

**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  
REPLY POST-HEARING BRIEF**

**18 May 2022**



**THREE CROWNS**

**KOBRE & KIM**

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## I. INTRODUCTION

1. In devoting well over half of its Post-Hearing Brief (*PHB*) to the question of the quantum of the Claimant's damages, the ROK has signaled unmistakably its recognition that the only real question remaining before this Tribunal is exactly how much loss the Claimant suffered as a consequence of the ROK's criminal conduct-based breaches of the Treaty.
2. In its PHB, the ROK now offers new and different answers to that question, introducing for the first time what it curiously describes as "non-zero damages".<sup>1</sup> As detailed below, one of these answers—using the KRW 69,300 share price of SC&T on 16 July 2015 (the day before the Merger vote)—would lead to damages of approximately US\$ 117 million.
3. The ROK's belated recognition that this claim inevitably resulted in substantial damages is still insufficient because it does not put the Claimant anywhere close to the position it would have been in but for the ROK's breaches. Using the share price *before* the Merger vote does not address the key question of by how much the share price of SC&T would have increased *after* the Merger vote in the Counterfactual Scenario where the ROK did not breach the Treaty, and the Claimant was not deprived of the gains that would have been realized on its more than US\$ 600 million investment.
4. Regrettably, the ROK's breaches precluded us from learning the answer to that key question from the market itself. And so, a valuation analysis of SC&T must be performed, and only the Claimant has provided one for this Tribunal.
5. As addressed below, the evidence confirms what is common sense: that an historic NPS vote against the Merger would have caused the share price of SC&T to rise instantaneously and substantially, and that share price would have reached the range proposed by Mr. Boulton of KRW 98,083/share (15% discount) to KRW 109,622/share (5% discount). Both the contemporaneous and expert evidence now before the Tribunal confirm that there would have been such an increase in the share price in the Counterfactual Scenario:
  - a. Mr. Boulton's SOTP valuation of SC&T as at 16 July 2015 equates to a per share value of KRW 115,391.<sup>2</sup> His valuation is no outlier: it is substantially the same as those reached by multiple experts at the time, including the ISS (KRW 110,234),<sup>3</sup> the Big Four Accounting firm engaged by Elliott at the time (KRW 100,597-

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<sup>1</sup> ROK's PHB, ¶¶ 134-135 {B/11/58-59}.

<sup>2</sup> Mr. Boulton arrives at an SOTP of SC&T of KRW 18,510,678 million, equating to a KRW 115,391 per share value across the 160,416,487 shares of SC&T as at 16 July 2015. *See* Second Boulton Report, fn. 212 and Figure 64 {F5/1/65} and {F5/1/168}.

<sup>3</sup> ISS Special Situations Research, 3 July 2015, **Exh C-30**, p. 14 {C/30/14}.

114,134/share)<sup>4</sup> and even Deloitte Anjin, engaged by Samsung, whose first (and least contaminated) valuation was [REDACTED]<sup>5</sup> By contrast, the ROK has not put forward its own SOTP valuation of SC&T.

b. The parties agree that SC&T's traded share price as at 16 July 2015 reflected a substantial discount to its NAV or SOTP value. The question of by how much the SC&T share price would have increased on rejection of the Merger is, put another way, a question of how much of that discount to NAV would have been removed? Mr. Boulton's Merged Entity analysis concludes that the remaining holding company discount would have been as low as 5% (KRW 109,622/share) but no higher than 15% (KRW 98,083/share). Here again, Mr. Boulton's assessment should be uncontroversial. It is uncontested that in the seven-year period prior to 2015, SC&T traded on occasion at a premium to its NAV but in all events at an average discount to its NAV of 16%,<sup>6</sup> trading as high as KRW 91,800 in that time.<sup>7</sup>

6. The ROK's insistence that the rejection of the Merger would have had no effect on the discount to NAV is fanciful. Not only does it defy the historical data regarding SC&T's average discount to NAV, but all the experts agreed that in a semi-strong efficient market such as the Korean stock market, the successful, historically significant, opposition to the Merger would be immediately reflected in the SC&T stock price. Unquestionably, thwarting a threatened substantial transfer of value to Cheil—the very purpose of the criminal scheme—would have been immensely valuable to SC&T shareholders. As Professor Milhaupt testified, rejection of the Merger—involving the largest and most important chaebol in Korea—would have had a “powerful impact” and been a “highly significant event for Korean corporate governance.”<sup>8</sup> And the immediate positive impact for SC&T shareholders would have inured greatly to the Claimant's benefit because it held 7.12% of the company, representing its more than US\$ 600 million investment.

7. On matters of jurisdiction, breach and causation, the ROK's PHB is noteworthy for its persistent mischaracterization of the Claimant's case and the evidence before the Tribunal.

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<sup>4</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **Exh R-9**, p. 11 {R/9/11}.

<sup>5</sup> Deloitte 21 May Report, **Exh C-775**, pp. 2, 6 {C/775/3} {C/775/7} ([REDACTED]).

<sup>6</sup> Second Smith Statement, ¶ 17 {D1/2/9-10}; Elliott, SC&T NAV analysis, 30 June 2015, **Exh C-395**, tab “MACRO” {C/395}.

<sup>7</sup> Elliott, SC&T NAV analysis, 30 June 2015, **Exh C-395**, tab “Historical”, column C, row 3861 (22 July 2011) {C/395}.

<sup>8</sup> Curtis Milhaupt {Day6/14:3} – {Day6/15:5} and {Day6/23:2-4}.

Select examples are addressed in the sections that follow. That the ROK should resort to such tactics in a post-hearing submission betrays the facts that:

- a. It has no legitimate objection to this Tribunal’s jurisdiction. Having now apparently abandoned its “qualifying investment” and “abuse of process” objections, the ROK maintains weak arguments that the orders and instructions of its government officials, from the Office of the President (the *Blue House*), through the Ministry of Health and Welfare (*MHW*), down to its National Pension Service (*NPS*), somehow do not constitute “measures.” Further, the ROK’s attribution objection is stated in complete disregard of the central roles played by President [REDACTED] and Minister [REDACTED], both convicted and imprisoned for their conduct. And the ROK further ignores the volumes of evidence before the Tribunal confirming that government officials specifically utilized the NPS to carry out the ROK’s corrupt plan because the NPS was a State organ, entrusted with delegated governmental duties, whose decision-making the Blue House and MHW could subvert and control.
  - b. Admitting that it is “stuck with” the decisions of its courts, the ROK has essentially no defense on the merits. Those decisions confirm that (i) President [REDACTED] ordered that the NPS approve the Merger; (ii) the MHW instructed the NPS to “have the Investment Committee decide on the Merger”; and (iii) the Investment Committee’s (*IC*) compliance with this illegal order was procured by the presentation of false and fabricated information to its members, who voted in favor of the Merger in reliance on that information.<sup>9</sup> The conduct was so egregious that five Government officials (and as many Samsung representatives) were criminally convicted. This conduct breached the Treaty because it led to a decision that was (i) irrational; (ii) in willful disregard of due process; and (iii) motivated and accomplished by gross illegality.
  - c. Finally, it is undeniable that the ROK’s breaches caused the NPS to vote in favor of the Merger and that the NPS vote caused the Merger to be approved. The IC members themselves have said so under oath, and the decisive consequence of the NPS’s vote is mathematical fact and has been judicially recognized.
8. Accordingly, in the sections that follow, the Claimant briefly addresses the two remaining jurisdictional objections (**Section II**) and the last vestiges of the ROK’s defense on the merits (**Sections III** and **IV**), before dedicating the remainder of this final submission to the evidence confirming why an award of US\$ 408 million plus interest is appropriate in this extraordinary case (**Section V**).

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<sup>9</sup> Claimant’s PHB, ¶¶ 40-42 {B/10/18-24}.

## II. PRELIMINARY OBJECTIONS

### A. THE ROK'S CONDUCT CONSTITUTES "MEASURES"

9. The ROK states that "[t]he Claimant's argument is that the conduct does *not* have to be a measure as defined under the Treaty."<sup>10</sup> This is a glaring mischaracterization. The Claimant has always accepted that the ROK's conduct must and does fall within the definition of "measures" under the Treaty.<sup>11</sup> Article 1.4 of the Treaty is explicitly non-exhaustive in its definition: "measures" *include* "any law, regulation, procedure, requirement, or practice."<sup>12</sup> Thus: (i) the term "practice" captures purely material actions and omissions, whether or not they are grounded in formal "laws" or "regulations"; and (ii) because the types of actions and omissions listed in Article 1.4 are explicitly non-exhaustive ("includes"), any other action or omission that is attributable to the State would be characterized as a "measure". The ROK's conduct here amply constitutes a series of "measures" on either approach.
10. While the ROK's other arguments on "measures" are similarly superficial, two further points may be helpful to bear in mind. The first is that, while the ROK asserts that the Claimant has not established a legally significant connection between Elliott and the ROK's measures, the ROK fails to address or even acknowledge the many documents on the record in which its officials identify the Claimant *by name* in designing and implementing those measures.<sup>13</sup> As the Claimant has detailed in its pleadings and summarized again in its PHB,<sup>14</sup> the evidence is clear and undisputed that the ROK specifically targeted the Claimant both as a member of a limited and known class of investors (as a SC&T shareholder) and individually (as the key opponent of its corrupt plan to have the Merger approved). The ROK's choice to ignore this evidence entirely speaks for itself.
11. The second observation concerns the ROK's answer to Tribunal's Question 5. The ROK belatedly attempts to shoehorn a due-process argument as a preliminary objection.<sup>15</sup> But this issue goes to the merits, and, specifically, only one of the Claimant's various complaints that the ROK breached the Treaty by failing to observe due process (it does not answer the Claimant's other merits complaints at all<sup>16</sup>). The suggestion apparently underlying the ROK's

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<sup>10</sup> ROK's PHB, ¶ 12 {B/11/7} (emphasis in original).

<sup>11</sup> See, e.g., Reply, ¶¶ 281-285 {B/6/198-200}; Counsel for Claimant {Day1/83:4-11}.

<sup>12</sup> Treaty, **Exh C-1**, Article 1.4 {C/1/5}.

<sup>13</sup> ROK's PHB, ¶ 18 {B/11/9-11}.

<sup>14</sup> See, e.g., Claimant's PHB, ¶¶ 55-58 {B/10/28-29} and evidence cited therein.

<sup>15</sup> ROK's PHB, ¶¶ 19-21 {B/11/11-12}.

<sup>16</sup> See Claimants PHB, ¶¶ 111-120 {B/10/46-50} (the NPS's decision to support the Merger was irrational) and ¶¶ 135-140 {B/10/56-58} (the NPS's decision was motivated and accomplished by gross illegality). See also below Section IV.

purported answer is that the Claimant’s claim, if accepted, would raise a “floodgates” concern. But the suggestion misses the facts here. The Claimant’s complaint is that the ROK’s conduct—from the highest levels of its government down and culminating in the NPS’s subverted decision-making—involved a willful disregard of due process in respect of which the Claimant was an entirely foreseeable and foreseen casualty. As addressed in the Claimant’s PHB, accepting this complaint would not expand the scope of due-process duties to include anonymous investors who are collaterally and unforeseeably harmed by a State’s conduct.<sup>17</sup>

12. The international minimum standard of treatment protects investors in positions of known (or knowable) proximity to a State’s conduct. When it is foreseeable that a qualifying investor with a qualifying investment would be harmed by the State’s conduct, then the violation of due process is actionable under international law.<sup>18</sup> It is beyond dispute that the ROK specifically had the Claimant in mind when designing and committing the breach.<sup>19</sup> Moreover, as one example, aware that the failure to refer the Merger vote to the EVC breached international law obligations owed *to this specific Claimant*, officials from the Blue House, MHW, and NPS (accurately) predicted that their conduct would expose the ROK to a Treaty claim.<sup>20</sup>

**B. THE CONDUCT OF THE BLUE HOUSE, MHW, AND NPS IS ATTRIBUTABLE TO THE ROK**

13. The ROK’s PHB is notable as to its limited discussion on the subject of attribution—which, as the Tribunal will recall, was one of the ROK’s principal defenses until the hearing.
14. Elliott’s primary position is that the conduct of President █████, Minister █████, and their Blue House and MHW subordinates—indisputably attributable to the ROK—suffices to establish breaches of the Treaty. Yet, conspicuously, nowhere in the relevant section of the ROK’s PHB can one find the names of President █████ or Minister █████—or indeed any reference to their conduct or that of their Blue House and MHW subordinates.<sup>21</sup> Nor is there any reference to the decisions of the ROK’s own courts finding that President █████ and Minister █████ each played a role in railroading the NPS’s approval of the Merger, which led to their criminal conviction.<sup>22</sup> The NPS’s approval of the Merger was the foreordained outcome of the clear

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<sup>17</sup> Claimant’s PHB, ¶¶ 124-125 {B/10/51-52}.

<sup>18</sup> Claimant’s PHB, ¶ 122 {B/10/51}.

<sup>19</sup> See evidence cited in Claimant’s PHB, ¶¶ 56-58, 125 {B/10/28-29} {B/10/52}.

<sup>20</sup> See, e.g., Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 14 June 2017, **Exh C-514**, p. 19 {C/514/6}. See also Claimant’s PHB, ¶ 41(f) {B/10/21} and evidence cited therein.

<sup>21</sup> See ROK’s PHB, ¶¶ 22-39 {B/11/12-19}.

<sup>22</sup> See, e.g., Seoul High Court, █████, **Exh C-286**, pp. 103, 111 {C/286/42} {C/286/50}; Seoul High Court, █████ Decision, **Exh C-79**, pp. 70-72 {C/79/70-72}.

orders of these individuals,<sup>23</sup> whose conduct the ROK accepts (as it must) is attributable to the State.

15. The ROK instead limits itself to arguments concerning its international law responsibility for the conduct of the NPS, relying on various technical classifications derived from its domestic administrative law regime. The ROK's PHB tellingly lacks any real engagement with the Claimant's arguments in respect of KAMCO (or the *Dayyani* case) and the Bank of Korea. All the ROK can muster is the blanket statement that "neither the status of central banks nor the finding of another tribunal regarding the status of KAMCO is relevant here."<sup>24</sup> That is a bold assertion. As the Claimant demonstrated at the hearing and again in its PHB, in considering the parallels between the NPS, on the one hand, and the Bank of Korea and KAMCO, on the other, two truths come to light.
16. **Organ:** *First*, the ROK's arguments in respect of ILC Article 4 are based on domestic-law distinctions that are not germane to attribution under international law.<sup>25</sup> On the international plane, Professor Kim's nuances between direct and indirect lines of reporting and oversight to the ROK's President are distinctions without a difference.<sup>26</sup> The same applies to separate legal personality, which equally is not determinative of attribution under ILC Article 4.
17. On this point, the Claimant notes yet another mischaracterization in the ROK's PHB. The ROK claims that the Claimant has "misrepresented the relevance" of two international decisions, which held that the conduct of two social-security bodies did engage the international responsibility of their respective States, in that neither case was decided under international law.<sup>27</sup> The Claimant has explained the relevance of these decisions in its submissions and at the hearing.<sup>28</sup> One simply recalls that the European Court of Justice and UN Human Rights Committee regarded social-security services as being inherently governmental;<sup>29</sup> and, accordingly, scholars regard these decisions as being reflective of customary international law.

