

**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**

**ELLIOTT ASSOCIATES, L.P.**

Claimant

**-v-**

**REPUBLIC OF KOREA**

Respondent

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**RESPONSE TO NOTICE OF ARBITRATION  
13 AUGUST 2018**

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## I. INTRODUCTION

1. Pursuant to the Free Trade Agreement between the Republic of Korea (the *ROK*) and the United States of America (the *Treaty*) and Article 4 of the 2013 UNCITRAL Arbitration Rules (the *UNCITRAL Rules*),<sup>1</sup> the ROK submits this Response to the Notice of Arbitration and Statement of Claim dated 12 July 2018 (the *NOA and SOC*) submitted by Elliott Associates, L.P. (*Elliott* or the *Claimant*).

\* \* \*

2. The Claimant's NOA and SOC alleges that certain conduct in relation to a merger of two publicly-listed Korean companies—neither of which is connected with the Korean Government—is attributable to the ROK as a matter of international law and gives rise to a breach of the Treaty sounding in more than three-quarters of a billion US dollars in damages.
3. The Claimant's allegations are wholly unsupported by witness or expert evidence. Instead, the Claimant has advanced a number of factual and legal allegations in respect of the merger on the basis of a haphazard collection of media reports, which offer conclusive evidence of nothing, and certain criminal proceedings in the Korean courts, which remain pending for final determination before the appellate courts.

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<sup>1</sup> The Claimant has elected to arbitrate under the UNCITRAL Rules and invoked the 2013 version of those rules as the applicable rules in the present arbitration. *See, e.g.*, NOA and SOC, 12 July 2018, paras 1, 110. The ROK notes that certain provisions in Chapter 11 of the Treaty appear to contemplate the application of the 1976 version of the UNCITRAL Rules, such as Article 11.20(6)(c) which mentions “the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules”; the provision of the 2013 UNCITRAL Rules that deals with the Statement of Claim is Article 20. The ROK on this occasion does not object to the proposed application of the 2013 version of the UNCITRAL Rules to this arbitration except to the extent modified by the Treaty. However, for the avoidance of doubt, the ROK's acceptance of the application of the 2013 UNCITRAL Rules is for the purposes of the present arbitration only, and the ROK is not bound by that acceptance in any other proceedings. The ROK further notes that the 2013 version of the UNCITRAL Rules is identical to the 2010 version of those rules but for the inclusion of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which are not applicable to the present arbitration.

4. Even on the basis of the lower criminal courts' decisions, there is no evidence that the impugned merger was proposed or that enough shareholders supported the merger for it to be passed as a result of any wrongful measure adopted or maintained by the ROK, whether by the former President and her administration, the National Pension Service (the *NPS*) and its employees, or any of the other individuals and entities alleged to have carried out conduct attributable to the ROK. In fact, the Korean civil courts—in decisions the Claimant omits to mention—have validated the merger, finding that it was supported by valid commercial motivations and that the share swap ratio at which the deal was done was not “manifestly unfair”.<sup>2</sup>
5. At its core, the Claimant's complaint is premised on the exercise by the NPS of its right as a shareholder—and it was a shareholder in both companies that merged—to vote for or against a proposed merger based on its own assessment of its own best interests. The Claimant fails to explain how the NPS' exercise of that right amounts to breach by the ROK of its Treaty obligations. Indeed, the NPS' vote alone was not sufficient to carry the merger—and the Claimant has not alleged, much less proven, that the ROK somehow directed the votes of shareholders other than the NPS.
6. Turning from liability to damages, the Claimant's damages claim of more than US\$770 million rests on nothing but assertion. The Claimant has adduced no evidence that the alleged measures adopted or maintained by the ROK caused it to suffer any loss, still less that the alleged loss amounts to more than three-quarters of a billion US dollars. The core of the Claimant's damages claim appears to be the Claimant's wishful thinking that it single-handedly could transform a Korean conglomerate into a vastly different company—and, on speculation alone, “unlock” hundreds of millions of dollars in the process. There is no evidence that the Claimant could have done so, much less that it was the ROK that prevented it from doing so.

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<sup>2</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, pp 9-14; Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, pp 10-12, 17-27.

7. The Claimant chose to commence these proceedings under the UNCITRAL Rules. Having so chosen, the Treaty requires that the Claimant begin its claim not only with a bare notice of arbitration, as is possible under some other treaties, but also with its complete statement of claim.<sup>3</sup> The Claimant has failed to adduce cogent evidence in the NOA and SOC as required by the UNCITRAL Rules, which provide that a “statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them”.<sup>4</sup>
  8. The absence of witness and expert evidence accompanying the NOA and SOC is either because: (a) there simply is no witness or expert evidence available to support the Claimant’s damages and other claims; or (b) the Claimant has chosen to employ an impermissible procedural tactic, seeking, in contravention of the Treaty and the UNCITRAL Rules, to delay presentation of any witness and expert evidence in an attempt to conceal the weaknesses in its case. The ROK reserves all of its rights in this respect.
  9. In this Response, the ROK seeks briefly and dispassionately to identify the relevant facts establishing the nature and circumstances of the dispute. The ROK will supplement these facts, and its defence to the Claimant’s claims, in due course in its Statement of Defence and evidence accompanying it.
  10. For the avoidance of doubt, the ROK elects not to treat this Response as its Statement of Defence.
- \* \* \*
11. This Response is structured as follows: Section II provides particulars of the ROK and its counsel; Section III addresses the nature and circumstances of the Parties’ dispute; Section IV deals with procedural matters in this arbitration, including the ROK’s appointment of its arbitrator; Section V sets out the

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<sup>3</sup> Treaty, C-1, Art 11.16(4)(c).

<sup>4</sup> UNCITRAL Rules, Art 20(4).

ROK's prayer for relief; and Section VI contains the ROK's reservation of rights.

## II. THE ROK AND ITS COUNSEL

12. The Respondent is the Republic of Korea.
13. Pursuant to Article 11.27 and Annex 11-C of the Treaty,<sup>5</sup> the ROK confirms that its address for service is:

Address: **Office of International Legal Affairs**  
Ministry of Justice of the Republic of Korea  
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14. The ROK is represented in this arbitration by Freshfields Bruckhaus Deringer and Lee & Ko. All correspondence, notices and other documents in relation to this arbitration should be addressed to:

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<sup>5</sup> Treaty, C-1, Art 11.27 and Annex 11-C.

