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

REPUBLIC OF KOREA'S SUBMISSION ON THE REMITTED ISSUE (CORRECTED)

7 June 2026

Peter & Kim
GLOBAL DISPUTES LAWYERS

Arnold & Porter

TABLE OF CONTENTS

I. INTRODUCTION

1. Following the English High Court's judgment in the set-aside proceeding ("**Set-Aside Judgment**"),[1] the Tribunal must now resolve various important questions of causation. As directed in the Order made by Lord Justice Foxton ("**Judge**") on 18 March 2026 ("**Remittal Order**"), the remitted issue is:

> Did the breaches of the Treaty found to have been constituted by the measures of the Blue House, the Minister of Health and Welfare, and the Ministry of Health and Welfare cause loss or damage to the Claimant, and the relief to be awarded for such loss or damage?[2] ("**Remitted Issue**")

2. The Tribunal already has before it detailed submissions in the earlier phase of this arbitration ("**Original Proceedings**") regarding causation, to which the ROK refers. The ROK also refers to the additional evidence which the Tribunal has agreed to admit to the record,[3] namely (i) two judgments rendered in respect of civil proceedings brought by certain SC&T shareholders against the ROK seeking damages for losses allegedly suffered as a result of the Merger ("**Shareholder Claims Judgments**");[4] and (ii) three Judgments in respect of criminal proceedings brought against JY Lee and others on charges of violations of the Financial Investment Services and Capital Markets Act, including in connection with alleged manipulation of the share price of SC&T

---

[1] **CLA-222**, *Republic of Korea v. Elliott Associates, L.P.* [2026] EWHC 368 (Comm) ["**Set-Aside Judgment**"]. Unless stated otherwise, capitalized terms in this Submission have the same meaning as was assigned to them in the ROK's prior written pleadings, the ROK's 14 May 2026 application for leave to submit additional evidence, as well as in the Award.

[2] **CLA-226**, *Republic of Korea v. Elliott Associates, L.P.,* CL-2023-000395, Order of Foxton LJ, 18 March 2026 ["**Remittal Order**"], ¶ 3.

[3] *See* Procedural Order No. 23, ¶ 36.

[4] **Ex. R-389**, Seoul Central District Court, Case No. 2020GaHap600079 ("**Shareholder Claims District Court Judgment**"), 25 November 2022; **Ex. R-390**, Seoul High Court, Case No. 2023Na2000796 ("**Shareholder Claims High Court Judgment**"), 12 February 2026.

and the terms of the Merger ("**JY Lee Unlawful Merger Judgments**").[5] These five judgments are referred to collectively as the "**Additional Judgments**."

3. In deliberating on the Remitted Issue, one of the key distinct questions which the Tribunal now faces, and which it must consider afresh, is: What would have happened in the counterfactual world absent the Treaty breaches found by the Tribunal at the level of the President, Minister of Health and Welfare, or the MHW ("**Blue House Measures**")?

4. To prevail on this question, Claimant must show that—in all probability—the NPS would have voted differently but for the Blue House Measures. It cannot do so by any measure or standard. That is true on the evidence which was previously before the Tribunal, and the Additional Judgments confirms it.

5. Rather than engaging with this key question, Claimant spends the majority of its 27 April 2026 submission ("**Claimant's Submission**") on something else. That is, Claimant persists in advancing various arguments that the scope of the Remitted Issue is very limited; specifically, that only a narrow issue of legal causation arises, and that there are already binding findings of factual causation.

6. Claimant's approach is contrary to the terms of the Set-Aside Judgment, the Remittal Order, as well as the Judge's further ruling which accompanied the Order and which explained the terms on which the Judge made the Remittal Order ("**Ruling**").[6] The ROK addresses the points made by Claimant in more detail in **Section II** below. In brief:

   a. As the Remittal Order itself makes clear, the issue which arises before the Tribunal is whether the Blue House Measures caused loss or damage

[5] **Ex. R-391**, Seoul Central District Court, Case No. 2020GoHap718, 920 (consolidated) ("**JY Lee Unlawful Merger District Court Judgment**"), 5 February 2024; **Ex. R-392**, Seoul High Court, Case No. 2024No635 ("**JY Lee Unlawful Merger High Court Judgment**"), 3 February 2025; **Ex. R-393**, Supreme Court of Korea, Case No. 2025Do2805 ("**JY Lee Unlawful Merger Supreme Court Judgment**"), 17 July 2025.

[6] *See* **CLA-227**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, Ruling on Consequential Issues, 18 March 2026 ["**Ruling**"].

to Claimant and, if so, what relief (if any) is to be awarded for such loss or damage.

b. The Tribunal's finding that the NPS's vote in favor of the Merger ("**NPS Vote**") was the factual cause of the Merger is not set aside. There is, however, no determination in the Award whether the Blue House Measures caused the NPS Vote, nor whether the Blue House Measures can be treated as the legal cause of the loss or damage (if any) to Claimant. These matters arise afresh upon this remission.

7. Given that there is now this further stage of the arbitration dedicated specifically to causation, the ROK sets out in **Section III** below its supplemental submissions on the substance of the factual causation issue. As to this:

a. It is common ground that (i) Claimant bears the burden of establishing both factual and legal causation; and, (ii) in respect of factual causation, Claimant has to establish that "but for" the Blue House Measures, it would not have suffered the loss for which damages were awarded by the Tribunal. Thus, in order to succeed on its claim, Claimant has to show that but, for the Blue House Measures, the NPS would not have voted in favor of the Merger.

b. Following a debate in previous submissions about the applicable legal standard for that exercise, the Tribunal has, in the Award, rightly applied the well-established requirement that Claimant has to show that, "in all probability," matters would have transpired as Claimant contends.[7] That is a higher standard of proof than a "balance of probabilities," as it requires proof to a sufficient degree of certainty.

8. The issue that now arises, therefore, is whether Claimant can show to that required standard that the NPS would have voted differently but for the Blue

[7] **RLA-194**, Award (as corrected and partially set-aside) ("**Award**"), 20 June 2023, ¶ 931.

House Measures. Claimant cannot do so. (Nor would it be able to do so even to the lower "balance of probabilities" threshold.)

9. As addressed in more detail in **Section III** below, in the counterfactual scenario in which there had been no Blue House Measures (i.e., there had been no interference with NPS decision-making by the President, Minister of Health and Welfare, or the MHW), many key factors would have likely remained unchanged, namely:

   a. Decision-making would have depended upon the approaches taken by various people at the NPS (both in preparing materials to facilitate decision-making and in deliberating on and taking the relevant decisions).

   b. The NPS had substantial shareholdings both in Cheil and in SC&T, and far broader holdings in the Samsung Group generally. Around a quarter of assets of the National Pension Fund ("**Fund**") were invested in Samsung Group entities. The NPS *did* take into account the potential impact of the Merger on these broader holdings—and equally would have done so in any "but for" world.

   c. Although Claimant was opposed to the Merger, and it approaches matters as though it is self-evident that the Merger was unsound, that is just one point of view. The market had initially reacted very positively to the announcement of the Merger. Many other participants supported it. Many institutional investors voted in favor of it. They were undoubtedly perfectly aware of Claimant's very public arguments about why the Merger would be detrimental. But they plainly considered that the Merger would benefit, not damage, their shareholding.

   d. The assessment of the financial merits of the Merger was a multi-factorial and subjective exercise, with very many variables.

   e. On the other hand, there were predictions that rejection of the Merger would lead to immediate and very serious reduction in the value of

SC&T shares, in which the Fund had a very substantial stake. One important estimate was of an immediate downside risk of 22.6%. This was in addition to concerns that rejection of the Merger would damage the stock performance of the entire Samsung Group over the medium to long-term.

f. It is known that, in the actual scenario, the Investment Committee members did not just look at the synergy effect on which Claimant focused in the Original Proceedings, but considered the situation more broadly and holistically. In any event, the fact that the synergy calculation that was actually prepared was flawed does not mean that a financial analysis prepared without improper influence could not have supported a decision to vote for the Merger. Indeed, leaving aside the validity of the synergy figure, the various elements underlying that calculation were unquestionably factors properly to be considered as benefits of the Merger.

g. Importantly, by the time that a vote at the NPS had (and would have) taken place, a Korean court had considered Claimant's application for an injunction to stop the Merger. As well as noting a positive market reaction to the Merger, the court had stated that it was "not unreasonable to consider" that SC&T had "sufficient motive to offset its decline in sales in the construction and trading business with [Cheil's] strength or potential in the leisure, fashion, foods and beverage, and biotechnology sectors."[8] That judicial decision had particular weight for NPS decisionmakers in the actual world, and the same would have held true in any counterfactual scenario.

10. In the ROK's submission, if one were to ask the question: is there a realistic possibility that the NPS would have voted in favor of the Merger absent interference, the answer to that question must be "yes." There can be no credible argument by Claimant to the contrary.

---

[8] **Ex. R-009**, Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, p. 14.

