Before the

PERMANENT COURT OF ARBITRATION (PCA)

ELLIOTT ASSOCIATES, L.P. (U.S.A.)
Claimant,

v.

REPUBLIC OF KOREA,
Respondent.

PCA Case N° 2018-51

ANNEX B

EALP'S REVISIONS TO THE ROK'S ANNEX TO THE SUBMISSION ON THE REMITTED ISSUE

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30 June 2026

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I. INTRODUCTION

1. In Procedural Order No. 23, the Tribunal noted that the Parties' counsel were well-positioned "to explain the relevance and materiality of the Additional Judgments to the issues before the Tribunal."[1] Accordingly, the ROK's counsel have prepared this Annex as a guide for the Tribunal to the Additional Judgments. EALP's revisions to the ROK's Annex are marked in blue text.

2. The Merger between SC&T and Cheil gave rise to numerous civil and criminal cases in the Republic of Korea. Different Korean courts have each adjudicated the various issues arising from the Merger, to the extent necessary and relevant in their respective cases. Those courts have issued the following judgments, among others:

   (a) R-389, Seoul Central District Court Judgment of 25 November 2022 in Case No. 2020*GaHap*600079 ("**Shareholder Claims District Court Judgment**")

   (b) R-391, Seoul Central District Court Judgment of 5 February 2024 in Case No. 2020GoHap718, 920 (Consolidated) ("**JY Lee Unlawful Merger District Court Judgment**")

   (c) R-392, Seoul High Court Judgment of 3 February 2025 in Case No. 2024No635 ("**JY Lee Unlawful Merger High Court Judgment**")

   (d) R-393, Supreme Court Judgment of 17 July 2025 in Case No. 2025Do2805 ("**JY Lee Unlawful Merger Supreme Court Judgment**"; together with the JY Lee Unlawful Merger District Court Judgment and the JY Lee Unlawful Merger High Court Judgment, "**JY Lee Unlawful Merger Judgments**")

   (e) R-390, Seoul High Court Judgment of 12 February 2026 in Case No.2023Na2000796 ("Shareholder Claims High Court Judgment"; together with the Shareholder Claims District Court Judgment, "**Shareholder Claims Judgments**")

[1] Procedural Order No. 23, ¶ 34.

II. OVERVIEW AND SUMMARY OF THE SHAREHOLDER CLAIMS JUDGMENTS

1. *Overview*

3. This Section summarizes the two Shareholder Claims Judgments: (i) the first-instance judgment of 25 November 2022 and (ii) the second-instance judgment of 12 February 2026, in which individuals who held shares in SC&T as it existed before its merger by absorption with Cheil sought damages from the ROK on the theory that an abuse of authority by a public official (Minister Hyung-pyo Moon) caused the NPS to approve the Merger, to the shareholders' detriment.

4. The Shareholder Claims Judgments share a common factual matrix with this arbitration, given that, like Claimant, the plaintiffs were former shareholders of SC&T seeking compensation from the ROK.

5. The Shareholder Claims District Court Judgment was rendered on 25 November 2022, and the Shareholder Claims High Court Judgment, on the appeal brought by 14 of the first-instance co-plaintiffs, was rendered on 12 February 2026. Following the second-instance judgment, no further appeal was taken, and the judgment became final and conclusive.

2. *Parties and Intervenor*

6. The Shareholder Claims case was brought against the Republic of Korea by 72 former shareholders of SC&T.

7. Separately, under Article 71 of the Civil Procedure Act, a third party with an interest in the outcome of litigation may intervene in pending proceedings to assist one of the parties; this is referred to as auxiliary intervention (*bojochamga*).[2] The NPS intervened in support of the defendant at both the first and second instances.

3. *Structure of the Judgments*

8. The Shareholder Claims Judgments consist of the formal particulars, the order, the

[2] **RLA-181**, Korean Civil Procedure Act, Act No. 19516, 12 July 2025 (Auxiliary Intervention), Art. 71 ("A third party who has an interest in the outcome of litigation may intervene in pending proceedings before a court in order to assist one of the parties. This shall not apply, however, where such intervention would significantly delay the proceedings.")

relief sought (including, for the second instance, the relief sought on appeal), and the reasons. The reasons of the Shareholder Claims District Court Judgment are organized in the following order: (1) "Factual Background," (2) "Arguments of the Parties," (3) "Decision on the Preliminary Objection," and (4) "Decision on the Merits" (applicable legal principles, followed by a discussion of whether the elements are established, followed by the conclusion). The reasons of the Shareholder Claims High Court Judgment are divided into "Adoption of the First-instance Judgment," "Part to be Modified," and "Additional Findings" (concerning the plaintiffs' claim for compensation for psychological harm, raised for the first time on appeal).

4. *Factual Background*

9. The factual background sets out the court's factual findings regarding the status of the parties, the background of the Merger, followed by a summary of the Moon/Hong criminal proceedings and Appraisal Price proceedings, which can be further summarized as follows:[3]

(a) The Background to the Merger of the former SC&T and Cheil

(i) On 26 May 2015, the former SC&T and Cheil entered into a merger agreement (**"Merger Agreement"**). Under the Merger Agreement, the former SC&T would be absorbed into Cheil at a merger ratio of 1: 0.3500885. On 17 July 2015, the former SC&T passed a resolution at a general meeting of shareholders, approving the Merger Agreement. 69.53% of the former SC&T shares present (58.91% of the total issued shares) voted in favour, including the NPS, which held 11.21% of former SC&T's issued shares. On 2 September 2015, the merger took effect, with Cheil absorbing former SC&T and changing its name to SC&T Corporation.

(b) Summary of Moon/Hong Proceedings

(i) Following the announcement of the Merger, the research team within the NPS's Investment Management Division concluded that a merger ratio of '1 (Cheil): 0.35 (former SC&T)' would result in a

[3] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 2-7.

loss to the NPS. Furthermore, the Korean Corporate Governance Service and domestic and international proxy advisory firms recommended opposing the Merger on grounds including the calculated merger ratio being unfavourable to shareholders of former SC&T.

(ii) In a structurally similar prior merger between SK C&C and SK, the NPS's Investment Committee (**"IC"**) referred the matter to the Expert Voting Committee (**"EVC"**), which ultimately opposed the merger. In early July 2015, the NPS's Responsible Investment Team under the NPSIM's Investment Strategy Division, in charge of administering the exercise of voting rights in the Merger, was of the view that it would be appropriate to refer the matter of the Merger to the Expert Voting Committee, in accordance with the SK C&C and SK merger precedent. Despite this precedent, from late June 2015 and in numerous occasions, MHW officials, acting under instructions from Minister Moon, conveyed to the NPS that the decision on the Merger should be made by the NPS's IC, and made remarks to the effect that the NPS approve the Merger.

(iii) Under the direction of CIO Hong, the NPS's Research Team produced within one day an analysis stating that the Merger would generate synergy effects of approximately KRW 2.1 trillion, without conducting a substantive review of actual merger synergies, which projected that this would offset the NPS's losses of KRW 138.8 billion arising from the Merger. The synergy analysis was presented at the IC meeting on 10 July 2015 as offsetting the NPS's losses. CIO Hong also contacted certain members of the IC individually to suggest them to vote in favour of the Merger resolution. On 17 July 2015, the IC voted 8 for, 1 against and 3 abstained to approve the Merger, and the NPS exercised its 11.21% shareholding in SC&T to vote in favour.

(iv) Minister Moon was convicted of abuse of authority and obstruction of exercise of rights, through MHW officials, by making CIO Hong perform acts that he was not obliged, by having CIO Hong report that the Merger would be decided by the NPS IC rather than the EVC and persuading some IC members to vote in favour of the Merger, and have [redacted] to explain to IC members fabricated synergy figures to induce a vote in favour. CIO Hong was convicted of occupational breach of duty to the NPS for presenting fabricated synergy projections to the IC and failing to act in the NPS's interests, causing unquantified losses to the NPS. Both were sentenced to 2.5 years in prison (Seoul High Court Case No. 2017*No*1886), and the appeal was dismissed.

(c) Summary of Appraisal Price Proceedings

(i) Shareholders of the former Samsung C&T, including Ilsung Pharmaceuticals and other dissenting shareholders, notified their opposition to the resolution of the general meeting of shareholders regarding the Merger in July 2015 and made a stock appraisal claim of their respective shares. After Samsung C&T offered KRW 57,234 per share, calculated under the Capital Markets Act and its Enforcement Decree, the shareholders challenged the valuation and filed a claim for stock appraisal before the Seoul Central District Court on 26 August 2015 (Case No. 2015BiHap91).

(ii) The Seoul Central District Court initially upheld Samsung C&T's proposed appraisal price of KRW 57,234 per share for the 3,307,070 common shares. On appeal, however, the Seoul High Court increased the appraisal price to KRW 66,602 per share. Both the shareholders and the merged Samsung C&T appealed to the Supreme Court, but the Supreme Court dismissed the appeals on April 14, 2022, thereby finalizing the Seoul High Court's determination that the fair appraisal price was KRW 66,602 per share.

10. In the Shareholder Claims Judgments, there are no clear references to the primary evidence of government intervention that was considered in the Moon/Hong proceedings. It is thus unclear whether this evidence was considered by the court in the Shareholder Claims proceedings. The court also did not overturn any of the

factual findings of or primary evidence from the Moon/Hong criminal proceedings.