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### III. THE NATURE AND CIRCUMSTANCES OF THE PARTIES' DISPUTE

15. The ROK sets out below its preliminary responses to the assertions in the NOA and SOC.
16. At the heart of the dispute is the merger of two publicly-listed Korean companies—Samsung C&T Corporation (*Samsung C&T*) and Cheil Industries Inc. (*Cheil*)—neither of which is connected with the Korean Government. The Claimant was a shareholder in Samsung C&T and opposed that merger; many other shareholders, including some of the world's most sophisticated investors, supported it.

17. The Claimant's allegations are based almost entirely on media reports and decisions handed down by Korean courts,<sup>6</sup> most of which are currently under appeal to the Korean Supreme Court.<sup>7</sup> The ROK submits this Response on the basis of publicly available materials and the exhibits submitted by the Claimant, but does not accept the accuracy of the contents of those materials and exhibits, pending further investigation into the factual circumstances relating to the merger between Samsung C&T and Cheil. The ROK also does not accept the accuracy of the translations that the Claimant has submitted, and reserves all its rights in that regard as it continues its review of those translations.
18. The ROK expressly does not concede any allegations of fact or law made by the Claimant in its NOA and SOC and reserves the right to amend and supplement its responses, including in respect of any allegations not specifically addressed below.

**A. SAMSUNG C&T AND CHEIL**

19. Samsung C&T was founded in 1938 as the parent company of the Samsung group of companies.<sup>8</sup> Samsung C&T was designated as the first general trading company in Korea to lead overseas sales operations in 1975.<sup>9</sup> In December 1995, Samsung C&T merged with Samsung Construction, which

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<sup>6</sup> The only evidence that the Claimant submitted with its NOA and SOC is documentary evidence. Of the 83 fact exhibits (they are numbered C-1 to C-84, but C-75 is "Intentionally Left Blank") that the Claimant submitted, 53 are media reports and four are Korean court decisions (one is a civil court decision).

<sup>7</sup> See Extract from the Korean Supreme Court website on Supreme Court Case No. 2017Do19635 (the appeal from the Seoul High Court's decision in 2017No1886 on the prosecution of [REDACTED] and [REDACTED]), accessed on 30 July 2018, **R-28**; Extract from the Korean Supreme Court website on Supreme Court Case No. 2018Do2738 (the appeal from the Seoul High Court's decision in Case No. 2017No2556 on the prosecution of [REDACTED]), accessed on 30 July 2018, **R-29**.

<sup>8</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **C-17**, p 1 ("Samsung C&T Corporation was founded in 1938, as a parent company of Samsung Group.").

<sup>9</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **C-17**, p 1 ("In 1975, Samsung C&T was designated as the first general trading company in Korea to lead overseas sales operations.").

led the company to be divided into two groups, one for trading and investment and the other for engineering and construction, with global business carried out from offices in about 50 countries.<sup>10</sup> As at 31 December 2014, Samsung C&T operated globally, and had 95 subsidiaries and 41 associates and joint ventures.<sup>11</sup> Its shares were listed on the Korean Stock Exchange from 1975 to 2015.<sup>12</sup>

20. According to information on Samsung C&T's website, Cheil's businesses included construction, food and beverage services, property development and theme park operation.<sup>13</sup> On 18 December 2014, Cheil's shares were listed on the Korean Stock Exchange.<sup>14</sup>
21. As of 31 December 2014, based on its publicly available accounts, Samsung C&T owned 1,849,850 shares in Cheil, amounting to a 1.37-percent stake in the company.<sup>15</sup>
22. The Claimant alleges in its NOA and SOC that it had "invested in [Samsung C&T] for 15 years since 2003", and that "[b]y the date of the Merger vote, Elliott's investment consisted of 11,125,927 [Samsung C&T] common voting shares, representing approximately 7.12% of outstanding [Samsung C&T]

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<sup>10</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **C-17**, p 1 ("In December 1995, Samsung C&T incorporated Samsung Construction, which led the company to be divided into the Trading & Investment Group (T&I Group) and Engineering & Construction Group (E&C Group) with global business carried out in offices in around 50 countries. The two companies have worked closely together over the years [...]").

<sup>11</sup> Consolidated Financial Statements of Samsung C&T Corporation and its Subsidiaries, 31 December 2014 and 2013, **R-2**, p 12.

<sup>12</sup> Consolidated Financial Statements of Samsung C&T Corporation and its Subsidiaries, 31 December 2014 and 2013, **R-2**, p 12.

<sup>13</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, **C-17**, p 1 ("Cheil Industries was established in 1963 as a property developer and theme park operator, and expanded its business to construction and F&B services. The company acquired a fashion business unit from the former Cheil Industries in 2013, and went public on the Korean Stock Exchange at the end of 2014.") (information as at 26 May 2015).

<sup>14</sup> Consolidated Financial Statements of Samsung C&T Corporation and its Subsidiaries, 31 December 2014 and 2013, **R-2**, p 62, fn 3.

<sup>15</sup> Consolidated Financial Statements of Samsung C&T Corporation and its Subsidiaries, 31 December 2014 and 2013, **R-2**, p 62.

common stock”.<sup>16</sup> The Claimant claims that its 7.12-percent shareholding constitutes a protected investment under the Treaty.<sup>17</sup> The Claimant has provided no documentary support for its claimed shareholding in Samsung C&T at any point in time, much less evidence that it had invested in Samsung C&T continuously “since 2003”, and no evidence of the terms and circumstances of its acquisitions of Samsung C&T shares. The ROK reserves all of its rights, including to make a jurisdictional objection in this regard and to make appropriate document production requests in due course.

**B. THE MERGER BETWEEN SAMSUNG C&T AND CHEIL**

23. On 26 May 2015, Samsung C&T and Cheil announced that their respective boards of directors had passed resolutions deciding that Cheil would acquire and merge with Samsung C&T.<sup>18</sup>
24. The companies explained that the proposed merger would create a world-class global company with a diversity of leading businesses and potential for growth.<sup>19</sup> Samsung C&T published contemporaneously the following reasons for the merger: (a) Cheil had, since its initial public offering in December 2014, been exploring measures to expand its construction, fashion and other business units;<sup>20</sup> (b) at the same time, Samsung C&T had been seeking ways to diversify its businesses and develop new growth momentum in order to

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<sup>16</sup> NOA and SOC, 12 July 2018, para 19. *See also* paras 1, 80.

<sup>17</sup> NOA and SOC, 12 July 2018, para 80.