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<sup>23</sup> Claimant's PHB, ¶¶ 59-60 {B/10/29-30}.

<sup>24</sup> ROK's PHB, ¶ 36 {B/11/17}.

<sup>25</sup> Claimant's PHB, ¶¶ 70-77 {B/10/33-36}.

<sup>26</sup> Claimant's PHB, ¶¶ 72-77 {B/10/34-36}.

<sup>27</sup> ROK's PHB, ¶ 34 {B/11/16-17}.

<sup>28</sup> See Reply, fn. 980 {B/6/218}; Counsel for Claimant {Day1/96:14} – {Day1/98:7}.

<sup>29</sup> Recent European Union sanctions upon the Russian State Development Corporation have similarly reflected the view that social-security services, specifically the management of State pension funds, are an inherently governmental activity.



18. Ultimately, what is determinative for ILC Article 4 purposes are the salient characteristics of the entity in question. In the case of the NPS, its salient characteristics confirm that it is indeed a State organ within the meaning of ILC Article 4 and Article 11.1.3(a) of the Treaty.<sup>30</sup>
19. **Delegated governmental powers:** *Second*, the ROK’s blinkered focus on just the NPS’s vote as part of its objection to attribution under ILC Article 5 is the reddest of herrings. Just as the fact that an ordinary commercial actor can purchase securities does not detract from the governmental nature of such conduct when done by the Bank of Korea for the sake of monetary stability, the governmental nature of the NPS’s management of the NPF, which indisputably is a property of the State, is in no way diminished by the different, commercial nature of other shareholders’ conduct. The provision of State pensions is a legal duty that the Korean Constitution imposes upon the State, discharged by the Government.<sup>31</sup> Commercial actors operate under no such duties or attendant constraints. Conduct undertaken to fulfill the State’s legal duty is an “exercise of powers” within the meaning of Article 11.1.3(b) of the Treaty, regardless of whether other actors, in other contexts, can engage in the same discrete acts. It is precisely the fact that the NPS’s conduct was in fulfilment of duties *exclusively* conferred on the State that makes this conduct attributable.
20. Hence there is no “daylight” between “providing pension services on the one hand” and what the ROK calls the NPS’s “other, particularly commercial, activities.”<sup>32</sup> To the very contrary, the NPS votes on mergers and other corporate decisions of its portfolio companies in exercise of its delegated governmental mandate to manage the “vault”<sup>33</sup> of the Korean nation (*i.e.*, the National Pension Fund) *so that* pensions can ultimately be paid to Korean citizens, thus fulfilling the State’s constitutional and statutory duty to do so.<sup>34</sup> The same cannot be said of *any* commercial actor.
21. It is idle in that context to seek to draw parallels with the law of sovereign immunity, as the ROK does.<sup>35</sup> What is “governmental” in the customary law of attribution is broader than what is “sovereign” in the customary law of sovereign immunity, not least because the law of attribution looks at the totality of the circumstances—that is, “not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be

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<sup>30</sup> See Claimant’s PHB, ¶ 71 {B/10/33-34} and evidence cited therein.

<sup>31</sup> See Constitution, **Exh C-88**, Article 34(1) and (5) {C/88/8-9}; Claimant’s PHB, ¶ 78 {B/10/36}.

<sup>32</sup> ROK’s PHB, ¶ 39 {B/11/18-19}.

<sup>33</sup> Sung-Soo Kim {Day4/160:22}.

<sup>34</sup> See Claimant’s PHB, ¶ 80 {B/10/37}; Counsel for Claimant {Day9/55:16} – {Day9/56:8}. *Cf.* NPA, **Exh C-77**, Articles 1, 24, 102 and 105 {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 {C/534/2} {C/534/21} {C/534/25}.

<sup>35</sup> *Cf.* ROK’s PHB, ¶ 38 {B/11/18} and Claimant’s PHB, ¶¶ 84-85 {B/10/38}.

exercised and the extent to which the entity is accountable to government for their exercise”<sup>36</sup>—rather than an act in isolation.<sup>37</sup>

22. Moreover, even in the law of sovereign immunity, context can be paramount. Thus, the embassy cook can sue for unfair dismissal (their employment contract being an act *jure gestionis*), but the cipher clerk is barred by sovereign immunity (the employment contract being regarded as an act *jure imperii*). Here, the NPS’s management of State property (which the ROK does not and cannot dispute), such as shares in the NPF, has one purpose only: to pay out pensions, discharging the State’s duty.

### III. THE ROK BREACHED THE TREATY

#### A. THE ROK IS BOUND BY ITS COURTS’ DECISIONS AND THE PPO INDICTMENT

23. Chief among the extraordinary weight of evidence in this arbitration are multiple decisions of the Korean criminal and civil courts which confirm the facts on which the Claimant’s case is based. These decisions have been described in detail in prior pleadings.<sup>38</sup> The ROK rightly accepts that it is “stuck with” those decisions and cannot contradict the findings of its courts.<sup>39</sup>
24. In addition to those judicial decisions, and in parallel with its defense in these proceedings, the ROK’s own Public Prosecutors’ Office (*PPO*) issued yet another indictment against [REDACTED] [REDACTED]. While none of the allegations in the indictment is necessary to establish the ROK’s breaches of the Treaty, the indictment notably specifically alleges the existence of a corrupt presidential *quid pro quo* in relation to the Merger dating back to September 2014 (a matter the ROK continues to dispute),<sup>40</sup> and further alleges that Samsung engaged in a carefully coordinated plan to devise and execute tunneling transactions, including through widespread market manipulation of the share prices of SC&T and Cheil (rendering the ROK’s reliance on SC&T share prices during the relevant period ridiculous).<sup>41</sup>
25. In response to Tribunal Question 4, the ROK argues that the Tribunal “should not rely on the Indictment or its factual allegations as evidence, especially in the absence of a conviction.”<sup>42</sup> This is wrong for at least two reasons. *First*, the suggestion that its PPO “is not required to

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<sup>36</sup> Commentary to the ILC Articles, **Exh CLA-38**, Article 5, ¶ 6, p. 43 {H/38/14}.

<sup>37</sup> Claimant’s PHB, ¶ 85 {B/10/38}.

<sup>38</sup> *See, e.g.*, Reply, Section II {B/6/18-153}; Claimant’s PHB, ¶¶ 35-43 {B/10/16-24}.

<sup>39</sup> *See* Counsel for Respondent {Day2/16:17-19} {Day2/17:9-12}.

<sup>40</sup> PPO Second Indictment of [REDACTED], **Exh R-316**, p. 56 {R/316/57}. *See also* Claimant’s Application for Adverse Inferences, 14 July 2021, ¶¶ 23, 25.

<sup>41</sup> PPO Second Indictment of [REDACTED], **Exh R-316**, pp. 27, 52-58 {R/316/27} {R/316/53-59}. *See also* Claimant’s Application for Adverse Inferences, 14 July 2021, ¶ 44.

<sup>42</sup> ROK’s PHB, ¶ 40 {B/11/19}.

satisfy any standard of proof or threshold of evidence before it can issue an indictment”<sup>43</sup> is an astonishing submission for the ROK to make. As the Claimant explained in its PHB, the ROK’s Prosecution Practice Manual makes clear that “an indictment can be issued *only* when *there is enough evidence to secure conviction*. If the level of proof is below that level, the prosecutor shall not indict.”<sup>44</sup> The Practice Manual specifically states that this applicable standard is more stringent than the “probable cause” standard applied by prosecutors in the US.<sup>45</sup> *Second*, and in all events, the PPO is a “State organ” of the ROK (which the ROK cannot and does not dispute),<sup>46</sup> and the ROK is unable to disavow its statements as a matter of law in this arbitration.<sup>47</sup>

26. The ROK seeks to distract the Tribunal from this clear standard by referring to the Investigation Deliberation Committee panel’s recommendation that the PPO not indict [REDACTED] and other Samsung executives.<sup>48</sup> The referral to any such panel, or any decision by it, is irrelevant to the standard of proof required for issuing an indictment and to the evidential value of the PPO indictment in the context of this Treaty claim. As the ROK acknowledged, the Investigation Deliberation Committee panel makes non-binding recommendations.<sup>49</sup> In the present case, following such a non-binding recommendation, the PPO conducted a “comprehensive review of . . . the accuracy of the facts”, given the “evidence, importance and severity of the matter,” and still chose to indict.<sup>50</sup>

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<sup>43</sup> ROK’s PHB, ¶ 43 {B/11/20}.

<sup>44</sup> Prosecution Practice Manual I: Law Practice Course (2018), **Exh CLA-196**, p. 14 {H/196/2} (emphasis added). *See also* Claimant’s PHB, ¶ 108 {B/10/45}.

<sup>45</sup> Prosecution Practice Manual I: Law Practice Course (2018), **Exh CLA-196**, p. 14, fn. 10 {H/196/2}.

<sup>46</sup> *See* Criminal Procedure Act, 7 January 2018, **Exh C-315**, Article 246 {C/315/2} (titled “Principle of Public Prosecution by *State*” and stipulating that public prosecution shall be instituted and executed by a “*prosecutor*”).

<sup>47</sup> Claimant’s PHB, ¶¶ 104-110 {B/10/44-46}.

<sup>48</sup> ROK’s PHB, ¶ 44 {B/11/20-21}.

<sup>49</sup> ROK’s PHB, ¶ 44 {B/11/20-21}.

<sup>50</sup> 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**, p. 1 {C/698/1}. In a further attempt to cast doubt on the indictment brought by its own PPO, the ROK points to the decisions of its judiciary, which are purportedly “contrary” to the PPO’s indictment (*see* ROK’s PHB, ¶ 45 {B/11/21}). However, for the purposes of this arbitration, the findings of the Korean criminal courts, reflecting a standard of proof “beyond reasonable doubt,” do not necessarily conflict with the views of the ROK’s PPO. To use the example relied on in the ROK’s PHB, the Korean courts have indeed found beyond reasonable doubt that Samsung paid bribes to President [REDACTED] on the 25 July 2015, but that fact does not exclude the finding by the PPO that, on the balance of probabilities, Samsung’s payments were made in consideration of President [REDACTED]’s decisive assistance on the Merger vote, only a few weeks earlier. Indeed, the Korean courts have referred to that probability on multiple occasions in their judgments. *See below* ¶ 34.

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

27. The ROK’s PHB confirms that there is no dispute between the parties on the legal standard to be applied to establish a breach of the MST under the Treaty.<sup>51</sup> Rather, the parties’ dispute turns on whether the evidence establishes that a breach in fact occurred. In responding to the bases of breach set out in the Claimant’s opening,<sup>52</sup> paragraphs 55 to 60 of the ROK’s PHB either simply ignores the probative evidence on the record or demonstrably mischaracterizes the facts. The Claimant sets out below some of the most glaring examples, and more generally urges the Tribunal to review closely the evidence cited by the Claimant at paragraphs 40 to 42 of its PHB, being evidence that led to the criminal convictions of President █████, Minister █████, and CIO █████
28. **ROK’s PHB ¶ 55:** The ROK first argues that “[t]he evidence does not show that the ROK made a ‘governmental order’ that the IC vote on, and in favour of, the Merger.”<sup>53</sup> In fact, the Claimant has described these orders in detail,<sup>54</sup> identifying overwhelming evidence that those orders took place.<sup>55</sup> Specific examples of the ROK’s mischaracterizations include:

The ROK asserts...	but the evidence shows...
<p>“The evidence . . . shows, at the highest, that . . . █████” (ROK’s PHB, ¶ 55(a)(i) {B/11/25}, citing Exh C-488, p. 6 {C/488/3}.)</p>	<p>Blue House Senior Official Mr. █████ testified that “█████” (Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, Exh C-488, pp. 5-6 {C/488/2-3} (emphasis added).)</p>
<p>“The evidence . . . shows, at the highest, that . . . Minister █████ instructed MHW personnel to take steps to determine how each</p>	<p>The Seoul High Court accepted the testimony of (i) MHW Deputy Director █████ that “[t]he [Minister] instructed that ‘this matter must be 100% sure. Create a detailed countermeasures with respect to each Experts Voting Committee member.’ <i>I understood this to be instructions to come up with possible measures to guarantee the approval of the Merger;</i>”</p>

<sup>51</sup> ROK’s PHB, ¶ 49 {B/11/22-23}.

<sup>52</sup> Claimant’s Opening Presentation, slide 110 (“4.1 MST Breach”) {J/1/110}, referring to (1) a governmental order that the IC vote on, and in favor of, the Merger, in violation of the legal obligation to respect the Principle of Independence; (2) a governmental order that the NPS’s procedural safeguards be by-passed to ensure that the IC voted on, and in favor of, the Merger; (3) a governmental order that was implemented by criminal fraud and fabrication resulting in a decision by the NPS that violated legal obligation to manage the National Pension Fund in accordance with the Principle of Profitability; (4) a resulting decision by the NPS to approve the Merger that was self-damaging and therefore irrational; and (5) a governmental order that resulted from a corrupt bargain between the ROK’s President █████ and Samsung’s █████

<sup>53</sup> ROK’s PHB, ¶ 55 {B/11/24-26}.

<sup>54</sup> For the five grounds set out at slide 110 of the Claimant’s Opening Presentation: Ground 1: *see* Reply, Section II.C.1, particularly ¶ 105 {B/6/56-58} and Claimant’s PHB, ¶ 40 {B/10/18-19}; Ground 2: *see* Reply, Section II.C.2 and Section II.C.3, particularly ¶¶ 114(e)-(j) and (l) {B/6/70-78} and Claimant’s PHB, ¶ 41 {B/10/19-22}; Ground 3: *see* Reply Section II.C.3 and Section II.C.4, particularly, ¶¶ 114(j) and 123-128 {B/6/75-76} {B/6/89-96} and Claimant’s PHB, ¶¶ 42(a)-(c) {B/10/22-23}; Ground 5: *see* Reply, Section II.C.1, particularly ¶¶ 91-92 {B/10/50-52} and Claimant’s PHB, ¶ 40 {B/10/18-19}.