5. The Claims

11. The plaintiffs raised a tort claim against the Republic of Korea that, because Hyung-pyo Moon's abuse of authority encouraged the NPS to approve the Merger and thereby caused the Merger to be approved, the defendant, as a joint tortfeasor[4] together with the NPS, must compensate them for the loss equal to the difference between the fair value and the merger price.[5]

(a) Because the action was brought against the State, the claim arose under the State Compensation Act and was, in essence, one of tort liability. Article 2 of the State Compensation Act provides that the State is liable where a public official, in the course of performing official duties, causes damage to another intentionally or negligently and in violation of the law.[6] As the Shareholder Claims District Court recognized, this requires a causal relationship between the public official's breach of official duty and the damage incurred.[7]

(b) Because such a claim is, in essence, one of tort liability, its requirements substantially track the elements of a tort under the Civil Code: (1) an intentional or negligent act; (2) the "unlawfulness" of the act; (3) the occurrence of damage; and (4) a causal relationship between the unlawful act and the occurrence of damage.[8]

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[4] **RLA-182**, Korean Civil Code, Act No. 21454, 17 March 2026 (Liability of Joint Tortfeasors), Art. 760(1) (providing that, in setting out the liability of joint tortfeasors, "if two or more persons have by their joint unlawful acts caused damages to another, they shall be jointly and severally liable to make compensation for such damages.").

[5] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 7–8.

[6] **RLA-183**, Korean State Compensation Act, 7 January 2025, Art. 2 (providing that, "Where public officials or private persons entrusted with public duties (hereinafter referred to as "public officials") inflict damage on other persons by intention or negligence in performing their official duties, in violation of the statutes … the State or local governments shall compensate for such damage pursuant to this Act.")

[7] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 10.

[8] **RLA-182**, Korean Civil Code, Act No. 21454, 17 March 2026 (Definition of Tort), Art. 750 (defining a tort as follows: "Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising

(c) The burden of proving these requirements lies with the plaintiff (the injured party). Under the principles of civil procedure, the requisite standard of proof requires establishing a high degree of probability (likelihood), sufficient to recognize the existence of a fact by comprehensively reviewing all evidence in light of the rules of experience. Furthermore, this high degree of probability must reach a sufficient level of certainty that an ordinary, reasonable person would not entertain any doubt.[9]

(d) With respect to the requirement of a causal relationship between (i) the public official's violation of his or her official duties (or another relevant unlawful act) and (ii) the occurrence of damage, the Supreme Court explains the causal relationship between an unlawful act and damage according to the theory of proximate causation: "In order to fall within the scope of damages arising from a tort, it is not sufficient that there be a natural or factual causal relationship between the tort and the damage; there must also be an ideological or legal causal relationship, that is, a proximate causal relationship."[10]

(e) The Supreme Court has further stated that the existence of a proximate causal relationship "must be determined by comprehensively considering the likelihood of the occurrence of the result, the manner of the unlawful act, the nature of the infringed interest, and the like,"[1110] thereby providing a provisional standard for determining proximate causation while leaving it to the trial court to make its determination, by comprehensively considering various matters in the specific case.

(f) Under the above Supreme Court precedents on proximate causation, Korean law does not impose on a tortfeasor the obligation to compensate for all damage caused by the unlawful act. Rather, the obligation to compensate exists only for damage for which a causal relationship is

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therefrom.").

[9] **RLA-184**, Supreme Court of Korea Case No. 2012Da65331, 29 November 2012.

[10] **RLA-185**, Supreme Court of Korea Case No. 2012Da78825, 20 March 2015.

[11] **RLA-186**, Supreme Court of Korea Case No. 2010Da102755, 26 April 2012.

recognized in accordance with the legal assessment of "proximity."

12. In the alternative, the plaintiffs argued that the defendant was liable for damages because it had "functional control" over the NPS's conduct. The plaintiffs also brought a claim alleging that the defendant had infringed the shareholders' "freedom to exercise their voting rights" and "freedom to form collective decisions."[12]

13. Finally, the plaintiffs at the appellate stage added, in the alternative, a claim for compensation for pain and suffering on the ground that the defendant's unlawful intervention constituted a tort infringing the freedom to exercise voting rights and the freedom to form collective decisions, which are encompassed within the constitutional freedom of association. The plaintiffs claimed that such compensation was payable even if proximate causation was denied.[13]

6. The Court's Decision on Each Claim and the Principal Grounds

Shareholder Claims District Court Judgment

14. Consistent with the Supreme Court precedents,[14] the first-instance court in this case held that, "in order for the State to be held liable for compensation based on one of its public official's violation of his or her duties, a proximate causal relationship between the public official's violation of his or her duties and the Plaintiffs' damages must be found."[15]

15. The first-instance court then dismissed all of the plaintiffs' principal and alternative claims, holding, for the following reasons, that no proximate causal relationship was recognized between the public official's abuse of authority

[12] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 8.

[13] **Ex. R-390**, Shareholder Claims High Court Judgment, p. 7.

[14] The first-instance court referred to Supreme Court Judgment Case No. 2014Da225083 dated 25 August 2016, which ruled that "[i]n order to determine whether such a proximate causal relationship is found, a comprehensive consideration of factors such as the probability of a typical outcome as well as the purpose of code of conduct, including laws and regulations, which impose the duties, and the nature of the liable act and the degree of damage is required". **Ex. R-390**, Shareholder Claims High Court Judgment, p. 10.

[15] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 10.

and the plaintiffs' damage.[16]

(a) The possible impact of Minister Moon's conduct on the Plaintiffs' losses: Based on the admitted facts below, the first-instance court found that there is room to find that the Defendant MHW Minister Hyung-pyo Moon's actions of abuse of authority may have affected the result of, due to the passing of the Merger Agreement by vote, the Plaintiffs being issued shares of Cheil at a merger value which is lower than the stock appraisal price determined in the Stock Appraisal Proceedings, because:[17]

(i) the Defendant's MHW Minister Hyung-pyo Moon abused his supervisory power over [the NPS], (1) by having Wan-seon Hong, the Head of the Investment Management Division of [the NPS], (a) to report that the Merger agenda at issue would be determined by the Investment Committee rather than the Expert Voting Committee, and (b) to suggest to certain members of the Investment Committee to vote for the Merger and have [redacted] to explain the fabricated figures of merger synergy effect to encourage favorable votes for the Merger, and (2) by having [redacted] to explain the fabricated figures of merger synergy effect to the Investment Committee members and to encourage favorable votes for the Merger, thereby having Wan-seon Hong and [redacted] perform conduct not to be performed;

(ii) the matter of the Merger was approved at [the NPS]'s Investment Committee, and consequently the [NPS], as the shareholder holding 11.21% of former SC&T, voted for the Merger at the former SC&T shareholders' meeting dated 17 July 2015;

(iii) the resolution on the Merger was approved at the former SC&T shareholders' meeting;

[16] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 10–14. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 36-38.
[17] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 11.

(iv) Plaintiffs, as shareholders of the former SC&T were issued 0.3500885 common shares per every common stock held at the date of the Merger based on Cheil's merger value of KRW 159,294 and that of former SC&T at KRW 55,767; and

(v) as aforementioned, the stock price of former SC&T is lower than the stock appraisal price of KRW 66,602 as determined in the Stock Reappraisal Proceedings.[18]

(b) General principles of attribution of liability and proximate causation: The first-instance court held that, because the independent act of the NPS in exercising its shareholder rights constituted an intervening act, attributing liability to the defendant would require (i) a joint tort by the public official and the NPS, (ii) that the official's unlawful act "deprived the [NPS]'s freedom to make decisions to the extent that the NPS has been used as an instrument," or (iii) at least that the NPS's exercise of its shareholder rights resulted from a defective declaration of intent, such as by deception or coercion.[19]

(c) Absence of a joint tort: Because a shareholder's exercise of voting rights is not the handling of another shareholder's affairs, the NPS's exercise of voting rights cannot constitute a breach of a duty of care or a breach of trust toward the plaintiffs, and no joint tort under Article 760(1) of the Civil Code was established.[20]

(d) Absence of use as an instrument or of a defective declaration of intent: The court acknowledged the previous criminal court's findings concerning Hyung-pyo Moon and Wan-seon Hong ("**Moon/Hong Criminal Judgments**") and stated the following: "It is acknowledged that the Defendant's public officials exercised a certain degree of influence over the decision-making process of the [NPS]'s Investment Committee, in that

[18] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 10-11.

[19] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 12.

[20] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 12.

Hyung-pyo Moon and others instructed Wan-seon Hong, Chief Investment Officer of [NPS], to have the Investment Committee decide whether to approve or oppose the Merger, and Wan seon Hong [sic], having determined that the Investment Committee would decide the matter, directed the preparation of analyses on the projected synergy effects of the Merger and encouraged the Investment Committee members to vote in favor of the Merger."[21] However, the court found that it is difficult to conclude that the conduct of Hyung-pyo Moon and Wan-seon Hong affected the Investment Committee's decision: "[I]t is difficult to find that the acts of Hyung-pyo Moon and Wan-seon Hong actually affected the exercise of voting rights by the [NPS]'s Investment Committee."[22] This conclusion was based on, among other things, (i) the fact that the roll-call voting method was not necessarily favorable to securing an "Agree" vote at the Investment Committee; (ii) the fact that all members of the Investment Committee, as experts, were aware that the synergy figures could not be accurately quantified and, in fact, concerns raised by certain members led to discussions on this issue during the Investment Committee meeting; and, therefore, "it cannot be said that the members believed the losses that would be caused by the reduction of the number of shares as a result of the Merger could be recovered on the basis of the synergy analysis alone"; and (iii) the fact that various factors beyond synergy effects, such as changes in the governance structure, the impact on share prices of relevant securities and Samsung Group affiliates, the impact on the stock market, the impact on the economy, and the impact on fund management if the Merger fell through were comprehensively considered by the Investment Committee members.[23] The court stated that "it cannot be found that [the NPS]'s consent to the Merger was a result of the Defendant's control over [the NPS]'s conduct so much so that [the NPS] served as an instrument for the

[21] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 12.
[22] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 36-38.
[23] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 39.