<sup>18</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **C-16**, Sec 1 (“Cheil Industries Inc. to acquire and merge with Samsung C&T Corporation.”).

<sup>19</sup> Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **C-17**. *See also* DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **C-16**, Sec 2 (“By combining various business areas and operating know-how held by Cheil Industries Inc. and differentiated competitiveness in the construction sector and overseas infrastructure held by Samsung C&T Corporation, we will establish foundation of growth for becoming a world-class global company through both top-line and bottom-line growth and finding new prospecting businesses.”).

<sup>20</sup> Samsung C&T Corporation, Press Release, “Merger Between Cheil Industries and Samsung C&T”, 26 May 2015, **C-17**.

overcome a sluggish global economy and high competition;<sup>21</sup> and (c) the strategy behind the merger was for the two companies to grow into a global leader in fashion, food and beverage, construction, leisure and biotech industries, allowing them to offer premium services across the full span of human life.<sup>22</sup> Many market players agreed with that strategy, including 21 Korean securities analysts who were reported to have held positive views about the prospective merger because of a maximisation of synergies.<sup>23</sup>

25. The merger was to be effected by an exchange of 0.3500885 Cheil shares (common stock and preferred stock) for each Samsung C&T share.<sup>24</sup> In other words, the merger ratio for Cheil stock (whether common or preferred) as to Samsung C&T stock (whether common or preferred) was 1:0.3500885.<sup>25</sup> The merger ratio was calculated in accordance with Korean legal requirements from which companies cannot deviate. It was calculated based on the average of each company's: (a) average closing price for the most recent one month weighted by trade volume; (b) average closing price for the most recent one week weighted by trade volume; and (c) most recent closing price, where the

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<sup>21</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, C-17.

<sup>22</sup> Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015, C-17.

<sup>23</sup> [REDACTED], "How do the Domestic Securities Analysts View the 'Samsung C&T Merger'?", *Digital Daily*, 8 July 2015, R-11. See also [REDACTED], "Majority of Securities Companies that supported the Merger say 'I'd vote for the merger even now'", *Dong-A*, 25 November 2016, R-19.

<sup>24</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, C-16, Secs 4(1)C ("The Company shall issue 0.3500885 shares of common stock (face value of 100 Won) of Cheil Industries Inc., a remaining company, per common stock of Samsung C&T Corporation (face value of 5,000 Won) for ordinary shareholders listed on the shareholders list of Samsung C&T Corporation which is the company to be extinguished."); 4(2)C ("As of the merger date (scheduled for September 1, 2015), 0.3500885 shares of Cheil Industries Inc.'s preferred stock (face value of 100 Won) per share of Samsung C&T Corporation's preferred stock (face value of 5,000 Won) will be issued to the shareholders of the preferred stock listed in the list of Samsung C&T Corporation.").

<sup>25</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, C-16, Sec 3 ("Merger ratio (1) Cheil Industries Inc.'s common stock [:] Samsung C&T Corporation's common stock = 1:3500885 (2) Cheil Industries Inc.'s preferred stock [:] Samsung C&T Corporation's preferred stock = 1:3500885").

date considered most recent is the date immediately preceding the date of the board of directors' resolution approving the merger.<sup>26</sup>

26. To proceed with the merger, Samsung C&T and Cheil each had to convene an extraordinary shareholders' meeting, and the merger had to be approved by at least two-thirds of the voting rights of the attending shareholders and at least one-third of the total number of issued and outstanding shares with voting rights.<sup>27</sup>
27. Extraordinary meetings of the shareholders of each company were scheduled for 17 July 2015.<sup>28</sup> Shareholders who opposed the decision to merge were entitled by law to request the company whose shares they owned to buy their shares within 20 days from the date of the shareholders' meeting.<sup>29</sup> Pursuant to Korean statutory requirements,<sup>30</sup> Samsung C&T's common stock would be bought at KRW 57,234 per share and its preferred stock at KRW 34,886 per share, and Cheil's common stock would be bought at KRW 156,493 per share.<sup>31</sup>
28. It appears from a public filing made by the Claimant that at the time of the announcement, the Claimant held just under 5 percent of the shares of

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<sup>26</sup> Financial Investment Services and Capital Markets Act, 1 May 2018, **R-24**, Art 165-4; Enforcement Decree of the Financial Investment Services and Capital Markets Act, 9 May 2018, **R-25**, Art 176-5; Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, p 10; Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 3.

<sup>27</sup> Korean Commercial Act, 2 March 2016, **R-16**, Arts 522, 434 (“[A resolution for approval of a merger] shall be adopted by the affirmative votes of at least two thirds of the voting rights of the shareholders present at a general meeting of shareholders and of at least one third of the total number of issued and outstanding shares.”).

<sup>28</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **C-16**, Sec 13B (“Key dates of the merger [...] Temporary shareholders' meeting scheduled: July 17, 2015”).

<sup>29</sup> Financial Investment Services and Capital Markets Act, 1 May 2018, **R-24**, Art 165-5.

<sup>30</sup> Financial Investment Services and Capital Markets Act, 1 May 2018, **R-24**, Art 165-5; Enforcement Decree of the Financial Investment Services and Capital Markets Act, 9 May 2018, **R-25**, Art 176-7; Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, pp 4-7.

<sup>31</sup> DART Filing titled “Samsung C&T Corporation/Company Merger Decision” by SC&T, 26 May 2015, **C-16**, Sec 11B.

Samsung C&T.<sup>32</sup> On 4 June 2015, the Claimant disclosed that it had acquired an *additional* 2.17 percent of Samsung C&T shares on 3 June 2015—after the merger was announced—and thereby increased its shareholding in Samsung C&T to 7.12 percent.<sup>33</sup> In the Claimant’s disclosure of its 2.17-percent acquisition, it stated that its purpose was “[t]o participate in management”.<sup>34</sup> In fact, by increasing its stake in Samsung C&T by almost 50 percent *after* the announcement of the merger, the Claimant took the chance that the merger would be approved and that its investment returns—for better or for worse—would reflect that.

29. From 4 June 2015 to 17 July 2015, the Claimant took steps to oppose the merger (notwithstanding its acquisition of additional shares following announcement of the merger).
- (a) On 4 June 2015, the Claimant announced that it held a 7-percent stake in Samsung C&T<sup>35</sup> and expressed its objections to the merger of Samsung C&T and Cheil.<sup>36</sup>
- (b) On 9 June 2015, the Claimant applied to the Seoul Central District Court for an injunction to restrain Samsung C&T and its directors from notifying Samsung C&T’s shareholders of an extraordinary meeting to vote on the merger of Samsung C&T and Cheil, and from passing and executing resolutions in relation to the proposed merger.<sup>37</sup>

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<sup>32</sup> See DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, which shows that before the Claimant acquired additional shares in Samsung C&T on 3 June 2015, the Claimant held 7,732,779 shares in Samsung C&T (p 3), and that Samsung C&T had a total of 156,217,764 issued shares with voting rights (p 5). 7,732,779 of 156,217,764 is 4.95 percent.