<sup>55</sup> *See* Claimant’s PHB, ¶¶ 40-41 {B/10/18-22} and evidence cited therein.

The ROK asserts...	but the evidence shows...
<p>member of the Special Committee would vote on the Merger.” (ROK’s PHB, ¶ 55(a)(ii) {B/11/25}, citing <b>Exh C-79</b>, p. 29 {C/79/29}.)</p>	<p>and (ii) MHW Director [REDACTED] that “[t]he [Minister] stated that this Merger must be approved and instructed us to prepare measures [to] enable the approval [of the] decision at the [EVC].” (Seoul High Court, [REDACTED] Decision, <b>Exh C-79</b>, p. 29 {C/79/29} (emphasis added).)</p>
<p>“The evidence . . . shows, at the highest, that . . . MHW personnel instructed NPS personnel to refer the merger vote to the [IC] in accordance with the Voting Guidelines.” (ROK’s PHB, ¶¶ 55(a)(iii) and 55(b) {B/11/25}, citing <b>Exh C-79</b>, pp. 15-16 {C/79/15-16}.)</p>	<p>EVC member (and the ROK’s sole fact witness in this arbitration) Mr. [REDACTED] further testified that “[REDACTED]” (Statement Report of [REDACTED] to the Public Prosecutor’s Office, 28 November 2016, <b>Exh C-459</b>, p. 12 {C/459/12} (emphasis added).) NPS CIO [REDACTED] testified to the ROK’s prosecutors as follows: “[REDACTED]” (Transcript of Court Testimony of [REDACTED] ( [REDACTED] Seoul Central District Court), 17 May 2017, <b>Exh C-511</b>, p. 55 {C/511/9} (emphasis added).) See also Claimant’s PHB, ¶¶ 41(f)-(g) and accompanying footnotes {B/10/21-22}.</p>
<p>“The Investment Committee members were never instructed that they had to approve the Merger.” (ROK’s PHB, ¶ 55(b) {B/11/25}.)</p>	<p>Director General [REDACTED] testified as follows: “O [REDACTED]” and “[REDACTED]” (Transcript of Court Testimony of [REDACTED] ( [REDACTED] Seoul Central District Court), 22 March 2017, <b>Exh C-497</b>, pp. 16, 34 {C/497/16} {C/497/30} (emphasis added).) The evidence shows CIO [REDACTED] in turn instructed:</p> <ul style="list-style-type: none"> <li>- IC member Mr. [REDACTED] that he “[REDACTED]” Mr. [REDACTED] felt that CIO [REDACTED]’s words were “[REDACTED]” (Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, <b>Exh C-463</b>, pp. 7-8 {C/463/5-6} (emphasis added));</li> <li>- IC members Messrs. [REDACTED] and [REDACTED] during a break in the IC meeting that they should “[REDACTED]” (Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, <b>Exh C-464</b>, pp. 46-47 {C/464/15-16} (emphasis added));</li> <li>- IC member Mr. [REDACTED] that “[REDACTED]” CIO [REDACTED] was “[REDACTED]” (Statement Report of [REDACTED] to the Special Prosecutor, 26 December 2016, <b>Exh C-465</b>, p. 7 {C/465/5} (emphasis added)); and</li> <li>- IC members Messrs. [REDACTED] and [REDACTED] to “[REDACTED]” on the Merger. (Suspect Examination Report of [REDACTED] to the Special Prosecutor, 26 December 2016, <b>Exh C-464</b>, pp. 45-46 {C/464/14-15} (emphasis added)).</li> </ul>

29. **ROK’s PHB ¶ 56:** The ROK next argues that the evidence does not show that the Blue House’s or MHW’s conduct violated the Principle of Management Independence, because “there could be no independent breach of the so-called ‘Principle of Independence’ unless another [Fund management] Principle was breached.”<sup>56</sup> In fact, the evidence demonstrates

<sup>56</sup> ROK’s PHB, ¶ 56(a) {B/11/26-27}.

that the Principle of Management Independence can be breached independently, as it was here (in addition to the Principle of Profitability<sup>57</sup>).

The ROK asserts...	but the evidence shows...
<p>“The ‘Principle of Management Independence’ requires no more than that “[t]he Fund must be managed in accordance with the above principles [<i>i.e.</i>, the Principles of Profitability, Stability, Public Benefit, and Liquidity set out in Article 4], and these principles should not be undermined for other purposes’ . . . . So there could be no independent breach of the so-called ‘Principle of Independence’ unless another Principle was breached.” (ROK’s PHB, ¶ 56(a) {B/11/26-27}.)</p>	<p>The Korean courts have confirmed that the Principle of Management Independence is intended to protect the Fund from political interference and thus requires that “the Fund <i>must not be used to serve as a tool to achieve certain policy goals or promote political agenda or service certain interest groups, in a way contrary to the interests of pensioners.</i>” (Seoul High Court, ██████████ Decision, <b>Exh C-79</b>, p. 71 {C/79/71} (emphasis added). <i>See also</i> First CK Lee Report, ¶¶ 49-50 {F1/1/25-26}.)</p> <p>The Korean courts have found <i>unequivocally</i> that government officials interfered with the Principle of Management Independence of the NPS.<sup>58</sup> For example, the Seoul High Court held that:</p> <p>“[Minister ██████████] abused his authority in directing and/or monitoring [the NPS], by making [CIO ██████████], through the [MHW officials], induce votes in favor of the Merger, thereby making him perform actions contrary to his official duties. . . . Moreover [Minister ██████████] exerted unlawful undue influence over the exercise of voting rights . . . with the motive to consummate the Merger . . . <i>thereby undermining the function of institutional devices established to ensure independence in the operation of [the NPS] and causing loss to [the NPS].</i> Further, [Minister ██████████] weakened the pillars of [the NPS] by damaging the ROK citizens’ trust in National Pension Fund’s professional and autonomous management/operation.” (Seoul High Court, ██████████ Decision, <b>Exh C-79</b>, pp. 71-72 {C/79/71-72} (emphasis added).)</p>
<p>“The evidence rather shows that the NPS considered that the Merger would have significant projected benefit to its investment portfolio.” (ROK’s PHB, ¶ 56(b) {B/11/27}.)</p>	<p>There is no evidence that the <i>IC members</i> believed the Merger, if approved, would be beneficial to the Fund’s portfolio,<sup>59</sup> but instead they relied on the fabricated “synergy effect” presented by the NPS Research Team to obscure the KRW 138.8 billion loss the NPS knew it would suffer.<sup>60</sup> As NPS Research Team Member Mr. ██████████ testified: “██████████” (Statement Report of ██████████ to the Special Prosecutor, 2 January 2017, <b>Exh C-477</b>, pp. 16-17 {C/477/10-11} (emphasis added).)</p> <p>The Korean courts accordingly held that “<i>the proposed Merger would yield loss for the NPS,</i>” and CIO ██████████ was convicted for having inflicted “<i>a loss of unknown value to the NPS.</i>” (Seoul Central District Court, ██████████, <b>Exh C-69</b>, pp. 9, 17-18 {C/69/9} {C/69/17-18} (emphasis added). <i>See also</i> Seoul High Court, ██████████ Decision, <b>Exh C-79</b>, p. 64 {C/79/64}.)</p>

30. **ROK’s PHB ¶ 57:** The ROK next asserts that there was no order to bypass the NPS’s procedural safeguards.<sup>61</sup> Here, again, the evidence shows the opposite is true:<sup>62</sup>

<sup>57</sup> See Claimant’s PHB, ¶ 114 {B/10/47}.

<sup>58</sup> This finding is supported by the views of multiple government officials who also considered the ROK’s conduct at the time as “██████████ [ing]” and “██████████ [ing]” the NPS Principle of Independence. *See, e.g.*, Second Statement Report of ██████████ to the Special Prosecutor, 7 January 2017, **Exh C-485**, pp. 41-42 {C/485/3-4}; Second Statement Report of ██████████ to the Special Prosecutor, 22 December 2016, **Exh C-461**, pp. 6-7 {C/461/4-5}; Fourth Suspect Examination Report of ██████████ to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 {C/482/5}.

<sup>59</sup> *See, e.g.*, NPSIM Management Strategy Office, “2015-30th Investment Committee Meeting Minutes”, 10 July 2015, **Exh R-128**, p. 11 {R/128/12}; ██████████, Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, p. 4 {C/428/4}.

<sup>60</sup> Claimant’s PHB, ¶¶ 42(d), 115-118 {B/10/23-24} {B/10/47-49}; Reply, ¶ 137 {B/6/104-107}.

<sup>61</sup> ROK’s PHB, ¶¶ 57(a)-(c) {B/11/27-29}.

<sup>62</sup> *See also* Claimant’s PHB, ¶¶ 131-132 {B/10/54-55} and evidence cited therein.

The ROK asserts...	but the evidence shows...
<p>The order was “merely to have the [IC] consider the Merger <i>in the first instance.</i>” (ROK’s PHB, ¶ 57(a) {B/11/28} (emphasis in original)).</p>	<p>Deputy Minister of Health and Welfare, Mr. [REDACTED], confirmed that “[REDACTED]” (Transcript of Court Testimony of [REDACTED] ( [REDACTED] Seoul Central District Court), 22 March 2017, <b>Exh C-496</b>, pp. 15-16 {C/496/3-4} (emphasis added).)</p> <p>Later that same day, “[Director General [REDACTED]] summoned urgently [CIO [REDACTED]] . . . to the [MHW] . . . and gave instructions to have this merger case decided not [by] the [EVC], but by the [IC].” Director General [REDACTED] “firmly told [CIO [REDACTED]] that ‘it is [Minister [REDACTED]]’s intention to handle this through the [IC].” (Seoul Central District Court, <b>Exh C-69</b>, p. 47 {C/69/47} (emphasis added).) Director General [REDACTED] testified that, [REDACTED] (Transcript of Court Testimony of [REDACTED] ( [REDACTED] Seoul Central District Court), 22 March 2017, <b>Exh C-497</b>, pp. 32-33 {C/497/28-29} (emphasis added).)</p>
<p>“The Investment Committee members considered throughout their meeting that they could still refer the merger to the Special Committee if they found the matter difficult.” (ROK’s PHB, ¶ 57(b) {B/11/28}.)</p>	<p>There is no evidence to support this assertion. The ROK merely points to the meeting minutes raising the possibility of referring the matter to the EVC, but this was an illusory possibility, as confirmed by the IC’s stonewalling in the face of the EVC Chairperson’s requests that the Merger vote be referred to it,<sup>63</sup> which the IC ignored.<sup>64</sup></p>
<p>The EVC’s reaction to the IC’s decision “does not prove that the NPS’s procedural safeguards were bypassed.” (ROK’s PHB, ¶ 57(c) {B/11/28-29}.)</p>	<p>EVC member [REDACTED] testified to the Korean prosecutor that “[REDACTED]” [REDACTED] He also testified that “[REDACTED]” (Statement Report of [REDACTED] to the Public Prosecutor’s Office, 28 November 2016, <b>Exh C-459</b>, pp. 7, 12 {C/459/7} {C/459/12} (emphasis added).)</p> <p>Mr. [REDACTED] similarly testified at the hearing that “[the EVC] felt as if someone had suddenly taken [the decision on the Merger vote] away from us. So that is why many members [of the EVC], including myself <i>were angry.</i>” He confirmed that he considered it “<i>significantly inappropriate</i>” for the IC to decide this matter that “<i>should be put before the Special Committee</i>” and described it as “[REDACTED]” ([REDACTED] {Day3/201:9-22} {Day3/209:13} – {Day3/211:11} (emphasis added).)</p>

31. **ROK’s PHB ¶ 58:** The ROK maintains that the NPS’s decision did not result from “criminal fraud and fabrication.”<sup>65</sup> Relying on its Demonstrative C, the ROK asserts that the IC’s decision to support the Merger was “the outcome of an independent deliberation and vote.”<sup>66</sup> However, Demonstrative C presents select evidence of how individual IC members voted on the Merger *on the assumption that the synergies were real and thus the NPS would not suffer*

<sup>63</sup> Claimant’s PHB, ¶¶ 41(d), 130-131 {B/10/20-21} {B/10/54-55}; Email from [REDACTED] (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**, pp. 1-3 {C/427/1-3}; Seoul Central District Court, [REDACTED], **Exh C-69**, pp. 9-10 {C/69/9-10}.

<sup>64</sup> Claimant’s PHB, ¶ 41(d) {B/10/20-21}; 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}; Seoul Central District Court, [REDACTED], **Exh C-69**, p. 9 {C/69/9}; Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 41 {C/79/41}.

<sup>65</sup> ROK’s PHB, ¶ 58 {B/11/29-30}.

<sup>66</sup> ROK’s PHB, ¶¶ 58(a)-(b) {B/11/29-30}.

a loss. The ROK’s Demonstrative C does not provide evidence of “independent deliberation”; it records the result of the ROK’s manipulation and wrongdoing. The evidence is unequivocal that the synergy effect was concocted arbitrarily, using numbers that “ [REDACTED] [REDACTED] ”<sup>67</sup> And the evidence of the IC members confirms that they would not have voted for the Merger had they not been presented with false and fabricated calculations:<sup>68</sup> specifically, IC members “were highly influenced by the synergy effect,” “[t]he synergy effect was highly influential in the [IC’s decision],” and their decision was made “based on the [synergy] calculation.”<sup>69</sup> This evidence led the Korean courts to conclude that “a considerable number of the Investment Committee members who voted in favor would not have done so” if they knew that the merger synergy was fabricated.<sup>70</sup>

32. Faced with this overwhelming evidence of influence, the ROK turns to the Seoul Central District Court’s decision in the Merger Nullification case, which it argues “confirmed that the [IC] members exercised independent judgement” in reaching their decision on the Merger.<sup>71</sup> That overstates the court’s findings and amounts to gross mischaracterization when considered against the fact that most if not all of the illegal conduct at issue had not been exposed, let alone considered, at the time of that decision in 2017. The court said no more than that “[IC] members who voted for the Merger appeared to have concluded that the Merger would . . . be beneficial [to the NPS].”<sup>72</sup> Those members of course arrived at that conclusion with their judgment materially affected by the fraudulent data before them, again, something that was not known at the time of the court’s decision.
33. **ROK’s PHB ¶ 59:** The ROK contends that the evidence shows that—after considering various factors—the NPS concluded that the Merger was beneficial.<sup>73</sup> This is manifestly false. The evidence demonstrates that the NPS knew that the Merger would cause it significant financial harm, hence why CIO [REDACTED] was imprisoned for causing the NPS to suffer “loss of unknown value.”<sup>74</sup> Further, as noted above, any favorable views IC members may have

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<sup>67</sup> Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 12, 14-16 {C/477/6} {C/477/8-10}.

