

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

**AND**

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

**ELLIOTT ASSOCIATES, L.P.**

Claimant

-v-

**REPUBLIC OF KOREA**

Respondent

---

**RESPONDENT'S REPLY POST-HEARING BRIEF**

---



**Freshfields Bruckhaus Deringer**

42-01 Ocean Financial Centre  
10 Collyer Quay  
Singapore 049315



63 Namdaemun-ro, Sogong-dong, Jung-gu,  
Seoul 04532  
Korea

## CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>THRESHOLD ISSUES .....</b>	<b>3</b>
	<b>A. THE ROK’S ALLEGED CONDUCT DID NOT CONSTITUTE A “MEASURE”.....</b>	<b>3</b>
	<b>B. THE IMPUGNED CONDUCT IS NOT ATTRIBUTABLE TO THE ROK.....</b>	<b>5</b>
	1. The conduct of President [REDACTED], Minister [REDACTED] and their subordinates is insufficient to prove the Claimant’s claims .....	5
	2. The NPS’s conduct is not attributable to the ROK under the Treaty or customary international law.....	6
<b>III.</b>	<b>MERITS.....</b>	<b>10</b>
	<b>A. THE TRIBUNAL IS NOT BOUND BY KOREAN COURTS’ FINDINGS, AND CANNOT RELY ON PROSECUTORS’ ALLEGATIONS IN THE INDICTMENT TO PROVE FACTS .....</b>	<b>10</b>
	<b>B. THE ROK DID NOT BREACH THE MST.....</b>	<b>12</b>
	1. It is not in dispute that a breach of MST requires a “high threshold” of severity and “manifestly” arbitrary conduct.....	12
	2. The Claimant has failed to establish the “high threshold” of severity and “manifestly” arbitrary conduct necessary for an MST breach.....	13
	<b>C. THE CLAIMANT’S ASSUMPTION OF RISK IS A DEFENCE TO THE ALLEGED BREACHES OF THE TREATY BY THE ROK .....</b>	<b>21</b>
	<b>D. THE ROK ACCORDED THE CLAIMANT NATIONAL TREATMENT.....</b>	<b>22</b>
<b>IV.</b>	<b>CAUSATION.....</b>	<b>24</b>
	<b>A. THE ROK DID NOT CAUSE THE NPS TO VOTE IN FAVOUR OF THE MERGER.....</b>	<b>24</b>
	<b>B. THE NPS’S VOTE DID NOT CAUSE THE MERGER TO BE APPROVED .....</b>	<b>26</b>
	<b>C. THE MERGER DID NOT CAUSE THE CLAIMANT’S CLAIMED LOSS .....</b>	<b>26</b>
	<b>D. THE CLAIMANT’S CLAIMED LOSS WAS NOT A PROXIMATE OR INTENDED CONSEQUENCE OF THE ROK’S ALLEGED TREATY BREACHES .....</b>	<b>26</b>
<b>V.</b>	<b>DAMAGES .....</b>	<b>27</b>
	<b>A. THE CLAIMANT WRONGLY CLAIMS IT MADE AN OVERALL TRADING LOSS .....</b>	<b>27</b>
	<b>B. IF THE TRIBUNAL AWARDS DAMAGES DESPITE THE CLAIMANT’S TRADING PROFIT, IT SHOULD DO SO BASED ON WHAT VALUE THE CLAIMANT COULD HAVE REALISED HAD THE TREATY NOT BEEN BREACHED.....</b>	<b>29</b>
	<b>C. THE PARTIES AGREE THAT THE RELEVANT STANDARD OF VALUE OF THE CLAIMANT’S SC&amp;T SHARES IN THE COUNTERFACTUAL IS FMV.....</b>	<b>30</b>

<b>D. THERE IS NO NEED TO PERFORM AN SOTP VALUATION; MARKET PRICES RELIABLY INDICATE THE FMV OF SC&amp;T SHARES IN THE COUNTERFACTUAL (AND INDEED SOTP IS NOT EQUIVALENT TO FMV).</b>	<b>31</b>
1. Mr Boulton QC’s SOTP valuation cannot represent realisable value on the Valuation Date .....	32
2. Market prices reliably indicate SC&T’s FMV in the counterfactual .....	33
3. Rejection of the Merger would not have led to an “immediate and substantial increase” in SC&T’s share price.....	34
4. Mr Boulton QC’s quantification of the Excess Discount is wholly unrealistic and unsupported .....	37
5. The Claimant’s restructuring plan is irrelevant to damages .....	39
<b>E. OTHER DAMAGES ISSUES.....</b>	<b>40</b>
<b>VI. REQUEST FOR RELIEF .....</b>	<b>40</b>

## I. INTRODUCTION

1. In 2015, Elliott<sup>1</sup> made a financial speculation (its line of business, for which it is renowned) in South Korea on one position in its investment portfolio. It made a profit on that position and thus accomplished its mandate. In the wake of a political scandal that has seen the incarceration of the former President of the ROK, it saw an opportunity to profit further, and has made a further gamble, this time of a legal nature: it has made an investment in legal fees in the hope of a spectacular return. In considering the claims brought here by the Claimant, EALP, the Tribunal should keep these basic underlying facts in mind.
2. The Claimant's Post-Hearing Brief (*PHB*) resorts to the same imprecise aspersions on which the Claimant has relied throughout these proceedings, while still failing to address the fundamental flaws with its claim.<sup>2</sup> This case, at its core, is about an investment decision made with full knowledge of the "inevitability" of the impending Merger of which the Claimant now complains, and an individual vote taken by a pension fund as a shareholder of each of the two companies involved in that Merger. The Claimant was a shareholder of one of those companies, and hedged its bets with exposure to the other (ultimately profiting from its trades). The pension fund's exercise of its shareholder voting rights, even if that interfered with the Claimant's trading strategy, was not a breach by the State of the Treaty. The pension fund is not an organ of the ROK, owed no duty to the Claimant in exercising its votes, and decided how it would exercise those votes in accordance with its internal procedures.
3. Nevertheless, the Claimant seeks to hold the ROK responsible for its own failed gamble. As damages, it is demanding not what its shares were worth on the market, and not even what it originally expected it might enjoy as a return on that gamble. Rather, it wants the value it imagines it would immediately have been able to "realize" on its SC&T shares if the Merger failed, *i.e.*, its SOTP

---

<sup>1</sup> Unless otherwise specified, capitalised terms in this Reply Post-Hearing Brief have the meanings given to them in the Republic of Korea's PHB.

<sup>2</sup> The Claimant's PHB repeats many arguments. This Reply PHB does not repeat all the ROK's previous arguments in response. Any allegations not specifically addressed here should not be considered accepted; the ROK relies on the submissions in its SOD and Rejoinder.

valuation. Its theory for this fails because of an internal, and fatal, contradiction: it relies on an event occurring on 17 July 2015, which would allegedly create market value, yet the Claimant's steadfast position is that the only "appropriate" Valuation Date is 16 July 2015, before any such value-creating event. There is no theory on which the value claimed was "realizable" on 16 July 2015.

4. This theory of instant elimination of a longstanding market discount to Korean companies' SOTP valuations (after 17 July 2015) is also a fantasy—one that has not become a reality even after decades of reforms in Korea. The *only* evidence supporting this theory is the say-so of Mr Boulton QC, an accounting expert who admits that he revised his opinion after learning of this longstanding discount from the ROK's quantum expert. The Claimant's expert in the Korean capital markets, produced only after the ROK's Prof Dow introduced the Korea discount into the discussion, has confirmed that a scenario in which SC&T's market price almost matched its SOTP valuation would be unprecedented.
5. The Claimant's PHB also presumes that SC&T's market price was unreliable for estimating its FMV, without even attempting to identify the allegations of manipulation that purportedly render the market price unreliable, much less prove that they affected the price. This presumption also ignores the Korean courts'—now, even its Supreme Court's—findings that SC&T's market price, at least as of 17 December 2014, reflected its "objective value".
6. The Claimant's threshold arguments fail, and its merits case is similarly deficient. Rather than prove its claims, it continues to conflate the ROK's support for the Merger with support for the Samsung Group's (broader) succession plan, and wrongly describes a "criminal *quid pro quo*" as the "backdrop" to alleged governmental intervention in the Merger, despite the Korean courts finding that the "*quid pro quo*" was only formed after the Merger.
7. All the evidence in the record—not just the buzzwords from select court cases and prosecutorial statements—must be weighed in deciding this case. For example, the Investment Committee members' statements in open court that they considered factors other than the sales synergy data from the NPS Research

Team cannot be ignored. Neither can the fact that the Claimant chose to double-down on its exposure to SC&T shares when it knew the Merger was “inevitable” and the NPS could not be counted on to oppose the Merger. When all the evidence is examined, the balance tips in favour of dismissing this claim.

## **II. THRESHOLD ISSUES**

### **A. THE ROK’S ALLEGED CONDUCT DID NOT CONSTITUTE A “MEASURE”**

8. The Claimant does not dispute that the conduct in question must be a “measure” as defined by the Treaty.<sup>3</sup> The Claimant alleges that the ROK ignores the acts by the President, the Blue House, and the Ministry, and instead “singularly focuses” on the NPS’s vote,<sup>4</sup> which cannot itself constitute a Treaty measure.
9. This is misleading. The ROK has shown in its previous written submissions that none of the acts by the ROK satisfies the Treaty definition of measure.<sup>5</sup> The Claimant’s own argument is that the NPS’s vote caused it harm.<sup>6</sup> The alleged acts leading up to the Merger, even if they were Treaty measures (and they were not), were merely preliminary steps to the intervening act that allegedly caused the harm. As the ROK has shown, that act—the NPS’s vote on the Merger—does not satisfy the Treaty definition of measure.<sup>7</sup>
10. The Claimant also has failed to show that the purported measure “relates to” the Claimant or its investment.<sup>8</sup> The NPS voted on the Merger as any shareholder would; it owed no duty to the Claimant (or to any other fellow shareholder) in so doing.<sup>9</sup> Therefore, the NPS’s exercise of voting rights was not “related to” the Claimant or its SC&T shares. The Claimant, seemingly relying on

---

<sup>3</sup> The Claimant has argued that the impugned conduct does *not* have to be a measure as defined under the Treaty. Tr., {Day1/83:4-7}; ROK’s PHB, ¶11 {B/11/7}; but appears now to accept that the conduct in question must be a Treaty measure, which is the correct position.

<sup>4</sup> Claimant’s PHB, ¶50 {B/10/27}.

<sup>5</sup> SOD, ¶¶220-227 {B/4/101}.

<sup>6</sup> ROK’s PHB, ¶14 {B/11/8}.

<sup>7</sup> ROK’s PHB, ¶14 {B/11/8}.

<sup>8</sup> C-1, Art 11.1 {C/1/72}. EALP agrees it must show this. Claimant’s PHB, ¶54 {B/10/28}.

<sup>9</sup> See ROK’s PHB, ¶7 {B/11/5}.

*Methanex*, argues that the NPS’s Merger vote related to it because it “targeted” a “specific class of investors” including Elliott, *i.e.*, more than 100,000 SC&T shareholders.<sup>10</sup> The evidence shows no such “targeting”.