<sup>33</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 4.

<sup>34</sup> DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **R-3**, p 7.

<sup>35</sup> Elliott, Press Release, 4 June 2015, **C-20**.

<sup>36</sup> Elliott, Press Release, 4 June 2015, **C-20**.

<sup>37</sup> See Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, p 2. Media reports suggested that the Claimant made the injunction application for strategic purposes other than actually blocking the approval of the merger. See, e.g., [REDACTED], “[Full Report] Elliott, in opposition of Samsung C&T merger, applies for injunction ‘against resolution at the shareholders’ meeting’”, *E-Today News*, 9 June 2015, **R-4**; [REDACTED], “Samsung C&T says

- (c) On 1 July 2015, the Seoul Central District Court dismissed the Claimant’s application for the injunction in relation to the extraordinary shareholders’ meeting.<sup>38</sup> The Court found, among other things, that: (i) the Claimant did not have the right to claim injunctive relief against the directors of Samsung C&T because the Claimant had only held shares in Samsung C&T since 2 February 2015, and therefore did not meet the statutory requirement of having continued to hold 0.025 percent of the company’s shares for at least six months in order to have the right to claim injunctive relief against the company’s directors;<sup>39</sup> (ii) the merger ratio could not be deemed manifestly unfair;<sup>40</sup> and (iii) the Claimant’s allegation that the purpose of the merger was unreasonable was groundless.<sup>41</sup>
- (d) On 6 July 2015, the Claimant appealed against the Seoul Central District Court’s dismissal of its application for injunctive relief.<sup>42</sup>

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“future uncertainties were the reason for the merger” ... responds with data for the first time””, *Yonhap News*, 10 June 2015, **R-5**; [REDACTED], “[Reporter’s Eye] The shareholder Elliott purports to protect is none other than itself”, *Asia Today*, 12 June 2015, **R-6**; [REDACTED], “Predatory Natured Elliott’s Self-Contradictions”, *Munhwa Ilbo*, 17 June 2015, **R-7**.

<sup>38</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, p 1.

<sup>39</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, pp 6-8. Article 542-6(5) of the Korean Commercial Act provides that “[a]ny person who has continued to hold stocks equivalent to no less than 50/100,000 (25/100,000 for listed companies determined by Presidential Decree) of the total number of issued and outstanding shares of a listed company for more than six months may exercise shareholders’ rights under Article 402 (including cases where Articles 408-9 and 542 shall apply *mutatis mutandis*)”. Article 402 of the Korean Commercial Act provides that “[i]f a director commits an act in contravention of any statute or the articles of incorporation, and such act is likely to cause irreparable damage to the company, the auditor or a shareholder who holds no less than one percent of the total number of issued and outstanding shares may demand on behalf of the company that the relevant director stop such act”. Korean Commercial Act, 2 March 2016, **R-16**, Arts 402, 542-6(5).

<sup>40</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, pp 9-14.

<sup>41</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, p 14.

<sup>42</sup> Extract from the Korean Supreme Court website on Seoul High Court Case No. 2015Ra20485 (the appeal against the Seoul Central District Court’s dismissal of the Claimant’s injunction application in Case No. 2015KaHab80582), accessed on 13 August 2018, **R-34** (which states that Case No. 2015Ra20485 was filed on 6 July 2015).

- (e) On 16 July 2015, the Seoul High Court dismissed the Claimant's appeal.<sup>43</sup> The Claimant appealed against the Seoul High Court's dismissal, but withdrew the appeal on 23 March 2016.<sup>44</sup>
30. On 17 July 2015, Samsung C&T and Cheil each convened an extraordinary meeting of their respective shareholders, and the merger was approved pursuant to the votes of the shareholders in both meetings.<sup>45</sup> The Claimant's efforts to dissuade other shareholders from supporting the merger were unsuccessful: 69.53 percent of the voting rights of the Samsung C&T shareholders who attended the extraordinary meeting were exercised in favour of the merger (equivalent to 58.91 percent of Samsung C&T's total issued and outstanding shares).<sup>46</sup> The NPS held 11.21 percent of Samsung C&T's total issued and outstanding shares.<sup>47</sup> In fact, other Samsung C&T shareholders holding almost 50 percent of the company's total issued and outstanding shares also voted in favour of the merger.
31. The NPS,<sup>48</sup> which was a shareholder in both Samsung C&T and Cheil,<sup>49</sup> voted in favour of the merger.<sup>50</sup> According to media reports, the Samsung C&T shareholders that voted in favour of the merger also included the Government

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<sup>43</sup> Extract from the Korean Supreme Court website on Seoul High Court Case No. 2015Ra20485 (the appeal against the Seoul Central District Court's dismissal of the Claimant's injunction application in Case No. 2015KaHab80582), accessed on 13 August 2018, **R-34** (which states that Case No. 2015Ra20485 was dismissed on 16 July 2015).

<sup>44</sup> Extract from the Korean Supreme Court website on Supreme Court Case No. 2015Ma4216 (the appeal from the Seoul High Court's decision in Case No. 2015Ra20485 dismissing the Claimant's appeal against the Seoul Central District Court's dismissal of the Claimant's injunction application in Case No. 2015KaHab80582), accessed on 30 July 2018, **R-30** (which states that Case No. 2015Ma4216 was withdrawn on 23 March 2016). *See also* [REDACTED], "Elliott-Samsung feud over", *Korea Times*, 25 March 2016, **R-17**.

<sup>45</sup> DART Filing by former SC&T, "Result of extraordinary general shareholders' meeting", 17 July 2015, **C-47**.

<sup>46</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 4.

<sup>47</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 4.

<sup>48</sup> The NPS is a corporation, pursuant to the Korean National Pension Act. National Pension Act, 20 June 2018, **R-26**, Art 26.

<sup>49</sup> The NPS held 11.21 percent of Samsung C&T's shares, as well as 4.84 percent of Cheil's shares for the vote (as of 11 June 2015). *See* Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, pp 3, 22, 37.