<sup>68</sup> Claimant’s PHB, ¶ 169 {B/10/67-69}.

<sup>69</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 60 {C/79/60} (emphasis added).

<sup>70</sup> Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 60 {C/79/60}; Seoul High Court, [REDACTED], **Exh C-773**, p. 26 {C/773/12}. See also Reply, ¶ 147 {B/6/116-119}; Claimant’s PHB, ¶¶ 169-170 {B/11/67-70}.

<sup>71</sup> ROK’s PHB, ¶ 58(c) {B/11/30} (emphasis added).

<sup>72</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **Exh R-20**, p. 39 {R/20/39} (emphasis added).

<sup>73</sup> ROK’s PHB, ¶ 59 {B/11/30-31}.

<sup>74</sup> 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}.



expressed cannot be disentangled from the fraud-ridden information they had received on the Merger:

<b>The ROK asserts...</b>	<b>but the evidence shows...</b>
<p>“[T]he evidence . . . shows that the Merger would be beneficial to the NPS by increasing the value of both the merged entity in which the NPS would hold shares and the NPS’s entire portfolio generally.” (ROK’s PHB, ¶ 59 {B/11/30-31}.)</p>	<p>NPS Research Team member Mr. [REDACTED] testified that “[REDACTED]” (Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, <b>Exh C-477</b>, pp. 16-17 {C/477/10-11}.)</p> <p>The Seoul High Court also held that “[C/O [REDACTED]] was aware that the Merger would yield loss to [NPS]” and that he had “deliberately breached his duty.” (Seoul High Court, [REDACTED] Decision, <b>Exh C-79</b>, p. 64 {C/79/64} (emphasis added).)</p>
<p>“The Investment Committee members considered various factors beyond the synergy calculations, such as ‘[REDACTED]’ and ‘[REDACTED]’.” (ROK’s PHB, ¶ 59 {B/11/30-31}, citing <b>Exhs C-500</b> and <b>C-502</b> {C/500} {C/502}.)</p>	<p>The ROK cites to <b>Exh C-500</b> (Transcript of Court Testimony of Investment Committee member, [REDACTED] (Seoul Central District Court), 10 April 2017), at page 26: “[REDACTED]” {C/500/4}</p> <p>However, the ROK does not direct the Tribunal to page 12 of the same transcript, which records: “[REDACTED]” {C/500/3} (emphasis added). <i>See also</i> Claimant’s PHB, ¶ 169(a) in relation to <b>Exh C-500</b> {B/10/67-68}.</p> <p>The Seoul High Court also recently held (in January 2022) that “<i>it is highly likely that the [IC] would have decided to refer the matter to the [EVC] had it been revealed during the [IC] meeting that the merger synergy and the sales growth rate were calculated without basis given that a considerable number of the [IC] members who voted in favour would not have done so.</i>” Therefore, it is difficult to say that Plaintiff’s affirmative explanations on the merger synergy had little impact on [IC’s] vote in favour of the Merger in this case.” (Seoul High Court, [REDACTED], <b>Exh C-773</b>, p. 26 {C/773/12} (emphasis added).)</p>

34. **ROK’s PHB ¶ 60:** Finally, the ROK contends that the evidence does not show that “any ‘governmental order’ ‘resulted from a corrupt bargain between ROK’s President [REDACTED] and Samsung’s [REDACTED]’—instead, so the ROK says, the Korean courts have found that “the alleged illegality . . . took place only *after* the Merger vote.”<sup>75</sup> Leaving aside the fact that the ROK incorrectly refers here to the adjudicated findings of its own courts that led to President [REDACTED]’s imprisonment as “alleged illegality,” the evidence in the record directly contradicts the ROK’s contrived timeline. As the Claimant set out at the hearing and again in its PHB, the Korean courts in fact found that the bribes received by President [REDACTED] were payment for her having *already* “given decisive assistance to the Merger.”<sup>76</sup> The fact that Samsung delivered its side of the bargain—namely, financial support—only after the Merger vote had been concluded does not negate the fact of a pre-existing bargain to ensure the NPS approved the

<sup>75</sup> ROK’s PHB, ¶ 60 {B/11/31-32} (emphasis in original).

<sup>76</sup> Claimant’s PHB, ¶ 139 {B/10/57-58}; Seoul High Court, [REDACTED], **Exh C-286**, p. 103 {C/286/42}; Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, **Exh R-314**, pp. 44-45 {R/314/14-15}.

Merger proposal.<sup>77</sup> And in all events, the existence and timing of any exchange is not determinative in this arbitration.

The ROK asserts...	but the evidence shows...
<p>“The evidence does not show any ‘bargain’ that former President [REDACTED] would support the Merger in exchange for bribes from [REDACTED]; the earliest that the evidence shows President [REDACTED] bartered her support for Samsung’s succession plan in exchange for bribes was on 25 July 2015.” (ROK’s PHB, ¶ 60 {B/11/31-32}, citing <b>Exh R-316</b> {R/316}.)</p>	<p>The Seoul High Court found that “[i]n the first private meeting on September 15, 2014, Former President [REDACTED] demanded from [REDACTED] that ‘[Samsung] Group shall be a chairperson of [Korea Equestrian] Federation and actively provide supports, such as buying a good horses so that rising athletes in horseback riding could participate in the Olympics’” (Seoul High Court, [REDACTED], <b>Exh C-80</b>, p. 27 {C/80/27}.).</p> <p>The Seoul Central District Court also found that “[REDACTED] met Vice Minister of Culture, Sports and Tourism (“MOCST”) [REDACTED], aide of [REDACTED], on 24 June 2015 and communicated that plans to provide financial support to [REDACTED] as soon as she got better and explained that [Samsung] had not been able to provide equestrian support due to [REDACTED]’s recent childbirth.” (Seoul Central District Court, [REDACTED], <b>Exh C-706</b>, p. 3 {C/706/2}.).</p>
<p>“[T]he Korean courts have found that the alleged illegality, which the Claimant claims influenced the NPS’s decision, took place only <i>after</i> the Merger vote.” (ROK’s PHB, ¶ 60 {B/11/31-32}, citing only the ROK’s own Opening Presentation, slides 123-128 {J/14/123-128}.)</p>	<p>The Seoul High Court held that “[i]t is natural for the Defendant [President [REDACTED]] (<i>having given</i> decisive assistance to the Merger and intended to continue to support [REDACTED]’s succession work) and [REDACTED] (<i>having received</i> such decisive assistance for the Merger and required the Defendant’s assistance for the subsequent succession work) to have had a conversation during the 25 July 2015 one-on-one meeting about [REDACTED]’s primary matter of concern which was the succession of corporate control—including the Merger that was recently achieved by the NPS’s approval—on which [Samsung] Group had exerted all its powers. There was a <i>decisive assistance from the [REDACTED] Administration to the Merger</i> immediately prior to the meeting”. (Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, <b>Exh R-314</b>, pp. 44-45 {R/314/14-15} (emphasis added).)</p>

**C. “ASSUMPTION OF RISK” IS NO DEFENSE TO THE ROK’S LIABILITY**

35. In its PHB, the ROK maintains its contention that “assumption of risk is a defence to any breach of the Treaty.”<sup>78</sup> That assertion continues to be wrong as a matter of law and fact.
36. *First*, the ROK’s PHB offers no legally sound basis for the existence of such a defense to liability under international law.<sup>79</sup> In its PHB, the ROK argues that the “assumption of risk defence to liability *is the principle of good faith*.”<sup>80</sup> However, none of the authorities that the ROK relies on establishes that “assumption of risk” is a recognized manifestation of the principle of good faith under international law.
37. *Second*, even assuming there is some principled basis for the existence of an assumption of risk defense under international law, it could not apply on the facts of this case. The Claimant has repeatedly drawn the distinction between the commercial risk, which it accepted in investing in Korea, and the entirely distinct risk of illegal (indeed criminal) governmental

<sup>77</sup> See also Claimant’s PHB, ¶¶ 135-140 {B/10/56-58}.

<sup>78</sup> ROK’s PHB, Section III.C {B/11/32-40}.

<sup>79</sup> See also Claimant’s PHB, ¶ 143 {B/10/58}.

<sup>80</sup> ROK’s PHB, ¶ 63 {B/11/32} (emphasis added).

interference, which the Claimant plainly did not assume.<sup>81</sup> Despite this, the ROK continues to conflate these risks to argue that the Claimant “voluntar[ily] assum[ed] the very risks that have materialised.”<sup>82</sup>

38. Responding to the distinction between ordinary commercial risks and the risk of criminal governmental interference, the ROK argues that its purported defense “*does not require a claimant to have envisioned the risk of illegal governmental interference*”.<sup>83</sup> This makes no sense: the ROK’s argument is essentially that the Claimant cannot complain that the Merger was approved for *illegitimate* reasons because the Claimant assumed the risk of the Merger being approved for *legitimate* reasons. There is no law that supports such an argument, and it would self-evidently blunt the utility of the Treaty’s investment protections.

39. *Third*, the ROK grossly mischaracterizes the *commercial* risks that the Claimant did assume.

a. The ROK repeatedly points to the comment from Spectrum Asia that a merger was “inevitable,” as if to suggest that this amounts to the Claimant accepting the risk of a predatory merger achieved through governmental interference. In fact, Elliott was fully aware of the likelihood of a merger involving SC&T, confirmed contemporaneously that it was willing to support such a merger if it were on fair terms, and even proposed a merger involving SC&T in its own restructuring proposal. Moreover, we know for a fact that the Merger was not “inevitable,” because, had the NPS voted in accordance with its guidelines, it would have voted *against* the Merger and the Merger would not have passed.<sup>84</sup>

b. The ROK claims that “[i]t has not been proven that the Merger was on unfair terms from the NPS’s perspective.”<sup>85</sup> That is plainly wrong: the Korean courts have repeatedly held that the Merger caused a loss to the NPS.<sup>86</sup> Indeed, the ROK *knew* the NPS would suffer a significant loss as a result of the Merger.<sup>87</sup> The fact that the NPS held shares in Cheil does not alter the risk calculus. As set out in the Claimant’s

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<sup>81</sup> Claimant’s PHB, ¶¶ 144-146 {B/10/59}.

<sup>82</sup> ROK’s PHB, ¶ 62 {B/11/32}.

<sup>83</sup> ROK’s PHB, ¶ 70 {B/11/35} (emphasis added).

<sup>84</sup> See below Section IV.B.

<sup>85</sup> ROK’s PHB, ¶ 74 {B/11/36-37}.

<sup>86</sup> See Seoul High Court, ██████████ Decision, Exh C-79, pp. 71-72 {C/79/71-72} (ruling that Minister ██████████ and CIO ██████████ “caus[ed] loss to [the NPS]” by “exert[ing] unlawful undue influence over the exercise of voting rights attached to the shares of certain entities which [the NPS] owns, with the motive to consummate the Merger of certain entities”). See also Supreme Court Case No. 2017Do19635, 14 April 2022 (“**Supreme Court, ██████████ Decision**”), Exh C-781, p. 10 {C/781/10}.

<sup>87</sup> See above ¶¶ 29 and 33 and evidence cited therein.

PHB,<sup>88</sup> even after crediting the windfall that the NPS would gain as a Cheil shareholder, the NPS calculated it would suffer a significant loss of at least KRW 138.8 billion if the Merger was approved. The fictitious “synergy effect” was contrived precisely to make that expected loss disappear.

- c. The ROK also suggests that the Claimant knew that a Korean institutional investor like the NPS could support Samsung even if a merger was not in its interest, because of a history of passivity, nationalism, or Samsung’s lobbying capabilities.<sup>89</sup> But, again, that is irrelevant to the facts of this case. The Merger was not supported for legitimate reasons; nor was it the result of legitimate lobbying by Samsung. The factual record is clear that the NPS did not support the Merger because it was being passive or because it was persuaded by Samsung’s legitimate lobbying efforts. It did so in compliance with illegal government directions, decreed by President [REDACTED] and Minister [REDACTED]

40. These examples reveal the obvious flaw in the ROK’s assumption of risk “defense to liability,” which is that it assumes the truth of its premise, being that the NPS’s vote in favor of the Merger was not a predetermined conclusion brought about through criminal governmental misconduct.

#### **IV. THE ROK’S TREATY BREACHES CAUSED THE CLAIMANT’S LOSS**

41. In its PHB, the ROK asserts that the Claimant must establish both “liability causation” and “loss causation.”<sup>90</sup> The Claimant has always maintained that the ROK’s assertion of “liability causation” is back-to-front and attempts to introduce harm as an element of international wrong.<sup>91</sup> Evidently, the ROK now agrees. Notably departing from its previous posture, the ROK’s PHB now calls on the Tribunal to question whether “liability” causation exists, “*even if the Tribunal finds that there was arbitrary or irrational conduct by ROK contrary to MST.*”<sup>92</sup> In other words, while the ROK feigns to maintain a distinction between “liability” and “loss” causation, the point of analysis is the same: causation is to be assessed once breach is established, and not as an element of breach itself.

42. Having conceded the flaw in its causation analysis from the outset, the ROK’s framing of the “liability causation” analysis now comports with the first step in the Claimant’s analysis, namely: (A) did the ROK cause the NPS to vote in favor of the Merger? Thereafter, the ROK’s

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<sup>88</sup> Claimant’s PHB, ¶¶ 42(a), 115 {B/10/22} {B/10/47-48}.

<sup>89</sup> ROK’s PHB, ¶ 74 {B/11/36-37}.

<sup>90</sup> ROK’s PHB, ¶¶ 87(a)-(b) {B/11/41}.

<sup>91</sup> *See, e.g.*, Reply, ¶¶ 503-504 {B/6/330-331}.

<sup>92</sup> ROK’s PHB, ¶ 87(a) {B/11/41} (emphasis added).

“loss causation” analysis responds to the remaining three steps in the Claimant’s analysis, namely: (B) did the NPS vote cause the Merger to be approved at the EGM; and (C) was the ROK’s wrongdoing a proximate cause of the Claimant’s loss?<sup>93</sup> However, although the ROK now adopts a correct framework for the causation analysis, it continues to misconstrue and misapply law and fact, in its attempt to avoid the consequences of its wrongful conduct.