Defendant's unlawful acts. It also cannot be found that the Defendant through deceit or coercion actually affected [the NPS]'s decision in a manner exceeding that of an instruction or a suggestion, so much so that [the NPS] did not exercise its voting rights based on its free will."[24]

(e) Fairness of the Merger Ratio: Citing the Merger Annulment Proceedings,[25] the court found that "the merger ratio had not reached a level of gross unfairness."[26] The court also found that "[t]here is no further evidence to establish otherwise that the merger ratio had reached the level of gross unfairness."[27] The court concluded that, insofar as the Merger Ratio had not reached the level of gross unfairness, there was no proximate causal relationship between the official's conduct and the loss incurred by the shareholders who did not exercise their appraisal rights.[28]

16. As to the plaintiffs' claim that their freedom to exercise voting rights had been infringed, the first-instance court rejected the assertion on the ground that, since the NPS exercised its shareholder rights of its own free will, it was difficult to find that the defendant had infringed the freedom of other shareholders.[29]

Shareholder Claims High Court Judgment

17. The plaintiffs on appeal added a claim for compensation based on pain and suffering in the alternative, but the second-instance court adopted the first-instance judgment in its entirety and dismissed the appeal, citing, among other grounds, (i) that the exercise of voting rights is not the handling of other shareholders'

[24] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 36-39.

[25] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

[26] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 17.

[27] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 17.

[28] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 36.

[29] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 13–14. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 36.

affairs, (ii) that there was no evidence that the plaintiffs' own exercise of voting rights had been obstructed, and (iii) that the mere fact that the merger proposal was approved cannot establish psychological harm exceeding the tolerable limit.[30]

18. As part of the court's modified findings of the lower court, the appeal court found that the factual findings and determination on the legal points in the Elliott and Mason Awards cannot be relied upon to establish find proximate causation between the ROK's acts and the plaintiffs' losses for the following reasons, drawing a distinction between the legal tests to establish factual and legal causation in investor-state arbitration and in the domestic shareholders' compensation claim:

(a) "… arbitration strongly operates under the principle of private autonomy, as parties voluntarily agree to resolve disputes through arbitration rather than through a court judgment and voluntarily accept the awards rendered by the arbitral tribunal constituted under such agreement. In addition, the Investor-State Dispute Settlement (ISDS) is a procedure for resolving investment disputes set forth in an investment treaty, under which a foreign investor, may initiate arbitration against the host state, alleging that it has suffered investment losses as a result of the host state's breach of an investment treaty, and the dispute is resolved by the ruling of an international arbitral institution; as such, its jurisdiction, procedures, and applicable law differ in nature from domestic judicial proceedings. Therefore, the results of the aforementioned arbitration awards cannot be considered binding on this Court."[31]

(b) "Specifically, these arbitral awards appear to have merely recognised the causal relationship between the Defendant's measures and the damages suffered by the U.S. investor from an international law perspective in relation to the Korea-U.S.A. Free Trade Agreement. They did not determine

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[30] **Ex. R-390**, Shareholder Claims High Court Judgment, p. 8. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 36-38.

[31] **Ex. R-390**, Shareholder Claims High Court Judgment, p. 6.

whether, on the premise that the [NPS]'s exercise of voting rights was an exercise of its inherent right as a shareholder, a proximate causal relationship existed under domestic law between the abuse of authority by the Defendant's public official and the damages suffered by other shareholders. Indeed, in the international investment dispute between Elliott and the Defendant, the arbitral tribunal did no more than determine—on the premise that the [NPS] constituted a de facto state organ and thus its actions are attributable to the Defendant as the relevant state party under international law —that factual and legal causation existed between the [NPS]'s exercise of voting rights and the damages suffered by shareholders including Elliott."[32]

(c) "Moreover, it seems that, while the arbitral tribunal in the ISDS between Mason and the Defendant determined that the [NPS]'s actions were not attributable to the Defendant but nevertheless recognised a causal relationship between the Defendant's unlawful intervention and the shareholders' damages, the award appears to have recognised that the requirements for establishing the Defendant's liability for damages under the Korea-U.S.A. Free Trade Agreement are distinct from, and differ from, those under domestic law, in stating that "Mason and other shareholders are not seeking to hold the [NPS] liable for the breach of a duty of care vis-á-vis other shareholders under Korean law" or that "the absence of the [NPS]'s liability under Korean law does not extinguish Defendant's liability under international law"."[33]

19. In short, the Shareholder Claims Judgments denied any proximate causal relationship between the public official's abuse of authority and the damage to the plaintiffs.

[32] **Ex. R-390**, Shareholder Claims High Court Judgment, pp. 6-7.
[33] **Ex. R-390**, Shareholder Claims High Court Judgment, p. 7.

III. OVERVIEW AND SUMMARY OF THE JY LEE UNLAWFUL MERGER JUDGMENTS

1. *Overview*

20. The JY Lee Unlawful Merger Judgments address a total of 24 charges against 14 defendants, concerning (1) violation of the Financial Investment Services and Capital Markets Act (the "Capital Markets Act," Act No. 12947), (2) breach of occupational trust, (3) violation of the Act on External Audit of Stock Companies (the "External Audit Act," Act No. 12715), and (4) perjury. At first instance, Case No. 2020*GoHap*718 and Case No. 2020*GoHap*920 with different defendants (explained further in paragraph 19 below) were consolidated and tried together.

21. The first-instance court acquitted all defendants of all charges. The Prosecution appealed against all of the acquittals, but the second-instance court dismissed the appeal in its entirety.[34] The Prosecution then appealed to the Supreme Court against all of the acquittals, but the Supreme Court dismissed the appeal in its entirety, thereby rendering the acquittals of all defendants final.[35]

22. Unlike the Shareholder Claims Judgments, the JY Lee Unlawful Merger Judgments do not have a separate section comprehensively setting out the court's factual findings. In the JY Lee Unlawful Merger Judgments, there are no clear references to the primary evidence of government intervention that was considered in the Moon/Hong proceedings. It is thus unclear whether this evidence was considered by the court in the JY Lee Unlawful Merger proceedings. The court in these proceedings also did not overturn any of the factual findings of or primary evidence from the Moon/Hong proceedings.

2. *The Defendants*

23. There are 14 defendants in the JY Lee Unlawful Merger Judgments. The 11 defendants in Case No. 2020*GoHap*718 are: (i) JY Lee; (ii) B, C, D, E, and F, who are related to the Samsung Group's Future Strategy Office ("FSO"); (iii) G, H, and I, who are related to SC&T; and (iv) J and K, who are related to Samsung Biologics

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[34] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 856–857.

[35] **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, p. 5.

and Samsung Bioepis.[36] The three defendants in Case No. 2020*GoHap*920 are Accounting Firm N and its accountants L and M.

3. *Structure of the JY Lee Unlawful Merger Judgments*

Structure of the JY Lee Unlawful Merger District Court Judgment

24. The JY Lee Unlawful Merger District Court Judgment is broadly composed of (a) the part concerning Case No. 2020*GoHap*718, (b) the part concerning Case No. 2020*GoHap*920, and (c) the conclusion.

25. The part concerning Case No. 2020*GoHap*718 consists of (i) the summary of charges, (ii) the decision on the admissibility of evidence, and (iii) the decision on each charge. With respect to (i), the summary of charges sets out the alleged offenses as asserted by the Prosecution in indicting the defendants. It reflects the Prosecution's allegations only, and does not represent any determination by the court. With respect to (ii), the decision on the admissibility of evidence sets out the summary of relevant arguments of the defendants' counsel, the related legal principles, the established facts, and the court's decision. With respect to (iii), the decision on each charge sets out, for each charge, the summary of the Prosecution's allegation and the arguments of the defendants' counsel, the related legal principles, the established facts, and the court's decision.

26. The part concerning Case No. 2020*GoHap*920 consists of (i) the summary of charges, (ii) arguments of the defendants' counsel, and (iii) the court's decision.

27. The conclusion sets out the court's decision on all of the charges against the defendants.

Structure of the JY Lee Unlawful Merger High Court Judgment

28. As the appellate court, the second-instance court identified "issues" for review based on the Prosecution's grounds of appeal and ruled on them. In accordance with the structure of the Prosecution's Statement of Appeal, the JY Lee Unlawful Merger High Court Judgment is broadly composed of (a) the decision on

[36] This classification follows that in the JY Lee Unlawful Merger District Court Judgment (**Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 4–7).

the admissibility of evidence, (b) the decision on charges for unfair trading practices (alleged violations of the Capital Markets Act), (c) the decision on charges for fraudulent accounting (alleged violations of the External Audit Act), (d) the decision on charges for breach of occupational trust and perjury, and (e) the conclusion.

(a) The decision on the admissibility of evidence sets out the court's decision on the Prosecution's grounds of appeal regarding evidence that was determined as inadmissible at the first instance, and the court's decision on the additional evidence submitted by the Prosecution at the second instance.