- (a) This supposed class of investors was in no way a *specific* or *limited* class. Besides the Claimant, there were 110,000 other SC&T shareholders.<sup>11</sup> The vote on the Merger cast by every voting SC&T shareholder also had an impact on the 50,000 or so Cheil shareholders, and on hundreds of thousands more shareholders throughout the Samsung Group.<sup>12</sup>
- (b) *Methanex* specifically requires a “legally significant connection” relating directly to the investor or investment.<sup>13</sup> If the alleged measures had the same effect on the Claimant as it did on every other SC&T and Cheil shareholder, there is no legally significant connection to the Claimant, and any impact on the Claimant can only be tangential.
- (c) The NPS, in exercising its shareholder vote on the Merger, did not owe any duty to the Claimant, and exercised its rights the same as any other SC&T shareholder.<sup>14</sup> This class of shareholders argument would mean the *Claimant’s* vote also “targeted” other shareholders, and the vote of every shareholder “targeted” the NPS. This is an absurd proposition.

- 11. The Claimant also argues that the measures were “specifically targeted at Elliott”.<sup>15</sup> None of the documents that the Claimant cites supports its allegation that it was “targeted”. The “targeting” of which the Claimant complains consists of a position the ROK adopted long before EALP spoke out against the Merger.<sup>16</sup> The Blue House memorandum on the NPS’s voting [REDACTED]

---

<sup>10</sup> Claimant’s PHB, ¶54 {B/10/28}.

<sup>11</sup> ROK’s PHB, ¶16 {B/11/9}.

<sup>12</sup> See ROK’s Rejoinder, ¶33 {B/7/22}; ROK’s PHB, ¶16 {B/11/9}.

<sup>13</sup> **RLA-22**, ¶147 {I/22/70} (emphasis added).

<sup>14</sup> See ROK’s PHB, ¶7 {B/11/5}.

<sup>15</sup> Claimant’s PHB, ¶¶54-55 {B/10/28}.

<sup>16</sup> See ROK’s Rejoinder, ¶¶41 {B/7/25}, 314 {B/7/183}.





the acts of the ROK government (*i.e.*, former President █████, Minister █████ and other Blue House and MHW officials). *First*, such conduct does not constitute measures that sufficiently related to the Claimant and its investment.<sup>24</sup> *Second*, such conduct did not breach the Treaty.<sup>25</sup> *Third*, the Claimant itself insists that it is the NPS’s vote that caused its alleged harm,<sup>26</sup> and if the acts of the NPS and the Investment Committee are not attributable to the ROK, they are intervening causes that break the chain of causation.

**2. The NPS’s conduct is not attributable to the ROK under the Treaty or customary international law**

14. The ROK will address three attribution issues raised by the Claimant’s PHB.<sup>27</sup>
15. *First*, as to the Tribunal’s question 3 on the “exercise of powers”,<sup>28</sup> the Claimant argues that “governmental powers” in Article 11.1.3(b) is broader than the notion of “sovereign authority” in the context of State immunity, requiring a host of factors to be taken into consideration in characterising conduct as “governmental”.<sup>29</sup> The Claimant’s argument creates a false distinction between “governmental powers” in ILC Article 5 and the notion of sovereign authority under the law of State immunity. The Tribunal need not look to the law of State immunity to understand ILC Article 5: in the context of Article 11.1.3(b) (which

---

<sup>24</sup> ROK’s Rejoinder, ¶238 {B/7/136}.

<sup>25</sup> SOD, Section IV {B/4/174}; ROK’s Rejoinder, Section III {B/7/85}; ROK’s PHB, Sections III {B/11/19}, IV.A {B/11/42}.

<sup>26</sup> Throughout its written submissions and at the hearing, the Claimant has alleged that it is the shareholder vote that ultimately violated the Treaty. ASOC, ¶¶13 {B/3/7}, 72 {B/3/36}, 84 {B/3/43}, 86 {B/3/44}; Reply, ¶607 {B/6/387}; Claimant’s Closing Presentation, Slide 2 {J/22/2}; Tr., {Day9/5:25} - {Day9/6:2}.

<sup>27</sup> None of the Claimant’s PHB arguments on attribution under Article 11.1.3(a) and (b) is new. The ROK’s position—that the NPS is not a State organ, and did not exercise governmental powers—is detailed in its written submissions, including the ROK’s PHB, and is not repeated here. The facts also do not show that the NPS acted under the “effective control” of the ROK. Even if ILC Article 8 applied (it does not, *see* SOD, ¶¶297-304 {B/4/131}; ROK’s Rejoinder, ¶¶86-92 {B/7/57}; ROK’s PHB ¶27, fn 46 {B/11/13}), the NPS’s Merger vote cannot be attributed to the ROK on that basis.

<sup>28</sup> Claimant’s PHB, ¶¶81-87 {B/10/37}; Tribunal’s Questions to the Parties, Q3 (“Does provision of public services qualify as ‘exercise of powers’ within the meaning of Article 11.1.3(b) of the KORUS FTA or, more generally, as exercise of sovereign powers (acts *jure imperii, puissance publique*)? Does voting on the merger by the NPS qualify as exercise of such powers?”).

<sup>29</sup> Claimant’s PHB, ¶¶83-84 {B/10/37}.

should be interpreted by reference to ILC Article 5<sup>30</sup>), the term “governmental powers” is simply used to refer to conduct that is “sovereign” in nature.<sup>31</sup>

16. The Tribunal’s question rightly distinguishes public services from a vote on the Merger. The Claimant rejects this distinction, arguing that focusing on the NPS’s acts and omissions without considering the constitutional duty they serve would be wrong.<sup>32</sup> Yet the distinction is important because it recognises that the use of the phrase “in the exercise of” in Article 11.1.3(b) makes it clear that, for conduct to be attributable, the entity must have been *exercising* sovereign powers in that particular instance.<sup>33</sup> This is also consistent with ILC Article 5 jurisprudence.<sup>34</sup> For example, in *Staur v Latvia*, the claimant argued—as EALP effectively does here<sup>35</sup>—that the authority in question in that case (the SJSC Airport) had been granted general governmental authority requiring it to act in the public interest and to be publicly accountable for the exercise of those powers. That Tribunal held that, even if this were the case, all that matters is whether “the conduct of SJSC Airport *that is at issue in this arbitration* can properly be said to implicate the exercise of governmental authority”, as opposed to being “of a quintessentially commercial character”.<sup>36</sup> What matters here is the Merger vote, a purely commercial act. Decontextualised analysis of the NPS’s overarching constitutional duties is irrelevant to determining whether the vote on the Merger was an “exercise of” governmental powers.
17. *Second*, the Claimant’s arguments on *lex specialis* are misconceived.

---

<sup>30</sup> SOD, ¶¶245-246 {B/4/109}; ROK’s PHB, ¶27 {B/11/13}.

<sup>31</sup> For example, the *Al Tamimi* Tribunal held that conduct under ILC Article 5 “must be “governmental” or *sovereign* in nature (acta jura imperii)”. **CLA-21**, ¶323 {H/21/112} (emphasis added). Similarly, the *Bayindir* Tribunal also held that “Attribution under [ILC Article 5] requires in addition that the instrumentality acted in a sovereign capacity in that particular instance”. **CLA-26**, ¶¶121-122 {H/26/41}.

<sup>32</sup> Claimant’s PHB, ¶87 {B/10/39}.

<sup>33</sup> ROK’s PHB, ¶38 {B/11/18}.

<sup>34</sup> ROK’s Rejoinder, ¶74 {B/7/50}.

<sup>35</sup> **CLA-165**, ¶340 {H/165/105}.

<sup>36</sup> **CLA-165**, ¶343 {H/165/107} (emphasis added).

- (a) The Claimant pretends that the ROK’s position is that the Treaty excludes *all* customary international law.<sup>37</sup> The ROK’s argument, as it has always made clear, is that Article 11.1.3(a) is *lex specialis*, and excludes the principle of attribution codified in ILC Article 8.<sup>38</sup>
- (b) The Claimant argues that ILC Article 8 is not excluded because the Treaty’s *travaux préparatoires* do not indicate an intention to exclude it.<sup>39</sup> This argument is baseless: there is no requirement that the “discernable intention” to exclude rules of attribution must be gathered from the negotiating history.<sup>40</sup> Here, this intention is evident from the Treaty provisions. The Claimant’s suggestion that *Al Tamimi* is wrong because, unlike in the present case, the *Al Tamimi* Tribunal did not have the benefit of the *travaux préparatoires*, is meaningless.<sup>41</sup>
- (c) The Claimant also argues that Article 11.22 requires the Tribunal to decide the dispute in accordance with international law.<sup>42</sup> The Claimant ignores the actual text of the Article, which states that the Tribunal “shall decide the issues in dispute in accordance with this Agreement *and applicable rules* of international law”.<sup>43</sup> The Tribunal is obviously required to apply the express terms of the Treaty. Those terms exclude ILC Article 8, thus rendering it *not applicable*.
- (d) In any event, the rules of international law provide for *lex specialis* in ILC Article 55. The Claimant argues that “if Article 11.22 only incorporated already-enumerated rules of international law, the principle

---

<sup>37</sup> Claimant’s PHB, ¶66 {B/10/31}.

<sup>38</sup> Article 11.1.3(a) of the Treaty is similar to ILC Article 4, and Article 11.1.3(b) of the Treaty is similar to ILC Article 5. No Treaty provision incorporates the principles of ILC Article 8, and thus those principles cannot be used to attribute conduct to the ROK under this Treaty. SOD, ¶¶294-304 {B/4/131}; ROK’s Rejoinder, ¶¶86-92 {B/7/57}.

<sup>39</sup> Claimant’s PHB, ¶66 {B/10/31}.

<sup>40</sup> The commentary to the ILC Articles confirms that there need only be a “discernible intention” to exclude. **CLA-38**, Art 55 commentary, ¶4 {H/38/111}.

<sup>41</sup> Claimant’s PHB, ¶69 {B/10/32}.

<sup>42</sup> Claimant’s PHB, ¶67 {B/10/32}.

<sup>43</sup> **C-1**, Art 11.22 {C/1/88} (emphasis added).

of *lex specialis* [...] would not be incorporated into the Treaty either”.<sup>44</sup> This argument reflects a fundamental—and no doubt purposeful—misrepresentation of the ILC Articles and the ROK’s position. ILC Article 55, which contains the *lex specialis* rule, does not provide for a rule of attribution, but only states the well-established principle of *lex specialis*. This principle recognises that general rules of attribution (such as in ILC Articles 4, 5 and 8) can be excluded where special rules of attribution exist.<sup>45</sup> That special rule exists in the form of Article 11.1.3.

- (e) Finally, the Claimant suggests that the United States’ NDP submission comments on the issue of *lex specialis* and ILC Article 8.<sup>46</sup> It does not. The reference in the United States’ NDP was to the ICJ’s decision in the *ELSI* case, which pertained to the wholly different issue of proximate causation. In any event, the ICJ in that decision confirmed that parties to a treaty may exclude principles of customary international law (other than peremptory norms), as is indeed the object of many treaties.<sup>47</sup> The intention to exclude ILC Article 8 is evident on the face of Article 11.1.3, which, for the avoidance of doubt, is not an exclusion by implication, in that the State parties expressly set out the rules that were to govern attribution by repeating some but not all of the rules in the ILC Articles.

18. *Third*, the Claimant continues to misrepresent Korean administrative law. These issues are addressed in full in the ROK’s submissions, but to give two examples:

- (a) as Prof Kim explained, the tax decisions did not confirm the NPS was exempt from taxation because State organs are exempt from taxation under Korean law:<sup>48</sup> the courts did not address the issue of State organs at all, relying instead on whether the acquired shares would be vested in

---

<sup>44</sup> Claimant’s PHB, ¶67 {B/10/32}.

<sup>45</sup> The commentary to the ILC Articles confirms that there need only be a “discernible intention” to exclude. **CLA-38**, Art 55 commentary, ¶4 {H/38/111}.

<sup>46</sup> Claimant’s PHB, ¶66 {B/10/31}.