11. The question, therefore, becomes whether Claimant can persuade the Tribunal that, despite this fact, the Tribunal can safely conclude that, "in all probability," the NPS would have voted to oppose or abstain if the Blue House Measures had not occurred. Claimant in its Submission has not even tried to discharge that burden, seeking instead to argue that the issue simply does not arise. Unless Claimant intends to advance no case in the alternative to its contention that the issue has already been decided and does not arise, it appears that Claimant has sought to "keep its powder dry" until its Reply (despite having the burden of proof). If so, that is unfortunate and all of the ROK's rights are reserved in that respect, given the critical importance of this issue being properly determined.

12. As demonstrated herein, the evidence does not support a conclusion that the NPS in all probability would have voted differently but for the Blue House Measures. (Nor, and for the avoidance of doubt and in the alternative, does the evidence support such a conclusion even if the test Claimant needs to satisfy were a "balance of probabilities" test. Instead, there are many reasons to conclude that the result would likely have been the same as the actual decision taken by the Investment Committee.)

13. Claimant places considerable weight in its submissions on the fact that the tribunal in the *Mason v. ROK* arbitration concluded that the Blue House Measures caused loss. The ROK addresses this argument in **Section III.C** below. To state the obvious, the fact that one decision-making tribunal has decided to take a particular approach does not mean that its decision was correct. Were that so, there would be no need for appeals in domestic proceedings. Of course, the ROK cannot appeal the merits of the decision in *Mason*, and the question in these Remitted Proceedings is not whether or not that decision is correct. Instead, this Tribunal must approach matters afresh and by reference to the evidence and arguments before it, which differ from that in *Mason*. In particular, the *Mason* tribunal did not have the benefit of the Additional Judgments, one of which[9] specifically clarifies that the *Mason*

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

tribunal's reasoning reflected an erroneous interpretation of a previous Korean court judgment. Further, and in any event, the *Mason* tribunal's reasoning is relatively short, and in some respects conclusory, and does not adequately engage with the justifications for supporting the Merger. On a proper analysis, the answer to the question before the Tribunal is that the Blue House Measures cannot be said to have been the but-for cause of the Merger.

14. Even if *factual* causation were made out by Claimant, the Tribunal would also have to be satisfied that the Blue House Measures could be treated as a *legal* cause, i.e., that the loss claimed is not too remote and is within the scope of the relevant Treaty rule that has been breached. As demonstrated in **Section IV** below, when one properly analyses the causal chain on which Claimant relies, that chain involves so many third parties at each stage of the chain, and so much potential for uncertainty, that the reduction in market value which the Tribunal awarded Claimant *is* too remote from the Blue House Measures to be recoverable. Further, Claimant did not have any entitlement of *outcome*, the terms of the Merger are not themselves unlawful, and the question of the merits or demerits of the Merger is highly subjective and debatable. To award the full amount of loss quantified by the Tribunal would be beyond the scope of the breach constituted by the Blue House Measures.

15. All of these issues are developed in more detail below. In the ROK's submission, the appropriate conclusion is that no damages are recoverable by Claimant due to lack of causation. At most, and strictly in the alternative, it might be that Claimant could advance some entitlement on a "loss of a chance" basis to a percentage of damages already calculated. Given that this point was specifically mentioned by the Judge in the set-aside proceedings ("**Set-Aside Proceedings**"), it warrants closer and more careful consideration (even if Claimant has failed to do so in its Submission). The ROK will address any further argument by Claimant on this issue in due course. Notably, "loss of a chance" was the only type of loss that the Korean criminal court in the Moon/Hong proceedings focused on—and, even then, the Korean court was unable to quantify the amount of a "loss of a chance" basis, and instead left the figure unquantified.

16. The remainder of this Submission on the Remitted Issue ("**Submission**") is structured as follows:

a. **Section II** describes the proper scope of the Remitted Issue, and demonstrates that the surviving findings in the Award do not resolve any of the questions the Tribunal must now determine. If it had been otherwise, there would have been no remission.

b. **Section III** addresses the burden and standard of proof for factual causation, explaining that Claimant bears the burden to prove factual causation to a sufficient degree of certainty (**Section III.A**); demonstrates that Claimant has failed to establish factual causation: the evidence does not support a sufficiently certain conclusion that, absent the Blue House Measures, the NPS would have voted against the Merger or abstained (**Section III.B**); and addresses the *Mason* award (**Section III.C**).

c. **Section IV** demonstrates that Claimant has failed to establish legal causation: the link between the Blue House Measures and the loss found in the Award is too remote to satisfy the requirements of directness and proximity, and the damages calculated by the Tribunal are outside the scope of the rule which is breached by the Blue House Measures.

d. **Section V** addresses the potential alternative argument that a loss of chance analysis should apply.

e. **Section VI** explains that Claimant's request for its costs of the Set-Aside Proceedings is outside the Tribunal's jurisdiction and in any event barred by the doctrine of *res judicata*.

f. **Section VII** explains that, as the Remittal Order has set aside the Tribunal's decision and order on the allocation of the Parties' legal costs in the arbitration, the Tribunal must now consider afresh how legal costs should be allocated based on the Parties' relative successes in the arbitration, including in light of the outcome of these Remitted Proceedings.

g. **Section VIII** sets out the ROK's request for relief.

17. This Submission is accompanied by an **Annex**, which for the Tribunal's convenience contains a summary of the Additional Judgments.

18. The ROK further submits herewith legal authorities **RLA-181** through **RLA-212**, as well as supplemental and corrected translations of certain legal authorities and factual exhibits (as listed in the accompanying indexes). For the convenience of the Tribunal and the Parties, the ROK has submitted as **RLA-194** a copy of the Award in which (i) the portions that have been set aside are highlighted; and (ii) the Tribunal's corrections ordered in its Decision on Requests for Correction (1 September 2023) are marked.

II. THE PROPER SCOPE OF THE REMITTED ISSUE

A. Introduction

19. The scope of the Remitted Issue is as follows:

> Did the breaches of the Treaty found to have been constituted by the measures of the Blue House, the Minister of Health and Welfare, and the Ministry of Health and Welfare cause loss or damage to the Claimant, and the relief to be awarded for such loss or damage?

20. Despite this broad wording, Claimant spends the bulk of its Submission advancing a variety of arguments to support its assertion that:

> the single remitted issue is properly understood as a question of law, and a very narrow one, following on from the High Court's different attribution finding, namely: Does the determination by the High Court that the NPS may not be regarded as a State organ alter the Tribunal's finding that the legal requirement of causation i.e. foreseeability / proximity is met?[10]

21. Claimant seeks to suggest, in particular, that (i) no issue of factual causation has been remitted to the Tribunal at all;[11] (ii) in respect of legal causation, the only issue for the Tribunal is the issue as formulated by Claimant in the

---

[10] Claimant's Submission, ¶ 63. *See also id.*, ¶¶ 10, 19(e).

[11] *See* Claimant's Submission, ¶ 11.

paragraph quoted above; and (iii) no questions regarding loss or damage or relief (if any) arise in these Remitted Proceedings.

22. Claimant's characterization of the Remitted Issue is fundamentally incorrect. It is inconsistent with the Set-Aside Judgment, the Remittal Order, and the Ruling which accompanied it.[12]

23. The entire relevant section of the Set-Aside Judgment—from paragraph 261 to paragraph 267—is short and the Tribunal is invited to re-read it. But the Tribunal need look only to two paragraphs of the Set-Aside Judgment to see that Claimant's position is incorrect.

24. At paragraph 265 of the Set-Aside Judgment, the Judge stated:

> I am not persuaded that it is open to me to conclude on a fair reading of the Award that the Tribunal has found that, even if the acts of NPS are not attributable to Korea, **legal and factual causation are established** in respect of the breaches constituted by the Blue House Measures alone.[13] (Emphasis added)

25. In paragraph 266, the Judge set out the relief he was granting, which included the remission:

> It follows that I am satisfied that I should grant the following relief:
>
> i) the Award should be set aside in so far as it finds that the NPS was an organ of the State and finds that the conduct of the NPS constituted a breach of Article 11.5 of the Treaty on that basis; and
>
> ii) **the issue of causation of the breaches of the Treaty found to have been constituted by the Blue House Measures** and the relief award **be remitted to the Tribunal for reconsideration**.[14] (Emphasis added)

---

[12] *See* **CLA-227**, Ruling.

[13] **CLA-222**, Set-Aside Judgment, ¶ 265.

[14] **CLA-222**, Set-Aside Judgment, ¶ 266.

26. It could hardly be clearer that the Judge considered the remission to encompass issues of both legal *and* factual causation. There is no proper room for debate on this point.

27. The ROK has already had to repeatedly correct Claimant's mischaracterizations of the scope of the Remitted Issue, both in prior correspondence and at the CMC.[15] Given Claimant's approach, the ROK now needs to do so again in this Submission. This is a matter of regret, not least in light of the associated cost and the compressed procedural timetable for these Remitted Proceedings. Nevertheless, it is revealing that Claimant persists with its approach, instead of focusing on the actual question that is properly before the Tribunal.