(b) The decisions on charges for unfair trading practices, fraudulent accounting, and breach of occupational trust and perjury are each composed of a general discussion, a detailed discussion, and a sub-conclusion. The detailed discussion sets out, for each charge, (i) the summary of the charge in the indictment, (ii) the summary of the Prosecution's grounds of appeal, (iii) the summary of the lower court's judgment and its principal grounds, (iv) the summary of the Prosecution's detailed allegations on the issues identified by the second-instance court, followed by the summary of the response of the defendants' counsel, and (v) the second-instance court's decision.

(c) The conclusion sets out the court's decision on the Prosecution's grounds of appeal against the defendants.

<u>Structure of the JY Lee Unlawful Merger Supreme Court Judgment</u>

29. As the court of final appeal, the Supreme Court ruled on the Prosecution's grounds of appeal on questions of law, not fact. In accordance with the structure of the Prosecution's Statement of Final Appeal, the JY Lee Unlawful Merger Supreme Court Judgment is composed of the decisions on the grounds of final appeal concerning (a) the admissibility of evidence, (b) the violations of the Capital Markets Act, (c) the violation of the External Audit Act, (d) breach of occupational trust and perjury, and (e) the conclusion.

30. The following sections summarize the charges against the defendants, the first-instance court's judgment and its principal grounds (as stated by the second-instance court), the Prosecution's detailed allegations on the issues identified by the second-instance court, and the second-instance court's decision thereon. As the Supreme Court adjudicated only on matters of law, and the second-instance court was the last instance to determine the facts, the following sections are structured around the JY Lee Unlawful Merger High Court Judgment.

31. The summaries are limited to the charges relevant to the issues in this Arbitration, namely violation of the Capital Markets Act and breach of occupational trust.

4. *Charges against the Defendants*

Violation of the Capital Markets Act

32. With respect to the violation of the Capital Markets Act, 16 charges were brought in the indictment against the defendants JY Lee, B, C, D, E, G, H, and I,[37] alleging violations of Articles 176(2)(i) and 176(3) (Prohibition on market manipulation, etc.) and Articles 178(1)(i), 178(1)(ii), and 178(2) (Prohibition on unfair trading, etc.) (charges Nos. 1-16).[38] Subsequently, the second-instance court requested the Prosecution to specify the applicable provisions of the law and the number of offenses for the alleged violations of the Capital Markets Act, in particular the offenses regarding "unfair trading."[39] The Prosecution added the "formulation of further illicit plans to secure the merger" to the acts set out in the indictment (charges Nos. 1-16), thereby identifying 17 individual instances of alleged violation of the Capital Markets Act.[40]

33. Articles 176(2)(i), 176(3), 178(1)(i), 178(1)(ii), and 178(2) of the Capital Markets

[37] For the purposes of this Annex, the identification of the defendants for each charge is not material. Accordingly, the defendants in each charge are hereinafter collectively referred to as the "related defendants."

[38] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 69; **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. xxiii.

[39] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 69–70. This was because "Article 178(1) and (2) employ a number of vague concepts, as follows: in particular, the interpretation of 'unlawful (means, etc.)' in Subsection (1)(i), 'false statements regarding material matters' in Subsection (1)(ii), and 'fraud' in Subsection (2), as well as the relationship between these provisions, are open to question."

[40] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 70–71.

Act are reproduced below.[41]

Article 176 (Prohibition on Market Price Manipulation, etc.)

(2) No one shall engage in any of the following acts with intent to attract anyone to trade listed securities or exchange-traded derivatives:

i. Misleading any person into misapprehending that the trading of such securities or derivatives is in a bull market, or selling or purchasing, or entrusting or being entrusted with the sale or purchase of, such securities or derivatives to cause a fluctuation in the market price (referring to the market price formed in the securities market or the derivatives market, or the market price formed in the course of intermediating the trading of listed stocks through an alternative trading system, or other market price prescribed by Presidential Decree; hereinafter the same shall apply);

(3) No one shall engage in making purchases or sales in connection with listed securities or exchange-traded derivatives or shall entrust or be entrusted with such act, with intent to fix or stabilize the market price of the listed securities or exchange-traded derivatives; provided, this shall not apply in any of the following cases:

i. Where an investment trader (limited to an investment trader who has entered into an underwriting contract with the issuer or owner of the securities subject to public offering or sale; hereafter in this Article the same shall apply) trades such securities with intent to make the public offering or sale of the securities smooth by stabilizing the price of the securities (hereafter in this paragraph referred to as "manipulation for stabilization") during the period beginning on a day prescribed by Presidential Decree not exceeding 30 days before the end of the subscription period for the public offering or sale of the securities, and ending on the expiration of the subscription period;

ii. Where an investment trader trades securities to create supply and demand (hereafter in this paragraph referred to as "market creation") for the securities publicly offered or sold in a manner prescribed by Presidential Decree during a period prescribed by Presidential Decree not exceeding six months from the day on which the securities are listed;

iii. Where a person prescribed by Presidential Decree, such as an executive officer of the issuer of securities publicly offered or sold, entrusts an investment trader with manipulation for stabilization;

iv. Where an investment trader is entrusted with manipulation for stabilization in accordance with subparagraph 3;

v. Where an underwriter of securities publicly offered or sold, entrusts an investment trader with market creation;

vi. Where an investment trader is entrusted to create market in accordance with subparagraph 5.

Article 178 (Prohibition on Unfair Trading, etc.)

[41] **RLA-187**, Financial Investment Services and Capital Markets Act, Act No. 12947 , 1 July 2015, Arts. 176 and 178.

(1) No one shall commit any of the following acts in connection with trading (including public offering, private placement, and sale in case of securities; hereafter in this Article and Article 179 the same shall apply) or other transaction of financial investment instruments:
i. Utilizing an unfair means, scheme, or trick;
ii. Attempting to earn money or any interest in property, by using a document containing a false description or representation of a material fact, or an omission of a description or representation of a material fact necessary for preventing others from being misled, or any other description or representation; (2) No one shall disseminate a rumor, use a deceptive scheme, or use force or make a threat, with intent to trade or make any other transaction in financial investment instruments or attempt to cause a fluctuation in the market price.

34. For each charge, the Prosecution specified individual acts of unfair trading and identified the applicable provisions, as set out in Prosecution's Argument: Table of the Charges below.[42]

Prosecution's Argument: Table of the Charges

		Applicable Law		
No.	**Table of Contents of the Indictment and Individual Counts**	Article 178(1)(i) (Unfair means, etc.)	Article 178(1)(ii) (False statements, etc.)	Article 178(2) (Deception)
1	**II-1.~4. Crimes committed at the phase of board of directors decision and merger agreement**			
	(a) April 2015: The arbitrary merger decision and instructions for implementation of the Merger	○		
	(b) May 2015: Preparation of a false merger ratio review report; fabrication of false merger synergies and figures; and a pro forma board resolution, etc.	○		
	(c) After May 2015: False disclosures, dissemination of merger-related press releases, holding analyst briefings, etc.	○	○	○
2	**III-1. Formulation of further illicit plans to secure the merger**			
	(a) June 2015: Formulation of an emergency response strategy to ensure the merger goes ahead	○		
	III-2-① Divestment of Company X's treasury shares for the purpose of securing voting rights			

[42] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 70–71.

3	(a) June 2015: Promise of financial benefits to Company BU; Board resolution regarding the divestment of Company X's treasury shares	○		
	(b) June 2015: Dissemination of false information to the media and investors	○		○
4	**III-2-②-a Concealment and misrepresentation of restrictions regarding controlling rights over the bio-subsidiary, Company AA**			
	(a) May–June 2015: Company S's merger prospectus, amended merger prospectus, merger investment memorandum and shareholder briefing materials	○	○	○
	(b) June–July 2015: Corporate presentations, press briefings and presentation materials on 'Future Business Management Plans'	○	○	○
5	**III-2-②-b False disclosure of investment risks arising from the creation of new circular shareholdings**			
	(a) June 2015: False disclosures concerning securities registration statements and supplementary documents for proxy voting solicitations		○	○
	(b) July 2015: False representation to AD during meeting	○		○
6	**III-2-②-c False disclosure regarding the proposed divestment of shares in Company Q, a major asset of Company S**			
	(a) May–June 2015: False disclosure in the securities registration statement and final prospectus relating to the merger	○	○	○
7	**III-2-③-b Dissemination of false information through contact with overseas investors and proxy advisory firms**			
	(a) June 2015: Dissemination of false information to Company CQ	○	○	○
	(b) June–July 2015: Dissemination of false information to DP Investment Agency, Company DQ, Company AE and Company DT	○	○	○
8	**III-2-③-c Dissemination of false information through the distribution of shareholder briefing materials and public disclosures**			
	(a) June–July 2015: Distribution of shareholder briefing materials containing false information, shareholder newsletters containing false information, and Company CQ's rebuttal materials	○	○	○
	(b) May–June 2015: Disclosure of various false merger-related materials	○	○	○