<sup>50</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 4.

of Singapore Investment Corporation, the Saudi Arabian Monetary Agency, and the Abu Dhabi Investment Authority.<sup>51</sup> The Samsung C&T shareholders who voted against the merger included the Claimant, as well as Korean shareholders such as Ilsung Pharmaceuticals Co., Ltd. (*Ilsung*) and Jongjong Co., Ltd. (*Jongjong*).<sup>52</sup>

32. On 4 August 2015, having failed to dissuade sufficient shareholders to oppose the merger, the Claimant exercised its right to require Samsung C&T to buy 7,732,779 of the shares it owned in Samsung C&T (amounting to 4.95 percent of Samsung C&T's common stock),<sup>53</sup> albeit reserving its rights in relation to the buyback price of KRW 57,234 per share.<sup>54</sup> The Claimant later commenced proceedings against Samsung C&T in relation to that price and the merger.<sup>55</sup>
33. It appears from public sources that the Claimant and Samsung C&T have settled their dispute.<sup>56</sup> The terms of the settlement are not known to the ROK,

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<sup>51</sup> See, e.g., [REDACTED], "Successful Merger of Samsung C&T, How Did They Win The Heart of Foreigners and Minority Shareholders?", *Business Post*, 17 July 2015, **R-12** ("Samsung Group, even including vice Chairman [REDACTED] himself, has been trying to persuade foreign investors and minority shareholders. It is analyzed that this has achieved considerable success. [...] It is known that, during this process, they gained support from Asian sovereign wealth funds such as Singapore Government Investment Corporation (1.47%), Saudi Arabian Monetary Agency (1.11%) and Abu Dhabi Investment Authority (1.02%)."); [REDACTED], "Overwhelming number of minority shareholders voted 'for' ... Samsung C&T, succeeds in last-minute flip despite ISS's opposition", *Hankyung News*, 17 July 2015, **R-13** ("SCT executives and [REDACTED] vice chairman of Samsung Electronics and others met with foreign shareholders to persuade them, and some foreign institutional investors such as Government of Singapore Investment Corporation (1.47%), reportedly voted in favor of the merger. An official of a foreign investment bank (IB) stated 'majority of foreign shareholders seems to have predicted that growth would not be easy unless SCT merged with CI'.")

<sup>52</sup> See Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 3 ("Applicants gave notice in writing during the application period for notice of intention to oppose the merger from July 2, 2015 to July 16, 2015 to the Former SC&T of its intention to oppose the resolution regarding its merger at the general shareholders' meeting.")

<sup>53</sup> See DART filing titled "Report on Stocks, etc. Held in Bulk", 10 August 2015, **R-14**.

<sup>54</sup> See DART filing titled "Report on Stocks, etc. Held in Bulk", 10 August 2015, **R-14**, p 6.

<sup>55</sup> Extract from Korean Supreme Court website on Seoul High Court Case No. 2016Ra20189, accessed on 11 August 2018, **R-32**. See also Seoul High Court Case No. 2016Ra20189 (Consolidated), 30 May 2016, **C-53**, p 2 ("[...] Applicants seek a determination of the purchase price of each common shares issued by Samsung C&T Corporation (110111-0002975) recorded in the enclosed Chart 1, which Applicants have requested for purchase thereof (Elliott Associates, L.P. withdrew its application on March 23, 2016).")

<sup>56</sup> [REDACTED], "Elliott-Samsung feud over", *Korea Times*, 25 March 2016, **R-17**.

and in due course the ROK will make document production requests requiring the Claimant to disclose all information relating to the settlement and its terms. However, and pending disclosure by the Claimant, the fact of the settlement suggests that the Claimant may have agreed with Samsung C&T on an amount that would compensate the Claimant for its dissatisfaction with the merger and all its alleged losses (if any could be proven) in relation to the merger and the ratio at which it proceeded, and received such compensation.

34. The merger was effected on 2 September 2015.<sup>57</sup>
35. As a result of the merger, Samsung C&T (as it then was) ceased to exist<sup>58</sup> and Cheil was renamed Samsung C&T Corporation (the *New Samsung C&T*).<sup>59</sup>
36. The ROK does not know if the Claimant continues to own any shares in the New Samsung C&T today.
37. The Claimant's NOA and SOC suggests that leading up to the merger, there had been uniform criticism in the market of the business decision to merge.<sup>60</sup> That is wrong: there was a diversity of views and disagreements between analysts about the merits of the merger and its terms. The Claimant had led a campaign against the merger (and yet bought about a third of the total shares it eventually held in Samsung C&T *after* the merger had been announced). In the pages of the financial press, there was a vigorous debate about the merits of the merger, including coverage of the Claimant's objections to it.<sup>61</sup> However,

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<sup>57</sup> See Performance Report on the Issuance of Securities (Merger) from Cheil Industries Inc. to the Chairman of the Financial Supervisory Service, 2 September 2015, **R-15**, p 2, Note 3 ("Request for the registration of the merger (the registration of the dissolution) was completed on 2 September 2015."). Under Korean law, a merger enters into effect on the date of the request for the registration of the merger. Korean Commercial Act, 2 March 2016, **R-16**, Art 234; Korean Commercial Registration Act, 4 August 2016, **R-18**, Art 3(2).

<sup>58</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **C-16**, Sec 1 ("Company to be extinguished: Samsung C&T Corporation").

<sup>59</sup> DART Filing titled "Samsung C&T Corporation/Company Merger Decision" by SC&T, 26 May 2015, **C-16**, Sec 1 ("Remaining company: Cheil Industries Inc. [...] The name of the remaining company after the merger: Samsung C&T Corporation").

<sup>60</sup> NOA and SOC, 12 July 2018, paras 29, 33.