28. The true position is as follows:

    a. Having found that the NPS was a de facto State organ, such that its acts were attributable to the ROK, the Tribunal did not determine (as it considered that it did not need to do so) whether conduct of the President, Minister of Health and Welfare, or the MHW caused the NPS Vote. Instead, the Tribunal approached the question of causation by considering whether the NPS Vote—which, on the Tribunal's approach, was an act of the ROK, and therefore itself could qualify as a breach of the Treaty—had caused the Merger and thereby caused loss to Claimant.

    b. Following the ROK's successful set-aside challenge, the conduct of the NPS and its officers is no longer attributable to the ROK, and the issue of causation plainly arises afresh. The Tribunal has, of course, already heard the Parties' arguments and received evidence on this issue, which was live before the Tribunal on the cases previously advanced in the Original Proceedings. The ROK makes references to such arguments and evidence in the remainder of this Submission. The ROK also refers

[15] *See* **RLA-195**, Respondent's Letter to the Tribunal, 26 March 2026, ¶ 8; **RLA-196**, Respondent's Answers to Issues Raised by the Tribunal for the Case Management Conference, 9 April 2026, ¶ 1.5; **RLA-197**, Case Management Conference Transcript, 9 April 2026, 26:11–25; 31:7–10; 33:20–34:1.

below to the additional evidence the Tribunal has agreed to admit to the record, namely the Additional Judgments.[16]

29. The remainder of this section first deals with the Remittal Order and the Set-Aside Judgment and Ruling (**Section B**) and then addresses the numerous findings in the Award on which Claimant relies (**Section C**).

B. The Remitted Issue as defined by the English Court

30. The terms of the Remittal Order are as set out above, at paragraph 19. Two aspects of the Remittal Order are worth noting at the outset:

a. First, the Remittal Order is notable for the breadth of its language. That language—"Did the breaches . . . **cause** loss or damage to the Claimant . . . ?" (emphasis added)[17]—is *not* limited to a question of legal causation, but refers to causation in general.

b. Second, the Remittal Order raises two different questions: (1) Did the Blue House Measures cause loss or damage to Claimant? (2) If so, what is the relief (if any) to be awarded for such loss or damage? The Court did not set aside the paragraphs of the Award quantifying loss. They serve as a maximum recoverable loss. However, the Remitted Issue does not assume that the Blue House Measures were a factual or legal cause of such loss or indeed any loss.[18] Nor does the Remitted Issue assume that the loss, if any is recoverable in respect of the Blue House Measures, would necessarily be the full amount of loss for which damages were awarded in the Award. In fact, as discussed further below, the Court noted that one analysis raised by the Parties' submissions in the Original Proceedings but not decided in the Award is a "loss of chance" analysis.[19] Such a framework necessarily would imply a different—smaller—loss than that found in the Award.

---

[16] *See* Procedural Order No. 23, ¶ 36.

[17] **CLA-226**, Remittal Order, ¶ 3.

[18] For the sake of brevity, the ROK refers below to "loss" as encompassing both loss and damage.

[19] *See* **CLA-222**, Set-Aside Judgment, ¶ 263(v). *See also* **Section V** below.

31. Despite the Remittal Order's broad wording, Claimant's position is that the Remittal Order should be construed so that the only task that the Court has remitted to the Tribunal is the very narrow one asserted by Claimant.

32. Section II of Claimant's Submission, which purports to "define the narrow issue to be determined by the Tribunal," is structured as follows: In Section II.A, Claimant contends that the extent of the remission has to be interpreted by reference to and in light of the background to the Remittal Order.[20] In Section II.B, Claimant then sets out what it contends is the "relevant background."[21] Instead of focusing on the Set-Aside Judgment and the Ruling, Claimant spends the vast majority of Section II.B—pages 7 to 16 of Claimant's Submission—setting out what it contends are "the salient findings in the Award."[22] Claimant then proceeds to set out findings that were not made in the Award, but instead (i) were made by the English Court in its Set-Aside Judgment,[23] or (ii) were made by the tribunal in another arbitration, *Mason v. ROK*.[24] Section II concludes with further comments regarding the proceedings before the English Court.[25]

33. Claimant's construction of the Remitted Issue is flawed.

34. There is no dispute that, as a matter of English law, a judicial order can be interpreted by reference to its background. The relevant approach to interpreting an order was summarized by the Judicial Committee of the Privy Council ("**JCPC**") in *Sans Souci Ltd v VRL Services Ltd*.[26] The JCPC held that an order remitting "the issue of damages" did not remit to the tribunal *all* questions of damages which had arisen in the arbitration in that case, but

[20] *See* Claimant's Submission, ¶ 17.

[21] *See* Claimant's Submission, ¶¶ 19 *et seq.*

[22] *See* Claimant's Submission, ¶¶ 20–48.

[23] *See* Claimant's Submission, ¶¶ 45–46.

[24] *See* Claimant's Submission, ¶¶ 41–44, 47. There is no serious basis for contending that these, in particular, can be said in any meaningful sense to be relevant background to interpreting the English Court's order.

[25] *See* Claimant's Submission, ¶¶ 53–63.

[26] **CLA-229**, *Sans Souci Ltd v. VRL Services Ltd* [2012] UKPC 6.

instead remitted the specific issue which had been the focus of the Court's judgment in that case: namely, the way in which the arbitrators had dealt with, or failed to deal with, "unrecoverable expenses."[27] Claimant makes reference to *Sans Souci*,[28] but it is unclear why Claimant considers the authority helpful to its case, given the clarity of the Remitted Order in this case. In any case, for completeness and to assist the Tribunal, the ROK sets out relevant formulations of the principle from *Sans Souci* immediately below.

35. In *Sans Souci*, the JCPC observed, among other things, that the construction of a judicial order:

> depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.[29]

36. In this case, the essential background and context to the Remittal Order can be found in the Set-Aside Judgment and Ruling which accompanied the Remittal Order. The ROK therefore addresses the Set-Aside Judgment and Ruling first (**Section II.B**), before responding to Claimant's other submissions, which focus on findings in the Award (**Section II.C**). For the reasons given above and further developed below, the Set-Aside Judgment and Ruling plainly support the ROK's position as to the scope of the Remitted Issue.

1. Set-Aside Judgment and Ruling

37. There was considerable argument before the Judge about the effect that a conclusion that the NPS was not a State organ would have on the Award. Such arguments concentrated on the effect of such a conclusion on (i) the Tribunal's

---

[27] **CLA-229**, *Sans Souci Ltd v. VRL Services Ltd* [2012] UKPC 6, ¶¶ 4, 11, 15.

[28] *See* Claimant's Submission, ¶ 17.

[29] **CLA-229**, *Sans Souci Ltd v. VRL Services Ltd* [2012] UKPC 6, ¶ 13.

findings of breach; and (ii) the position regarding causation. At the Judge's request, the Parties provided the Judge with references to their arbitration pleadings regarding causation. As is evident from the Set-Aside Judgment, the Judge carefully reviewed those pleadings:

a. In respect of breach: the Court rejected the ROK's argument that, once it was appreciated that the NPS was not a State organ, the Tribunal's findings of breach were affected.[30] Claimant places weight on the Court's rejection of that argument in it Submission;[31] however, the Court's decision on this point is irrelevant to the matters now before the Tribunal. The ROK is not contending that the Tribunal can or should revisit its finding that there was a Treaty breach at the level of the Blue House, Minister, or the MHW. The question, rather, is whether that breach caused any compensable loss to Claimant.

b. In respect of causation: as noted above, the Judge addressed the issue at paragraphs 261–267 of the Set-Aside Judgment, which the ROK invites the Tribunal to re-read. He identified issues of both factual <u>and</u> legal causation which arose from the Parties' pleadings if the only relevant breaches were at the level of Blue House, Minister, or the MHW.[32] The Judge determined that, on his reading of the Award, these issues had not been determined by the Tribunal.[33] He then made the order for the remission on the terms set out above,[34] without limiting remission to the one narrow issue of legal causation which Claimant now suggests is the only issue arising.

38. At this point, it is helpful to deal with three further points arising out of findings made by the Court, before turning to address in detail the various arguments made by Claimant by reference to the findings of the Award.

[30] **CLA-222**, Set-Aside Judgment, ¶ 260.

[31] Claimant's Submission, ¶ 50.

[32] *See* **CLA-222**, Set-Aside Judgment, ¶ 262.

[33] *See* **CLA-222**, Set-Aside Judgment, ¶ 265.

[34] *See* **CLA-222**, Set-Aside Judgment, ¶ 266. *See also* **CLA-226**, Remittal Order, ¶ 3.

39. First, there are various significant points to be taken from the Ruling, which make it evident, among other things, that the Court considered both issues of factual and legal causation as being remitted.

a. Following the Court's Set-Aside Judgment, the Parties were invited to agree an order to give effect to the Court's Judgment. This is standard practice in England. Issues about the scope of the Order are then resolved by the Court. Here, there were issues about the wording of the Remittal Order, both relating to the terms of the remission and the set aside of paragraphs of the Award.[35]

b. Claimant seeks to place weight on the fact that the ROK had sought to have the entirety of the causation section of the Award set aside.[36] But this point does not assist Claimant's position. The ROK had contended that setting aside only parts of the causation section of the Award would lead to textual incoherence and make the Tribunal's task more difficult.[37] The Judge did not consider it was necessary to set aside the entire causation section, and instead decided to set aside only particular paragraphs.[38] However, there is nothing in his approach which supports Claimant's current position as to the scope of the remission. On the contrary, his approach to which paragraphs were to be set aside is inconsistent with the approach Claimant now urges on the Tribunal.

c. The Judge *did not* set aside the first sentence of paragraph 814 or any part of paragraph 815 of the Award. This was on the basis that these are "concerned with the general legal test for causation. The Tribunal's findings as to the test remain relevant to the issues which are

[35] *See* **CLA-226**, Remittal Order.