	(c) June–July 2015: Disclosure and provision of false supplementary materials to solicit proxy votes	○	○	○
9	**III-2-③-d Interference in the preparation of an analysis report by a financial investment firm, resulting in the misrepresentation of its contents**			
	(a) June–July 2015: Interference, including pressuring an analyst at Company DX not to publish a report unfavorable to the Merger	○		○
	(b) July 2015: Imposition of pressure on an analyst at Company EE to delete information unfavorable to the Merger and then encouraging its publication	○		○
10	**III-2-③-e Deliberate manipulation of public opinion to distort investor decision-making**			
	(a) June–July 2015: Imposition of pressure on media outlets (by contacting them) to encourage the publication of articles favorable to the Merger and to prompt the deletion or amendment of unfavorable articles	○		○
	(b) June–July 2015: Deliberate encouragement of articles favorable to the Merger by utilizing interviews with	○		○
	prominent figures from the commercial sector			
11	**III-2-④-a Announcement of a false plan regarding Company AA's listing on NASDAQ**			
	(a) June–July 2015: Distribution of materials for investor briefings and press conferences held by Company Z and Company AA, as well as Q&A materials for media outlets, for the purpose of artificially inflating share prices	○	○	○
12	**III-2-④-b Publication of false development plans relating to Company R**			
	(a) June–July 2015: Corporate briefing for Company S, promotion of media coverage, etc.	○	○	○
	III-2-⑤ Providing false information to AD and encouraging the President to exert undue influence			
	(a) June–July 2015: Provision of false explanatory materials and a falsified analysis report on the merger ratio	○		○
	(b) July 2015: Solicitation of support for the Merger from members of the Experts Voting Committee among others	○		○

13	(c) July 2015: Preparation and provision of additional meeting materials containing fabricated information regarding synergy effects, etc. / provision of false explanations	○		○
	(d) June 2015: Encouraging the President to exert undue influence by agreeing to the President's personal requests	○		○
14	**III-2-⑥-a Proposal to provide substantial benefits to Company DD**			
	(a) June–July 2015: Proposed offering substantial benefits to Company DD in connection with the exercise of voting rights, including ‘construction of a new company building’ and ‘purchase of shares at a premium’	○		○
	(b) June–July 2015: Concealment of the fact that a large-scale profit-sharing proposal had been made to Company DD, and representation that no such fact existed	○		○
15	**III-2-⑥-b Securing voting rights for general minority and small-scale shareholders by mobilizing Company AN’s retail organization**			
	(a) June–July 2015: Concealment of conflicts of interest at Company AN,	○		○
	misuse of personal data and efforts to secure votes in favor			
16	**IV-2 Safeguarding against unfair share price declines by sending a request for proposals for the listing of Company AA**			
	(a) July 2015: Formulation and implementation of a plan to issue a request for proposals aimed at boosting share prices	○		○
17	**IV-3 Artificial manipulation of the share price through the concentration of treasury share purchases by Company S during the shareholder appraisal period**	○		○
		Article 176(2)(i) (Market manipulation) Article 176(3) (Market price stabilization)		

35. On the premise that multiple provisions may apply concurrently to a single act, the second-instance court determined, individually and specifically, whether each act violated the relevant provision(s).

<u>Breach of occupational trust</u>

36. With respect to breach of occupational trust, a single charge was brought in the

indictment alleging violation of Article 356 of the Criminal Code.[43]

37. The Prosecution filed charges against the related defendants that the defendants, in breach of their occupational duties, allowed JY Lee to acquire control over SC&T and Samsung Electronics, and to obtain other financial benefits, while causing financial damage to the victims, SC&T and its shareholders, by depriving them of opportunities to increase corporate and shareholder value that could have been secured through active negotiation for appropriate merger deal conditions and structures or selection of alternatives to the Merger.[44]

5. *Legal Elements of Each Charge*

Violation of the Capital Markets Act

38. Article 176 of the Capital Markets Act prohibits the artificial manipulation or fixing of the market price of listed securities or exchange-traded derivatives.

39. Article 178(1) of the Capital Markets Act prohibits unfair practices that undermine the fairness, reliability, and efficiency of trading and other transactions in financial investment instruments.[45]

(a) Article 178(1)(i) prohibits utilizing "unfair means, schemes, or tricks," which means any means, schemes, or tricks that are generally regarded as unfair in society. According to legal precedents, "unfairness" must be determined by considering whether the act in question is prohibited by laws and regulations, and whether it poses a risk of undermining the fairness, reliability, and efficiency of the capital markets by causing other investors to make erroneous judgments, thereby harming fair competition and shifting losses onto bona fide investors.[46]

(b) Article 178(1)(ii) prohibits attempting to earn money or any interest in

[43] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. xxiii.

[44] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 813.

[45] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 73–74 (*quoting* **RLA-188**, Supreme Court of Korea Case No. 2019Do12887, 30 May 2024).

[46] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 73–74 (*quoting* **RLA-188**, Supreme Court of Korea Case No. 2019Do12887, 30 May 2024).

property, by making false representations of "material facts," which means matters that have a significant impact on the assets or management of the relevant corporation, or matters necessary for the fair trading of specific financial investment instruments and the protection of investors, which may influence an investor's investment decision.[47]

40. Article 178(2) of the Capital Markets Act prohibits, among other things, the dissemination of rumors or the use of deceptive schemes for the purpose of trading in financial investment instruments or other transactions, or for the purpose of influencing market prices. A "deceptive scheme" refers to means, plans or stratagems intended to mislead a counterparty or unspecified investors in order to induce them to take a specific course of action.[48]

41. The purpose of Articles 176 and 178 of the Capital Markets Act is to protect the interests of individual investors participating in transactions involving financial investment instruments and in the trading of listed securities, as well as to safeguard the general public's confidence in the capital and securities markets, thereby ensuring that the capital and securities markets contribute to the development of the national economy, given that unfair practices in such transactions can affect a large number of people and undermine the integrity of the capital and securities markets as a whole.[49]

Breach of occupational trust

42. Breach of occupational trust under Article 356 of the Criminal Code is established where (i) a person who manages another's affairs in the course of business (ii) breaches such duty and (iii) thereby acquires a pecuniary benefit or causes a third party to acquire such benefit, to the loss of the principal. The Supreme Court has established the following standards with respect to each element.

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[47] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 73–74 (*quoting* **RLA-188**, Supreme Court of Korea Case No. 2019Do12887, 30 May 2024).

[48] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 75 (*quoting* **RLA-189**, Supreme Court of Korea Case No. 2013Do6962, 12 April 2018).

[49] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 73–74 (*quoting* **RLA-188**, Supreme Court of Korea Case No. 2019Do12887, 30 May 2024), pp. 75–76 (*quoting* **RLA-189**, Supreme Court of Korea Case No. 2013Do6962, 12 April 2018).

(a) A "person who manages another's affairs" refers to a person who protects and manages another's property on the basis of a relationship of trust that goes beyond the conflict of interest existing within an ordinary contractual relationship.[50]

(b) A "breach of duty" encompasses any act that betrays the relationship of trust with the principal, whether by performing an act that should not be performed or by failing to perform an act naturally expected under applicable statutes, contract, or the principle of good faith in light of the nature and character of the relevant affairs.[51]

(c) A "loss to the principal" is assessed from an economic perspective, rather than from a legal perspective. A "loss" encompasses not only actual loss, i.e., loss arising directly from a disposition of assets or other direct diminution of property, but also lost profits, i.e., profits lost where a pecuniary benefit that could objectively and reasonably have been expected to be obtained was not obtained as a result of the breach of duty. Such lost profits arise where an increase in assets that could objectively and probably have been expected did not materialize due to the breach of duty; accordingly, the existence and extent of such loss must be assessed by comparing the state of assets that would have been realized but for the breach with the state of assets actually realized as a result of the breach.[52]

(d) The Supreme Court has further held that a "loss to the principal" encompasses not only cases where actual loss has occurred, but also cases where a risk of loss has been created.[53] The Supreme Court has consistently maintained that breach of occupational trust is an endangerment offense, the legal elements of which are satisfied merely by creating a state of risk to the legally protected interest.[54]

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[50] **RLA-190**, Supreme Court of Korea Case No. 2019Do14340, 18 June 2020.

[51] **RLA-191**, Supreme Court of Korea Case No. 2011Do6798, 26 April 2013.

[52] **RLA-191**, Supreme Court of Korea Case No. 2011Do6798, 26 April 2013.

[53] **RLA-192**, Supreme Court of Korea Case No. 94Do1375, 21 November 1995.

[54] **RLA-193**, Supreme Court of Korea Case No. 99Do334, 11 April 2000.

6. The Court's Decision on Each Charge and the Principal Grounds

Violation of the Capital Markets Act

The unilateral Merger decision and directive to implement

43. The Prosecution alleged that JY Lee and the FSO, for the purpose of JY Lee's succession to corporate control, selected the ratio and timing of the Merger to the benefit of JY Lee, unilaterally decided on the Merger, and had SC&T implement the Merger decision, and that this constituted a violation of Article 178(1)(i) of the Capital Markets Act. Specifically, the Prosecution identified (i) the decision-maker and progression of the Merger, (ii) the main motives and purposes of the Merger, and (iii) the selection of the ratio and timing of the Merger as constituting "unfair means, schemes, or tricks."[55]

44. The first-instance court held that it was difficult to consider the objectives, progress, ratio, timing, and other matters of the Merger as unfair, and that it could not be viewed that the Merger was arbitrarily decided or that SC&T's board of directors made only perfunctory decisions.[56] The first-instance court accordingly held that it could not be concluded that unfair trading occurred and acquitted all of the related defendants.[57] The acquittal was upheld at the second and third instances.[58]

a. The decision-maker and progression of the Merger

45. The Prosecution alleged that the Merger was not decided by the boards of directors of both companies—the parties to the Merger agreement—according to management purposes, but was unilaterally decided by JY Lee and the FSO.[59] The first-instance court rejected the Prosecution's allegation.