<sup>47</sup> **CLA-31**, ¶50 {H/31/30}.

<sup>48</sup> Claimant’s PHB, ¶61 {B/10/30}.

the National Pension Fund, which is ultimately vested to the State as owner of the Fund (not because the NPS was a State organ),<sup>49</sup> and

- (b) the Claimant is wrong that there is no constitutional basis for the view that *cheo* and *cheong* may only be established pursuant to the GOA.<sup>50</sup> Article 96 of the Korean Constitution applies to all central administrative agencies, including *cheo* and *cheong*, which are Ministries under the Prime Minister and agencies under a *bu*, respectively,<sup>51</sup> and so Korean law does not permit *any* State organs to be established without a statutory basis in the GOA.<sup>52</sup>

### III. MERITS

#### A. THE TRIBUNAL IS NOT BOUND BY KOREAN COURTS' FINDINGS, AND CANNOT RELY ON PROSECUTORS' ALLEGATIONS IN THE INDICTMENT TO PROVE FACTS

19. Contrary to the Claimant's suggestion,<sup>53</sup> the ROK is not seeking to disavow the findings of its courts. In fact, the ROK specified in its PHB that, "to the extent the Korean courts have made affirmative factual findings, this Tribunal should respect those findings and avoid making contrary findings".<sup>54</sup> The ROK merely recognises that the Tribunal is not *bound* by Korean courts' findings. Where "the Tribunal has, before it, evidence that it could weigh—including against the courts' findings—to reach its own factual conclusions on a balance of probabilities", it is open to it to do so,<sup>55</sup> particularly where the courts have made

---

<sup>49</sup> C-252, p 5 {C/252/5}; C-262, p 3 {C/262/3}.

<sup>50</sup> See Claimant's PHB, ¶72, fn 197 {B/10/34}.

<sup>51</sup> C-88, Art 96 {C/88/21}.

<sup>52</sup> See SSK-53, Art 2(2) {G4/31/1}.

<sup>53</sup> Claimant's PHB, ¶106 {B/10/44}.

<sup>54</sup> ROK's PHB, ¶45 {B/11/21}.

<sup>55</sup> ROK's PHB, ¶45 {B/11/21}. The Claimant appears to agree. It confirms that "the Tribunal's factual findings can [...] differ from the findings of the Korean criminal courts [...] if 'compelled by the evidence before this Tribunal'". Claimant's PHB, ¶110 {B/10/46}. The Claimant wrongly glosses over the distinction between the Korean *courts'* findings and the Korean *prosecutors'* as-yet unproven allegations. See Claimant's PHB, ¶110 {B/10/46} (conflating "Korean courts and prosecutors").

conflicting findings.<sup>56</sup> For example, the Korean courts have not consistently found that the NPS's sales synergy calculations and alleged pressure applied by CIO █████ affected the Investment Committee's decision. The Seoul Central District Court, when considering the application to annul the Merger (*i.e.*, the Merger Annulment proceedings), found that they did not.<sup>57</sup> This decision is now final.<sup>58</sup> *Chevron v Ecuador II* does not apply: the ROK is not deviating from any affirmative position it took in previous proceedings with the Claimant.

20. The ROK does not agree that the Tribunal “can rely on the factual allegations made by the Korean prosecutor”.<sup>59</sup> The Claimant's claim that Korean prosecutors “will only issue an indictment if there is sufficient evidence to meet the criminal standard of proof [of] ‘beyond a reasonable doubt’”<sup>60</sup> is incorrect and ignores the Claimant's own burden to prove its allegations.
21. *First*, even if there is sufficient evidence from the *Korean prosecutors'* perspective to prove charges (in other words, *they* think so), that does not mean there is, objectively, evidence establishing the alleged facts such that this Tribunal should treat the accusations as a *fait accompli*.
22. *Second*, the “Prosecution Practice Manual” on which the Claimant relies for its contention is not law,<sup>61</sup> but a training handbook prepared for students.<sup>62</sup> The law

---

<sup>56</sup> Cf. the courts' consistent findings that the NPS's decision-making procedure for the Merger adhered to the NPS's guidelines. **R-20**, p 44 {R/20/38}; **R-153**, pp 44-45 {R/153/46}.

<sup>57</sup> **R-20**, p 45 {R/20/39} (“[I]t appears more likely that the Investment Committee members would make their decisions based on earnings or the shareholder value rather than be swayed by an individual's influence [...] expert Investment Committee members all knew that a precise calculation was impossible for the merger synergy [...] Investment Committee members who voted for the Merger appeared to have concluded that the Merger would stabilise the governance structure, which would in turn be beneficial to the fund's earnings and the benefits the merged company would receive by becoming the Samsung Group's holding company would be considerable and would also contribute to increasing shareholder value in the long term.”).

<sup>58</sup> All appeals from it have been withdrawn. See **R-388** {R/388}.

<sup>59</sup> Claimant's PHB, ¶110 {B/10/46}.

<sup>60</sup> Claimant's PHB, ¶108 {B/10/45}.

<sup>61</sup> **CLA-196**, p 14 {H/196/2} (“[I]t is a separate question as to what level of proof is required for an indictment. There is no express law on this point [...]”).

<sup>62</sup> **CLA-196** {H/196} is a 2018 “Prosecution Practice Manual I” published by the Judicial Research & Training Institute for a “Law Practice Course”.

is that Korean prosecutors have sole discretion to determine whether to issue an indictment, even if independent external reviewers recommend against it.<sup>63</sup>

23. *Third*, the Korean “Ministry of Government Legislation [...] legal guide” does not prove that Korean prosecutors can only indict when they have determined that there is sufficient evidence to meet the “beyond a reasonable doubt” standard (let alone that their determination is tantamount to truth). It effectively says only that Korean prosecutors have the discretion to issue indictments: the statement on which the Claimant relies cites Article 246 of Korea’s Criminal Procedure Act as its support,<sup>64</sup> and that provision states nothing more than that “[a] public indictment shall be instituted and executed by a prosecutor”.<sup>65</sup>
24. *Fourth*, even if prosecutors have enough evidence for a conviction on *charges*<sup>66</sup> in an indictment, that does not mean they have enough evidence to prove each *underlying alleged fact*.<sup>67</sup> It is fundamentally unsound to rely only on the prosecution case to prove the allegations contained therein.

## **B. THE ROK DID NOT BREACH THE MST**

### **1. It is not in dispute that a breach of MST requires a “high threshold” of severity and “manifestly” arbitrary conduct**

25. The Claimant has confirmed that the MST standard on which it relies is that set out by the *Waste Management Tribunal*.<sup>68</sup> Thus, the question of the “customary

---

<sup>63</sup> See ROK’s PHB, ¶¶43-44 {B/11/20}; **C-698**, pp 3 {C/698/3}, 17 {C/698/17} (“[T]he Prosecutors’ Criminal Investigation Review Committee [...] gave a recommendation of no indictment [...]).

<sup>64</sup> See **CLA-194** {H/194} (citing “Korea Law Information Center – Legal Terminology and [Criminal Procedure Act, Article 246”).

<sup>65</sup> **C-315**, Art 246 {C/315/2}. See also ROK’s PHB, ¶43 {B/11/20}, citing **R-308**, Art 246 {R/308/1} (**R-308** is the same as **C-315**).

<sup>66</sup> E.g., Unfair trading and market price manipulation in violation of the Capital Markets Act, occupational breach of trust, false disclosures and fraudulent accounting, perjury. See **R-316**, pp 7 {R/316/7}, 69 {R/316/70}, 74 {R/316/76}, 78 {R/316/80}.

<sup>67</sup> E.g., The alleged meeting between a Samsung representative and an ROK government official on 24 June 2015. Claimant’s PHB, ¶40a {B/10/18}, citing **R-316**, p 56 {R/316/57}.

<sup>68</sup> Claimant’s PHB, ¶¶99 {B/10/42}, 102 {B/10/43}; **CLA-16**, ¶98 {H/16/35}.

international law principles that protect the economic rights and interests of aliens” to which Annex 11-A of the Treaty refers is not relevant to this dispute.<sup>69</sup>

26. Commentary that the Claimant cites also confirms that only conduct that is “manifestly” arbitrary to a “high threshold” of severity can breach the MST obligation in the Treaty.<sup>70</sup>

**2. The Claimant has failed to establish the “high threshold” of severity and “manifestly” arbitrary conduct necessary for an MST breach**

27. The Claimant has alleged that the ROK breached the MST because the NPS’s decision to support the Merger: was “irrational”; involved a “willful” disregard of due process; and was “motivated and accomplished by gross illegality”.<sup>71</sup> As also discussed in the ROK’s previous submissions,<sup>72</sup> the evidence in support of the Claimant’s allegations falls short of demonstrating the “high threshold” of severity and “manifest” arbitrariness necessary to establish a breach of the MST.

**a. The NPS’s decision was not “irrational”**

28. The evidence does not prove that the NPS’s decision was “irrational”, and certainly not to the extent of the “high threshold” of severity and “manifest” arbitrariness required.
29. *First*, the evidence does not prove that the NPS’s decision to support the Merger “violated the NPS’s investment principle of profitability”.<sup>73</sup> The Korean courts have confirmed that there is “insufficient” evidence to find that “there were losses in the amount of the difference between the appropriate merger ratio and

---

<sup>69</sup> Claimant’s PHB, ¶97 {B/10/41}, 99 {B/10/42} (“The answer to that question has not been the focus of extensive doctrinal debate in these proceedings.”). *See also* ROK’s PHB, ¶49 {B/11/22}.

<sup>70</sup> *See CLA-195*, pp 145-147 {H/195/29} (Professor Patrick Dumberry observed, based on the decisions by the *Waste Management* and other NAFTA Tribunals, that: (a) the “threshold of severity applied by NAFTA tribunals in order to establish a finding of arbitrariness has been consistently high”; (b) the threshold to establish a breach of the MST is “*manifest* arbitrariness” (emphasis added) as opposed to just “arbitrariness”; and (c) “‘something more’ than simple illegality is required to constitute” (emphasis omitted) a violation of the MST).

<sup>71</sup> Claimant’s PHB, ¶112 {B/10/47}. *See also* ¶103 {B/10/43}.

<sup>72</sup> *See* SOD, Section IV.B {B/4/218}; ROK’s Rejoinder, Section III.B {B/7/165}; ROK’s PHB, Section III.B {B/11/22}.

<sup>73</sup> Claimant’s PHB, ¶¶113-120 {B/10/47}.



the Subject Merger Ratio”.<sup>74</sup> The Supreme Court of Korea has now entirely dismissed the appeal from the Seoul High Court’s decision in the [REDACTED] proceedings, thus upholding this finding.<sup>75</sup> Both the lower and upper Courts held only that CIO [REDACTED]’s breach of trust caused the NPS to lose out on *additional profits* that it potentially could have gained had it negotiated with Samsung for a more profitable merger ratio, without finding any other violation of the profitability principle.<sup>76</sup>

30. *Second*, while the principle provides that “[r]eturns must be maximized”,<sup>77</sup> this requirement relates to the management of “the Fund” as a whole,<sup>78</sup> and not each individual investment by the Fund. Nor does this principle create any duty towards the Claimant. Korean criminal court decisions do not show that the interests of “the Fund” as a whole could not have justified a vote in favour of the Merger.<sup>79</sup> The proceedings against Minister [REDACTED] and CIO [REDACTED] were concerned with the defendants’ abuse of authority and breach of trust respectively as regards the NPS’s investment in SC&T; they were not concerned with the justifications for the NPS’s ultimate decision to vote in favour of the Merger. Indeed, the courts in those proceedings *did not consider* the impact of the Merger on the NPS’s portfolio of investments (which included investments in several other Samsung companies) or on the Fund generally. Again, they only considered that the Merger caused the NPS to lose out on “*additional gains* that could have been acquired through the active utilization of its casting vote”.<sup>80</sup> The Claimant’s assertion that “[t]here is no meaningful reference to a Samsung-wide portfolio consideration found in the contemporaneous record”<sup>81</sup>

---

<sup>74</sup> C-781, p 10 {C/781/10}. See also C-79, pp 65-66 {C/79/65}.