[36] *See* Claimant's Submission, ¶¶ 51–52.

[37] *See* **RLA-198**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, ROK's Brief Submissions on Consequentials, 25 February 2026, ¶ 5(a); **RLA-199**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, ROK's Reply Submissions on Consequential Matters, 6 March 2026, ¶¶ 6(b), 6(d).

[38] *See* **CLA-227**, Ruling, ¶ 5(l).

remitted."[39] This is important. Claimant's position as to the scope of the remission is flatly inconsistent with what the Judge stated. In those parts of paragraphs 814 and 815 which the Court did not set aside, and which the Court stated would be relevant to the determination of the Remitted Issue, the Tribunal had set down its view as to what is required in respect of both legal causation and *factual* causation. The fact that the Court considered those passages "relevant to the issues which are remitted" is inconsistent with Claimant's current argument that no issue of factual causation arises upon remission.

d. In respect of paragraphs 816–821, the Court did set aside the first sentence of paragraph 821, but otherwise did not set aside these paragraphs.[40] The Judge considered that those paragraphs contained "relevant arguments on a potential causal pathway leading from the breaches found to be constituted by the conduct of the Blue House, MHW and the Minister."[41] Again, this directly contradicts Claimant's current position. In paragraphs 816–820 of the Award, the Tribunal considered whether there was, as a matter of factual causation, a causal link between the NPS Vote and the Merger.[42] The Judge would not have stated that such paragraphs contained "relevant arguments" in respect of what he described as a "**potential** causal pathway" starting with the Blue House Measures, if he considered that the Tribunal had already made a binding finding that, as a matter of factual causation, the Blue House Measures caused the NPS Vote. Plainly, the Judge considered that the Remitted Issue *did* include the question whether the Blue House Measures had caused the NPS Vote.[43]

[39] *See* **CLA-227**, Ruling, ¶ 5(l)(i).

[40] *See* **CLA-227**, Ruling, ¶¶ 5(i), 5(l)(ii).

[41] *See* **CLA-227**, Ruling, ¶ 5(l)(ii).

[42] *See, e.g.*, **RLA-194**, Award, ¶¶ 816–820.

[43] By comparison, Claimant in its Submission asserts that, in deciding not to set aside paragraph 816–821, the Court "did *not* disturb . . . the Tribunal's factual findings on the chain of causation from the conduct of the Blue House and the MHW to the NPS" (emphasis in original). *See* Claimant's Submission, ¶ 52.

e. It is also important to note what the Judge said in respect of findings in the causation section of the Award which had not been set aside. He stated expressly that, "[t]o the extent that those findings prove not to be apposite to the causation issue as remitted to the Tribunal, or not to address every issue which arises in that context, the Tribunal will not be precluded by those findings from determining those issues which they are persuaded do arise but have not been addressed appropriately."[44] This is important in and of itself, and also because it is further inconsistent with Claimant's position that only one narrow point of legal causation is remitted.

40. Second, it is useful to identify upfront findings in the Court's Set-Aside Judgment and Ruling that are inconsistent with Claimant's current position that particular paragraphs of the Award contain findings that the Blue House Measures caused the NPS Vote.

a. Claimant repeatedly contends that, in particular, paragraphs 602 and 623 of the Award contain a finding of causation.[45]

b. This is simply incorrect. Indeed, the Court expressly rejected Claimant's assertion that the above paragraphs contain a finding of causation, as discussed below.

c. Those paragraphs do not contain a finding as to how the NPS would have voted *but for* the conduct which has been held to be a breach (i.e., the Blue House Measures). The Judge stated this *in terms* in his Judgment, and made the position regarding paragraph 602(b) even more clear in his Ruling.

d. In his Judgment, he stated:

> EALP relies [i.e. to resist a remission on the issue of causation and support its argument that the Award had already determined causation] on the findings as [602]-[603] to the effect that the NPS acted under the instruction

[44] *See* **CLA-227**, Ruling, ¶ 5(l).

[45] *See* Claimant's Submission, ¶¶ 3(a)–(c), 24(b), 25(e)-(f), 34, 45, 68, 70.

> and direction of the MHW. However (i) these findings appear in a section of the Award concerning breach and (ii) on their face, **they do not address the issue of whether there was any requirement (and if so for whom) to show what would have happened had there been no breach of the Treaty constituted by the Blue House Measures, and whether that burden had been discharged**.
>
> **The same is true of the finding at [623]** that in its actual vote, NPS did not act independently and for a commercial purpose, but at the direction of the MHW (that too dealing with a breach question and Korea's assertion that only sovereign acts could give rise to a breach of Article 11.5 of the Treaty).[46] (Emphasis added)

e. Further, in the Ruling, the Judge stated the following regarding paragraph 602(b) of the Award:

> Once those provisions of the Award which find that the conduct of NPS constituted a measure adopted or maintained by Korea are set aside, this paragraph simply involves a factual finding as to what NPS did and under whose directions and instructions the NPS acted.[47]

41. Third, the ROK addresses Claimant's repeated submissions that, as a matter of English arbitration law and/or as envisaged by the Judge, the Tribunal's task is simply to "clarify" views that Claimant suffered loss.[48] Claimant seems to be contending that such views can already be discerned from the Award (even if they are not set out with the requisite degree of clarity) and that it is simply a question of the Tribunal now making clear what was not sufficiently clear before.[49] This, again, is fundamentally wrong.

a. As is set out below, Claimant cannot point to a single finding of the Tribunal in the Award which is a finding that the Blue House Measures were a factual or legal cause of the NPS Vote.

---

[46] **CLA-222**, Set-Aside Judgment, ¶¶ 264(i)–(ii).

[47] **CLA-227**, Ruling, ¶ 5(c).

[48] *See* Claimant's Submission, ¶¶ 2, 13–14, 55, 62 and § 3 (Heading).

[49] *See* Claimant's Submission, ¶¶ 13–14, 55, 62 (contending that "the High Court found that the Tribunal needed to clarify its finding on the remitted issue"), 64 *et seq*.

b. There is nothing in the Set-Aside Judgment suggesting that what the Judge envisaged would be done in the Remitted Proceedings would simply be "clarifying" views which he thought existed but which were not sufficiently clearly expressed.

c. Rather, the matter arises afresh for the Tribunal to decide.

d. In that regard, it is not clear what Claimant means by saying that "a decision on the remitted issue does not entail a *de novo* review."[50] The point is: there is no extant decision in the Award on the point and the Tribunal must now reach one. That is why there has been a remission. It must decide it in the same way that it decides other issues and not with a predisposition (for which Claimant apparently contends) to a particular outcome.

e. Further, contrary to Claimant's Submission,[51] the Judge nowhere indicated what he thought the likely outcome of the Remitted Proceedings would be. Claimant places weight on the Judge's statement that he reached his decision with reluctance.[52] As part of that statement, the Judge said that "it may well be" that Claimant is entitled to the same relief, even after these Remitted Proceedings.[53] There is no basis for Claimant to assert, on the basis of that statement, that the Judge thought there was a "likelihood" that the same outcome as in the Award would follow.[54] That is expressly not what the Judge said.

42. Finally, the ROK notes that at various points in its Submission, Claimant repeatedly comments on arguments advanced by the ROK in the Set-Aside Proceedings which did not succeed before the Court. *See* for example Claimant's Submission, paragraph 1, contending (wrongly) that the ROK's

---

[50] Claimant's Submission, ¶ 64.

[51] Claimant's Submission, ¶ 5.

[52] *See* Claimant's Submission, ¶¶ 5, 58 (*quoting* **CLA-222**, Set-Aside Judgment, ¶ 268).

[53] **CLA-222**, Set-Aside Judgment, ¶ 268.

[54] *See* Claimant's Submission, ¶ 5.

challenge to the Award was "largely unsuccessful." [55] The reason for Claimant's approach is unclear: such points are irrelevant to determining the scope of the remission and the approach that the Tribunal should take to the important issues now before it. The ROK does not address these points in detail. However, it does note that, when deciding issues on costs, the Judge rejected Claimant's arguments about the level of success that the ROK had achieved in the set-aside. He held that "there is no doubt that Korea is substantially the successful party."[56] That is a further indication that the scope of this remission is not as Claimant contends. It is unlikely that the Court would have made that statement if (as Claimant contends) (i) the ROK had managed to persuade the Judge to remit back to the Tribunal only one very limited issue; (ii) the Court made the Remittal Order only so that the Tribunal may "clarify" its existing findings on causation; and (iii) the Court considered it "likel[y]" that the same result as in the Award would follow.[57] None of those points advanced by Claimant is correct, as is demonstrated in the remainder of this Submission.