**A. THE ROK CAUSED THE NPS TO VOTE IN FAVOR OF THE MERGER**

43. The ROK maintains that, as a matter of principle, the Claimant must establish “with a sufficient degree of certainty” that the result of the impugned conduct would not have happened absent the ROK’s breaches of the Treaty.<sup>94</sup> The Claimant’s position continues to be that the “sufficient degree of certainty” standard is not higher than the standard of proof generally applied in international law, namely the “balance of probabilities” or “preponderance of the evidence” standard.<sup>95</sup> The ROK does not dispute that in its PHB.
44. On the facts, the ROK’s arguments distort the evidence. The ROK asserts that, even in the absence of its illegal intervention, (i) the Merger vote would have gone to the IC because of the NPS’s “written procedures,” and that there was nothing preventing the IC from referring the matter to the EVC;<sup>96</sup> (ii) the IC members would have voted in favor of the Merger, because there were “various factors” on which they based their decision;<sup>97</sup> and (iii) even if the vote had been passed to the EVC, there is no way of knowing what the EVC would have decided.<sup>98</sup>
45. *First*, the ROK’s reliance on the NPS’s “written procedures” continues to miss the point. Those “written procedures” are irrelevant to the question of causation, because the ROK’s conduct—including orders to “[REDACTED]”<sup>99</sup>—ensured there was never any prospect of referring the vote to the EVC.<sup>100</sup>
46. *Second*, the ROK’s proposition that there were “various factors” on which the IC members based their decision is misleading and wrong, as discussed above.<sup>101</sup> To the extent “various

<sup>93</sup> These three steps are set out in the Claimant’s PHB, ¶ 160 {B/10/64}.

<sup>94</sup> ROK’s PHB, ¶ 89 {B/11/42} (quoting the ICJ’s *Bosnian Genocide* case, **Exh CLA-24**, ¶ 462 {H/24/194-195}).

<sup>95</sup> Reply, ¶ 506 {B/6/332}.

<sup>96</sup> ROK’s PHB, ¶ 91 {B/11/42}.

<sup>97</sup> ROK’s PHB, ¶ 92 {B/11/43}.

<sup>98</sup> ROK’s PHB, ¶ 93 {B/11/43-44}.

<sup>99</sup> Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-496**, pp. 15-16 {C/496/3-4} (emphasis added).

<sup>100</sup> See above ¶¶ 28 and 30 and evidence cited therein.

<sup>101</sup> See above ¶ 33.

factors” were considered by the IC, those factors are not relevant to the analysis of causation, because they were infected by a flawed understanding of the merits of the Merger and cannot be disentangled from the ROK’s unlawful intervention in the IC’s deliberations on the Merger vote. As noted above, the IC members have confirmed this, explaining that their decision on the Merger would have differed, had they known of the ROK’s attempts to cover up the loss to the NPS if the Merger went ahead.<sup>102</sup>

47. *Third*, the ROK maintains that “there was no knowing how the [EVC] might have decided,” had the decision on the Merger vote been put to it.<sup>103</sup> As a matter of causation, the Claimant is not required to demonstrate that it would not have otherwise suffered the same harm absent the ROK’s wrongdoing.<sup>104</sup> But, in any event, as noted above,<sup>105</sup> the preponderance of evidence shows that the MHW and NPS acted specifically to *exclude* the EVC from any involvement in the vote, because their own assessment established the likelihood that the EVC would reject the Merger. The ROK has no response to this.
48. *Finally*, the ROK continues to misconstrue Mr. Garibaldi’s question on causation: the question did not ask whether causation is interrupted because the IC *in fact* “independently voted in favour of the Merger.”<sup>106</sup> Rather, the question was whether causation is interrupted because the IC *could have*, absent the ROK’s Measures, decided to support the Merger.<sup>107</sup> The judgment in *Harnett v. Bond* cited in the ROK’s PHB is therefore inapt and irrelevant.<sup>108</sup> That judgment stands for the proposition that the consequences of an independent act in a chain of causation are too remote from the original wrong to be deemed casually connected to the original wrongdoing. Here, the independence of the act in question is precisely the issue in dispute.
49. The ROK deliberately avoids addressing Mr. Garibaldi’s question, because it has no good answer to it. The answer to Mr. Garibaldi’s question is that an enquiry into a *sine qua non* condition does not require a claimant to establish that no other factual scenario could have led to the same result. Rather, the Claimant needs to show that, *in the particular set of circumstances* at issue, the ROK’s wrongdoing was the reason why the IC voted in favor of

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<sup>102</sup> See above ¶¶ 29 and 31-33. See also Claimant’s PHB, ¶ 169 {B/10/67-69}.

<sup>103</sup> ROK’s PHB, ¶ 93 {B/11/43-44}.

<sup>104</sup> Claimant’s PHB, ¶¶ 167-168 {B/10/66-67}.

<sup>105</sup> See above ¶ 30.

<sup>106</sup> ROK’s PHB, ¶ 94 {B/11/44}.

<sup>107</sup> Tribunal {Day2/132:12-18} (“The problem I have is that I don’t understand what is the theoretical or conceptual basis for the second argument, that causation is broken, a chain of causation is broken when the human agent that – who acted *could have achieved the same result* acting on his own without influence.”).

<sup>108</sup> See ROK’s PHB, ¶¶ 95-96 {B/11/44-45}.

the Merger.<sup>109</sup> None of the other legal authorities referred to by the ROK establishes that the Tribunal should adopt a different approach.<sup>110</sup>

**B. THE NPS VOTE CAUSED THE MERGER TO BE APPROVED AT THE EGM**

50. In its PHB, the ROK continues to assert that the NPS’s vote did not cause the Merger to be approved at the EGM, because “the NPS only held 11.21 percent of SC&T’s outstanding shares.”<sup>111</sup> As the Claimant has previously explained, simple arithmetic shows the NPS held the casting vote because, without its 11.21%, the Merger would not have been approved.<sup>112</sup> Again, the ROK ignores the evidence proving that the wrongful conduct at issue in this arbitration was specifically targeted at the NPS’s vote, because that vote was decisive—as multiple Korean court decisions have confirmed the same, the ROK cannot argue otherwise.<sup>113</sup>
51. To distract from the wealth of evidence establishing that the NPS had the casting vote on the Merger, the ROK’s PHB refers to purported “uncertain[ty]” prior to the EGM as to whether the Merger would go through.<sup>114</sup> The ROK cites a letter from the Claimant to the NPS on 13 July 2015, in which the Claimant suggests that the prospect of the Merger being approved was “very unlikely.”<sup>115</sup> That statement was obviously intended by the Claimant as a further attempt to persuade the NPS to vote against the Merger. It is also clear from other evidence on the record—including the views of MHW official themselves—that the NPS vote was considered to be determinative.<sup>116</sup> More relevant to the question of causation, the Claimant’s letter of 13 July 2015 expressed the belief that, “with NPS’ vote against . . . the [Merger]

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<sup>109</sup> H. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985), **Exh CLA-125**, p. 113 {H/125/9} (a *sine qua non* condition must be necessary “on the particular occasion for the occurrence of the event.” The authors note that, for every event “there is present on any given occasion one and only one independent set of conditions sufficient to produce it” and that, accordingly “every member of this set [of conditions] will be necessary on that occasion for the occurrence of the event and hence a condition *sine qua non* of it.”). See also R. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof*, **Exh CLA-155**, p. 1019 {H/155/19} (“[A] particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent *actual* conditions that was sufficient for the occurrence of the result.”).

<sup>110</sup> The authorities referred to at ¶¶ 89-90 of the ROK’s PHB {B/11/42} stand for the proposition that causation is not established where it can be shown that, in the circumstances of the case, factors other than the respondent’s wrongdoing caused the claimant’s harm.

<sup>111</sup> ROK’s PHB, ¶ 101 {B/11/46}.

<sup>112</sup> 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”). See also Claimant’s PHB, ¶¶ 172-173 {B/10/70-71}; Claimant’s Opening Presentation, slide 33 {J/1/33}; ASOC, ¶ 83 and Table 2 {B/3/41-42}; Reply, ¶ 514 {B/6/342-343}.

<sup>113</sup> Claimant’s PHB, ¶¶ 172-173 {B/10/70-71}.

<sup>114</sup> ROK’s PHB, ¶ 102 {B/11/46}.

<sup>115</sup> ROK’s PHB, ¶ 102 {B/11/46}; Letter from Elliott to NPS, 13 July 2015, **Exh C-232**, p. 3 {C/232/3}.

<sup>116</sup> Reply, ¶ 516 {B/6/343-344}.

would . . . be effectively guaranteed not to proceed.”<sup>117</sup> The record confirms that belief to have been correct.

**C. THE ROK’S WRONGDOING WAS THE BUT-FOR AND PROXIMATE CAUSE OF THE CLAIMANT’S LOSS**

52. The Claimant has consistently maintained that the ROK’s wrongdoing was the but-for and proximate cause of the loss that it claims in the arbitration, because that loss was (i) the direct and uninterrupted consequence of the ROK’s wrongdoing that would not otherwise have occurred; (ii) the foreseeable *and foreseen* consequence of the ROK’s conduct; and (iii) intentionally caused.<sup>118</sup> The ROK’s PHB is cursory in its response, claiming that, because the ROK had no knowledge of Samsung’s efforts that depressed SC&T’s share price (and, because that conduct is the subject of ongoing litigation), it was not “reasonably foreseeable on the ROK’s part that the Merger would transfer value from SC&T shareholders to Cheil shareholders.”<sup>119</sup> That posture is plainly contrived.

53. It is irrelevant whether the ROK knew of the details of Samsung’s unlawful manipulation of the SC&T and Cheil share price; rather, proximate causation requires only that the ROK was aware of the harm that would be caused to SC&T shareholders, which was to be effectuated via the Merger Ratio. As the ROK accepts, the Merger Ratio is a mandatory feature of Korean law,<sup>120</sup> which means that the possibility of a transfer of value between SC&T and Cheil shareholders was *knowable* as soon as the Merger (and Merger Ratio) was announced.<sup>121</sup>

54. As to whether the value transfer was in fact *known* by the ROK, members of the NPS Research Team testified that “ [REDACTED] ”<sup>122</sup> The Head of the NPS Research Team also explained to CIO [REDACTED] at the time that it would be “ [REDACTED] ”<sup>123</sup> Indeed, the value transfer resulting from the Merger was the very reason why the NPS was faced with the prospect of an at least KRW 138.8 billion loss, and thus why the NPS Research Team fabricated a merger “synergy” to obscure that

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<sup>117</sup> Letter from Elliott to NPS, 13 July 2015, **Exh C-232**, p. 3 {C/232/3}.

<sup>118</sup> Claimant’s PHB, ¶¶ 181 *et seq.* {B/10/74-76}.

<sup>119</sup> ROK’s PHB, ¶ 104 {B/11/47-48}.

<sup>120</sup> ROK’s PHB, ¶ 104(b) {B/11/47} (“The Merger Ratio was fixed by statute.”). *See also* Claimant’s PHB, ¶ 184 {B/10/75}.

<sup>121</sup> Claimant’s PHB, ¶ 184 {B/10/75}.

<sup>122</sup> Second Statement Report of [REDACTED], [REDACTED] and [REDACTED] to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 18-19 {C/462/8-9} (emphasis added). *See also* Statement Report of [REDACTED] to the Special Prosecutor, 2 January 2017, **Exh C-477**, pp. 16-17 {C/477/10-11}.

<sup>123</sup> Statement Report of [REDACTED] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 {C/487/3}. *See also* Reply, ¶¶ 132, 509(h) {B/6/99-103} {B/6/339}.



loss.<sup>124</sup> The Blue House, MHW, and NPS knew of the loss that the Merger would cause the NPS and other SC&T shareholders including the Claimant and yet, confronted with that loss, the ROK ordered the NPS to approve the Merger anyway.

## V. THE QUANTUM OF THE CLAIMANT'S DAMAGES

55. As noted, the ROK devotes the majority of its PHB to the question of damages. In those submissions, the ROK makes a striking *volte face*. Having spent the last four years dismissing the Claimant's damages claim as a fantasy, and after hundreds of pages of submissions, a two-week hearing, and no doubt thousands of hours of attorney and expert attention, the ROK quietly all but abandons its zero damages position. Belatedly, the ROK's PHB introduces a selection of alternative quantum theories any one of which the ROK positively asserts would result in (unquantified) "non-zero damages (subject . . . to credit for the Claimant's trading profit and any top-up on the appraisal shares)."<sup>125</sup> And yet, with characteristically overheated rhetoric, the ROK begins its PHB submissions on damages by criticizing *the Claimant* for a so-called "ever-shifting damages claim."<sup>126</sup>
56. In truth, the Claimant's quantum theory has been consistent throughout this arbitration: the benchmark for the quantum of damages must be SC&T's intrinsic value, not the market price of its shares. This is because the market price was depressed by fears of a predatory Merger and Samsung's market manipulation and so failed to fairly reflect SC&T's value as of the Valuation Date. The ROK's sudden about-turn is a last-ditch attempt to avoid the significant liability that the Claimant's evidence and submissions amply justify. The strategy here is not subtle. Having initially gambled on an all-or-nothing damages thesis, the ROK evidently reappraised its odds of success after the hearing and has now decided to hint at a last minute, low-ball, compromise position. The Claimant of course welcomes the concession to reality that the ROK's new "non-zero damages" case represents, but regrettably, as we explain below, the ROK's current position is as erroneous as its categorical zero-damages predecessor.
57. We address the ROK's misplaced claims for "credit" against the Claimant's damages claim in the final sub-section of this Reply PHB (**subsection E**), after:
- a. showing that the ROK's new "non-zero damages" arguments are still fundamentally misconceived and inadequate to measure the Claimant's loss (**subsection A**);

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<sup>124</sup> Reply, ¶ 132 {B/6/99-103}.

<sup>125</sup> ROK's PHB, ¶ 135 {B/11/59}. *See also id.*, ¶ 134 {B/11/58} ("[W]ould give rise to damages of more than zero").

<sup>126</sup> ROK's PHB, ¶ 7 {B/11/5-6}. *See also id.*, ¶ 105 {B/11/48} (opening the Damages section of its PHB with the same rhetoric).

- b. addressing the misplaced attack on the concept of intrinsic value (**subsection B**);
- c. restating the ample empirical evidence that the Claimant would have immediately realized the benefit of a substantial increase in SC&T's share price in the Counterfactual Scenario (**subsection C**); and
- d. restating the Claimant's response to the suggestion that it "assumed the risk" of the ROK's breaches of the Treaty on the Non-Appraisal Shares and thus can recover no damages for losses on the investment in those shares (**subsection D**).

**A. THE ROK'S NEW "NON-ZERO DAMAGES" ARGUMENTS ARE AN IMPORTANT CONCESSION, BUT STILL FUNDAMENTALLY FLAWED**

58. The ROK advances two different "non-zero damages" arguments in its PHB, implying a range of damages as a floor and ceiling for recovery in this case. In Section V.B.1 it argues for a valuation based on SC&T's share price on two different dates prior to the Merger, and in Section V.B.2 it argues for a valuation based on unspecified "adjustments" to SC&T's share price as at the Valuation Date to reflect the impact of "market manipulation." We address each of these arguments—for which no evidence was presented at the hearing—in turn.