<sup>75</sup> C-781, p 11 {C/781/11}.

<sup>76</sup> C-781, p 9 {C/781/9} (“The lower court found that [CIO [REDACTED]] was guilty of breach of trust, stating in the reasoning that [CIO [REDACTED]] violated his duties [...] by causing [the NPS] to suffer indeterminate losses due to the loss of the additional gains that could have been acquired through the active utilization of its casting vote.”). See also C-79, pp 59-61 {C/79/59}, 67 {C/79/67}.

<sup>77</sup> Claimant’s PHB, ¶114 {B/10/47} (citing C-194, Art 4 {C/194/6}).

<sup>78</sup> C-194, Art 4(1) {C/194/6}.

<sup>79</sup> See Claimant’s PHB, ¶118 {B/10/49}.

<sup>80</sup> C-781, p 9 {C/781/9} (emphasis added).

<sup>81</sup> Claimant’s PHB, ¶120 {B/10/50}.

is also wrong, as was confirmed during the hearing<sup>82</sup> (it is surprising that the Claimant resurrects this argument). The materials provided to the Investment Committee analyse the impact of a successful Merger versus a failed Merger on Samsung Group companies, and identify the 17 Samsung companies in the Fund's investment portfolio.<sup>83</sup>

31. *Third*, the evidence does not show that the “manipulated valuations and fabricated synergy effect” were “decisive” to the NPS’s decision.<sup>84</sup> Rather, the evidence shows that several Investment Committee members decided to approve the Merger based on factors *beyond* the NPS Research Team’s valuations and synergy calculations. The Merger undeniably restructured the Samsung Group, reducing the number of circular shareholdings within it and making the group structure closer to a holding company structure, as Prof Milhaupt confirmed.<sup>85</sup> The Investment Committee members considered that following this restructuring into a *de facto* holding company, New SC&T would benefit from brand royalty income and a long-term increase in the Samsung Group’s prices.<sup>86</sup>
32. The Claimant argues that at least six of the Investment Committee members who voted in favour of the Merger would not have done so but for the purported fabrication of the synergy effect.<sup>87</sup> The evidence does not prove this. The evidence that the Claimant cites shows Committee members’ consternation at being lied to. They were asked how they would have reacted if told *positively* that the NPS Research Team gave them fabricated data. The Seoul High Court in Mr ██████████’s case also only considered this scenario: “had it been *revealed* during the Investment Committee meeting that the merger synergy and

---

<sup>82</sup> See, e.g., Tr., {Day9/101:8-22}.

<sup>83</sup> **R-127**, p 8 {R/127/11}. See also **C-428**, pp 1-2 {C/428/1}.

<sup>84</sup> See, e.g., Claimant’s PHB, ¶42d {B/10/23}; ROK’s PHB, ¶¶59 {B/11/30}, 92 {B/11/43}; Tr., {Day2/59:22} - {Day2/64:19}.

<sup>85</sup> Tr., {Day6/59:18-20} (“So new SC&T, the merged entity today, is a kind of de facto holding company for the group.”). See also **RER-5**, Bae, ¶62 {G5/1/33}.

<sup>86</sup> See, e.g., **R-127**, pp 7-9 {R/127/10}; **R-128**, pp 11-12 {R/128/12}. See also **R-61**, p 1 {R/61/1}.

<sup>87</sup> Claimant’s PHB, ¶170 {B/10/70}.





statement reports over court testimony, although Mr ██████ had explained in court that things he said were “██████” of those reports.<sup>103</sup>

***b. The NPS’s decision was not made in “willful” disregard of due process***

34. The evidence does not prove that the NPS’s decision to vote in favour of the Merger was reached in “willful” disregard of due process, much less to the extent of the “high threshold” of severity and “manifest” arbitrariness required.
35. *First*, the Korean courts have not found that the procedure by which the NPS decided how to vote on the Merger violated any of the applicable regulations.<sup>104</sup> Even if there was a due process problem, no due process duty was owed to the Claimant in this regard. Its reliance on the *Rumeli Award*<sup>105</sup> fails: the *Rumeli Tribunal* found that the State’s termination of that claimant’s investment contract violated FET (not MST), in part because *in making that decision* and determining its validity, the State violated due process that was owed to the claimant, including by not allowing the claimant to state its position.<sup>106</sup> No analogy can be drawn to the present case, where the NPS decision had nothing to do with a contract, or indeed any other rights, of the Claimant here.
36. *Second*, the evidence shows that the alleged instructions from President ██████ to “look into” the Merger, and Blue House officials’ actions in monitoring and reporting on the Merger, were based on the Blue House’s view that the stable succession of management control over the Samsung Group was important to the Korean national economy.<sup>107</sup> They did not translate into the Investment Committee deciding to vote in favour of the Merger.

---

<sup>103</sup> **C-502**, pp 53-54 {C/502/13}; ROK’s Demonstrative C, p 7 {J/15/7}.

<sup>104</sup> *See, e.g.*, **R-20**, p 44 {R/20/38}; **R-153**, pp 11 {R/153/13}, 43-45 {R/153/45}; **C-69**, p 61 {C/69/61}; **C-781**, pp 6-7 {C/781/6}, 11 {C/781/11}.

<sup>105</sup> Claimant’s PHB, ¶123 {B/10/51}.

<sup>106</sup> **CLA-14**, ¶617 {H/14/169}.

<sup>107</sup> **R-153**, p 37 {R/153/39} (affirmed by Supreme Court of Korea Case No. 2017Do19635, 14 April 2022, **C-781** {C/781}). For example, the handwritten memo (**C-585** {C/585}) on which the Claimant relies was prepared between July and September 2014, at a time when the author had not even heard any inkling about the proposed Merger. *See* **C-522**, p 12 {C/522/10}



considerable public scrutiny of the NPS’s decision-making process;<sup>113</sup> and the SC&T-Cheil Merger was a major step in restructuring the Samsung Group to a holding company structure, whereas the SK Group already had a holding company structure at the time the SK Merger was proposed.<sup>114</sup>

39. *Fifth*, the Claimant insists on alleging again that CIO ██████ “went on to pack the [Investment Committee] with members who were under his influence and likely to vote in favor of the Merger”,<sup>115</sup> but this assertion has been roundly dismissed by the Korean courts, including the Korean Supreme Court.<sup>116</sup>

*c. The “illegality” on which the Claimant relies was unrelated to the Merger*

40. The evidence does not prove that the NPS’s decision was “accomplished by gross illegality”. The Korean criminal courts have found no *quid pro quo* between the ██████ and President ██████ bribery and the Merger. President ██████ was never convicted of any crime relating to the Merger. The Claimant can only assert that there was bribery for support for Samsung’s *succession plan*,<sup>117</sup> hoping the Tribunal will overlook the distinction between the overall succession plan and this specific Merger vote. The succession plan involved several more (future) steps than the Merger. The Claimant wrongly asserts that the *quid pro quo* “formed the backdrop to the illegal government intervention”.<sup>118</sup> The evidence shows, at the highest, only that *after* the Merger was approved did ██████ and former President ██████ *then* reach a *quid pro quo* on 25 July 2015 with respect to her support for those remaining future steps in the succession

---

<sup>113</sup> See, e.g., ROK’s Rejoinder, ¶¶211 {B/7/121}, 290-292 {B/7/168}.

<sup>114</sup> See **R-61**, p 5 {R/61/5} (“SK Group’s market capitalization [...] recorded about KRW 21.8 trillion after the transition [into a holding company], showing a surge in enterprise value”).

<sup>115</sup> Claimant’s PHB, ¶42(e) {B/10/24}.

<sup>116</sup> See **R-153**, p 58 {R/153/60} (“[T]here is no evidence to prove that [Mr ██████] and [Mr ██████] voted in favor of the Merger influenced by their close relationship with [CIO ██████ [...] the evidence that the Special Prosecutor submitted is insufficient on its own to prove beyond reasonable doubt that [CIO ██████ appointed [Mr ██████] and [Mr ██████] as Investment Committee members, and breached his professional duty.”); **C-781**, p 11 {C/781/11}.

<sup>117</sup> See Claimant’s PHB, ¶¶135 {B/10/56}, 138 {B/10/57}, 139 {B/10/57}.

<sup>118</sup> Claimant’s PHB, ¶39 {B/10/18}.

plan.<sup>119</sup> The Claimant still has no answer to this established fact. In any event, as discussed in paragraphs 31-32 above, the NPS’s decision was made independently of any government illegality, by the independent consideration of individual Investment Committee members.<sup>120</sup>

**C. THE CLAIMANT’S ASSUMPTION OF RISK IS A DEFENCE TO THE ALLEGED BREACHES OF THE TREATY BY THE ROK**

41. The Claimant’s suggestion that the assumption of risk defence requires that it “knew of or could have anticipated the governmental misconduct that resulted in the Merger” when it made its investment<sup>121</sup> would hamstring this doctrine. What the defence requires are actual or constructive knowledge of certain *risks* that a certain outcome could occur, the choice to still make the investment, and the subsequent materialisation of that outcome.<sup>122</sup> The defence cannot require actual or constructive knowledge of the allegedly Treaty-violative State conduct that is alleged—otherwise there would be no defence at all.<sup>123</sup>
42. Further, where the Claimant’s principal complaint, and the act that allegedly caused it harm, is that the Merger was approved, it does not matter whether the Claimant knew of every step leading to that approval; if the Claimant knew, or should have known, that the Merger might be approved—which it undeniably did—the Claimant assumed the risk of the Merger’s being approved and cannot now seek damages for that risk having come to pass.
43. The Claimant attempts to downplay its assumption of risk further by arguing that its research only “led it to reasonably believe that the NPS would act in its rational self-interest and in accordance with the principles embodied in the NPS

---

<sup>119</sup> See SOD, ¶158 {B/4/78}; ROK’s Rejoinder, ¶¶174(b) {B/7/96}, 278(c) {B/7/160}.

<sup>120</sup> See ¶¶31-32 above. See also ROK’s PHB, ¶¶58 {B/11/29}, 92 {B/11/43}; ROK’s Rejoinder, ¶¶294-303 {B/7/171}; Respondent’s Opening Demonstrative C {J/15}, citing **C-428** {C/428}; **C-465** {C/465}; **C-473** {C/473}; **C-499** {C/499}; **C-502** {C/502}; **C-507** {C/507}; **C-515** {C/515}; **R-128** {R/128}; **R-290** {R/290}; **R-291** {R/291}; **R-292** {R/292}.

<sup>121</sup> Claimant’s PHB, ¶146 {B/10/59}.

<sup>122</sup> See ROK’s PHB, ¶¶63-68 {B/11/32}.

<sup>123</sup> See also ROK’s PHB, ¶70 {B/11/35}.