<sup>61</sup> [REDACTED], "Merger between Samsung C&T and Cheil Industries ... 20 Securities Companies say "Synergy is Big"", *Maeil Business News Korea*, 21 June 2015, **R-8**.

there was also considerable support for the underlying commercial rationale for the merger.<sup>62</sup>

38. In fact, some of the shareholders that had voted against the merger, including Korean companies Ilsung and Jongjong, later filed an application to the Korean courts to annul the merger, and the Seoul Central District Court dismissed that application.<sup>63</sup> The Court found, among other things, that:

- (a) “there is room to conclude that Samsung C&T had a motive for pursuing a merger with Cheil, with its strengths and potential in the fields of leisure, fashion, food and beverage, and biotechnology, as a way to overcome the stagnation”;<sup>64</sup>
- (b) “there is no evidence to support the claims of the Plaintiffs that the Samsung Group intervened in Samsung C&T’s share market price around the [date before the announcement of the merger, *i.e.*, 25 May 2015]”;<sup>65</sup>
- (c) “[i]t is believed that Samsung C&T has decided to merge with Cheil because it was experiencing stagnation in terms of profitability and delay in growth at the time”;<sup>66</sup>
- (d) “[t]here is no evidence to suggest that the management’s decision as to the timing of the Merger was unfair”;<sup>67</sup> and

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<sup>62</sup> See, e.g., [REDACTED], “Domestic Securities Companies, “ISS report overinflated the value of Samsung C&T””, *Dong-A Ilbo*, 7 July 2015, **R-10**; [REDACTED], “How do the Domestic Securities Analysts View the ‘Samsung C&T Merger?’”, *Digital Daily*, 8 July 2015, **R-11**; [REDACTED], “Majority of Securities Companies that supported the Merger say ‘I’d vote for the merger even now’”, *Dong-A*, 25 November 2016, **R-19**.

<sup>63</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 2. The Seoul Central District Court’s decision is currently under appeal to the Seoul High Court in Case No. 2017Na2066757. Extract from Korean Supreme Court website on Seoul Central District Court Case No. 2016GaHap510827, accessed on 11 August 2018, **R-33**.

<sup>64</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 11.

<sup>65</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 19.

<sup>66</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 28.

<sup>67</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 28.

- (e) “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>68</sup>

**C. THE CLAIMANT’S ALLEGATIONS OF BREACH OF THE TREATY**

39. In the NOA and SOC, the Claimant makes a number of allegations regarding alleged interference by the ROK in the merger between Samsung C&T and Cheil and, on that basis, asserts that the ROK breached: (a) Article 11.5 of the Treaty, which guarantees to investments by US investors “the international minimum standard, including the obligation of fair and equitable treatment”;<sup>69</sup> and (b) the requirement in Article 11.3 of the Treaty “not to discriminate against U.S. investors”.<sup>70</sup>
40. The ROK denies that it has breached the Treaty, and reserves the right to respond to the Claimant’s allegations that the ROK breached the Treaty after it has investigated the factual allegations made by the Claimant in its NOA and SOC.
41. The ROK will, however, make the following comments at this stage.
42. The Claimant’s allegation that the alleged conduct of the individuals and entities identified in the NOA and SOC, including the NPS, is attributable to the ROK as a matter of international law and constitutes “measures adopted or maintained by a Party” for the purposes of Article 11.1(3) of the Treaty<sup>71</sup> is incorrect. The ROK reserves its right to respond to the Claimant’s allegations

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<sup>68</sup> Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, p 45.

<sup>69</sup> NOA and SOC, 12 July 2018, para 87.

<sup>70</sup> NOA and SOC, 12 July 2018, para 99.

<sup>71</sup> NOA and SOC, 12 July 2018, paras 15-16.

in due course, including, without limitation, by submitting a preliminary objection on an expedited basis or otherwise.

43. The Claimant also fails to discharge its burden of proving that the alleged conduct of the individuals and entities identified in the NOA and SOC, including the NPS, amounted to a measure adopted or maintained by the ROK that constituted a breach by the ROK of its Treaty obligations. The Claimant's complaint is premised on the exercise by the NPS of its right, as a shareholder of both Samsung C&T and Cheil, to vote for or against the proposed merger. The Claimant fails to explain how the NPS' exercise of that right—a right held by each shareholder, to be exercised as it saw fit—amounts to breach by the ROK of its Treaty obligations.
44. The Claimant relies on nothing more than a collection of media reports and Korean lower criminal court decisions currently under appeal as “evidence” that, it claims, “confirms conduct that amounts to breach by Korea of international law, and more specifically its treaty obligations under the KORUS FTA”.<sup>72</sup> That is, again, incorrect.
45. *First*, media reports are, obviously, not conclusive evidence of facts.
46. *Second*, the criminal court decisions do not prove that any alleged “measures adopted or maintained by” the ROK caused the impugned merger in breach of the ROK's Treaty obligations.
47. The Korean criminal courts have not found that the merger was proposed or passed by the requisite majority of shareholders as a result of any wrongdoing by the ROK's former President, ██████████, and members of her administration, or the NPS or its employees, or any of the other individuals and entities alleged in the NOA and SOC to have carried out wrongful conduct purportedly attributable to the ROK. On the contrary:

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<sup>72</sup> NOA and SOC, 12 July 2018, para 72.

- (a) in the trial of ██████,<sup>73</sup> the Seoul Central District Court found that the prosecution had failed to prove that Samsung's former Vice-Chairman, ██████, made explicit or implicit solicitations to ██████ in relation to the merger.<sup>74</sup> The Court found that the merger was "already resolved and concluded as of each private meeting [on 25 July 2015 and 15 February 2016]" between ██████;<sup>75</sup>
- (b) in the trial of Samsung's ██████, the Seoul High Court declined to find that ██████ paid bribes to ██████ in exchange for ██████ taking any actions in connection with the succession process in Samsung (through, among other things, the merger).<sup>76</sup> The Claimant states in its NOA and SOC that the Seoul Central District Court found that "Samsung bribed former President ██████ and her confidante ██████ with the expectation that they would assist in facilitating ██████'s succession",<sup>77</sup> but fails to mention that the Seoul High Court overturned that very finding;
- (c) in the trial of ██████, the former Minister of Health and Welfare, the Seoul High Court found only that ██████ had been "aware" of an instruction from ██████ to keep tabs on the NPS' exercise of its voting rights on the merger.<sup>78</sup> It did not find that there had been, or that ██████ had been aware of, an instruction from ██████ to procure the approval of the merger. Further and in any

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<sup>73</sup> ██████ was prosecuted for abuse of authority, coercion, bribery and divulgence of official secrets in relation to a range of events, not limited to events relating to Samsung and ██████. *See, generally*, Case No. 2017GoHap364-1 (Divided), Seoul Central District Court, 6 April 2018, **R-22**, in particular, p 1 (translations of the few hundred pages of the decision that deal with matters other than Samsung and ██████ have been omitted).

<sup>74</sup> Case No. 2017GoHap364-1 (Divided), Seoul Central District Court, 6 April 2018, **R-22**, pp 545-549.

<sup>75</sup> Case No. 2017GoHap364-1 (Divided), Seoul Central District Court, 6 April 2018, **R-22**, p 517.