**1. Valuing SC&T by reference to share price on various dates**

59. In Section V.B.1 of its PHB, the ROK suggests that the Tribunal might quantify damages by using the stock market prices of SC&T shares on 10 or 16 July 2015. This approach suffers from a number of fatal flaws.

*(i) Any valuation of SC&T based on the market price of SC&T shares is doubly flawed*

60. This approach continues to be based on the market price of SC&T shares. This embeds two fundamental problems.

61. The first fundamental problem with the "market is king" approach is that it turns a blind eye to the fact that the market price was unreliable. In its recent judgment in the Appraisal Price Litigation, the Korean Supreme Court specifically ruled that from at least the date of the Cheil IPO in December 2014 the market price of SC&T shares was not a fair reflection of the "objective value" of SC&T precisely because it was "affected by this merger," which itself "was accomplished as part of the succession work, which was conducted systematically from the Group level to strengthen [REDACTED]'s management control over the Samsung Group."<sup>127</sup> In other words, the Supreme Court has endorsed the very analysis put forward by Mr. Boulton to show that market prices for SC&T shares are inadequate as a basis for valuation. In so

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<sup>127</sup> Supreme Court Case No. 2016Ma5394 (Consolidated), 14 April 2022 ("Supreme Court, Appraisal Price Decision"), Exh C-782, pp. 6, 9 {C/782/6} {C/782/9}.

doing, the Korean Supreme Court cut the legs out from under Professor Dow's and the ROK's zero damages theory and negates the arguments that the SC&T share price on either 10 or 16 July 2015 should be used as the basis for valuation.

62. The second fundamental problem with any valuation based on market price is that a depressed market price was used to cause the damage for which the Claimant now seeks to be made whole. That which caused the loss that the Tribunal is trying to quantify (a price that does not reflect value) cannot provide a metric for measuring the same loss (the extent to which the price did not reflect value). Indeed, this very insight has also been endorsed by the Korean Supreme Court in its recent judgment in the Appraisal Price Litigation, where the court ruled it “irrational” to “calculate[e] the share purchase price based on a market price which has been formed at a lower level compared to the fair price due to the impact of [the] merger against shareholders opposing the merger for being disadvantageous to the target company”.<sup>128</sup>

***(ii) The share price awarded in the Appraisal Price Litigation is inadequate***

63. To the extent that the ROK now seeks to hold out the Supreme Court's decision in the Appraisal Price Litigation as a finding that the share price of KRW 66,602/share prior to the December 2014 Cheil IPO reflected the fair or intrinsic value of SC&T, that is inaccurate. The Supreme Court explicitly decided not to undertake a broader net asset valuation.<sup>129</sup> It would thus be wrong to suggest that the share price endorsed by the Supreme Court in some way reflected a judgment concerning the intrinsic or fair value of SC&T because that was not the question before the court. This is consistent with Professor SH Lee's unchallenged opinion that the approach taken pursuant to the relevant legislation is “problematic” as a mechanism for ensuring fair value to dissenting shareholders precisely because “it applies the trading price of shares on the market which may not fairly reflect proportionate value of the company in question.”<sup>130</sup> The Court's focus was narrowly on identifying a share price that predated events that gave rise to market speculation about a predatory merger.

***(iii) Any pre-Merger share price fails to account for the Counterfactual Scenario***

64. The damages question that is before this Tribunal is what the SC&T share price would have been after a vote against the Merger. Logically, SC&T's share price on either 10 or 16 July 2015 cannot provide an answer to that question. Both of those pre-vote share prices include some market uncertainty regarding the outcome of the vote that was scheduled for 17 July 2015; they therefore do not and cannot reflect what the price would have been in the

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<sup>128</sup> Supreme Court, Appraisal Price Decision, **Exh C-782**, p. 8 {C/782/8}.

<sup>129</sup> Supreme Court, Appraisal Price Decision, **Exh C-782**, p. 5 {C/782/5}.

<sup>130</sup> SH Lee Report, ¶ 75 {F2/1/30}.

Counterfactual Scenario where, after that vote, the risk of the predatory Merger had certainly disappeared. This would be true of any pre-Merger share price and is a further reason that any such share price is an inappropriate basis for valuing the Claimant's investment in SC&T.

**(iv) *The ROK's submissions in favor of 10 July 2015 as an alternative Valuation Date are speculative and unsupported***

65. The ROK first insists that 16 July 2015 *must* be used to calculate damages.<sup>131</sup> Then, without any apparent effort to reconcile the two positions, the ROK suggests that actually Friday, 10 July 2015 should be used as the Valuation Date because, according to the ROK, this was the day “immediately before the effect of the ROK’s alleged Treaty breach was reflected in SC&T’s share price.”<sup>132</sup> Notably, the ROK offers no conclusive evidence that the NPS’s vote in favor of the Merger “was known to the market” after 10 July 2015 or that “the effect of the ROK’s alleged Treaty breach was reflected in SC&T’s share price” after that date.<sup>133</sup> But this does not deter the ROK from the conclusory assertion that “SC&T’s market price on 10 July 2015 *thus would have been unaffected by the Treaty breach.*”<sup>134</sup>
66. With respect to 10 July 2015 in particular, it is both wrongheaded and speculative to focus on this date as having any significance to a quantum analysis.
- a. This argument is wrongheaded because it mischaracterizes the Claimant’s loss causation theory. The Claimant’s loss causation theory is not and never has been that the NPS’s vote approving the Merger, in and of itself, caused the SC&T share price to fall. Rather, the Claimant’s theory is that the NPS’s 17 July 2015 vote approving the Merger *locked in* the excessive discount to SC&T’s intrinsic value reflected in SC&T’s share price that had arisen from Samsung’s pursuit of the tunneling Merger. Mr. Boulton has demonstrated the existence of this discount with evidence; the Korean Supreme Court recently confirmed its existence as well.<sup>135</sup>
- b. On the evidence before the Tribunal and Professor Dow’s own parameters for statistically significant price movements, the ROK’s eleventh-hour submissions concerning the impact of rumors about the IC vote amount to no more than speculation. The ROK overstates what the evidence actually shows the market “knew” at the relevant time.<sup>136</sup> And the price movement after 10 July 2015 falls below the

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<sup>131</sup> ROK’s PHB, ¶¶ 128-130 {B/11/57}.

<sup>132</sup> ROK’s PHB, ¶ 132 {B/11/58}.

<sup>133</sup> ROK’s PHB, ¶¶ 132-133 {B/11/58}.

<sup>134</sup> ROK’s PHB, ¶ 134 {B/11/58}.

<sup>135</sup> Supreme Court, Appraisal Price Decision, **Exh C-782**, p. 9 {C/782/9}.

<sup>136</sup> See Claimant’s PHB, ¶¶ 245-246 {B/10/100-101}.

confidence interval set by Professor Dow’s event study and thus, according to the very framework he established, the should be judged to have no statistical significance.<sup>137</sup> Ultimately, the ROK’s conclusory post-hearing submissions, unsupported by evidence or any expert analysis of share price movements in the relevant period, do not enable the Tribunal to take a decisive view on whether the SC&T share price was or was not “unaffected by the Treaty breach” at issue here on that, or any other, date.

**(v) *The ROK cannot now seriously dispute that substantial damages are owing***

67. It is in any case obvious that the ROK’s principal purpose in suggesting these alternative dates is to argue that valuing SC&T by reference to its share price does not “inevitably” result in no damages being awarded to the Claimant and thus to rehabilitate its “market is king” mantra. So, the ROK trumpets the fact that using the share price on these Valuation Dates would result in “non-zero damages,” but scrupulously avoids putting a number on them. Amounts can, however, be discerned readily enough. SC&T’s stock market price on 10 and 16 July 2015 was KRW 64,400 and KRW 69,300 respectively.<sup>138</sup> If the Claimant had sold all of its 11,125,927 shares at those prices, it would have received KRW 716.5 billion and KRW 771 billion respectively. Subtracting from those figures the amount the Claimant actually did receive from the disposition of its shares, which the parties agree is not more than KRW 622.3 billion,<sup>139</sup> would imply a principal damages amount of at least KRW 94.2 billion or KRW 148.7 billion respectively, equating to US\$ 74 million or US\$ 117.5 million respectively at today’s rate.
68. For all of the reasons stated above—principally that these figures are derived from share prices that the Korean Supreme Court has itself deemed unreliable and that they answer different questions than the quantum question before this Tribunal—these figures are not put forward as alternative bases for a damages claim by the Claimant. But it is striking that even on the manifestly inadequate “non-zero damages” case now put forward by the ROK there is no longer any basis for the ROK to dispute that there are substantial damages owing to Claimant.

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<sup>137</sup> Second Dow Report, Appendix C {G3/1/109-110}. The excess returns of Cheil (-0.01724) on 13 July 2015 lie within the 95% confidence interval ( $\pm 0.06804$ ). *Id.*, Figure C-1 {G3/1/110}; **DOW-2-WP5**, Tab “Output” {G3/45}.

<sup>138</sup> ROK’s PHB, ¶ 134 {B/11/58}; SC&T and Cheil Share Prices 1 January 2014 to 31 December 2015, **Exh C-256**, p. 11 {C/256/11}.

<sup>139</sup> ROK’s PHB, ¶ 134 {B/11/58}, noting that the Claimant obtained KRW 57,234/share for the 7,732,779 Buyback Shares (KRW 442.6 billion), and an average of KRW 52,977 for the 3,393,148 Non-Buyback Shares (KRW 179.7 billion). *Cf.* Second Smith Statement, ¶¶ 66(i)-(ii) {D1/2/30-31} (explaining that the Claimant in fact received only KRW 581.7 billion for its shares).

## 2. The ROK's price adjustment theory

69. Section V.B.2 of the ROK's PHB outlines a second "non-zero damages" theory: that the Tribunal might award damages on the basis of some (unspecified) adjustment to SC&T's 16 July 2015 share price to offset any "market manipulation" that is proven. The ROK holds this out as a theoretical possibility, but the focus of Section V.B.2(a) of its PHB is to insist that no such manipulation has yet been proven in the ongoing criminal proceedings against ██████████ and other Samsung officials (which the ROK itself directs).<sup>140</sup> And in Section V.B.2(b) of its PHB the ROK suggests that, even if manipulation had occurred, "any impact . . . could be eliminated by a minor adjustment to SC&T's market price on the Valuation Date."<sup>141</sup> This section of the ROK's PHB can be dealt with quite quickly.
70. *First*, of course, this theory has the same fundamental flaw as the first "non-zero damages" theory: the market price of SC&T shares is simply not a reliable measure of SC&T's intrinsic value, and adjustments around the margins are not sufficient to correct this fundamental deficiency.
71. *Second*, the focus on "market manipulation" misses the forest for the trees. As the Korean Supreme Court itself recently explained, the phenomenon that rendered the SC&T share price unreflective of SC&T's value was tunneling—the Merger that transferred value away from SC&T shareholders to Cheil shareholders. The evidence before this Tribunal shows that "share price manipulation" of the sort that is currently being prosecuted by the ROK was but one of the reasons why the SC&T share price did not reflect SC&T's value—one aspect of the wider succession scheme. Simply adjusting for a single instance of share price manipulation, as the ROK proposes, would fail to capture the full extent to which the predatory Merger was causing a discount to SC&T's share price relative to its intrinsic value.
72. *Third*, the ROK has largely failed to assist the Tribunal with any basis for making such adjustments—an omission that one suspects was not an accident. The ROK's new theory appears to have been devised to accommodate Professor Dow's reluctant admission at the hearing that there may have been manipulation of SC&T's share price and, if so, that the effect of it "should be quantified and the market price should be adjusted."<sup>142</sup> But Professor Dow admitted that he had not made any attempt to quantify the appropriate adjustments and was merely responding to the tribunal's question "on the hoof".<sup>143</sup> He suggested in any event that the "members of the tribunal are probably quite capable of doing the mental analysis

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<sup>140</sup> ROK's PHB, ¶¶ 136-147 {B/11/59-67}.

<sup>141</sup> ROK's PHB, ¶¶ 148-153 {B/11/67-69}.

<sup>142</sup> James Dow {Day8/95:18-22}.

<sup>143</sup> James Dow {Day8/96:22}.

better than me”.<sup>144</sup> Thus, Professor Dow offered that, if the Tribunal considered it appropriate to adjust SC&T’s share price to account for the effects of Samsung’s manipulation, he would “let the tribunal make an attempt to quantify that”—but with no help from the valuation experts.<sup>145</sup> That truly extraordinary testimony speaks for itself—and it shows that the ROK does not take this alternative “non-zero damages” theory seriously. The Tribunal should not either.

**B. THE ROK’S ATTACK ON THE CONCEPT OF INTRINSIC VALUE IS MISPLACED, AND IRRELEVANT**

73. Having set out its alternative “non-zero damages” theories, in Section V.B.3 of its PHB the ROK’s focus shifts to reprising its critique of Mr. Boulton’s use of the concept “intrinsic value” in conducting his SOTP valuation. There is nothing new here, except perhaps the use of “scare quotes” around the phrase “intrinsic value,” as though to suggest some exoticism.
74. The ROK first argues that intrinsic value and fair market value are not the same thing and then insists that intrinsic value is a uniquely subjective concept “estimates of [which] will vary from one analyst to the next”.<sup>146</sup> That argument is nonsensical, self-serving, and completely inapposite.
- a. It is nonsensical first because any estimate of value requires the exercise of judgment by the valuer and is thus in this sense “subjective”<sup>147</sup> and second because—as the Tribunal will be well familiar with—expert analysts regularly differ over the determination of fair market value, however “objective” that concept may be. If the ROK and its expert found truly objectionable specific assumptions or judgments reflected in Mr. Boulton’s analysis, they should have put forward an alternative SOTP valuation that then could be tested by the parties and the Tribunal. But they did not.
  - b. Instead, the ROK and its expert initially adopted a posture designed to reach the conclusion that no damages were payable on the basis of near mythical faith in the efficiency of the market for SC&T shares. When it was pointed out that the very efficiency of that market meant that the market would instantaneously incorporate the impact of the ROK not breaching the Treaty in the Counterfactual Scenario, the ROK and Professor Dow retreated to an indefensibly “agnostic”<sup>148</sup> posture of simply refusing to extend the analysis to reach the obvious conclusion. The Tribunal should

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<sup>144</sup> James Dow {Day8/96:20-21}.

<sup>145</sup> James Dow {Day8/220:23} – {Day8/221:6}.