43. Thus, the following discrete questions fall to be decided in these Remitted Proceedings:

  a. Factual causation: Under the applicable framework, has Claimant satisfied its burden of proving that the Blue House Measures were a cause in fact of loss or damage to Claimant?

  b. Legal causation: Has Claimant satisfied its burden of proving that the Blue House Measures are to be treated as the legal cause of loss or damage to Claimant?

  c. Relief: What relief (if any) should be awarded to Claimant for any such loss or damage? If damages in respect of loss, is that the loss as quantified by the Tribunal, or some lesser amount?

---

[55] S*ee also* Claimant's Submission, ¶¶ 8, 49–52, 59–61.

[56] **CLA-227**, Ruling, ¶ 8.

[57] All points now advanced by Claimant: *see* Claimant's Submission, ¶¶ 2, 5, 10–11, 13, 55, 63.

C. The Tribunal's findings which have not been set aside do not resolve any of the questions encompassed by the Remitted Issue

44. At pages 7–16 of its Submission, Claimant refers to what it contends are "salient findings on causation" in the Award which have not been set aside.

45. Claimant is correct that there are various findings in the Award which have not been set aside. But many are not to do with causation at all, but instead with anterior questions of breach, and none of them determines the question which is now back before the Tribunal.

1. Applicable legal tests

46. Claimant notes that the Tribunal had set out in the Award tests for factual and legal causation.[58] It relies in this regard on the Tribunal's findings at paragraph 815 of the Award, in the section on causation. There is no dispute that, in that paragraph, the Tribunal set out its views as to the applicable legal tests.

47. The ROK notes three points.

a. First, the Tribunal's formulation in respect of factual causation is that it involves the determination of whether Claimant would have suffered the claimed loss or damage in the absence of the breach. Claimant *accepts* that the test turns on the "but for" question.[59] That is important to have in mind because none of the passages in the Award on which Claimant relies as supposedly including findings of factual causation show the "but for" question having been asked or answered in respect of breaches at the level of the Blue House, Minister, or the MHW.

b. Second, the ROK notes a further passage from the Award in which the Tribunal set down a legal standard it was applying, but which Claimant ignores. At paragraph 931, referring to *Chorzów Factory*, the Tribunal took the approach that, in order for potential loss to be compensable under international law, Claimant would have to demonstrate that the claimed increase in value (i.e., the failure to obtain that which was being

[58] *See* Claimant's Submission, ¶ 21.

[59] *See* Claimant's Submission, ¶¶ 21(a), 24, 28–29.

relied upon by Claimant as a loss) would have occurred "in 'all probability'." In other words, the Tribunal has already indicated the legal standard which it considers applies in respect of establishing causation and the existence of loss.

c. Third, as noted above, when explaining in the Ruling its decision not to set aside the entirety of the causation section of the Award, the Court stated: "To the extent that those findings [i.e. findings in the causation section] prove not to be apposite to the causation issue as remitted to the Tribunal, or not to address every issue which arises in that context, the Tribunal will not be precluded by those findings from determining those issues which they are persuaded do arise but have not been addressed appropriately."[60]

2. *Findings on which Claimant relies as supposedly showing that the Tribunal has already found that the Blue House Measures caused the NPS Vote*

48. Claimant refers to a number of passages from the Award which, it contends, show that "the Tribunal has already found that the ROK's breaches caused the NPS to vote in favor of the Merger."[61] Claimant asserts that the Award contains "the Tribunal's conclusions on whether the ROK's breaches caused the NPS to vote in favor of the Merger,"[62] and that "[t]he Tribunal has already made numerous factual findings that the ROK *did* cause the NPS to vote in favor of the Merger"(emphasis in original).[63]

49. The findings to which Claimant refers do *not* establish any such thing. They do not reflect a finding that, in a but-for world (i.e., one in which there had been no breach constituted by the Blue House Measures), the NPS would have decided to vote against the Merger or to abstain. Moreover, many of the matters which Claimant asserts[64] are findings of causation are not findings *by*

[60] **CLA-227**, Ruling, ¶ 5(l).

[61] Claimant's Submission, § II.B(1)(ii) (Heading). *See also id.*, ¶¶ 22–26.

[62] Claimant's Submission, ¶ 22.

[63] Claimant's Submission, ¶ 23.

[64] *See, e.g.*, Claimant's Submission, ¶¶ 3, 24–25, 27, 30.

the Tribunal at all, but are instead quotations included in the Award of what had been stated in Korean Court judgments of the Moon/Hong case.

50. The ROK now addresses in turn the points made by Claimant. It returns to some of those points in more detail below, in its analysis of the factual case in **Section III**.

51. At paragraph 24 of its Submission, Claimant states[65] that the Tribunal has already made various findings on the question whether, but for the instruction to bypass the EVC, the decision would have been referred to the EVC and whether the EVC would have voted against the Merger. This is inaccurate, for the reasons explained immediately below.

52. With respect to paragraph 24(a):

  a. What Claimant characterizes as a finding of the Tribunal is actually a summary of something stated by the first-instance court in the Moon/Hong case.[66] That is not a finding of fact by the Tribunal (though, of course, when considering the issue of causation now before it, the Tribunal will have regard to what has been said by the Korean courts (including in the Additional Judgments that are now part of the record).

  b. Moreover, the text to which Claimant refers here is not (and Claimant does not actually contend otherwise) a finding by the Tribunal that, in the circumstances of this case, but for the Blue House Measures, the vote would have been referred to the EVC.

53. With respect to paragraph 24(b):

  a. In the first sentence of the paragraph, Claimant stitches together quotations from three different paragraphs of the Award, the first of

[65] Claimant's Submission, ¶ 24.

[66] **RLA-194**, Award (as corrected and partially set-aside) ("**Award**"), 20 June 2023, ¶ 598.

which in fact merely recites what a Korean court said and is not a finding of fact made by the Tribunal.[67]

b. In the second sentence, Claimant inaccurately paraphrases the combined effect of those three quotations. Claimant asserts that "the Tribunal found that, due to instructions to bypass the EVC, the vote was handled by the Investment Committee and, moreover, *that the reason for this instruction was the likelihood that the EVC would have voted against the Merger*" (emphasis in original).[68] This is incorrect. *Nowhere* in the Award did the Tribunal find that it was likely that the EVC would have voted against the Merger.

c. If the Tribunal were to consider that, but for the breaches, the matter likely would have been referred to the EVC, the question of what decision, but for the breaches, the EVC in all probability would have reached is precisely one of the key issues to be considered in these Remitted Proceedings.[69]

d. A statement that referral to the EVC would not *guarantee* the Merger (which is quoted by Claimant[70]) is *not* the same thing as saying that, if the matter had been referred to the EVC, the EVC would have voted against.

54. In paragraph 24(c), Claimant states that "the Tribunal also found that the ROK offered no evidence to contradict this finding," i.e. the purported finding that Claimant has set out in paragraph 24(b). However, as the ROK has just shown, there was no such finding. Nor is there such a finding at paragraph 820 of the

---

[67] **RLA-194**, Award (as corrected and partially set-aside) ("**Award**"), 20 June 2023, ¶ 587.

[68] Claimant's Submission, ¶ 24(b).

[69] If the question *can* be decided: given that the answer depends on the actions of a number of independent third parties, and involves considerable uncertainty, it may be that the Tribunal's view is that Claimant's only viable claim is for a loss of a chance. *See* **Section V**.

[70] Claimant's Submission, ¶ 24(b) (*quoting* **RLA-194**, Award, ¶ 587).

Award, to which Claimant also refers.[71] Claimant does not actually rely upon any finding purportedly made in that paragraph, other than the Tribunal's statement that Mr. Cho's evidence was "inconclusive." What the Tribunal was doing in paragraph 820 of the Award was considering whether *the NPS Vote* had caused the Merger (not whether the Blue House Measures had caused the NPS to vote as it did). In that context, the Tribunal considered Mr. Cho's evidence. The Tribunal was considering whether the potential for the EVC to have voted in favor of the Merger in any way affected the conclusion that the NPS Vote had caused the Merger. The Tribunal considered Mr. Cho's evidence inconclusive in that context; and it stated that in any event, there was no basis for going behind the Korean court's findings (i.e., that the *NPS Vote* had caused the Merger). That, again, contains no finding at all about whether Claimant has established, to the requisite standard of proof, that the Blue House Measures caused the NPS to vote in favor of the Merger.