46. The second-instance court recognized and summarized the first-instance court's judgment as holding that it was reasonable to conclude that the Merger was

[55] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 80–90.

[56] The Merger Nullification Judgment made essentially the same factual finding. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 10-20, 27-46.

[57] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 511.

[58] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 568; **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, p. 5.

[59] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 85.

decided following consultations between Cheil and SC&T, and SC&T and the FSO, followed by a substantive review by the Merger Task Force ("**TF**") of both companies, and was ultimately decided upon through board resolutions following sufficient discussion by the boards of both companies.[60]

b. The main motives and purposes of the Merger

47. The Prosecution alleged that the purpose of the Merger was solely to strengthen JY Lee's control over Samsung Group and to lay the foundation for the subsequent succession plan, without consideration of the interests of SC&T and its shareholders.[61] The first-instance court rejected the Prosecution's allegation and further affirmatively found that the Merger had a reasonable business purpose.[62]

48. The second-instance court recognized and summarized the first-instance court's judgment as holding that a reasonable business purpose existed for the Merger. The second-instance court further found that, because the strengthening of group control and the stabilization of management control through the Merger should be regarded as benefiting SC&T and its shareholders as well, even if a purpose of strengthening control accompanied this Merger, the purpose of this Merger cannot be said to be improper.[63] The second-instance court set out the principal grounds as follows.[64]

(a) Assessment of the business purpose and anticipated effects of the Merger: It is reasonable to find that the business purposes for this Merger advanced by SC&T were beneficial to SC&T and its shareholders.[65]

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[60] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 90–91; the Merger Nullification Judgment made essentially the same factual finding in Section E (Determination on the Illegality of the Merger Procedure (In Relation to the Board of Directors' Resolution)). *See* **Ex. R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 27-29.

[61] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 84.

[62] The Merger Nullification Judgment made essentially the same factual finding. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[63] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 131–132. The Merger Nullification Judgment made essentially the same factual finding. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[64] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 132–134; **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 365–377.

[65] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 132. The Merger Nullification Judgment made essentially the same factual finding; *see* **Ex. R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

Immediately following the announcement of the Merger, numerous domestic securities firms and credit rating agencies gave positive assessments of the business necessity and anticipated effects of the Merger,[66] and numerous domestic and foreign shareholders expressed positive assessments.[67] In the Merger Annulment Proceedings, the court held that the Merger had reasonable business purposes.[68]

(b) Assessment of the governance-related purpose and effects of the Merger: The effects achieved through this Merger—including the stabilization of SC&T's management control, the strengthening of its position as a holding company, the resolution of circular shareholding, and the simplification of the governance structure—are all consistent with the interests of SC&T and its shareholders.[69] From the shareholders' standpoint, the stabilization of management control through the strengthening of the controlling shareholder's grip over the company in which they have invested cannot constitute a detriment. Domestic institutional investors, numerous foreign shareholders, and even Elliott concurred on the point that the strengthening of group control through the Merger with Cheil would

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[66] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 132 ("Immediately following the announcement of the merger, numerous domestic securities firms analyzed the anticipated effects of this merger as including diversification of the business portfolio, the establishment of bio-business as a new growth engine, and enhanced operational efficiency through integration of the construction divisions. Credit rating agencies likewise determined that, from [SC&T]'s perspective, the merger would yield such effects as strengthened business stability, an enhanced position and asset value within the [Samsung] Group, and an improved financial structure."). The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[67] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 132 ("(i) Numerous institutional investors expressed positive assessments—including the securing of long-term growth drivers through the creation of merger synergies and contributions to enhancing shareholder value—and voted in favour of this merger agenda; (ii) LA and LE, heads of asset management firms, also gave statements positively assessing the merger; and (iii) [SC&T]'s foreign shareholders likewise concurred with the purpose and anticipated effects of the merger."). The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[68] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 133; **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017. *See also* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[69] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 133; the Merger Nullification Judgment made essentially the same factual finding. *See* **Ex. R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

stabilize management control and make SC&T a de facto holding company, yielding positive effects for SC&T and its shareholders.[70] In the above-mentioned Merger Annulment Proceedings, the court held that the interests of "the controlling shareholder or the group as a whole" and the interests of "affiliate companies and their shareholders" are not in a mutually incompatible relationship.[71]

(c) Benefits to SC&T and its shareholders from the Merger as confirmed ex post: Following this Merger, SC&T's shareholders benefited in terms of the performance of the bio-business, improvement of the financial structure, resolution of circular shareholding rings, and credit rating upgrades.[72]

49. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[73]

c. <u>The selection of the ratio and timing of the Merger</u>

50. The Prosecution alleged that the defendants arbitrarily chose the timing for the benefit of JY Lee without considering the interests of SC&T's shareholders, in a manner unfavorable to SC&T and favorable to Cheil.[74] The first-instance court rejected the Prosecution's allegation.

51. The second-instance court recognized and summarized the first-instance court's

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[70] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 133. It is noteworthy that the first-instance court recognized that even Elliott, which opposed the Merger, stated that it "understand[s] and support[s] the necessity of restructuring for the succession of corporate control of Samsung Group"; the Government of Singapore Investment Corporation and the Abu Dhabi Investment Authority also expressed the view that "there will be an effect of simplifying the corporate governance structure, and this is certainly beneficial for investors"; UBS, domestic securities firm reports, and analysts also gave positive assessments. **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 371.

[71] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 133; **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[72] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 134 ("After the Merger, [SC&T] reflected approximately KRW 3 trillion in potential losses through the first quarter of 2016; had the Merger not occurred, [SC&T] would have had to bear those losses in isolation, which would have had a devastating consequence on its stock price.").

[73] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 136–142.

[74] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 85.

judgment which rejected the Prosecution's contention that, at the time of the Merger, Cheil's stock price was excessively overvalued and SC&T's stock price was undervalued, and that, by arbitrarily selecting a Merger timing, the Merger Ratio was unfairly calculated, thereby causing harm to SC&T and its shareholders.[75] The second-instance court set out the principal grounds as follows.[76][77]

(a) It cannot be concluded that, at the time of the Merger, Cheil's stock price was overvalued and likely to decline.[78] After Cheil went public, its stock prices had been on an upward trend until the board meeting on the Merger, and securities firms had continuously raised their target prices.[79] There also seemed to be various factors in favor of the increase of Cheil's stock price.[80]

(b) It cannot be concluded that, at the time of the Merger, SC&T's stock price was undervalued and likely to rise.[81] Prior to the Merger, SC&T's share price was in a downward trend, and securities firms had continuously lowered

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[75] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 143. The Merger Nullification Judgment made essentially the same factual finding. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 17-19.

[76] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 143; **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 380–422.

[77] The translation of the relevant parts is omitted in **Ex. R-392**; however, the relevant parts are addressed in pp. 381–422 of **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment.

[78] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 382–388. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 18-19.

[79] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 382. In this regard, the first-instance court recognized the following: the NPS net-purchased approximately KRW 466.9 billion worth of Cheil shares between the time when Cheil was listed and when the board meeting on the Merger took place; [redacted], the Head of the direct equity investment team of the Stock Portfolio Direct Management Team, responsible for overseeing the NPS's domestic investments, stated to the Special Prosecutor that "we purchased the shares as we affirmatively determined that Cheil's stock prices would rise in the long term."

[80] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 382–383. In this regard, the first-instance court recognized that the NPS also internally evaluated that Cheil had secured the bio-business which was expected to yield high growth, and that there were "[m]ultiple factors that could improve" due to global bio issues.

The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 18-19.

[81] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 388–397. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 18-19.

their target share prices for SC&T since around October 2014.[82][83]

(c) It is difficult to conclude that SC&T's share price was suppressed due to the expectations of a governance restructuring centered on Cheil after its listing.[84] In the Merger Annulment Proceedings where the fairness of the Merger Ratio was directly at issue, the court ruled that the decision in the case regarding the share appraisal price claim could not serve as significant evidence and subsequently determined that the Merger Ratio was not unfair.[85] It is difficult to conclude solely that JY Lee and the FSO planned and enforced a merger whose timing and ratio would be advantageous to Cheil over an extended period, resulting in a Merger Ratio and timing that favored Cheil and disadvantaged SC&T.[86] The Prosecution

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[82] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 388–389. In this regard, the first-instance court recognized that, from 18 December 2014 to 22 May 2015 (the business day before the board of directors meeting on the Merger), the NPS net sold a total of KRW 335.7 billion worth of SC&T shares.

[83] It is noteworthy that the first-instance court decided on "whether the unfairness of the Merger ratio was acknowledged in a criminal judgment against Wan-seon Hong, the former Chief Officer of the [Fund Management Department of NPS] at [NPS]." **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 396–397 ("[T]he Prosecut[ion] alleges that, in the criminal case against [Wan-seon Hong], the former Chief Officer of [Fund Management Department of NPS] at [NPS] the court determined that [Wan-seon Hong] had a duty to prevent harm to the [NPS] by demanding revision to the merger ratio, on the premise that the Merger ratio is unfair. Upon review, however, the appellate court's decision in the Wan-seon Hong case is as follows: […] Therefore, the appellate court's judgment merely stated that there were objective factors raising suspicions about the unfairness of the Merger ratio without concluding that the Merger ratio was unfair. Instead, it determined that there was no basis to recognize the damage arising out of the 'gap between the appropriate merger ratio and the Merger ratio'. This judgment was upheld by the Supreme Court (*see* **Ex. C-781**, Supreme Court Case No. 2017Do19635, 14 April 2022). Therefore, the Prosecutor's allegation above lacks merit."