<sup>76</sup> Case No. 2017No2556, Seoul High Court, 5 February 2018, **C-80**, pp 38-47.

<sup>77</sup> NOA and SOC, 12 July 2018, para 70b.

<sup>78</sup> Case No. 2017No1886, Seoul High Court, 14 November 2017, **C-79**, p 37.

event, the charges against ██████ were about duties owed to the NPS, and were no wider than that;<sup>79</sup> and

- (d) likewise, in the trial of ██████, the former Chief Investment Officer of the NPS, the Seoul High Court convicted ██████ for breaching the duty of care he owed to the NPS—not on any wider charges. In fact, the Court found that there was insufficient evidence that ██████’s actions had caused any loss to the NPS other than the loss of an opportunity to gain further benefits by negotiating with Samsung C&T.<sup>80</sup>

48. *Third*, the Korean criminal court decisions offer no evidence in support of the Claimant’s theory that it would have been able to transform Samsung C&T—a complex Korean conglomerate, with a long history—into a business worth vastly more than investors on the market were ever willing to pay for it. Much less do those decisions offer any evidence that the ROK prevented the Claimant from so doing. The criminal courts have been called upon to address altogether different questions, such as whether the former President had received or been offered bribes in return for or as a result of implicit or explicit solicitations; whether the former President was guilty of coercion or divulgence of official secrets; and whether duties owed to the NPS had been breached.

49. *Fourth*, the lower Korean criminal courts have not been able to agree on factual findings or decisions on various issues. In the various proceedings, the Seoul High Court reversed the Seoul District Court’s findings and decisions in several respects.<sup>81</sup> As the Claimant itself acknowledges,<sup>82</sup> all of the Korean criminal proceedings remain under appeal, pending determination by the

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<sup>79</sup> Case No. 2017No1886, Seoul High Court, 14 November 2017, C-79, pp 28-29.

<sup>80</sup> Case No. 2017No1886, Seoul High Court, 14 November 2017, C-79, p 67.

<sup>81</sup> *See, e.g.*, para 47(b) above.

<sup>82</sup> NOA and SOC, 12 July 2018, para 72.

Korean Supreme Court<sup>83</sup> and the Seoul High Court.<sup>84</sup> Pending such determination, factual findings in the lower courts' decisions are not final.<sup>85</sup>

50. *Fifth*, and in any event, the Claimant fails to identify the specific testimony or documentary evidence that it relies upon for the assertion that there is factual evidence that “confirms” a breach of international law, let alone a breach by the ROK. Nor does the Claimant explain on what basis a Tribunal applying international law, as opposed to a Korean court applying principles of Korean law, should make such a determination in respect of matters that remain pending before the Korean courts.
51. *Sixth*, the Korean civil courts in fact have, in two decisions not mentioned by the Claimant, validated the merger, finding that there were commercial reasons for it and for the NPS' approval of it, that the merger ratio at which it was concluded was not manifestly unfair, and that there was no evidence to

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<sup>83</sup> The Seoul High Court's decision in respect of ██████'s prosecution (*i.e.*, Case No. 2017No2556) is under appeal in Case No. 2018Do2738. *See* Extract from the Korean Supreme Court website on Supreme Court Case No. 2018Do2738 (the appeal from the Seoul High Court's decision in Case No. 2017No2556 on the prosecution of ██████), accessed on 30 July 2018, **R-29**. The Seoul High Court's consolidated decision in respect of both ██████'s prosecutions (*i.e.*, Case No. 2017No1886) is under appeal in Case No. 2017Do19635. *See* Extract from the Korean Supreme Court website on Supreme Court Case No. 2017Do19635 (the appeal from the Seoul High Court's decision in 2017No1886 on the prosecution of ██████), accessed on 30 July 2018, **R-28**.

<sup>84</sup> ██████ has withdrawn her appeal against the Seoul Central District Court's decision on the prosecution against her (in Case No. 2017GoHap364-1 (Divided), Seoul Central District Court, 6 April 2018, **R-22**), but the prosecution's appeal against that decision remains pending before the Seoul High Court (in Case No. 2018No1087). *See* Extract from the Korean Supreme Court website on Seoul Central District Court Case No. 2017GoHap184 (which consolidated Case No. 2017GoHap364), accessed on 13 August 2018, **R-35**.

<sup>85</sup> The Supreme Court may review a lower court's decision, including its factual findings, if the lower court made those findings in violation of law. Under Article 383(1) of the Korean Criminal Procedure Act, “[a] final appeal may be lodged against a judgment of the lower court [...] Where there has been a violation of the Constitution of the Republic of Korea, Acts, Ordinances, or regulations which have affected a decision of the court”. Korean Criminal Procedure Act, Art 383(1), **R-21**. Under Article 308 of the Korean Criminal Procedure Act, “[t]he probative value of evidence shall be left to the discretion of judges”. Korean Criminal Procedure Act, 7 January 2018, **R-21**, Art 308. The Supreme Court has held that the judge's discretion must be exercised in accordance with logical reasoning and empirical rules. *See* Case No. 2004Do2221, Supreme Court of Korea, 25 June 2004, **R-1**. If a lower court judge has failed to exercise such discretion in accordance with the principles of logical reasoning and empirical rules, and has made incorrect factual findings, a final appeal may be lodged against the judgment pursuant to Article 383(1) of the Korean Criminal Procedure Act.

support the claim that the Samsung Group had intervened in Samsung C&T's market price.<sup>86</sup>

**D. THE CLAIMANT'S INDICATION OF THE AMOUNT INVOLVED IN THE PRESENT CLAIM**

52. In the NOA and SOC, the Claimant asserts, without evidence, that its alleged losses "are currently estimated to total no less than approximately US\$770 million".<sup>87</sup>

53. It is remarkable that the Claimant is seeking more than three-quarters of a billion US dollars in damages from the ROK, but that its NOA and SOC provides neither fact evidence in support of its claim that it actually suffered loss as a result of the ROK's alleged conduct, nor expert valuation evidence in support of its claim that its loss is at least US\$770 million. Instead, the Claimant simply notes in passing that it "will further set out its case on damages and will quantify its losses in due course at an appropriate stage of these proceedings". As noted, above, this is contrary to the requirements of the UNCITRAL Rules, which the Claimant has chosen to apply to these proceedings, and the ROK reserves all of its rights, including with respect to costs.