Voting Guidelines”.<sup>124</sup> This sophistry plainly turns a blind eye to the evidence of Mr Smith. That evidence revealed that:

- (a) when the Claimant bought 7,732,779 of its SC&T shares, it knew that “Samsung’s lobbying capabilities were second to none such that it could overcome any obstacles to the merger” and that the NPS was “unlikely to pose a threat to the merger process”,<sup>125</sup> and it should have known that the NPS would not consider the Merger purely from the perspective of an SC&T shareholder, since it also held shares in Cheil and other Samsung Group companies;<sup>126</sup> and
- (b) when the Claimant bought a further 3,393,148 SC&T shares, it knew that SC&T management had already approved the Merger and all that stood in the way of the Merger’s approval was a close proxy fight among shareholders.<sup>127</sup> The Claimant’s belated alleged belief that the supermajority required would be “unobtainable” because the NPS would not support the Merger<sup>128</sup> is exposed as opportunistic revisionism by the Claimant’s own statement on 13 July 2015 that “it would be very unlikely that the Samsung C&T shareholder approval threshold would be met, even if the NPS was to vote for the Proposed Merger”.<sup>129</sup>

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

44. The Claimant’s PHB submissions on its national treatment claim fail to address the ROK’s equity interests<sup>130</sup> and social security<sup>131</sup> reservations to the Treaty. The Treaty’s national treatment provisions do not apply to this claim. The

---

<sup>124</sup> Claimant’s PHB, ¶146 {B/10/59}.

<sup>125</sup> **R-255**, p 24 {R/255/24}; Tr., {Day3/9:24} - {Day3/10:3}, {Day3/13:4-25}; ROK’s PHB, ¶¶72, 74 {B/11/36}.

<sup>126</sup> *See, e.g.,* **R-366** {R/366}; **R-368** {R/368}. *See also* **R-376** {R/376}; ROK’s PHB, ¶80 {B/11/38}.

<sup>127</sup> *See* ROK’s PHB, ¶73 {B/11/36}. *See also* ROK’s PHB, ¶¶228-231 {B/11/102}; ¶95 below.

<sup>128</sup> *See, e.g.,* Claimant’s PHB, ¶28 {B/10/12}.

<sup>129</sup> **C-232**, p 3 {C/232/3}.

<sup>130</sup> **R-52**, p 3 {R/52/3}.

<sup>131</sup> **R-52**, p 9 {R/52/9}.

alleged measure, *i.e.*, the Merger vote, was undertaken with respect to the transfer or disposition of equity interests.<sup>132</sup> The Claimant complains about the vote by the NPS, an entity that performs pension services, in part through investment activities like the Merger vote, for public purposes.<sup>133</sup>

45. If the Claimant maintains that its claim does not relate to the “disposition of equity interests”<sup>134</sup> (if it does, it is barred by the equity interests reservation), then its claim does not relate to any “treatment” of the Claimant’s SC&T shares that would be recognised by the Treaty. None of the ROK’s impugned conduct related to the “establishment, acquisition, expansion, management, conduct [or] operation”<sup>135</sup> of the Claimant’s SC&T shares, as shown in the ROK’s Rejoinder,<sup>136</sup> which has never been contradicted by the Claimant.
46. In any event, the Claimant’s national treatment claim is a non-starter. *First*, the Claimant argues that the “█ family” was a domestic investor “in like circumstances” with the Claimant because it is a “unit”.<sup>137</sup> There is no legal basis for asserting that a so-called “unit” could be a comparative “investor” under Article 11.1.3 of the Treaty on national treatment. An “investor” under the Treaty can only be a natural person or an enterprise; it cannot be a “unit”.
47. *Second*, the Claimant argues that it is enough that the “█ family” is “a comparator in like circumstances” and the Tribunal need not consider whether there is a more, or most, alike comparator.<sup>138</sup> This is wrong in law: it would be “perverse to ignore identical comparators if they were available and to use comparators that were less ‘like’” to determine a national treatment claim.<sup>139</sup>

---

<sup>132</sup> SOD, ¶¶550-551 {B/4/245}. *See also* ROK’s Rejoinder, ¶¶353-356 {B/7/206}.

<sup>133</sup> SOD, ¶¶552-554 {B/4/245}. *See also* ROK’s Rejoinder, ¶¶357-360 {B/7/208}.

<sup>134</sup> Reply, ¶¶482-485 {B/6/322}.

<sup>135</sup> C-1, Art 11.3(2), p 264 {C/1/73}.

<sup>136</sup> *See* ROK’s Rejoinder, ¶362(b)-(c) {B/7/210}.

<sup>137</sup> Claimant’s PHB, ¶¶154-156 {B/10/62}.

<sup>138</sup> Claimant’s PHB, ¶156 {B/10/63} (emphasis added).

<sup>139</sup> **RLA-28**, Part IV - Chapter B - page 8, para 17 {I/28/251}. *See also* ROK’s Rejoinder, ¶369 {B/7/212}.

48. Thus, even if the “█ family” could be a comparator, the existence of five Korean shareholders<sup>140</sup> in *identical* circumstances to the Claimant means the comparison must be between them and the Claimant. The Claimant was treated no less favourably than them. The Claimant argues, relying on an opinion in *UPS v Canada*, that there can be a violation of national treatment even if other domestic investors were subject to the same discrimination to which the claimant was subject, as long as one or more domestic investors was given more favourable treatment.<sup>141</sup> This is not the law: as the ROK pointed out in its SOD, this was a *dissenting* opinion.<sup>142</sup>
49. *Third*, the evidence on which the Claimant relies does not show any discriminatory intent by the ROK, let alone “weaponized discrimination”.<sup>143</sup> The evidence cited by the Claimant merely reflects that the government was concerned about the impact of any decision on the Merger on the public interest, given the significance of the Samsung Group to the national economy and recent experience with foreign hedge funds taking aggressive approaches.<sup>144</sup>

#### IV. CAUSATION

##### A. THE ROK DID NOT CAUSE THE NPS TO VOTE IN FAVOUR OF THE MERGER

50. The ROK’s alleged intervention was not the but-for cause of the NPS’s decision to vote for the Merger. *First*, as discussed above, the Claimant is unable to prove that a majority of the Investment Committee members would have voted against

<sup>140</sup> See SOD, ¶561 {B/4/248}. See also ROK’s Rejoinder, ¶371 {B/7/213}.

<sup>141</sup> Claimant’s PHB, ¶157 {B/10/63}.

<sup>142</sup> Further, Dean Ronald Cass, in this opinion, did not consider that the domestic investors who were given more favourable treatment may have been in *less* like circumstances than the domestic investors who were also subject to the discriminatory measures. See also SOD, ¶563, fn 881 {B/4/249} (“The Claimant misleadingly cited this as ‘*UPS v. Canada*, Award on the Merits, CLA-15, ¶¶59-60’, when it was actually citing paras 59-60 of the Separate Statement of Dean Ronald A Cass in that case.”)

<sup>143</sup> See Claimant’s PHB, ¶148 {B/10/60}.

<sup>144</sup> See, e.g., C-587, p 1 {C/587/1} ██████████  
██████████”;  
██████████”; “██████████  
██████████”). See also SOD, ¶511 {B/4/228};  
ROK’s Rejoinder, ¶315 {B/7/183}.

the Merger in the absence of the NPS Research Team’s valuations and synergy calculations.<sup>145</sup>

51. *Second*, the evidence does not show that the Special Committee would have voted against the Merger if given the chance.<sup>146</sup> Mr █████ was an honest witness who testified before this Tribunal candidly and credibly. He was unwilling to confirm that he would have voted in favour of the Merger, but he was equally—if not more—unwilling to confirm that he would have voted *against* the Merger.<sup>147</sup> His unchallenged evidence was that there were more factors in favour of approving the Merger, in contrast to the SK Merger, including the Seoul Central District Court’s decision on EALP’s injunction application, which he considered the Special Committee would have to respect.<sup>148</sup>
52. There is nothing to be read into the fact that no other Special Committee or Investment Committee members was a witness for the ROK, and certainly not that they contradicted the ROK’s position.<sup>149</sup> These members are not the ROK’s employees.<sup>150</sup> It was open to the Claimant to call them as witnesses to discharge its burden of proof in this case; it also chose not to do so, and one could just as well speculate—and with as much rigour—that this is because the Claimant reached out to them and they did not support *its* position.

---

<sup>145</sup> See ¶¶31-32 above.

<sup>146</sup> See Claimant’s PHB, ¶¶161(a) {B/10/64}, 164 {B/10/65}.

<sup>147</sup> See **RWS-1**, █████ I, ¶¶29-35 {E/1/10}; **RWS-2**, █████ II, ¶¶5-6 {E/2/4}. See also **RWS-2**, █████ II, ¶12(d) {E/2/8}.

<sup>148</sup> See **RWS-1**, █████ I, ¶¶20-21 {E/1/7}, 33 {E/1/12}; **RWS-2**, █████ II, ¶6 {E/2/4}.

<sup>149</sup> See Claimant’s PHB, ¶¶164 {B/10/65}, 169 {B/10/67}.

<sup>150</sup> The Investment Committee members were all NPS employees and heads of teams within the NPS Investment Management (NPSIM). See SOD, ¶¶44-45 {B/4/23}. The Special Committee members were attorneys, researchers and professors not employed by the government: █████ (Attorney at the I&S Law Firm), █████ (Researcher at the Korea Institute of Finance), █████ (Professor of Business Administration at Chung-Ang University), █████ (Researcher at the Korea Economic Research Institute), █████ (Professor of Economics at Sungkonghoe University), █████ (Researcher at the Economic Reform Research Institute), █████ (Professor of Finance Information Technology at Konkuk University), █████ (Professor of Business Administration at Chung-Ang University), █████ (Chairman, Professor of Business Administration at Hanyang University). See **C-469**, p 16 {C/469/16}.

53. The Claimant's failure to prove that the ROK caused the NPS to vote in favour of the Merger also defeats its claim that the ROK is liable for any Treaty breach.

**B. THE NPS'S VOTE DID NOT CAUSE THE MERGER TO BE APPROVED**

54. Had the NPS decided to vote against the Merger, it may still have been approved. The NPS's decision to vote in favour of the Merger was leaked six days before the EGM.<sup>151</sup> The Claimant itself says it is "inconceivable" that this leak did not impact the vote of other shareholders"<sup>152</sup>—in other words, that the NPS's support influenced others' actions. Had the NPS decided to vote against the Merger, a different constellation of shareholders may have attended the EGM and the attending shareholders may have voted differently.

**C. THE MERGER DID NOT CAUSE THE CLAIMANT'S CLAIMED LOSS**

55. The Merger did not cause the loss that the Claimant is seeking to recover from the ROK. As discussed in **section V.D.3** below, the evidence does not support the Claimant's assertion that "[h]ad the Merger [...] not occurred, the Claimant would have benefitted from a substantial and immediate uplift in SC&T's share price to reflect the intrinsic value".<sup>153</sup>

**D. THE CLAIMANT'S CLAIMED LOSS WAS NOT A PROXIMATE OR INTENDED CONSEQUENCE OF THE ROK'S ALLEGED TREATY BREACHES**

56. At the threshold, the authorities that the Claimant cites do not show that a causal link between a breach and an injury is "sufficient" just as long as the injury is not too remote, foreseeable, or deliberately caused.<sup>154</sup> Sufficiency requires a showing of a "high standard of factual certainty".<sup>155</sup>

57. There is no direct and uninterrupted chain of causation here. The chain was broken by the Investment Committee's independent decision, which took into

---

<sup>151</sup> Tr., {Day9/84:8} - {Day9/85:13}; Reply, ¶147(e)-(f) {B/6/118}, citing **R-131** {R/131}.

<sup>152</sup> Reply, ¶78 {B/6/45}.

<sup>153</sup> Claimant's PHB, ¶175 {B/10/72}.

<sup>154</sup> Claimant's PHB, ¶179 {B/10/73}.