55. At paragraph 25 of its Submission, Claimant sets out passages in the Award which in summary say that, in the *actual* world, the Ministry intervened in the NPS vote and instructed the NPS to ensure an affirmative vote; and the NPS acted on those instructions, by bypassing the EVC and taking steps to ensure that the Investment Committee would vote in favor of the Merger, to the effect that the Investment Committee did vote in favor of the Merger. As to this:

    a. Again, some of what the Claimant contends are relevant "findings" are in fact quotations from Korean court judgments and not findings by the Tribunal. The Tribunal's observations on those quotations appear at paragraphs 602 and 623 of the Award.

    b. The ROK does not address individually each of the points relied upon, because what is critical is that all those points describe what happened in the *actual* world. These say nothing about whether the same result (i.e., the NPS vote in favor of Merger) would have obtained in the absence of the Ministry's interference. It still remains for Claimant to

[71] *See* Claimant's Submission, ¶ 24(c).

prove the 'but-for' scenario. Findings from the "actual" world do not discharge Claimant's burden.

c. The English Court expressly and specifically highlighted that the findings at paragraphs 602 and 623 of the Award do not address factual causation with respect to the Blue House Measures.[72] The English Court has made crystal clear that paragraph 602(b) of the Award, in particular, contains no causal finding.[73] It is a matter of regret that Claimant repeatedly ignores this fact.

d. It therefore remains open for the Tribunal to address what would have happened absent the interference (that is, the factual causation question).

e. The quote at paragraph 25(h) of Claimant's Submission is a reference not to a finding by the Tribunal, but to the Tribunal noting that the Korean first instance Court in the Moon/Hong matter had relied upon the fact that a number of the Investment Committee members testified that they would likely not have voted for the Merger *had they known that the synergy effect was fabricated*.[74] That is not a finding as to how such Investment Committee Members would have voted if there had been no breach.[75] If a person says "I would not have voted at the meeting in favor of the Merger if I had known that the synergy effect is fabricated," that is not the same thing as saying "I would not have voted in favor of the Merger if I had been provided with other analysis." The ROK

---

[72] *See* **CLA-222**, Set-Aside Judgment, ¶¶ 264 (i)–(ii), ¶ 260.

[73] *See* **CLA-222**, Set-Aside Judgment, ¶ 260; **CLA-227**, Ruling, ¶ 5(c).

[74] **RLA-194**, Award (as corrected and partially set-aside) ("**Award**"), 20 June 2023 ¶ 598.

[75] Indeed, there had been detailed argument about this in the arbitration (to which reference is again made below). *See* ROK's Opening Presentation, Demonstrative C; Claimant's Statement of Reply and Defence to Preliminary Objections, 17 July 2020 ("**Claimant's Reply**"), ¶¶ 5(g), 506–508; Claimant's Amended Statement of Claim, ¶ 127. The fact that there is no indication in the Award of the Tribunal having considered such arguments provides further confirmation (not that one is needed) that the Award contains no finding of how the NPS likely would have voted in the absence of any interference at all.

addresses the evidence regarding how Investment Committee Members would have voted in a but for world in further detail below.[76]

56. At paragraph 26, Claimant again mischaracterizes the Tribunal's findings to go beyond what they actually say. Claimant says that these findings confirm that the Investment Committee Members "would not otherwise have supported the Merger." There is no such finding.

3. *Findings relating to whether the NPS Vote caused the Merger to be approved*

57. Paragraphs 27–29 of Claimant's Submission deal with the finding that the NPS held a casting vote on the Merger, such that the NPS Vote caused the Merger to be approved. That is, indeed, the subject of binding findings, which have not been set aside. But this does not in any way answer the prior question of whether the Blue House Measures caused the NPS Vote. It also does not rule out arguments that, if the question of legal causation is being asked from the perspective of the Blue House Measures, instead of at the level of the NPS, legal causation is not satisfied.[77] These are points addressed in more detail below.

4. *Quantum*

58. At paragraphs 30 and 31 of its Submission, Claimant turns to findings regarding quantum of loss caused by the Merger, which the Tribunal held had been caused by the NPS Vote. As noted above (and as discussed in more detail below), that is not the same question as what loss (if any) was caused by the Blue House Measures. Again, nothing here (contrary to what Claimant states at paragraph 32 of its Submission) is an "existing finding confirm[ing] that the loss suffered hy EALP was caused by the ROK's breaches of the Treaty."

---

[76] *See* **Section III.B** below.

[77] Nor does it rule out taking a view that the appropriate alternative analysis in this case is a "loss of a chance" analysis.

5. *Findings on which Claimant relies regarding absence of break in chain of causation*

59. At paragraphs 33–39 of its Submission, Claimant turns to addressing what it says are "the Tribunal's findings that there is no evidence of any intervening break in the chain of causation."

a. At paragraph 34, Claimant relies upon a finding that the Investment Committee did not *in fact* act independently. This is, of course, irrelevant to the *but for* question.

b. At paragraph 35, Claimant asserts that "the Tribunal rejected the ROK's argument that the EVC *could have* voted in favor of the Merger had the vote been referred to it, this hypothetical exercise of independent judgment thus breaking the chain of causation." It refers to paragraph 822 of the Award in which the Tribunal did indeed say that "[t]he Tribunal is also unable to agree with the Respondent's argument that there was no causal link or that any such link was interrupted because the Experts Voting Committee could also have rejected the Merger"(emphasis omitted). That paragraph has in fact been set aside.[78] Claimant says at footnote 61 that this was because that paragraph "could be somehow interrelated with the Tribunal's finding that the NPS was a de facto State organ," and that "the High Court invited the Tribunal to revisit this issue and thus it is entirely open to the Tribunal to confirm in its additional Award that the language on causation in paragraph 822 was not dependent on its finding regarding the legal status of the NPS."

c. What the Court actually said by way of explanation for setting aside that paragraph was:

> I am satisfied that the Tribunal's findings as to the absence of an intervening cause by reason of events internal to the NPS are inextricably linked with the findings of causation which it did make in respect of breaches said to be constituted by acts of the NPS as measures adopted or maintained by Korea, and to that extent fall to be revisited

[78] *See* **CLA-226**, Remittal Order, ¶ 2(h).

in circumstances in which the issue of causation is remitted.

d. It may be that the Tribunal considers that the statement of principle quoted by Claimant from paragraph 822 of the Award remains correct and should be applied. However, the Tribunal was applying the proposition expressed in that statement to a situation in which it considered that the NPS Vote was *itself* a breach and was asking whether the fact that the EVC *could* have voted in the same way (i.e., that the NPS could in other circumstances not have breached the Treaty) sufficed to undermine the causal potency of that breach (i.e., the Vote by the NPS). Here, the question is now completely different: namely, did the Blue House Measures cause the NPS to vote as it did?

e. Paragraph 36 is a reference to a finding as to lack of intervening act breaking the chain of causation *between the NPS vote and the loss/damage* (i.e., the finding at paragraph 821 of the Award). Again, this does not address the prior question of whether the Blue House Measures caused the NPS Vote.

f. Paragraphs 37 and 38 deal with findings of foreseeability. Such findings contain no finding as to factual causation.

60. Again, therefore, Claimant's conclusion is unsupported. At paragraph 39 of its Submission, it contends that "these findings [i.e., those addressed at paragraphs 33–38] conclusively establish both factual and legal causation at all three levels of the causal chain." They do no such thing. It is, however, revealing and helpful for there to be explicit acknowledgment from Claimant that there are different levels of the causal chain.

6. Mason tribunal findings

61. At paragraphs 40–48 of its Submission, Claimant seeks to use the analysis and findings of the *Mason* tribunal. It is unclear how this is said to be relevant to interpretation of the scope of the Remittal Order. It is not. Claimant's points regarding *Mason* are addressed at **Section III.C** below.

7. *Conclusion*

62. The basic point is that the surviving findings in the Award establish what occurred in the actual world and contain certain findings about legal standards to be applied regarding causation. They do not resolve—and in some cases were expressly identified by the English Court as not resolving—the question of whether the Blue House Measures caused the NPS Vote and what relief (if any) should be available to Claimant in respect of the breaches constituted by the Blue House Measures. Those are the questions for the Tribunal in these Remitted Proceedings. The ROK now turns to addressing them, making reference (as appropriate) to existing findings by the Tribunal.

III. CLAIMANT HAS NOT ESTABLISHED FACTUAL CAUSATION

63. As discussed in **Section II** above, the English Court concluded that the Tribunal had not established factual and legal causation "in respect of the breaches constituted by the Blue House Measures alone," "even if [as the Court found] the acts of NPS are not attributable to Korea."[79] Therefore, the Tribunal must now resolve questions of *factual causation* (i.e., whether, absent the Blue House Measures, the NPS would have voted differently) and *legal causation* (i.e., whether the claimed loss or damage is recoverable in law in respect of the Blue House Measures breach).

64. The ROK addresses legal causation in **Section IV** below.

65. In this section, the ROK addresses the question of factual causation, starting with the applicable burden and standard of proof (**Section A**). As the ROK then demonstrates, the evidence does not establish that, but for the Blue House Measures, the NPS would have voted against the Merger or abstained (**Section B**). The *Mason* tribunal's decision to the contrary is not supportable on the evidence before this Tribunal and is otherwise not persuasive (**Section C**).

[79] *See* **CLA-222**, Set-Aside Judgment, ¶ 265.

A. Claimant bears the burden of proving factual causation to a "sufficient degree of certainty" standard

66. As Claimant accepts, the burden of proving factual causation is on Claimant.[80]

67. Furthermore, at paragraph 932 of the Award, the Tribunal confirmed that speculative claims are not compensable under international law; and, at paragraph 931, it found—applying the principle of full reparation established in *Chorzów Factory*—that, for potential loss to be compensable under international law, Claimant needed to demonstrate that the claimed increase in value would have occurred "in all probability."[81] These holdings confirm the standard that governs the present inquiry: Claimant must prove, to a sufficient degree of certainty, that its but-for world would have come to pass.