<sup>146</sup> ROK’s PHB, ¶ 155(c) {B/11/70}.

<sup>147</sup> Claimant’s PHB, ¶ 200 {B/10/83-84}.

<sup>148</sup> Second Dow Report, ¶ 102 {G3/1/48}; James Dow {Day8/156:11-21}.

reject the self-serving criticism of Mr. Boulton for expressing an opinion (which is ultimately all the “subjective” label boils down to) in circumstances where, based on his stated expertise, Professor Dow could and should have done so, but simply refused to state an opinion in order to avoid reaching conclusions at odds with the case being put forward by the ROK.

c. The ROK’s attack on intrinsic value is, finally, completely inapposite because the Claimant is not claiming damages for the full intrinsic value of its investment in SC&T, and indeed Mr. Boulton’s quantification of damages is conservative in a number of respects.<sup>149</sup> The Claimant’s claim now reflects a 5 to 15% discount to better reflect the price that Mr. Boulton assesses the Claimant would in reality have been able to realize for its SC&T shares in the Counterfactual Scenario. The Claimant submits that the appropriate discount rate is 5%, by reference to observed share prices on the most relevant reference dates.<sup>150</sup> The 15% discount rate reflects the Claimant’s most conservative position, based on the lowest observed share prices in a broader period.<sup>151</sup>

75. The share price predicted within this range is entirely within reason even compared to other contemporaneous analyses and is no outlier: Mr. Boulton’s valuation is substantially the same as those reached by multiple experts at the time, including the ISS (KRW 110,234/share),<sup>152</sup> the Big Four Accounting firm engaged by Elliott at the time (KRW 100,597-114,134/share),<sup>153</sup> and even Deloitte Anjin, engaged by Samsung, whose first (and least contaminated) valuation was [REDACTED].<sup>154</sup>

76. Elsewhere in its PHB, the ROK also repeats its argument that some further discount needs to be applied to account for the “illiquidity of the investments in listed affiliates held by SC&T that make up a large portion of the Claimant’s alleged ‘intrinsic value’ of its shares” based on Professor Bae’s analysis.<sup>155</sup> Mischaracterizing the record, the ROK claims Professor Bae was “uncontradicted” in his evidence that the significant discount to SC&T’s intrinsic value would have persisted because “the market would not value SC&T’s shareholdings in listed affiliates

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<sup>149</sup> Claimant’s PHB, ¶¶ 14, 209(d), 240, 254-255 {B/10/6-7} {B/10/88} {B/10/98-99} {B/10/103-104}.

<sup>150</sup> Second Boulton Report, ¶¶ 6.5.7-6.5.13 and Figure 8 {F5/1/53-55}.

<sup>151</sup> Second Boulton Report, ¶¶ 6.5.14-6.5.16 and Figure 9 {F5/1/55-56}. In fact, even this 15% discount rate is conservative, as the highest discount during this broader period was 13.9%.

<sup>152</sup> ISS Special Situations Research, “SC&T: proposed merger with Cheil Industries”, 3 July 2015, **Exh C-30**, p. 14 {C/30/14}.

<sup>153</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **Exh R-9**, p. 11 {R/9/11}.

<sup>154</sup> Deloitte 21 May Report, **Exh C-775**, pp. 2, 6 {C/775/3} {C/775/7}.

<sup>155</sup> ROK’s PHB, ¶ 108 {B/11/49}.



at their market prices”.<sup>156</sup> In fact, Professor Bae’s claim was amply contradicted at the hearing, both during his examination and by Mr. Boulton, as highly idiosyncratic and unusual.<sup>157</sup> To the extent Professor Bae is arguing that a discount must be applied to reflect the presence of a controlling shareholder, such a discount is already included in Mr. Boulton’s assessment.<sup>158</sup>

77. Ultimately, at several places in its PHB, the ROK appears to be defending a damages claim that the Claimant is not making, for the undiscounted intrinsic value of SC&T.<sup>159</sup> To be clear, the Claimant did have a strategy for unlocking value in SC&T beyond its historical average discount to NAV and/or for increasing the NAV, including the restructuring plan.<sup>160</sup> But the claim for damages that is before the Tribunal does not depend on achieving any of those. The claim depends only on showing that SC&T’s share price would have increased significantly towards its SOTP value in the Counterfactual Scenario, the issue to which we now turn.

**C. THE EVIDENCE IS INCONTROVERTIBLE THAT THE SC&T SHARE PRICE WOULD HAVE INCREASED IN THE COUNTERFACTUAL SCENARIO**

78. In the balance of Section V.B, the ROK seeks in various ways to dispute that SC&T’s share price would have increased in the Counterfactual Scenario in which the ROK did not breach the Treaty and the Merger was therefore not approved. The case that it would have done so relies not just on the kind of forward-looking projections on which expectation damages claims are typically based (although we have some of those, including from the NPS and Samsung themselves). Instead, the Claimant’s claim is based on actual data concerning SC&T’s share price performance before and after the Merger. This gives the Tribunal a uniquely robust evidentiary basis for awarding damages in this case.

**1. The ROK’s apparent confusion over the Valuation Date**

79. Before turning to that evidence, we first address the ROK’s confused submissions concerning the Valuation Date and whether the Claimant’s damages claim is somehow ineligible or of a special (“loss of a chance”<sup>161</sup>) character because it turns on the question of what would have happened to the SC&T share price after the uncontested Valuation Date in the Counterfactual Scenario. In Section V.B.4 of its PHB, the ROK seeks to recast the Claimant’s claim as one

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<sup>156</sup> ROK’s PHB, ¶ 199 {B/11/88}.

<sup>157</sup> See Kee-hong Bae {Day6/133:8-14} (admitting that “shares [listed] on the stock exchange . . . obviously should be traded”); Richard Boulton {Day7/26:15} – {Day7/27:3}.

<sup>158</sup> Second Boulton Report, ¶¶ 6.3.18-6.3.19 {F5/1/44}.

<sup>159</sup> See, e.g., ROK’s PHB, ¶ 108 {B/11/49}.

<sup>160</sup> Claimant’s PHB, ¶¶ 24-30, 255(a) {B/10/10-14} {B/10/104}.

<sup>161</sup> ROK’s PHB, ¶¶ 174, 182 {B/11/76-77} {B/11/79}.

for the loss of “a speculative chance to realise a possible increase in value *after* the Valuation Date” and dismiss it on that basis, and in Section V.B.5(a) the ROK objects to the Claimant’s damages claim on grounds that “[t]he Claimant did not suffer the claimed loss as at the Valuation Date”. There is much that is confused about these submissions.

80. The ROK’s confusion arises because it conflates the two separate concepts of *price* and *value*. The Claimant certainly is claiming for a loss measured precisely by reference to an expected increase in *share price* that would occur *after* the Valuation Date in a Counterfactual Scenario in which the ROK did not breach the Treaty and the Merger was therefore not approved. That is not the same thing as arguing for an increase in the *value* of the Claimant’s investment after the Valuation Date or arguing that the Valuation Date should somehow change. Mr. Boulton offers a single SOTP valuation of SC&T as of a single Valuation Date as a measure of the *value* of the Claimant’s investment.
81. The ROK is simply wrong to assert that “under international law, it must be established that the allegedly lost profits were lost *as at the Valuation Date*”.<sup>162</sup> That does not make any sense—the Valuation Date is by convention (and by definition in this case<sup>163</sup>) a date prior to the breaches causing damages. The objection that “[t]here is no explanation of how the Claimant would have realised the claimed value on the Valuation Date in the counterfactual”<sup>164</sup> is similarly confused. The Claimant’s case is, and always has been, that: (i) SC&T’s share *price* as of the Valuation Date did not reflect its *value* (a point that the ROK concedes); (ii) in the Counterfactual Scenario the SC&T share *price* would have increased to more accurately reflect its *value* (a point that the ROK unreasonably contests); and (iii) the Claimant would in reality have been able to realize the *value* of its investment by selling its shares in market transactions at those increased *prices* (a point that the ROK conflates). There is nothing objectionable about the fact that this claim necessitates considering what would have happened to the price of SC&T shares *after the Valuation Date*. This is inevitable when considering a counterfactual scenario—namely, what would the world have been like in an alternative future if the ROK had not breached the Treaty. This does not entail changing the Valuation Date.
82. Thus the ROK’s efforts to recast this claim in terms of a “loss of a chance” fail.<sup>165</sup> Those arguments turn on: (i) recasting the Claimant’s legal *entitlement* to the minimum standard of treatment under the Treaty as a “*chance*” to have the Merger decided by an “untainted”

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<sup>162</sup> ROK’s PHB, ¶ 178 {B/11/78}.

<sup>163</sup> Second Boulton Report, ¶ 2.3.2 {F5/1/14}.

<sup>164</sup> ROK’s PHB, ¶ 180 {B/11/79}.

<sup>165</sup> ROK’s PHB, ¶¶ 174, 182 {B/11/76-77} {B/11/79}.

process; (ii) reiterating the ROK's arithmetically flawed suggestion that, had the NPS voted against the Merger, the Merger vote "might have gone either way"; and (iii) denigrating the Claimant's case that the SC&T share price would have increased in the Counterfactual Scenario as "too speculative" and "utterly unrealistic".<sup>166</sup> Points (i) and (ii) are addressed in our submissions on the merits,<sup>167</sup> and we turn to point (iii) now.

**2. There is uniquely robust empirical evidence that SC&T's share price would have increased in the Counterfactual Scenario**

83. A principal focus of Sections V.B.5(b) and V.B.6 of the ROK's PHB is to reiterate numerous arguments as to why it would have been unrealistic for the Claimant to expect that the SC&T share price would have increased substantially in the Counterfactual Scenario. As we show briefly below, all of those arguments are misconceived.

*(i) There is no meaningful legal impediment to a rapid increase in the share price*

84. The ROK first suggests (for the first time in its PHB) that there was some legal impediment that would prevent an increase in share price from happening, by reference to Korean regulations that are said to have "prevented a more than 15 percent movement in any stock on any day."<sup>168</sup> In fact, the relevant Korean regulations in force in July 2015 allowed for a 30% daily movement in the share price,<sup>169</sup> so within two days the entirety of the increase that the ROK disputes (an increase of 41.5-58% from the share price on the Valuation Date) could have been reflected in SC&T's share price. That is not a material impediment to the Claimant realizing the value of its investment by market transactions in very short order.

*(ii) Mr. Boulton's opinion that the SC&T share price would have increased in the Counterfactual Scenario is derived from actual SC&T share price movements*

85. The ROK then asserts that an increase in the share price "could not be reasonably anticipated" in the Counterfactual Scenario on the basis that a discount to SC&T's NAV of 42 to 67% had been "'longstanding' and 'stubborn'".<sup>170</sup> In fact, both the Claimant's contemporaneous monitoring and Mr. Boulton's analysis show that this level of discount was anomalous for SC&T. Such a high discount represented a marked departure from SC&T's historical trading patterns; it is uncontested that in the seven-year period leading up to 2015, SC&T shares

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<sup>166</sup> ROK's PHB, ¶ 174 {B/11/76-77}.

<sup>167</sup> See above ¶¶ 50-51.

<sup>168</sup> ROK's PHB, ¶ 184 {B/11/80}.

<sup>169</sup> KOSPI Market Operational Regulations, 29 April 2015, **Exh C-780**, Article 20(1)-(2); KOSPI Market Operational Regulations Detailed Enforcement Regulations, 19 May 2015, **Exh C-780**, Article 30(1), sub-para 1 {C/780/1-2}.

<sup>170</sup> ROK's PHB, ¶ 185 {B/11/80}.

traded on occasion at a premium and at an average discount to its NAV of only 16%.<sup>171</sup> That level of discount, of course, lies right alongside the higher end of the range quantified by Mr. Boulton. This evidence of SC&T's historical share price performance against NAV is a firm evidentiary foundation upon which the Tribunal can base an award of damages. On this basis, it is reasonably certain that, once the threat of the tunneling Merger was lifted, the SC&T share price would have increased as the Excess Discount disappeared.

86. The evidence of what actually happened to SC&T's share price after the Merger confirms that it is reasonably certain that the Excess Discount would have disappeared once the threat of the tunneling Merger was removed. Because that is exactly what actually did happen to the New SC&T formed through the Merger. Mr. Boulton's Merged Entity analysis demonstrates that in the period immediately after the Merger, New SC&T shed its Excess Discount, trading at only a 5-15% discount to its SOTP valuation.<sup>172</sup> In the actual scenario, after the Merger, SC&T remained a holding company; remained part of the Samsung *chaebol* subject to all of the governance complications given such emphasis by Professor Dow and the ROK; remained a participant in the Korean capital market; etc. The only thing that changed for SC&T in the immediate aftermath of the Merger is that it was no longer targeted for the tunneling Merger, because that event had already happened. This confirms that the levels of discount observed in the run-up to the Merger were indeed anomalous *and* that the discount would have significantly reduced in the Counterfactual Scenario: any discount that is eliminated for SC&T in the real world immediately after the Merger would logically also have been eliminated for SC&T in the Counterfactual Scenario immediately after the Merger was defeated.
87. Evidently having neither an empirical nor a methodological answer to this Merged Entity analysis, the ROK is reduced to questioning whether Mr. Boulton's 40 years conducting valuation analyses in fact qualifies him as an economics expert;<sup>173</sup> complaining that Mr. Boulton does not specifically identify a "Korea discount";<sup>174</sup> and *then* complaining that Mr. Boulton has sought to analyze and isolate components of what is held out (without explanation) to be an "inseparable mix of a holding company discount and the 'Korea discount'".<sup>175</sup> All of this is no more than labelling masquerading as analysis.

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<sup>171</sup> See above ¶ 5.b.

<sup>172</sup> Richard Boulton {Day7/16:4-16}; Second Boulton Report, ¶¶ 6.5.17-6.5.18 {F5/1/56}.

<sup>173</sup> ROK's PHB, ¶ 187 {B/11/81}.

<sup>174</sup> ROK's PHB, ¶ 191 {B/11/82}.

<sup>175</sup> ROK's PHB, Section V.B.5(b)(i) (header) {B/11/81}.

88. The ROK has notably not challenged Mr. Boulton’s *actual economic analysis* which *does* isolate the discount to SC&T’s intrinsic value that would have been expected to dissipate in the Counterfactual Scenario (and that did dissipate in the immediate aftermath of the Merger in the actual scenario) from the discount that would be expected to persist. The former he labels the “Excess Discount,” and the latter he labels a “Holding Company Discount” to include any general discount applied to holding companies in Korea. For the purposes of quantifying the Claimant’s damages, Mr. Boulton does not need to disaggregate which parts of the so-called Holding Company Discount are attributable to the “Korea discount” or the “holding company discount”—or indeed to any other kind of discount—because he has been able to isolate and robustly quantify the component of the discount that does matter for the quantum analysis, viz. the Excess Discount.