[84] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 397–400. In this regard, the first-instance court recognized that market experts have consistently analyzed governance structure issues as beneficial for SC&T, and that [redacted] from the NPS also stated to the Special Prosecutor that he "anticipated SC&T would benefit from governance restructuring." **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 401–402.

[85] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 398–400. The first-instance court also noted the following: "The case regarding the share appraisal price claim proceeded through a non-litigious proceeding, in which the price was determined by reasonable discretion on a guardianship-like nature and *ex officio* basis, and the court's decision on the case regarding the share appraisal price claim is not binding to third-parties. In the decision on the case regarding the share appraisal price claim, the court voluntarily limited its scope by defining the legal subject of the case as 'determination on the share appraisal price in a non-litigious proceeding' rather than 'whether the Merger ratio was fair,' and explicitly mentioned that its decision is non-binding to third-parties." The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 17.

[86] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 416–419.

alleged that the "Project-G document," prepared around December 2012, constituted a "predatory merger plan" premised on causing damage to SC&T and its shareholders; however, considering, among other things, that nothing in that document stated that damage to SC&T or its shareholders was intended or would be incurred, the Prosecution's allegation lacked merit.[87]

52. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[88] In particular, the Prosecution alleged that the *Elliott* arbitration Award and the *Mason* arbitration Award had recognized that the Merger Ratio was unfavorable and thus unfair to SC&T shareholders. The second-instance court rejected this allegation, finding that the parts cited by the Prosecution in the respective arbitration awards failed to sufficiently support the claim that the Merger Ratio itself was unfair, and stating as follows:

(a) "In Paragraph 879 [of the *Mason* Award], the arbitral tribunal effectively disagrees with the Korean civil courts' ruling that the Merger was not unfair in the stock appraisal price injunction decision filed by [Elliott], and the merger annulment case filed by [Ilsung Pharmaceuticals]. […] As grounds for that, the tribunal, at the beginning of the same paragraph, cites part of page 3 of the first instance judgment in the [NPS] breach of trust case [[89]] (*see* footnote 1403, 'the criminal division of the Seoul Central District Court concluded in the [Hyung-pyo Moon]/[Wan-seon Hong] case that "there were multiple events that objectively suggest the contention that the merger ratio announced by [Samsung Group] was unfair and unfavorable to the [SC&T]'s shareholders"'). This appears to refer to the finding as part of the 'background facts' of the criminal facts in the first instance criminal judgment: 'There were multiple objective circumstances that could reasonably raise suspicions that the [Samsung] Group intentionally chose the merger timing that would result in a merger ratio favorable to [Cheil]'s shareholders,

[87] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 418.

[88] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 151–165.

[89] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017.

including major shareholders of the [Samsung] Group such as [JY Lee], and unfavorable to [SC&T]'s shareholders, by intentionally maintaining [SC&T]'s stock price low through methods such as deliberately encouraging poor performance of [SC&T] at the [Samsung] Group level.' However, in the above first-instance criminal judgment, footnote 3) cites the relevant portion of the ruling by the appellate court in the Stock Appraisal Proceedings (Seoul High Court Judgment Case No. 2016*Ra*20189 dated May 30, 2016, etc.) as the basis for this part of the ruling. As examined earlier, the Supreme Court subsequently ruled in the re-appeal on April 14, 2022, to the effect that the foregoing ruling was inappropriate in that such facts had not been proven. Hence, the arbitral tribunal's determination on the unfairness of the merger ratio above is highly likely to have been made in a situation where sufficient review materials had not been presented."[90]

(b) "[T]he [*Elliott*] arbitral tribunal did not explicitly determine the unfairness of the merger ratio, and rather acknowledged that the possibility that [SC&T]'s intrinsic value could be reflected in the stock price in the future is mere speculation, and that it is not easy to predict whether a more favorable merger ratio for [SC&T] would have been formed had the Merger been rejected. Then, the tribunal ultimately calculated damages based on market prices, and the 'lock-in' seems to mean only that the fact of damage occurrence (i.e., "irreversible transfer of value") has been confirmed, and that damage calculation has become possible."[91]

<u>The provision of false information to the NPS and the encouragement of improper presidential influence</u>

53. The Prosecution alleged that the defendants (a) provided the NPS with false communication materials and the manipulated Merger Ratio review report,[92]

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[90] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 161–162.

[91] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 164–165.

[92] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 84–86 (the Prosecution alleged that the defendants "gave false explanation to the [NPS] indicating as if [SC&T]'s management and board of directors had decided on the Merger based on a business judgment and had conducted substantial review of the synergy effects and the adequacy of the Merger ratio in this process, and further, as if an accounting firm had conducted an independent and fair evaluation of the corporate value to confirm the adequacy of the Merger ratio, and thus provided the second batch of Shareholders

(b) solicited members of the Experts Voting Committee and the head of the Fund Management Department of the NPS, and others to approve the Merger,[93] (c) prepared and supplied additional meeting materials with manipulated synergy effects, among other things, to the NPS,[94] and (d) encouraged the NPS's approval of the Merger based on the influence of the President through acceptance of a personal request from the President,[95] among others, thereby using unfair means, schemes, or tricks in connection with the Merger and using deceptive schemes for the purpose of the Merger, in violation of Articles 178(1)(i) and 178(2) of the Capital Markets Act.[96]

54. The first-instance court acquitted all of the related defendants, on the ground that, based on the evidence submitted by the Prosecution, it was difficult to conclude that the defendants had provided the NPS with false information; conducted investor relations activities out of the ordinary that were unlawful or inappropriate; or secured the NPS's affirmative voting rights by encouraging the President's wrongful intervention.[97] In relation to the President's wrongful intervention:

(a) The first-instance court dismissed the Prosecutor's allegation that an indirect solicitation to the President was made through CIO Hong and acknowledged the previous criminal court's finding concerning

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Communication Material, review report, reply materials, etc. based on such false information.").

[93] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 86–87 (the Prosecution alleged that the defendants "dismissed [Wan-seon Hong]'s request to 'readjust Company [SC&T]'s merger ratio through a discount or mark-up of the Merger price so that the [NPS] can agree to the Merger', publicizing that 'the number of circular shareholding loops will be reduced to seven as a result of the Merger' and concealing the risk of occurrence of new circular shareholding[, and] provided false explanation indicating as if [SC&T]'s management and board of directors have conducted substantial review of the Merger synergy effects based on a business judgment and have autonomously decided on the Merger.").

[94] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 87–88 (the Prosecution alleged that "from around early July 2015, Defendant Es prepared the meeting materials entitled 'Expected Outcomes of the [SC&T]-[Cheil] Merger' to be provided to the [NPS], and after manipulating the merged corporation's 2020 sales, market capitalization, and merger synergy numerous times without any objective grounds, completed the said meeting materials on 7 July 2015 and provided the same to the [NPS].").

[95] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 88–90.

[96] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 82–93.

[97] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 749.

Moon/Hong, stating that "[i]n the second instance court judgment of [Wan-seon Hong], the Chief Officer of [the Fund Management Department] at [the NPS], (Seoul High Court Judgment Case No. 2017*No*1886 dated 14 November 2017), in relation to [Wan-seon Hong]'s criminal intent, it was not determined that [Samsung Group]'s solicitation was the cause, but rather the decision was merely that there was a repeated external pressure from public officials of the Ministry of [Health and Welfare]."[98]

(b) The first-instance court found that it was difficult to conclude that the NPS's decision-making on the Merger voting was distorted as a result of the President's wrongful intervention, based on the following reasoning in support:

(i) "Upon examination, after the investigation in the preceding case, the Special Prosecutor and the Prosecutor indicted the President and the Blue House staff on various charges under the crime of abuse of authority and obstruction of exercise of rights, but in relation to [the NPS]'s exercise of voting rights, did not indict anyone including the President or the Blue House staff, and only indicted the Minister of [Health and Welfare]."[99]

(ii) "In relation to the Company [*Elliott*] ISDS case, the ROK government revealed its stance that 'the Investment Committee members of the [NPS] voted based on each of their independent determinations by taking into consideration various factors', and emphasized that 'the [Korean] court determined that 'even if there was any unlawful act such as abuse of authority by [Hyung-pyo Moon], etc., in the end, [the NPS] appears to have exercised its voting rights independently'". In light of this, it seems that the ROK government's position is also that the [NPS] exercised its voting rights independently. In fact, the court has recently also found that, while it can be recognized that [Hyung-pyo Moon], etc. had, to a certain

[98] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 741.
[99] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 748.

extent, exerted influence on the decision-making process of the [NPS] Investment Committee, in the end, 'it is difficult to view that the acts of [Hyung-pyo Moon] and [Wan-seon Hong] had affected the [NPS] Investment Committee's exercise of its voting rights'. (Seoul Central District Court Judgment Case No. 2020*GaHap*600079 dated 25 November 2022, the Shareholder Claims District Court Judgment)."[100]

(iii) The first-instance court found irrelevant that the Defendants' encouragement of the President and the Blue House staff to exercise influence existed not only in the securing the NPS's affirmative votes, but also that of resolving the new circular shareholding links created by the Merger. In reaching this conclusion, the court relied on the preceding cases that rejected the claim that there was an indirect solicitation to the President through report and communication to, and instructions from her.[101]

55. The acquittal was upheld by the second and third instances.[102]

56. The second-instance court recognized and summarized the first-instance court's judgment as follows.[103]

(a) It could not be found that the second "Shareholders Communication Material" provided to the NPS on 24 June 2015 indicating a synergy figure of KRW 6 trillion, Anjin's report on review of the Merger Ratio, or the indication of the synergy effect of KRW 15 trillion in the material on synergy dated 7 July 2015 were false, or that any false information was given in relation thereto [104] Given that [SC&T] only explained the Merger Ratio to

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[100] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 748-749.