<sup>155</sup> ROK's PHB, ¶100 {B/11/45}.

account factors other than the NPS Research Team’s calculations.<sup>156</sup> Further, as explained in **section V.D.3** below, the evidence does not show that the Claimant would have been able to “realize” any “material increment of the value of its investment in SC&T” through a “██████████” of SC&T’s share price.<sup>157</sup> The “██████████” prediction was made by a single NPS analyst whose opinion Mr Boulton QC doubted in the box and whose credibility is impugned by the Claimant itself<sup>158</sup>—it is surprising that the Claimant still touts this absurd and meaningless comment as evidence in support of its enormous damages claim. Finally, the ROK did not target the Claimant or intentionally cause it loss. The references to “Elliott” in the documents the Claimant cites appear in the context of concerns for the stability of the economy, given previous activist episodes.<sup>159</sup>

## **V. DAMAGES**

58. In its PHB, the Claimant fails to grapple with several critical failings of its damages claim, all of which the ROK has comprehensively addressed in its own PHB. For example, the Claimant has not even attempted to identify the manipulation allegations that it says render market prices unreliable as compared to a subjective (and ultimately irrelevant, in the Korean market) SOTP valuation. The ROK will address the arguments that the Claimant has made, including by reference to parts of the ROK’s PHB that already address these matters, and otherwise rests on its previous submissions.

### **A. THE CLAIMANT WRONGLY CLAIMS IT MADE AN OVERALL TRADING LOSS**

59. The Claimant wrongly claims that it lost KRW 54.4 billion overall on its SC&T investment.<sup>160</sup> Instead, it made a profit of KRW 2.5 billion.<sup>161</sup>

---

<sup>156</sup> See ¶¶31-32 above. See also ROK’s PHB, ¶¶95-97 {B/11/44}.

<sup>157</sup> Claimant’s PHB, ¶182 {B/10/74}.

<sup>158</sup> See ROK’s PHB, ¶206 {B/11/91}.

<sup>159</sup> See ¶¶11-12 above; ROK’s Rejoinder, ¶¶313 {B/7/182}, 379-380 {B/7/218}; SOD, ¶¶511-513 {B/4/229}, 579-583 {B/4/255}.

<sup>160</sup> Claimant’s PHB, ¶242 {B/10/99}, read with ¶¶237 {B/10/98}, 241 {B/10/99}.

<sup>161</sup> See ROK’s PHB, ¶¶113-120 {B/11/50}.

60. *First*, the Claimant asserts, based on Mr Smith’s fourth witness statement (submitted in the middle of the hearing), that its trading profits from swaps amounted to KRW 49.5 billion. However, Prof Dow’s tally of the figures from the spreadsheets of swap transactions the Claimant has produced yields a profit of KRW 51.7 billion.<sup>162</sup>
61. *Second*, the Claimant asserts that its trading loss on its SC&T shares was KRW 103.9 billion, instead of KRW 49.2 billion. It is agreed that the difference represents taxes that the Claimant paid on the sale of its appraisal shares.<sup>163</sup> The Claimant argues that those taxes “should not be included in any calculation of the Claimant’s trading loss because the Claimant did not receive those sums but instead paid them to the ROK because the Settlement Agreement involved a taxable company buy-back of shares occasioned by the passage of the Merger”.<sup>164</sup> The Claimant’s suggestion that it only had to pay taxes on the sale of these SC&T shares because it sold them through a buyback procedure “occasioned” by the Merger is a misrepresentation. Had the Claimant sold those shares on the market, it would have had to pay tax on that sale, too. The Claimant itself previously accepted that its loss was KRW 49 billion.<sup>165</sup>
62. Thus, the Claimant’s trading loss on its SC&T shares was KRW 49.2 billion, its trading profit on its swaps was KRW 51.7 billion, and it *profited* overall by KRW 2.5 billion. The ROK maintains that the Tribunal should not award the Claimant any damages, given this profit that the Claimant realised. The alleged lost profits that the Claimant seeks as damages were purely theoretical.<sup>166</sup>

---

<sup>162</sup> **R-324** {R/324}, **R-325** {R/325}, **C-750** {C/750}, **C-760** {C/760}. In fact, based on the trade confirmations underlying the entries in the spreadsheets, the total trading profit is KRW 51.8 billion. *See* Prof Dow’s Presentation, Slide 7 {J/24/7}.

<sup>163</sup> Claimant’s PHB, ¶¶237-238 {B/10/98}; ROK’s PHB, ¶117 {B/11/52}. The Claimant sold these shares for KRW 456.6 billion; that was subject to about KRW 54 billion in taxes. *See* **C-450**, Arts 2.2(a) {C/450/4}, 3.1 {C/450/7}.

<sup>164</sup> Claimant’s PHB, ¶238 {B/10/98}.

<sup>165</sup> *See* Reply, ¶18 {B/6/16} (“[T]he Claimant invested 685 billion Korean won in SC&T [...] the Claimant exited its investment in SC&T having recouped only 636 billion Korean.”). KRW 685 billion less KRW 636 billion is KRW 49 billion.

<sup>166</sup> *See, e.g.*, ROK’s PHB, ¶¶175-209 {B/11/77}.

63. It is irrelevant that the Claimant has not claimed the potential “alpha movement” it may have gained on its Cheil swaps if the Merger had been rejected.<sup>167</sup> There is no evidence the Claimant would have made this gain. The Claimant in fact made a gain on its Cheil swaps when the Merger was *approved*—the opposite outcome it had expected when it opened those Cheil short swap positions.<sup>168</sup>

**B. IF THE TRIBUNAL AWARDS DAMAGES DESPITE THE CLAIMANT’S TRADING PROFIT, IT SHOULD DO SO BASED ON WHAT VALUE THE CLAIMANT COULD HAVE REALISED HAD THE TREATY NOT BEEN BREACHED**

64. If the Tribunal considers it appropriate to award the Claimant any damages, it should do so based on any trading losses the Claimant incurred on its SC&T investment.<sup>169</sup> As discussed above, the Claimant made none; it profited.

65. If the Tribunal is inclined to award damages on another basis, then the ROK agrees with the Claimant that “the specific question is what value the Claimant would have been able to realize for its SC&T investment *if the Treaty had not been breached*”,<sup>170</sup> *i.e.*, in the counterfactual scenario the Claimant posits.

66. The Claimant has wrongly suggested that the ROK has not identified an appropriate counterfactual scenario. The possible counterfactual scenarios are laid out on slide 25 of Prof Dow’s presentation at the hearing.<sup>171</sup> The Claimant’s counterfactual is the scenario at the bottom of that slide.

67. The Claimant’s assertion that Prof Dow refused to engage with this counterfactual is also wrong. Mr Boulton QC confirmed at the hearing that he had not identified any counterfactual in his first report;<sup>172</sup> naturally, Prof Dow

---

<sup>167</sup> See Claimant’s PHB, ¶¶240 {B/10/98}, 242 {B/10/99}.

<sup>168</sup> See CWS-7, Smith IV, ¶11 {D1/4/3}.

<sup>169</sup> See ROK’s PHB, ¶109 {B/11/49}.

<sup>170</sup> See Claimant’s PHB, ¶253 {B/10/103} (emphasis added). See also Claimant’s PHB, ¶250 {B/10/102}. The Claimant is unequivocal that whatever damages it may be entitled to must reflect how much it would have been able to “realize” for its SC&T shares, *i.e.*, sell for on the market. See, *e.g.*, Claimant’s PHB, ¶¶31 {B/10/14}, 182 {B/10/74}, 213 {B/10/89}, 235 {B/10/97}, 250 {B/10/102}, 253 {B/10/103}, 254 {B/10/103}, 255 {B/10/104}, 256 {B/10/105}.

<sup>171</sup> Prof Dow’s Presentation, Slide 25 {J/24/25}. See also RER-3, Dow II, ¶¶98-100 {G3/1/47}.

<sup>172</sup> Tr., {Day7/52:10-20}. See also ROK’s PHB, fn 248 {B/11/50}.



did not address any counterfactual in his own first report, which was a response to Mr Boulton QC's report, which lacked any counterfactual. After Mr Boulton QC identified a counterfactual in his second report, Prof Dow addressed that counterfactual in his second report<sup>173</sup> and at the hearing.<sup>174</sup>

68. The ROK maintains that the three scenarios set out on Prof Dow's slide 25 are all possible counterfactuals that can be narrowed down only upon the Tribunal's findings on causation. As discussed above, absent the ROK's alleged Treaty breaches: (a) the NPS may still have voted for the Merger because the NPS's decision was made by the Investment Committee independently of the NPS Research Team's calculations; or (b) the NPS may have voted to reject the Merger but the SC&T shareholder vote in that scenario may still have approved the Merger. Thus, all the Claimant lost was a chance at a vote without governmental interference. If, absent any Treaty breach, the NPS may still have voted for the Merger or the SC&T shareholder vote may still have approved the Merger, all the Claimant would have lost was a *chance* for the Merger to be rejected—which the Claimant has not quantified.

69. Both Parties agree that the relevant counterfactual scenario *for the purposes of any damages analysis* is where the NPS opposed the Merger and SC&T shareholders overall rejected the Merger. If the NPS still voted for the Merger or SC&T shareholders still approved the Merger, there would be no damages.<sup>175</sup>

**C. THE PARTIES AGREE THAT THE RELEVANT STANDARD OF VALUE OF THE CLAIMANT'S SC&T SHARES IN THE COUNTERFACTUAL IS FMV**

70. The Claimant's damages claim is based on "what value the Claimant would have been able to *realize* for its SC&T investment if the Treaty had not been breached".<sup>176</sup> This value refers to the *FMV* of SC&T shares in the counterfactual

---

<sup>173</sup> See, e.g., **RER-3**, Dow II, ¶¶96-101 {G3/1/46}.

<sup>174</sup> Tr., {Day8/19:16-17}.

<sup>175</sup> Mr Boulton QC confirmed this: Tr., {Day7/4:16-19}, {Day7/190:10-12}.

<sup>176</sup> See Claimant's PHB, ¶253 {B/10/103} (emphasis added). See also Claimant's PHB, ¶250 {B/10/102}.

where the Treaty had not been breached.<sup>177</sup> As discussed in the ROK’s PHB, the Parties agree that, on this basis, the Claimant’s damages would be the difference between the FMV of its SC&T shares in the counterfactual and the value it actually realised on its SC&T shares when it sold them.<sup>178</sup>

**D. THERE IS NO NEED TO PERFORM AN SOTP VALUATION; MARKET PRICES RELIABLY INDICATE THE FMV OF SC&T SHARES IN THE COUNTERFACTUAL (AND INDEED SOTP IS NOT EQUIVALENT TO FMV)**

71. The Claimant argues that quantifying its damages requires a valuation analysis to determine “by how much SC&T was undervalued in the Merger, specifically in the Merger Ratio” and thus “by how much SC&T shareholders were damaged as a result of the Merger”.<sup>179</sup> The ROK maintains that no SOTP valuation is required to compute the Claimant’s damages (if any) because the FMV of the Claimant’s SC&T shares in the counterfactual can be reliably estimated using market prices.<sup>180</sup>
72. The Parties’ disagreement in this regard stems from the Claimant’s incorrect attempt to equate the theoretical “intrinsic” value of SC&T with the value that would have been *realisable* on the Claimant’s SC&T shares in the counterfactual. The Claimant accepts that its damages must be based on the latter, but fails to prove that the former represents realisable value. It matters not whether the Merger resulted in a transfer in value from SC&T shareholders to Cheil shareholders, if SC&T shareholders would not have been able to “unlock” that value (*i.e.*, sell their shares at that value) in the counterfactual.
73. The Claimant argues (and must prove) that the “true value” of SC&T shares would have been “unlocked” through: (a) a rejection of the Merger that would

---

<sup>177</sup> See ROK’s PHB, ¶125 {B/11/56}. See also C-89, p 6 {C/89/1} (Mr Boulton QC’s authority, which states that “[o]ne often hears statements such as ‘I couldn’t get anywhere near the value of my house if I put it on the market today’ or ‘The value of XYZ Company stock is really much more (or less) than the price it’s selling for on the New York Stock Exchange today.’ The standard of value contemplated by such statements is some standard *other than* fair market value, since the concept of fair market value means the cash or cash-equivalent price at which a transaction could be expected to take place under conditions existing at the valuation date”).