68. The "in all probability" standard on which the Tribunal premised its analysis—equivalent to the "sufficient degree of certainty" standard applied by other tribunals[82]—does not equate to any exact percentage of likelihood, but it does require a showing of probability that is significantly higher than a pure balance of probabilities.

69. The standard derives from two seminal international law decisions, and, in addition to being accepted by this Tribunal at paragraph 931 of the Award, it has also been applied by other investor-State tribunals, including in *Bilcon v. Canada*.[83]

70. In *Chorzów Factory*, the PCIJ held that reparation must, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, **in all probability**, have existed if that act had not been committed"

---

[80] *See* Claimant's Reply, ¶ 504 ("The threshold factual question is whether, but for the State's wrongful acts, a claimant would have sustained the injury alleged."), ¶¶ 521, 523 (quoting the *Stati v. Kazakhstan* tribunal's statement that "Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct").

[81] **RLA-194**, Award, ¶¶ 931–932.

[82] *See* ROK's Statement of Defence, ¶ 469.

[83] *See* **RLA-194**, Award, ¶ 931; **RLA-090**, *Bilcon* (Award on Damages), ¶¶ 168–175.

(emphasis added).[84] The dictionary definition of the phrase "in all probability" points to *something that is very likely to happen*; it carries a meaning materially stronger than a mere balance of probabilities. English-language dictionaries define the expression as follows:

a. "almost certainly; very likely" (Merriam-Webster);[85]

b. "used to mean that something is very likely" (Cambridge Dictionary);[86] and

c. "in all likelihood" (Dictionary.com).[87]

71. The dictionary definitions thus confirm that the "in all probability" formula used in *Chorzów Factory* sets a threshold that is significantly higher than "more likely than not." The PCIJ's deliberate choice of that expression—as opposed to any readily available lower-register alternative, such as "probably"—reflects a standard that is materially more demanding than a balance of probabilities.

72. The ICJ in *Bosnian Genocide* complemented the *Chorzów Factory* formulation with the requirement that it be established "with a sufficient degree of certainty" that the loss "would in fact have been averted" had the respondent acted in compliance with its obligations.[88]

73. The *Bilcon* tribunal synthesized the above two authorities into the test that the ROK invoked in the Original Proceedings.[89] That tribunal, chaired by former ICJ judge Bruno Simma, summarized the position as follows:

> Authorities in public international law require a **high standard of factual certainty** to prove a causal link

[84] **CLA-097**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928, p. 47.

[85] **RLA-200**, Merriam-Webster, "in all probability".

[86] **RLA-201**, Cambridge Dictionary, "in all probability".

[87] **RLA-202**, Dictionary.com, "in all probability".

[88] **CLA-024**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, p. 43.

[89] *See* ROK's Statement of Defence, ¶ 469; ROK's Rejoinder, ¶¶ 432–434.

> between breach and injury: the alleged injury must "in all probability" have been caused by the breach (as in *Chorzów*), or a conclusion with a "sufficient degree of certainty" is required that, absent a breach, the injury would have been avoided (as in *Genocide*). While the facts of the *Genocide* case were of course markedly different from those underlying the present arbitration, there is an important similarity: the ICJ, as the Tribunal in the present case, was confronted with a situation of factual uncertainty, where in the view of one of the parties, the same injury would have occurred even in the absence of unlawful conduct.[90] (Emphasis added)

74. In addition to the *Chorzów Factory* and *Bosnian Genocide* authorities, the *Bilcon* tribunal also supported its holding with a reference to the "even stricter approach" established in *Nordzucker v. Poland*, which enquired whether the respondent's conduct "necessarily" led to the harm.[91]

75. Applying the "sufficient degree of certainty"—or "in all probability"—standard to the facts of the case before it, the *Bilcon* tribunal decided not to award the claimant any damages because a mere "realistic possibility" of the claimed outcome fell short of either formulation.[92] It held that there had been a treaty breach in how an environmental assessment had been carried out by a joint review panel but that the claimants had not demonstrated to the requisite high standard that, if there had been no breach, that decision making process would have resulted in permission having been granted.[93] The *Bilcon* tribunal awarded damages for the value of the right of having a treaty compliant environmental assessment carried out (i.e., on a "loss of chance" basis"),[94] but emphatically *not* on the basis that the Tribunal could conclude to the requisite high standard of factual certainty that permission would have been granted and the project proceeded.[95]

---

[90] **RLA-090**, *Bilcon* (Award on Damages), ¶ 110.

[91] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 111; **RLA-126**, *Nordzucker AG v The Republic of Poland* (UNCITRAL), Third Partial and Final Award, 23 November 2009, ¶ 51.

[92] **RLA-090**, *Bilcon* (Award on Damages), ¶¶ 168–175.

[93] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 175.

[94] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶¶ 221, 280.

[95] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 276.

76. The *Bilcon* claimants subsequently applied for the set-aside of the award, arguing that the tribunal "did not apply the correct standard of proof; rather, it applied a standard of proof that is unknown to international law" and which, the claimants alleged, was "so high it was impossible […] to meet."[96] In a judgment dated 24 November 2022, the Ontario Superior Court of Justice dismissed the claimants' application and, citing specifically to *Chorzów Factory* and *Bosnian Genocide*, held that "the Tribunal correctly identified the relevant principles of international law arising from jurisprudence."[97] On appeal, the Ontario Superior Court of Appeal confirmed that "there is no question that the tribunal identified the correct standard of proof."[98]

77. Claimant contested the *Bilcon* standard in the Original Proceedings, relying on authorities that (it claimed) applied a balance of probabilities test that "does not articulate a higher standard of proof rather than the general standard applied in international law, namely the 'balance of probabilities' or 'preponderance of evidence standard'."[99] The ROK addressed each of those authorities in the Rejoinder and explained why none of them supports Claimant's position on factual causation.[100] Although the Tribunal has already in effect resolved this dispute, by applying the "in all probability" standard at paragraph 931 of the Award, the ROK notes the following for completeness. The authorities Claimant cited—*Glencore*, *Bear Creek*, *Gold Reserve*, and *Kardassopoulos*—each concerned either the standard for proving findings of historical facts or the standard for proving the quantum of loss at the damages

---

[96] **RLA-203**, *Clayton et al. v. Attorney General of Canada*, 2022 ONSC 6583, 19-20 October 2022, ¶ 41.

[97] **RLA-203**, *Clayton et al. v. Attorney General of Canada*, 2022 ONSC 6583, 19-20 October 2022, ¶ 39. *See also id.*, ¶¶ 45–48.

[98] **RLA-204**, *Clayton v. Canada (Attorney General)*, 2024 ONCA 581, 15 May 2024, ¶ 22.

[99] Claimant's Reply, ¶ 506 (*citing* **CLA-121**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019; **CLA-089**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017; **CLA-122**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014; **CLA-133**, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010).

[100] *See* ROK's Rejoinder, ¶¶ 430–434.

stage. None addressed the distinct question of the standard of proof for factual (but-for) causation, which is an inherently counterfactual and probabilistic inquiry rather than a determination of what did happen.[101] Unlike Claimant's authorities, the authorities on which the ROK relies—*Chorzów Factory*, *Bosnian Genocide*, *Bilcon* and *Nordzucker*—all dealt directly with the question of burden of proof for causation. All agreed that the burden is *not* "a balance of probabilities."

78. Here, the applicable standard requires Claimant to prove to a sufficient degree of certainty that, absent the Blue House Measures, the NPS would have voted against the Merger or abstained, with the effect that the Merger Vote would have failed to reach the necessary two-thirds threshold and Claimant would not have suffered the alleged loss.

79. The ROK's primary position is that (i) this is the applicable framework, (ii) applying it to the evidence reveals that Claimant has failed to prove factual causation (**Section III.B** below), and, accordingly (iii) Claimant is not entitled to any compensation in this case. The ROK's alternative position is that a loss of chance framework should apply, as anticipated in paragraph 263(v) of the Set-Aside Judgment.[102] The ROK describes that framework and its application to the facts of this case in **Section V** below.

B. Claimant cannot show to the requisite standard that the NPS Vote would have been different but for the Blue House Measures

80. As demonstrated above, Claimant bears the burden of establishing factual causation to the "sufficient degree of certainty" standard. Claimant has not met that burden, and cannot meet that burden, because the evidence does not support a finding that, absent the Blue House Measures, it is sufficiently

[101] As the ROK explained at paragraph 430 of the Rejoinder, *Glencore* and *Gold Reserve* addressed proof of factual findings and quantum respectively; *Bear Creek* addressed the quantum only; and *Kardassopoulos* confirmed causation on self-evident facts without offering guidance on the applicable standard. *Gold Reserve* noted that, even under the balance of probabilities standard, evidence of something being merely "possible" does not suffice.

[102] **CLA-222**, Set-Aside Judgment, ¶ 263(v) ("It could be said that the correct analysis was a 'loss of a chance' analysis").

certain that the NPS would have voted against the Merger or abstained. Nor would Claimant succeed even if the burden were a lower one of balance of probabilities (which it is not). To the contrary—if matters were being considered on a balance of probabilities standard (which they should not be), and although the ROK does not bear the burden of so proving—the evidence establishes that an independent NPS likely would have voted for the Merger.