[101] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 749; **Ex. C-706**, JY Lee Bribery Seoul Central District Court Judgment, p. 23.

[102] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 568; **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, p. 5.

[103] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 407.

[104] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 407–411. One of the reasons given by the first-instance court was that "the Merger synergy figure of "KRW 6 trillion" as indicated in the

the NPS as having been "determined pursuant to the Capital Markets Act," it cannot be concluded that fabricated explanation was provided in the process of delivering the report.[105]

(b) It could not be deemed that the NPS's decision-making on the Merger voting was distorted as a result of the President's wrongful intervention.[106]

57. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[107]

<u>The dissemination of false information regarding the Merger through contact with foreign investors and proxy advisory firms</u>

58. The Prosecution alleged that the defendants developed false justifications and rationales for the Merger and presented them to foreign institutional investors and proxy advisory firms, in violation of Articles 178(1)(i), 178(1)(ii), and 178(2) of the Capital Markets Act.[108]

a. The first-instance court rejected the Prosecution's allegation, finding that it cannot be deemed that the defendants presented any false information to the foreign investors and proxy advisory firms that could distort their investment decisions.[109]

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above material was a target figure set by the Consolidated TF after the [SC&T]'s board of directors meeting on the Merger, through discussions and analyses with persons-in-charge based on data from each business division, and therefore it cannot be determined that this is a false figure." **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 724.

[105] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 725-729. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 17.

[106] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 414. In this regard, the first-instance court recognized that the court in the Shareholder Claims District Court Judgment (**Ex. R-389**, Shareholder Claims District Court Judgment) has recently found that, while it can be recognized that Hyung-pyo Moon and others had, to a certain extent, exerted influence on the decision-making process of the NPS Investment Committee, in the end, "it is difficult to view that the acts of Hyung-pyo Moon and Wan-seon Hong had affected the NPS Investment Committee's exercise of its voting rights." **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 748.

The Merger Nullification Judgment made essentially the same factual finding. *See* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 36-38.

[107] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 416–422.

[108] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 64–67.

[109] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 605–632.

The acquittal was upheld at the second and third instances.[110]

Whether false justifications and rationales were formulated to justify the Merger

59. The second-instance court recognized and summarized the first-instance court's judgment as holding that false justifications and rationales cannot be regarded as having been formulated with respect to (i) the purpose and progression of the Merger, (ii) the effects of the Merger, (iii) the review of the appropriateness of the Merger Ratio, (iv) the circumstances surrounding the selection of the Merger timing, among other matters.[111] The second-instance court set out the principal grounds as follows:[112]

(a) Purpose and progression of the Merger: The Merger had reasonable purposes and necessities, not only in governance terms but also in business terms.[113]

(b) Effects of the Merger: The KRW 6 trillion synergy figure was calculated through continuous discussions among the personnel in charge in the course of establishing revenue and operating-profit targets and strategies for each business division following the Merger board meeting, with the figures undergoing several rounds of revision and refinement. It is difficult to characterize this figure as false or unfounded.[114]

(c) Anjin's review of the appropriateness of the Merger Ratio: Anjin's report reviewing the Merger Ratio cannot be characterized as a fabricated and false product.[115]

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[110] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 568; **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, p. 5.

[111] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 279–280.

[112] The Merger Nullification Judgment made essentially the same factual finding**.** *See* **Ex. R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 17-20.

[113] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 280; the Merger Nullification Judgment made essentially the same factual finding. *See* **Ex. R-20**, Merger Nullification Seoul Central District Court Judgment, pp. 10-12.

[114] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 280–281.

[115] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 281.

(d) Circumstances surrounding the selection of the Merger timing: It cannot be said that the Merger Ratio and timing were disadvantageous to SC&T and its shareholders.[116]

60. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[117]

b. Whether false explanations were provided to foreign investors and proxy advisory firms

61. The second-instance court recognized and summarized the first-instance court's judgment as holding that the defendants cannot be regarded as having provided false statements or other matters to foreign shareholders that would have distorted their investment decision-making.[118]

62. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[119]

Breach of occupational trust

63. The Prosecution alleged that the defendants, in breach of their occupational duties, allowed JY Lee to acquire control over SC&T and Samsung Electronics, and to obtain other financial benefits, while causing financial damage to the victims, SC&T and its shareholders, by depriving them of opportunities to increase corporate and shareholder value that could have been secured through active negotiation for appropriate merger deal conditions and structures or selection of alternatives to the Merger.[120] The Prosecution's charges against the defendants were rejected by the first-instance court.

64. The second-instance court upheld the lower court's judgment acquitting all related defendants, on the basis that the charges of breach of occupational trust are premised on the recognition of the facts charged relating to the impropriety of the

[116] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 282; the Merger Nullification Judgment made essentially the same factual finding. See Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 20.

[117] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 293–295.

[118] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 282.

[119] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 296–297.

[120] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 813.

merger, etc., but those facts have not been sufficiently proven, and the facts charged concerning breach of trust are likewise unsupported by sufficient evidence.[121] The acquittal was also upheld by the Supreme Court.

65. The second-instance court examined the following issues in relation to the legal elements of breach of occupational trust.

Whose affairs SC&T's directors were handling

66. The Prosecution alleged that the defendants handled the affairs of SC&T and of its shareholders.[122] The second-instance court rejected the Prosecution's allegation.[123]

Whether there was a breach of duty related to reviewing the necessity of the Merger

67. The Prosecution alleged that the defendants, as SC&T directors, had a duty to closely analyze and review the business feasibility or necessity of pursuing the Merger to protect the interests of SC&T and its shareholders, but breached this duty.[124]

68. The second-instance court recognized and summarized the first-instance court's judgment as holding that it was difficult to find that the SC&T defendants violated their duty to assess business feasibility or necessity in pursuing the Merger.[125]

69. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.[126] It stated that, since it had already

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[121] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 856–857. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 21.

[122] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 823–824.

[123] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 825–826.

[124] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 828–829.

[125] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 815–816. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 21.

[126] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 828–830. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 21.

rejected all such allegations by the Prosecution regarding the necessity of the merger, merger timing, and whether SC&T's TF and board conducted substantial reviews in the earlier part of the judgment titled "unilateral Merger decision and directive to implement," the Prosecution's allegation was without merit.[127]

Whether there was a breach of duties concerning the Merger Ratio and other matters

70. The Prosecution alleged that the defendants breached the duty to verify the appropriateness of the Merger Ratio, the duty to more closely examine the merger conditions and other matters, the duty to actively negotiate with Cheil for a premium on the Merger Ratio, the duty to examine deal structures or various alternatives to ensure sufficient value for SC&T's assets, the duty to select a merger timing that could maximize the interests of SC&T and its shareholders, the duty to review the suspension or abandonment of the merger, and the duty to provide information to directors and shareholders.[128]

71. The second-instance court recognized and summarized the first-instance court's judgment as holding that the Prosecution's allegations were all meritless.[129] The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal, once again citing the earlier part of the judgment titled "unilateral Merger decision and directive to implement."[130]

Whether financial loss occurred

72. The Prosecution alleged that SC&T and its shareholders suffered loss due to the Merger.[131]

73. The second-instance court recognized and summarized the first-instance court's judgment as holding that it was difficult to definitively conclude that SC&T and

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[127] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 830. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 21.

[128] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 817.

[129] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 817.

[130] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 834. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 21.

[131] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 821.

its shareholders suffered losses due to the Merger.[132]

74. The second-instance court also rejected all of the Prosecution's detailed allegations in the Prosecution's Statement of Appeal.

(a) The Prosecution alleged that, because the second-instance court in the case of Moon/Hong Criminal Judgments had determined that the NPS suffered financial losses of unidentifiable value by losing its casting voter status and thereby forfeiting potential additional gains from actively leveraging the casting vote, the Merger Ratio could not be considered fair.[133]

(b) In response, the second-instance court held that, although the second-instance court in the Moon/Hong Criminal Judgments had determined as such, such lost profits were losses of the NPS and did not appear to be directly related to the damages the defendants owed to SC&T in relation to the Merger.[134][135]

(c) The Prosecution also alleged that, even if the Merger were to fall through, there was a very high probability that it would be re-initiated in the near future, and that in such a scenario, it would be possible to adjust the Merger Ratio to reflect the corporate value of SC&T, or that SC&T and its shareholders would derive additional benefits as a result of a recovery in SC&T's share price.

(d) In response, the second-instance court held that there was insufficient evidence to assess that the benefits claimed by the Prosecution would have

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[132] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 821. The Merger Nullification Judgment made essentially the same factual finding; *see* Ex. **R-20**, Merger Nullification Seoul Central District Court Judgment, p. 12.

[133] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 835.

[134] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 837–838.

[135] The second-instance court also stated the following: "Similarly, arbitral awards for [*Elliott*] and [*Mason*] each recognized their investment loss as damage and calculated the loss based on the difference between the stock price just before the "violation of the treaty" and the "actual proceeds from disposing the shares." The awards appear to have assessed the cause and calculation of the damage from a different perspective than the damage claimed in this case by the Prosecution, which is based on an unfair merger ratio." **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 838, fn. 286.

been realized.[136]

[136] **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 838.