<sup>178</sup> See ROK’s PHB ¶¶131-135 {B/11/57}.

<sup>179</sup> Claimant’s PHB, ¶192c {B/10/79} (emphases omitted).

<sup>180</sup> See, e.g., ROK’s PHB, ¶¶126-135 {B/11/56}.

have led to an “immediate and substantial increase” in SC&T’s share price;<sup>181</sup> and (b) the Claimant’s restructuring proposal for the Samsung Group.<sup>182</sup> As discussed below, the evidence proves neither.

**1. Mr Boulton QC’s SOTP valuation cannot represent realisable value on the Valuation Date**

74. Since the Claimant’s chosen Valuation Date is one day before the event it claims would “unlock” the value it seeks as damages, there is no analytically sound basis for awarding those damages. The Claimant could never have realised that value on 16 July 2015, as it did not then exist, and admits so itself.<sup>183</sup>
75. The Claimant has failed to address the President’s request that it clarify whether proposition 2 on page 4 of its closing slides “means an adjustment in the claimant’s position on the valuation date or whether this simply goes to another question which is the basis of the valuation, rather than the valuation date”.<sup>184</sup>
76. The President’s request was critical, because it exposes a fundamental—and irreparable—defect in the Claimant’s damages claim: that claim is for value that the Claimant allegedly would have *realised* (i.e., by a sale on the market)<sup>185</sup> for its SC&T shares *upon the occurrence of an event* (i.e., a shareholder vote rejecting the Merger) sometime after 17 July 2015;<sup>186</sup> thus, where the

---

<sup>181</sup> See, e.g., Claimant’s PHB, Section VI.E {B/10/90}.

<sup>182</sup> See, e.g., Claimant’s PHB, ¶¶3 {B/10/4}, 24 {B/10/10}, 29 {B/10/12}.

<sup>183</sup> See, e.g., Reply, ¶¶591 {B/6/381} (“[H]ad the Merger been voted down by minority shareholders, [...] [t]his would have been an event that had a “therapeutic” effect on the SC&T share price.”), 595 {B/6/382} (“[H]ad the Merger been defeated as a result of the Claimant’s strong economy-driven campaign and an NPS ‘no’ vote, the Claimant would have been able to realize a substantial part of the Intrinsic Value of its investment [...]).

<sup>184</sup> Tr., {Day9/150:15} - {Day9/151:3}.

<sup>185</sup> Claimant’s PHB, ¶¶213 {B/10/89} (“[T]he Claimant would realize any gain on its investment in SC&T shares by selling them.”), 253 {B/10/103} (“[T]he Claimant’s method for realizing gains on this investment would have been to sell the shares for more than it bought them for [...]).

<sup>186</sup> See, e.g., Claimant’s PHB, ¶¶182 {B/10/74} (“[T]o realize that value, which foreseeably would have been released by a ‘[REDACTED]’ share price if the Merger had been defeated.”), 250 {B/10/102} (“If the NPS vote had not caused the Merger to occur [...] the Claimant would have been able to realize that value as an immediate gain on its investment in SC&T shares, when the share price instantaneously rose towards the intrinsic value to reflect the dissipation of the threat of the tunneling Merger [...]); Claimant’s Closing Presentation, Slide 95 {J/22/95}

Claimant's chosen Valuation Date is 16 July 2015 (which, indeed, is the proper Valuation Date as compared to anything later), there is no basis for it to be awarded damages for value that purportedly would be created and become realisable only after 17 July 2015.

## 2. Market prices reliably indicate SC&T's FMV in the counterfactual

77. The ROK has explained in its PHB that SC&T's market prices on 10 and 16 July 2015 are reliable estimates of SC&T's FMV in the counterfactual.<sup>187</sup>
78. The Claimant has still failed to prove that there was any manipulation that actually had an impact on SC&T's share price to render it unreliable as a measure of FMV. The ROK showed in its PHB that there was none.<sup>188</sup> The Supreme Court of Korea since then has, in the appraisal price litigation, confirmed that there are "no documents on record that show that the market price of the Former SC&T at the time around the listing of Cheil [*i.e.*, 18 December 2014] could not have reflected its objective value by being affected by improper means that interfere with market functions, including price manipulation, etc."<sup>189</sup> The Supreme Court has also determined that it was "inadequate" for the lower court to find that SC&T intentionally depressed its performance for the benefit of succession within the Samsung Group.<sup>190</sup> (In so doing, the Court also reaffirmed the finding below that the timing of the

---

("The SC&T share price would have increased significantly and instantaneously upon rejection of the Merger"); Reply, ¶595 {B/6/382} ("[H]ad the Merger been defeated as a result of the Claimant's strong economy-driven campaign and an NPS 'no' vote, the Claimant would have been able to realize a substantial part of the Intrinsic Value of its investment [...]"); **CER-5**, Boulton II, ¶¶3.3.4 {F5/1/27} ("[I]n the Counterfactual Scenario, in which the Merger vote was rejected, [t]he unwinding of market concerns would have caused SCT's Listed Price to increase to Intrinsic Value."), 5.4.2 {F5/1/38} ("I consider that, in the Counterfactual Scenario, news that the Merger had been rejected would have been incorporated into SCT's Listed Price, thereby causing it to adjust to Intrinsic Value.").

<sup>187</sup> ROK's PHB, ¶¶131-135 {B/11/57}.

<sup>188</sup> ROK's PHB, ¶¶136-147 {B/11/59}.

<sup>189</sup> **C-782**, p 10 {C/782/10}.

<sup>190</sup> **C-782**, p 10 {C/782/10}.

announcement of the Qatar contract (the only such incident the Claimant expressly identified in previous submissions) was *not* a manipulation.<sup>191</sup>)

79. Even if the Tribunal finds that there was manipulation affecting the reliability of SC&T’s share price, it can derive SC&T’s FMV by adjusting market prices to account for the effect of proven manipulation allegations, which would yield non-zero damages amounts.<sup>192</sup> For example, the Tribunal could follow the Korean courts’ approach in the appraisal price litigation of using SC&T’s market prices pre-dating the alleged manipulation.<sup>193</sup> The Korean Supreme Court has upheld the Seoul High Court’s decision that the price on 18 December 2014, of KRW 66,602 per share, reflected the “objective value” of SC&T.<sup>194</sup>
80. In the circumstances, where Mr Boulton QC himself has accepted that share prices in an efficient market represent the “collective wisdom of thousands of investors” in the market,<sup>195</sup> his SOTP valuation—which is a subjective valuation by one analyst hired by the Claimant—remains less reliable than market prices for estimating SC&T’s FMV in the counterfactual. As explained in the ROK’s PHB, SOTP is not a measure of FMV.<sup>196</sup>

**3. Rejection of the Merger would not have led to an “immediate and substantial increase” in SC&T’s share price**

81. In any event, the claim that rejection of the Merger would have led to an “immediate and substantial increase” in SC&T’s share price is untenable.
82. In its PHB, the Claimant contends that: (a) “rejection of the Merger would have represented the exercise of negative control by a group of non-aligned shareholders, led by the NPS”;<sup>197</sup> (b) there is “consensus” among the experts

---

<sup>191</sup> C-782, p 10 {C/782/10}, read with C-53, p 20 {C/53/20}. See also ROK’s PHB, ¶¶141-147 {B/11/64}.

<sup>192</sup> See ROK’s PHB, ¶¶149-153 {B/11/67}.

<sup>193</sup> See ROK’s PHB, ¶¶151-152 {B/11/68}.

<sup>194</sup> C-782, p 10 {C/782/10}.

<sup>195</sup> See ROK’s PHB, ¶163 {B/11/72}.

<sup>196</sup> ROK’s PHB, ¶¶155-159 {B/11/69}.

<sup>197</sup> Claimant’s PHB, ¶219(c) {B/10/92}.

that SC&T's share price would have instantaneously taken into account news of the Merger's rejection;<sup>198</sup> (c) Mr Boulton QC's "Merged Entity analysis [...] isolates the proportion of the observed 40% discount that *actually* disappeared when the Merger was concluded because [...] the tunneling risk dissipated";<sup>199</sup> and (d) "SC&T's mean historical discount to its intrinsic value" was, according to the Claimant (based on Mr Smith's testimony), approximately 16 percent.<sup>200</sup> Each of these contentions is wrong.

83. Rejection of the Merger would have at most represented *one instance* of exercise of "negative control" by non-aligned shareholders, including the NPS. Nothing in the evidence shows that these shareholders would vote together in future transactions, or that the market would expect such continued coordination. As explained in the ROK's PHB, the Claimant's assertion that SC&T management had no "██████" options to propose future "tunneling" transactions is based on a single document that does not identify actual barriers to doing so.<sup>201</sup> And the NPS may not have voted in alignment with other shareholders on future transactions: when the NPS opposed the merger between Samsung Heavy Industries and Samsung Engineering, it *abstained* rather than voting against the transaction;<sup>202</sup> and Mr ██████'s evidence that decisions by the Special Committee were entirely unpredictable<sup>203</sup> is unchallenged.
84. The Claimant says that Prof Milhaupt's analysis shows the "implausibility" that the NPS's vote against the Merger would have been a "non-event".<sup>204</sup> Prof Milhaupt's views were the purely theoretical hypotheses that the NPS's "voting no" would have "lent momentum to corporate governance reform in

---

<sup>198</sup> Claimant's PHB, ¶227 {B/10/95}.

<sup>199</sup> Claimant's PHB, ¶227 {B/10/95} (emphasis in the original).

<sup>200</sup> Claimant's PHB, ¶227 {B/10/95}.

<sup>201</sup> See ROK's PHB, ¶¶204(a) {B/11/90}.

<sup>202</sup> See **R-209**, item no. 14 {R/209}.

<sup>203</sup> See ROK's PHB, ¶93 {B/11/43}; **RWS-1**, Cho I, ¶¶21 {E/1/8}, 30-35 {E/1/11}; **RWS-2**, Cho II, ¶¶5-6 {E/2/4}.

<sup>204</sup> Claimant's PHB, ¶229 {B/10/95}. See also Claimant's PHB, ¶225 {B/10/94}.

Korea” and “emboldened shareholder activists in Korea”.<sup>205</sup> They are no basis for finding an “immediate and substantial increase” in the SC&T price in the counterfactual. He conducted no empirical analysis and identified no precedent. He meanwhile had no view on the *magnitude* of any impact of the NPS’s “no” vote on SC&T’s share price.<sup>206</sup> In fact, there is no precedent for the single-day jump in share price hypothesised by Mr Boulton QC.<sup>207</sup>

85. The experts’ “consensus” on an “instantaneous” share price reaction to news of the Merger’s rejection is immaterial; there is *no* consensus of the *magnitude*—or even the direction—of that reaction.<sup>208</sup>
86. Mr Boulton QC’s “Merged Entity analysis” provides no analogue to the counterfactual scenario: in the former, the “wedge” reduced<sup>209</sup> and thus so did the “tunnelling” risk;<sup>210</sup> in the latter, the “wedge” remains as it was pre-Merger and the evidence does not show that the “tunneling” risk would have dissipated.
87. The “mean historical discount” of 16 percent factors in a 25.8 percent premium to NAV at which SC&T’s shares traded in late 2007.<sup>211</sup> Mr Boulton QC agrees that the mean can be skewed by outliers, and both Parties’ experts agree that trading at a premium to NAV would have been “unusual”.<sup>212</sup> Further, the percentage discounts and premia to NAV in the Claimant’s analyses were

---

<sup>205</sup> See Tr., {Day6/15:1-5}.