54. On 25 July 2018, the ROK wrote to the Claimant seeking: (a) confirmation that the Claimant's "Notice of Arbitration and Statement of Claim dated 12 July 2018" was its Statement of Claim for the purposes of the Treaty; and (b) an explanation as to what was intended by the Claimant's statement that it would "further set out its case on damages and will quantify its losses in due course at an appropriate stage of these proceedings".<sup>88</sup> The Claimant

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<sup>86</sup> Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, **R-9**, pp 9-14; Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, **R-20**, pp 10-12, 17-27.

<sup>87</sup> NOA and SOC, 12 July 2018, para 109.

<sup>88</sup> Letter from Freshfields Bruckhaus Deringer to Three Crowns, 25 July 2018, **R-27**.

responded on 1 August 2018 with “no further comment”, and no witness or expert evidence in support of its claims.<sup>89</sup>

#### IV. PROCEDURAL MATTERS

##### A. THE ARBITRATION AGREEMENT AND APPLICABLE ARBITRATION RULES

55. The Claimant has submitted its claim against the ROK to arbitration under Article 11.16 of the Treaty, which provides in relevant part that:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

[...]

and

(ii) that the claimant has incurred loss or damages by reason of, or arising out of that breach;

[...]

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

[...]

(c) under the UNCITRAL Arbitration Rules;

[...]

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Letter from Three Crowns to Freshfields Bruckhaus Deringer, 1 August 2018, **R-31**. The Claimant’s counsel referred to *Renco Group v Peru* and *Ballantine v The Dominican Republic* as “precedents” on “how parties have implemented identical provisions of other FTAs [...] without controversy”. However, it does not appear that the States in those cases objected to the claimants’ submission of a notice of arbitration and statement of claim without accompanying factual witness and expert evidence.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):

[...]

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent;

[...]

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints;

[...] <sup>90</sup>

56. Article 11.28 of the Treaty defines "claimant" as "an investor of a Party that is a party to an investment dispute with the other Party".<sup>91</sup>

57. The Claimant delivered to the ROK written notice of its intention to submit its claim to arbitration on 13 April 2018.<sup>92</sup> The Claimant states that it has not been able to resolve the dispute since then, and therefore has elected to arbitrate under the UNCITRAL Rules.<sup>93</sup> Pursuant to Article 11.16(4)(c) of the Treaty, the Claimant submitted its Notice of Arbitration, together with its Statement of Claim, on 12 July 2018. Pursuant to Article 11.21(1) of the Treaty, the ROK transmitted a copy of the Claimant's NOA and SOC to the United States by diplomatic channels on 23 July 2018, and published it on the Korean Ministry of Justice's website on 26 July 2018.

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<sup>90</sup> Treaty, C-1, Art 11.16.

<sup>91</sup> Treaty, C-1, Art 11.28.

<sup>92</sup> Letter from Three Crowns to the Republic of Korea, 13 April 2018, R-23.

<sup>93</sup> NOA and SOC, 12 July 2018, paras 1, 110.

**B. APPOINTMENT OF ARBITRATOR**

58. The ROK appoints as arbitrator Mr J. Christopher Thomas QC. Mr Thomas' contact details are as follows:

Mr J. Christopher Thomas QC  
900 Waterfront Centre  
200 Burrard Street, PO Box 52  
Vancouver, British Columbia  
Canada, V7X-1T2

Email: jcthomas@thomas.ca

59. To the best of the ROK's knowledge, Mr Thomas is impartial and independent of the Parties. The ROK is unaware of any circumstances, past or present, likely to give rise to justifiable doubts as to Mr Thomas' impartiality or independence.
60. Pursuant to Article 11.19(3) of the Treaty, the presiding arbitrator shall be appointed by agreement between the Parties.<sup>94</sup>

**C. LANGUAGE OF ARBITRATION**

61. Pursuant to Article 11.20(3) of the Treaty, English and Korean shall be the official languages of this arbitration, including all hearings, submissions, decisions, and awards.
62. The ROK does not accept the Claimant's proposal that English be the sole language of this arbitration, with the exception that the ROK agrees that: (a) legal authorities that are originally published in English need not be translated into Korean; (b) only relevant portions of lengthy English and Korean fact exhibits need be translated into the other language; and (c) *inter partes* correspondence may be in English only.

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<sup>94</sup> Treaty, C-1, Art 11.19(3). If the presiding arbitrator is not appointed within 75 days of the date that a claim is submitted to arbitration (*i.e.*, within 45 days of the submission of this Response), either party may request that the Secretary-General of the International Centre for Settlement of Investment Disputes appoint that arbitrator.

**D. PLACE OF ARBITRATION**

63. Pursuant to Article 11.20 of the Treaty, the Parties may agree on the legal place of any arbitration. If the Parties fail to agree, the Tribunal shall determine the place in accordance with the UNCITRAL Rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.<sup>95</sup>

64. The ROK does not agree with the Claimant's proposal that London, United Kingdom, be the legal place of the arbitration. The ROK proposes that Singapore be the legal place of this arbitration, without prejudice to the Tribunal's discretion to hold hearings at any other physical venue it considers appropriate.

**E. ADMINISTRATION OF THE ARBITRATION**

65. The ROK agrees with the Claimant's proposal that the Permanent Court of Arbitration be designated to act as registry and administrator for the purposes of this arbitration.<sup>96</sup> For the avoidance of doubt, in accordance with Article 11.19(2) of the Treaty, the appointing authority shall remain the Secretary-General of ICSID.

**V. REQUEST FOR RELIEF**

66. For the reasons outlined above and that will be supplemented later in these proceedings, the ROK respectfully requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) ORDER the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the

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<sup>95</sup> Treaty, C-1, Art 11.20.

<sup>96</sup> NOA and SOC, 12 July 2018, para 118.

Tribunal and of any experts appointed by it, and the ROK's legal costs (both internal and external) and disbursements for this arbitration; and

- (c) ORDER such other and further relief as the Tribunal may deem appropriate.

## **VI. RESERVATION OF RIGHTS**

- 67. The ROK expressly reserves all of its rights in full, including, without limitation, its right to: (a) raise preliminary objections for determination on an expedited basis or otherwise; and (b) amend and supplement the positions set out in this Response, including its prayer for relief, including, without limitation, with respect to matters of jurisdiction and the merits.

Respectfully submitted on 13 August 2018



**Freshfields Bruckhaus Deringer**

Peter J. Turner QC  
Nicholas Lingard  
Robert Kirkness  
Joaquin Terceño  
Daniel Allen  
Callista Harris  
Samantha Tan



Moon Sung Lee  
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