***(iii) The ROK’s speculation that “nothing much would have changed” is belied by the evidence***

89. The ROK then tries to argue in various ways that no increment of the “inseparable” discount to SC&T’s intrinsic value would have been eliminated in the Counterfactual Scenario. That is inherently implausible, but at least the debate before the Tribunal is clear. The Claimant sees rejection of the Merger by the NPS (and thus its defeat) as a watershed event. The ROK says it would have been met by the Korean capital markets with a collective shrug. Considering the criminal lengths that ██████ and others were willing to go to in order to ensure the outcome of the Merger vote, the evidence on this speaks for itself.

90. The ROK argues that “the risk of the Merger would necessarily still be embedded in SC&T’s share price” in the Counterfactual Scenario in which the NPS voted to reject the Merger.<sup>176</sup> This argument fails to grapple with the distinction between the generalized corporate governance risk involving Samsung, and the specific risk of predation posed by this particular Merger, ignoring the empirical evidence of how SC&T’s share price behaved after the Merger, which is the empirical foundation for Mr. Boulton’s Merged Entity Analysis. The ROK instead reprises a series of arguments that the corporate structure of Samsung<sup>177</sup> and the *incentive* for ██████ to attempt a predatory merger<sup>178</sup> would have remained the same. But the ROK does not address what the rejection of the Merger *would* have changed. In light of the exercise of negative control by the NPS and SC&T’s other non-aligned shareholders, ██████ would no longer be *able* to push through a predatory merger. As ██████ himself said, there

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<sup>176</sup> ROK’s PHB, ¶ 159 {B/11/71-72}; *see also* ROK’s PHB, ¶ 173 {B/11/76}.

<sup>177</sup> ROK’s PHB, ¶¶ 196-198 {B/11/87-88}.

<sup>178</sup> ROK’s PHB, ¶¶ 200, 203 {B/11/88-90}.

was “██████████” and the Merger “██████████”<sup>179</sup> The ROK’s efforts to dismiss these statements as ██████████ merely “advocating for the completion of the Merger”<sup>180</sup> make no sense. If anything, ██████████’s continuing incentive to transfer control, combined with the demonstration of negative control by non-affiliated minority shareholders including the NPS and the Claimant, would have created an opportunity for those shareholders to negotiate and execute the succession plan on fair terms, as Elliott had envisaged all along<sup>181</sup> (and as ██████████<sup>182</sup>). Nor does it matter that ██████████’s statements were “not public”:<sup>183</sup> what matters is that the market would have known that SC&T shareholders had (very publicly) rejected the predatory Merger and could be expected to do so again.

91. The ROK also tries to downplay the NPS’s own contemporaneous acknowledgment that defeating the Merger would cause the price of SC&T shares to “██████████,” going so far as to suggest, wrongly, that this was the “sole support” for Mr. Boulton’s “belief that the SC&T share price would have risen ‘instantaneously’ to its supposed SOTP value in the counterfactual”.<sup>184</sup> These submissions are a dishonest attempt to deal with a document that is very difficult for the ROK, and the even more difficult reality that Professor Dow was the first to express the opinion that the efficiency of the market for SC&T shares meant that the share price would react “instantaneously” to information like the results of a SC&T shareholder vote on the Merger.<sup>185</sup>

***(iv) The ROK’s arguments for a higher discount rate should be rejected***

92. Finally, in Section V.B.6 of its PHB, the ROK is constrained to argue for the application of purportedly “realistic,” “common sense,” or “suitable” (for which read “higher”) discount rates in a transparent effort to zero out or reduce an inevitable damages award against it.<sup>186</sup> This amounts to an implicit acknowledgement that the ROK is unable to undermine Mr. Boulton’s Merged Entity analysis on empirical or methodological grounds.

93. The ROK’s first gambit is to point, again, to the discounts observable in the share prices of allegedly comparable companies.<sup>187</sup> Mr. Boulton has already explained that these companies

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<sup>179</sup> [██████████], NPS CEO Meeting Notes, 7 July 2015, Exh C-413, p. 1 {C/413/1}.

<sup>180</sup> ROK’s PHB, ¶ 204(a) {B/11/90}.

<sup>181</sup> Claimant’s PHB, ¶ 24 {B/10/10}.

<sup>182</sup> Market Forecast Analysis (Draft), 10 June 2015, Exh C-759, p. 37773 {C/759/2} (██████████).  
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<sup>183</sup> ROK’s PHB, ¶ 204(b) {B/11/91}.

<sup>184</sup> ROK’s PHB, ¶ 206 {B/11/91-92}.

<sup>185</sup> First Dow Report, ¶¶ 86, 95, 99 {G1/1/42} {G1/1/45} {G1/1/47}.

<sup>186</sup> ROK’s PHB, ¶ 210 {B/11/94}.

<sup>187</sup> ROK’s PHB, ¶¶ 212-220 {B/11/95-97}.

were not in similar circumstances to SC&T.<sup>188</sup> The ROK offers no new explanation as to how these comparators could be more “suitable” than evidence of SC&T’s own share price performance for determining an appropriate discount rate to apply in respect of SC&T.

94. The second gambit is the discredited claim that the Claimant’s trading plan guidelines reflect or disclose a discount rate at which the Claimant expected SC&T to trade or at which the Claimant would have exited its investment in SC&T.<sup>189</sup> Mr. Smith’s consistent evidence has been that the “unwind” portion of the trading plan guidelines was rarely indicative of the discount at which the Claimant would have exited its investment.<sup>190</sup> These were templates in which the “unwind” was automatically populated to match the build-up of the position so as to avoid traders overpaying for the securities when the investment position was being built.<sup>191</sup> In any event, the trading plan guidelines had been rendered inapplicable when the Claimant determined to engage in an activist campaign by developing the restructuring proposal after early April 2015.<sup>192</sup> It is therefore highly disingenuous for the ROK to characterize the trading plan guidelines as a reflection of the Claimant’s considered view of a likely persistent discount to NAV for SC&T, as the ROK attempts to do in its PHB.

#### **D. THE NON-APPRAISAL SHARES**

95. Shares acquired after 27 May 2015 did not attract appraisal rights and have been referred to in the arbitration variously as “Non-Appraisal Shares”, “Non-Buyback Shares” or “Non-Putback Shares”. There is no reason to treat those shares any differently to the shares acquired by the Claimant over the preceding five months.
96. The ROK argues that the Claimant should not be entitled to recover damages on the 3,393,148 Non-Appraisal Shares purchased after the Merger was announced on 26 May 2015 because the “decision to buy these shares was a speculative move that contributed to any injury the Claimant later suffered”.<sup>193</sup> Here again, the ROK distorts the facts.
97. The Claimant’s acquisition of these shares in the days after the Merger announcement was not a “speculative move”. Indeed, the Claimant’s overall investment in SC&T reduced very

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<sup>188</sup> Second Boulton Report, ¶¶ 6.4.14-6.4.15 {F5/1/51-52}; Boulton Presentation, slide 29 {J/21/29}.

<sup>189</sup> ROK’s PHB, ¶¶ 221-223 {B/11/97-100}.

<sup>190</sup> Third Smith Statement, ¶¶ 15-16 {D1/3/9-10}. *See also* Second Smith Statement, ¶¶ 20, 22 {D1/2/10-12}; James Smith {Day3/60:13-25} {Day3/64:7-10} {Day3/70:6-19}.

<sup>191</sup> Second Smith Statement, ¶ 20 {D1/2/10-11}; Third Smith Statement, ¶ 16 {D1/3/9-10}; James Smith {Day3/60:13-25} {Day3/78:13-23}.

<sup>192</sup> Third Smith Statement, ¶ 18 {D1/3/10-11}; James Smith {Day3/80:3-14}.

<sup>193</sup> ROK’s PHB, ¶¶ 228-231 {B/11/102-103}.

slightly in that period,<sup>194</sup> and as Mr. Smith has explained (and was not challenged on), the Claimant shifted from swaps to shares after 26 May 2015 because shares had voting rights and thus would assist the Claimant’s efforts to oppose the Merger.<sup>195</sup>

98. Finally, and critically, there is no “assumption of risk” with respect to the Non-Appraisal Shares that is any different to the Appraisal Shares: both were purchased assuming ordinary commercial risk, and neither was purchased with the knowledge of, let alone assuming the risk of illegal governmental intervention that caused the Claimant’s loss here.

**E. THE ROK’S CLAIMS FOR “CREDIT” AGAINST THE DAMAGES IT OWES THE CLAIMANT ARE MISPLACED**

**1. The Claimant’s trading position is irrelevant**

99. As noted above, the ROK opens its post-hearing submissions on quantum with extensive argumentation aimed at establishing that the Claimant made an overall profit of KRW 2.5 billion—that is, approximately US\$ 2.5 million—“on its investment,” defined—presumably only for this purpose<sup>196</sup>—as its SC&T shares and swaps in SC&T and Cheil.<sup>197</sup> There is no dispute that the Claimant had no trading gains on its SC&T shares but made a trading loss.<sup>198</sup>

100. The Claimant has set out its arguments on the trading position more generally in evidence and in its prior submissions.<sup>199</sup> Neutralizing trading losses (or, for that matter, taking account of any trading gains) does not inform the damages question that is before this Tribunal, which is what position the Claimant would have been in but for the ROK’s breaches—the trading position is irrelevant to that question.

101. The Claimant makes no claim for trading losses nor does it claim for losses in connection with its swap positions.<sup>200</sup> The claim that any trading gains on these positions should be “credit[ed]”<sup>201</sup> against the Claimant’s damages claim is accordingly misplaced. Mr. Boulton’s quantification of damages in respect of the investment in SC&T shares has already fully taken into account sums received when the Claimant disposed of that

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<sup>194</sup> As set out in Appendix A to the second witness statement of James Smith {D1/2/37}, on 26 May 2015, the Claimant held 7.42% of SC&T, 4.84% of which was held in shares and 2.58% in swaps, but by 3 June 2015, the Claimant had fully exited its swap positions and owned 7.12% of SC&T shares.

<sup>195</sup> Second Smith Statement, ¶ 65 {D1/2/30}.

<sup>196</sup> The ROK has consistently asserted that the swaps are not a protected investment under the Treaty. *See, e.g.*, Rejoinder, ¶¶ 103-128 {B/7/69-77}.

<sup>197</sup> ROK’s PHB, Section V.A (header) {B/11/50}.

<sup>198</sup> ROK’s PHB, ¶ 117 {B/11/52-53}; Claimant’s PHB, ¶ 237 {B/10/98}.

<sup>199</sup> Claimant’s PHB, ¶¶ 235-242 {B/10/97-99}; Fourth Smith Statement, ¶¶ 18-21 {D1/4/5}.

<sup>200</sup> Claimant’s PHB, ¶¶ 235, 240, 242 {B/10/97-99}.

<sup>201</sup> *See, e.g.*, ROK’s PHB, ¶ 112 {B/11/50}.



investment.<sup>202</sup> Just as the Claimant is not increasing its claim by adding heads of damage relating to losses on other investment instruments, so too should the Claimant's claim not be reduced by any alleged gains on those instruments.

**2. Elliott has received a Top-Up payment from SC&T, and updates its claimed damages**

102. The ROK's PHB concludes in Section V.D with a new request that the Tribunal order the Claimant to pay over to the ROK any future top-up payment it receives from Samsung pursuant to the Settlement Agreement with SC&T.<sup>203</sup> This is presented as a mechanism for avoiding double recovery of damages payable by the ROK for breaches of the Treaty. This request is entirely unnecessary. The Claimant has recently received a Top-Up payment from SC&T of KRW 65,902,634,943, net of withholding and other taxes. The funds were received on 12 May 2022, and currently are held in the Claimant's account at Citibank Korea, awaiting further remittance subject to various tax and regulatory confirmations. Accordingly, the Claimant hereby updates its damages claim by deducting the same amount from the principal amount claimed.

	KRW millions	US\$ <sup>204</sup>
<b>5% holding company discount</b>		
Net loss to EALP (as at 12 May 2022)	517,363	408,253,247
Pre-award interest (to 18 May 2022) <sup>205</sup>	261,850	206,633,357
<b>15% holding company discount</b>		
Net loss to EALP	388,979	306,950,089
Pre-award interest (to 18 May 2022)	209,593	165,393,777

\* \* \*

103. We conclude by taking a step back from the four years of briefing this arbitration, in which the ROK repeatedly disparaged the Claimant's damages case as fantasy. The ROK has insisted that, instead of substantial damages, *none* were payable. As briefing concludes, the ROK has abruptly accepted the propriety of a substantial damages award in the Claimant's favor.

104. Now the battleground has narrowed: the question for the Tribunal is not, as the ROK originally framed the case, all or nothing. The question is whether, if the ROK had not

<sup>202</sup> Second Boulton Report, ¶ 2.9.2 and Figure 3 {F5/1/23-24}.

<sup>203</sup> ROK's PHB, ¶ 234 {B/11/104}.

<sup>204</sup> This is calculated using the USD:KRW Exchange Rate as of 18 May 2022.

<sup>205</sup> Pre-award interest has been calculated using KRW 583,265 million as the principal up to 12 May 2022 and KRW 517,363 million as the principal for 13-18 May 2022 following receipt of the Top-Up Payment.

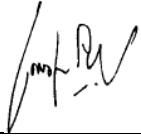
breached the Treaty, the price for SC&T shares would either (i) not have increased above the share price of KRW 69,300 immediately prior to the Merger vote, as the ROK contends; or (ii) would have increased to near its intrinsic value. An increase to within 15% of intrinsic value implies a share price of KRW 98,083/share (a 41.5% increase in price), and an increase to within 5% of intrinsic value implies a share price of KRW 109,622/share (a 58% increase in price)—entirely in line with contemporaneous valuations.

105. The only serious answer to the question of what would have happened to the SC&T share price in the Counterfactual Scenario is that it would have immediately and substantially increased. Mr. Boulton’s and Professor Milhaupt’s opinions—together with a wealth of contemporaneous analysis and findings by the Korean courts themselves—explain why it would have increased. Mr. Boulton’s Merged Entity analysis quantifies by how much it would have increased. If anything, Mr. Boulton’s calculation is conservative and should form the floor for any reasonable and principle-driven determination.

## **VI. REQUEST FOR RELIEF**

106. For the foregoing reasons, the Claimant hereby requests that the Arbitral Tribunal dismiss 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\$ 408,253,247; 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\$ 206,633,357 as at 18 May 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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18 May 2022