<sup>206</sup> See ROK’s PHB, ¶208(a) {B/11/93}; Tr., {Day6/40:15-22}. See also Tr., {Day6/40:4-5}.

<sup>207</sup> While the Korean law limitation in share price fluctuation was increased to 30 percent in a single day after 15 June 2015, Mr Boulton QC argues for a jump as high as 42 to 58 percent, and there is no precedent for that.

<sup>208</sup> Professor Milhaupt declined to express a view on this. See ROK’s PHB, ¶208(a) {B/11/93}; Tr., {Day6/40:15-22}. See also Tr., {Day6/40:4-5}.

<sup>209</sup> Tr., {Day6/16:17-21} (“Professor Bae in his report provides an analysis showing that the wedge [...] was reduced, as a result of the Merger. I agree. It was reduced.”).

<sup>210</sup> See CER-6, Milhaupt, ¶56 {F6/1/19} (“The disparity in voting rights and cash flow rights (sometimes referred to as the ‘wedge’ in the corporate governance literature) creates incentives for the controller to engage in transactions within the business group (i.e., related-party transactions) that jeopardize the interests of the unaffiliated minority shareholders.”); RER-5, Bae, ¶51 {G5/1/29}.

<sup>211</sup> See C-365 MACRO sheet {C/365} (pdf in Smith cross-examination bundle); C-365 NAV Disc sheet {C/365} (pdf in Boulton cross-examination bundle), C-395 MACRO sheet {C/395} (pdf in Boulton cross-examination bundle).

<sup>212</sup> CER-5, Boulton II, ¶¶2.5.7(I) {F5/1/17}, 6.4.8 {F5/1/50}.

calculated on a different basis from Mr Boulton QC's calculations of the residual Holding Company Discount of 5 to 15 percent. The Claimant's analyses used the after-tax valuations of SC&T's investments in listed affiliates; Mr Boulton QC's used the before-tax valuations of those investments.<sup>213</sup>

88. The evidence shows that the counterfactual scenario where the Merger was rejected would be hardly any different from the scenario before the Merger was proposed.<sup>214</sup> The only difference would have been that SC&T shareholders had turned down *one* transaction proposed by the Board by a thin—2.42 percent—margin.<sup>215</sup> On two previous occasions, despite “negative control” demonstrated by shareholders, including the NPS, against proposed *chaebol* mergers, the NAV discounts in the companies that avoided the mergers persisted.<sup>216</sup>

**4. Mr Boulton QC's quantification of the Excess Discount is wholly unrealistic and unsupported**

89. The claim that rejection of the Merger would have led to an “immediate and substantial increase” in SC&T's share price is also untenable because it is based on Mr Boulton QC's entirely artificial quantification of a so-called “Excess Discount”. Mr Boulton QC's Excess Discount was manufactured by him alone, has not been endorsed by any Korean capital markets expert, and cannot be relied upon to award damages or at all.
90. *First*, the quantification of the Excess Discount hinges on a bare assumption that Mr Boulton QC was able, as he claims, to separately account for the Korea discount, such that the observed discount between the SOTP valuation and the

---

<sup>213</sup> See ROK's PHB, ¶221 {B/11/97}.

<sup>214</sup> See ROK's PHB, ¶¶196-205 {B/11/87}.

<sup>215</sup> See SOD, ¶414 {B/4/184}, p 182, Figure 12 {B/4/188}.

<sup>216</sup> In the proposed merger between Samsung Heavy Industries and Samsung Engineering, so many shareholders, including the NPS, exercised their appraisal rights instead of supporting the proposed merger that the companies had to abort it, resulting in the calling off of a merger that was designed as part of the Samsung Group's succession plan, similar to the Merger. The rejection of the proposed merger between a spin-off from Hyundai Mobis and Hyundai Glovis was the result of successful opposition by Elliott, the NPS and shareholders of the listed Hyundai Mobis. Still, Hyundai Mobis continued to trade at a sizeable discount (according to Elliott itself). See **RER-3**, Dow II, ¶¶190-192 {G3/1/89}, 196-199 {G3/1/92}; **RER-5**, Bae, ¶¶84-88 {G5/1/44}.



traded price is attributable only to the Excess Discount and the so-called Holding Company Discount.

- (a) Mr Boulton QC has claimed that his SOTP valuations of SC&T and Cheil already account for the Korea discount because the Korea discount is reflected in: (i) the valuations of the comparable companies he used to value SC&T's and Cheil's operating businesses; (ii) the traded prices of SC&T's and Cheil's listed investments, which are Korean companies; and (iii) the analyst reports he used to value Samsung Biologics.<sup>217</sup>
- (b) However, there is no academic literature—not even Prof Milhaupt's opinion—confirming that the Korea discount of a holding company like SC&T is the sum of the Korea discounts applicable to each of its parts. Prof Milhaupt noticeably was not asked to consider whether Mr Boulton QC's methodology for “separating out” the Korea discount from the Holding Company Discount applicable to SC&T is credible or effective. He observed no more than that this is the “first case that would require actually separating out those components” and blandly said that his “understanding is that [Mr Boulton QC] is doing exactly that”.<sup>218</sup> Mr Boulton QC's approach purportedly to separately account for the Korea discount in his SOTP valuations is entirely artificial.<sup>219</sup>

91. *Second*, Mr Boulton QC's theory that “[a]ny discount between the traded price of the Merged Entity and its intrinsic value that persisted after the Merger [...] represented a true holding company discount”<sup>220</sup> leaves unexplained his claim that the Excess Discount also reflected market concerns over “outstanding” allegations of share price manipulation.<sup>221</sup> The Claimant reasons, based on

---

<sup>217</sup> CER-5, Boulton II, ¶6.3.29 {F5/1/46}; Tr., {Day7/12:8-19}.

<sup>218</sup> Tr., {Day6/60:3-11}.

<sup>219</sup> See also ROK's PHB, ¶189 {B/11/81} (“Prof Milhaupt and Bae [...] both confirmed that they would be unable to separate out and independently quantify the part of SC&T's NAV discount that is attributable to a holding company discount and the part that is attributable to the “Korea discount”. Prof Dow has the same view.”).

<sup>220</sup> See Claimant's PHB, ¶209 {B/10/87}.

<sup>221</sup> See, e.g., CER-5, Boulton II, ¶¶2.5.3(II) {F5/1/16}, 3.3.5 {F5/1/27},

Mr Boulton’s opinions, that “the day after the Merger, the risk to New SC&T (*i.e.*, the Merged Entity) of a predatory transaction had disappeared (because the transaction had been accomplished), but nothing else had changed”.<sup>222</sup> However, there is no explanation of what happened to the discount due to alleged market manipulation. It is illogical to suppose that upon approval of the Merger, the market would have forgotten about the “outstanding” allegations that the share prices of pre-Merger SC&T and Cheil had been manipulated.

92. *Third*, Prof Dow’s event study disproving Mr Boulton QC’s Excess Discount theory stands. Despite the Claimant’s suggestion to the contrary,<sup>223</sup> the cross-examination on this subject is of no consequence.<sup>224</sup>

### **5. The Claimant’s restructuring plan is irrelevant to damages**

93. The overwhelming weight of the evidence thus shows that there is no basis to adopt Mr Boulton QC’s SOTP valuation as the estimated FMV of SC&T shares in the counterfactual: the SC&T share price would not realistically have jumped, from KRW 69,300 on 16 July 2015, by 42 to 58 percent to Mr Boulton QC’s valuation of KRW 98,083 to KRW 109,622 (at 15 and 5 percent residual Holding Company Discount respectively)<sup>225</sup> had the Merger been rejected.
94. But there is also now no question that the SC&T share price might have jumped to zero percent residual Holding Company Discount. Even Mr Boulton QC declined to support this claim.<sup>226</sup> Unsurprisingly, the Claimant has now expressly abandoned it.<sup>227</sup> For completeness, it is clear from the evidence that the Claimant’s restructuring plan would provide no support for an increased

---

<sup>222</sup> Claimant’s PHB, ¶209 {B/10/87}.

<sup>223</sup> Claimant’s PHB, ¶230 {B/10/96}.

<sup>224</sup> ROK’s PHB, ¶194 {B/11/84}.

<sup>225</sup> **CER-5**, Boulton II, Figure 3, p 15 {F5/1/24}.

<sup>226</sup> Tr., {Day7/152:4-8}.

<sup>227</sup> Claimant’s PHB, ¶13 {B/10/6} (“Of course, the Claimant could have maintained its shareholding in SC&T following the defeat of the Merger and implemented its restructuring plan, creating even greater value over time. *But that greater value over time forms no part of the Claimant’s quantum case.* The Claimant advances the perfectly orthodox and indeed conservative claim for damages calculated on the basis that the Claimant could have cashed out immediately after a no vote.” (emphasis added)).

damages claim. That plan was nowhere close to implementation; it never even got close to Samsung management or the Lee family (recall the long chain of evidently ineffectual intermediaries<sup>228</sup>), and Mr Smith's evidence was that it would have taken up to a year to implement.<sup>229</sup>

**E. OTHER DAMAGES ISSUES**

95. In its arguments about *RosinvestCo*, the Claimant misses the point that it bought 3,393,148 of its shares in SC&T after the Merger was announced at the Merger Ratio. The ROK maintains that the Claimant must not be awarded any damages in respect of these shares.<sup>230</sup>

96. Now that the Korean Supreme Court has conclusively determined the appraisal price for SC&T shares to be KRW 66,602 per share, this Tribunal should deduct, from any damages awarded to the Claimant, an amount representing the difference between KRW 66,602 and KRW 57,234 per share for the Claimant's appraisal shares. The Claimant is entitled to receive this amount from SC&T under the Settlement Agreement. If the Tribunal also orders the ROK to pay this amount to the Claimant, the Claimant will be doubly compensated.

97. The ROK stands by its previous submissions on interest and currency.<sup>231</sup>

**VI. REQUEST FOR RELIEF**

98. The ROK's request for relief is as stated in its first PHB.

---

<sup>228</sup> See ROK's PHB, ¶226 {B/11/101}; Tr., {Day3/35:18-25}; CWS-5, Smith II, ¶62 {D1/2/29}.

<sup>229</sup> CWS-6, Smith III, ¶24 {D1/3/13}.

<sup>230</sup> See ROK's PHB, ¶¶228-231 {B/11/102}.

<sup>231</sup> SOD, ¶¶608-609 {B/4/265}; ROK's Rejoinder, ¶¶523-527 {B/7/279}; Tr., {Day2/19:5-10}.

Respectfully submitted on 18 May 2022



**Freshfields Bruckhaus Deringer**

Peter J. Turner QC  
Nicholas Lingard  
Joaquin Terceño  
Samantha Tan  
Rohit Bhat  
Nicholas Lee



---



Moon Sung Lee  
Sanghoon Han  
Minjae Yoo  
Joon Won Lee  
Han-Earl Woo  
Suejin Ahn  
Yoo Lim Oh

for the Respondent