1. *The balance of relevant factors weighed in favor of approving the Merger*

81. The announcement on 26 May 2015 by the boards of SC&T and Cheil that they had approved the proposed Merger set off a fierce contest between proponents of the Merger, led by Korea's largest conglomerate, the Samsung Group, and opponents, led by Claimant, with both sides waging extensive persuasion campaigns targeted at SC&T shareholders.[103] The Fund was the largest shareholder of SC&T, with more than 17.5 million shares, representing 11.21% of the company's total outstanding shares; at the same time, the Fund also held more than 6.5 million shares in Cheil, representing 4.84% of that company's total outstanding shares.[104] Although the Fund held more SC&T shares than Cheil shares, the market value of its shareholding in the two companies was similar—KRW 1.25 trillion (approximately USD 800 million) for SC&T and KRW 1.14 trillion (approximately USD 729.6 million) for Cheil, as of the end of June 2015.[105]

82. It fell to the NPS, as the entity responsible for operating the Fund and exercising its voting rights,[106] to decide how to vote the Fund's shares on the Merger. As discussed further below, the operative Voting Guidelines required the NPS to exercise the Fund's voting rights with a view to enhancing long-

---

[103] **RLA-194**, Award, ¶¶ 209–216.

[104] **Ex. R-126**, NPSIM Management Strategy Office (Responsible Investment Team), "Agenda for Decision: Proposed Exercise of Voting Rights on Domestic Equity Investments", 10 July 2015, p. 1 (shareholding as of 10 July 2015).

[105] **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 8. Indicative USD figures at exchange rate of KRW 1 = USD 0.00064, obtained from Oanda Currency Converter (last accessed on 7 June 2026).

[106] **RLA-194**, Award, ¶¶ 154–156.

term shareholder value and improving long-term and stable rates of return on the Fund's assets.[107] Application of those guidelines to the Merger decision was a high-stakes exercise. Critically, the Merger decision was expected to have important consequences for the business continuity and overall profitability of the Samsung Group as a whole.[108] The importance of this factor to the NPS is underscored by the fact that as much as one-fourth of the entire Fund portfolio, with a market value in excess of KRW 23.19 trillion (approximately USD 14.8 billion), was invested in Samsung Group companies at that time.[109]

83. In the sections below, the ROK demonstrates that the balance of relevant factors weighed in favor of a decision by an independent NPS that the Merger could be expected to contribute to the long-term stability and profitability of the Fund's portfolio of investments in the Samsung Group, including SC&T and Cheil, and should be approved.

a. <u>Relevant considerations under the Voting Guidelines</u>

84. The NPS exercises the voting rights of the Fund in accordance with the Voting Guidelines promulgated by the Fund Operation Committee.[110] The Voting Guidelines require that the Fund's voting rights be exercised in good faith for the benefit of the Fund's beneficiaries[111] and in such a manner as to "increase shareholder value in the long term."[112] The Voting Guidelines also mandate a principle of "responsible investment," whereby the Fund's voting rights must be exercised "in consideration of factors of responsible investment such as the

[107] **RLA-194**, Award, ¶ 222. *See also* **Section III.B.1.a** below.

[108] *See* **Section III.B.1.b** below.

[109] **RLA-194**, Award, ¶ 235; **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 8.

[110] **RLA-194**, Award, ¶ 221.

[111] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 3; **RLA-194**, Award, ¶ 222.

[112] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 4; **RLA-194**, Award, ¶ 222.

environment, society, and corporate governance in order to enhance long-term and stable rate of return."[113]

85. Article 6 of the Voting Guidelines establishes the following "fundamental principles" in relation to the exercise of voting rights:

> 1. If the item does not go against the interests of the fund and does not lead to a decrease in shareholder value, the Fund shall vote in approval.
>
> 2. If the item goes against the interests of the fund or decreases shareholder value, the Fund shall vote in opposition.
>
> 3. In the event that an item does not fall within the aforementioned categories, the Fund may vote neutrally or abstain.[114]

86. The Voting Guidelines provide further that agenda items for mergers and acquisitions should be assessed on a case-by-case basis, and the Fund should vote against if the merger proposal is deemed to damage shareholder value.[115] The term "shareholder value" is generally understood to refer to the returns earned by a company's shareholders in the form of stock price increases and dividend payments, and this is how the NPS understood the term in the actual scenario.[116]

87. In deciding on the Merger in the actual scenario, the NPS determined that its mandate to assess the impact of the Merger on shareholder value necessarily required it to consider the impact on the Fund's shareholding not only in SC&T and Cheil (the two merging companies), but also in the other 15 Samsung Group companies in which the Fund held sizable investments and that were

---

[113] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 4-2; **RLA-194**, Award, ¶ 222.

[114] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 6. *See also* **RLA-194**, Award, ¶ 222.

[115] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 7, Attachment 1, Art. 34(1); **RLA-194**, Award, ¶ 222.

[116] *See, e.g.*, **RLA-127**, IBA Rules on the Taking of Evidence in International Arbitration 2010, pp. 7–8, 12 (analyzing expected impact of Merger on stock prices and dividend payout ratio).

expected to be impacted by the Merger.[117] In its judgment in the Moon/Hong case, the Seoul Central District Court acknowledged that it had been necessary for the NPS to consider not only the value of the SC&T shares, but also "the overall profitability of the entire portfolio regarding the Samsung Group, which accounted to about 25% of the total shares under the Fund."[118] There is no basis to assume that the NPS would have taken a different view in the Treaty-compliant counterfactual scenario. Thus, an independent NPS would have decided on the Merger having regard to the impact not only on the Fund's shareholdings in SC&T and Cheil but also its substantial holdings in other Samsung Group companies.

b. Factors weighing in favor of approval

88. Consistent with the objectives of protecting the interests of the Fund, increasing long-term shareholder value, and responsible investment to enhance long-term and stable investment returns, the following factors weighed in favor of approval of the Merger.

(i) Enhancing long-term shareholder value and stable returns through necessary corporate governance reform

89. One full year before the Merger was announced, the NPS produced an analysis of corporate governance reform of Korea's major *chaebols*, which concluded

[117] **RLA-194**, Award, ¶ 235 ("While the Investment Committee recognized that the Merger Ratio was unfavorable to SC&T if viewed in isolation, it also considered the NPS's shareholding in Cheil and other Samsung Group entities, i.e., the overall profitability of its entire portfolio regarding the Samsung Group, as the Samsung Group investments 'accounted to about 25% of the total shares of under the Fund.'"); **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 7–10 (analyzing impact of Merger decision on value of shares held by the Fund in 17 Samsung Group companies, as well as impact on the Korean stock market and Korean economy as a whole).

[118] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67 ("Overall, the [NPS] Investment Management, while concerned about the SC&T shares being undervalued, had to consider the overall profitability of the entire portfolio regarding the Samsung Group, which accounted to about 25% of the total shares under the Fund, which made it difficult to decide on a yes or no vote."). *See also* **RLA-194**, Award, ¶ 235; **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 39–40 (holding that Voting Guidelines required consideration of impact of Merger on entire Fund portfolio, not solely on shares of SC&T and Cheil and not solely on basis of Merger Ratio).

that changing from a complex cross-shareholding structure (typically used by the founding family of the *chaebol* to maintain control without owning majority stakes) to a holding company structure consistently resulted in the period following the reform in an enhancement of shareholder value—specifically, an increase in stock prices (reflecting a reduction in the so-called "Korea discount" that the stock market applies to *chaebol* shares).[119] Cross-shareholding structures are disfavored for a number of reasons, including their tendency to obscure conflicts of interest and facilitate non-transparent transfers of wealth to controlling families at the expense of other shareholders (i.e., "tunneling").[120] The NPS analyzed the prospects for the Samsung Group to undergo reform toward a holding company structure, including (in one scenario) via a merger of SC&T and Cheil (formerly Samsung Everland).[121] The NPS assessed that a reform of that nature was expected to "have a positive impact on the result of Korean equities investment"[122]—i.e., it would result in an increase in the stock performance of Samsung Group companies by reducing the "Korea discount."

90. After the Merger was announced, and throughout the period in which the NPS was deliberating on the exercise of its voting rights on the Merger, the NPS viewed the Merger as a desirable step toward reforming the governance structure of the Samsung Group and thereby improving the stock performance of the Samsung Group companies in which the Fund held substantial investments.[123] The NPS's expectation was that the Merger would enhance

[119] **Ex. R-061**, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups", 15 May 2014, p. 1.

[120] *See, e.g.*, **RER-5**, Bae Report, ¶¶ 39–40, 46–47, 50–51.

[121] **Ex. R-061**, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups", 15 May 2014, p. 6.

[122] **Ex. R-061**, Domestic Equity Division of Investment Management, "Review of the Possibility of Corporate Governance Reform of Major Groups", 15 May 2014, p. 1.

[123] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 2, 7–9. *See also* **Ex. R-123**, NPS document titled "For reference" containing data relating to the Merger, 8 July 2015, p. 55; **Ex. C-500**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court)

long-term shareholder value (i.e., stock price performance and dividend payout ratios over the long term) in the combined SC&T/Cheil ("**New SC&T**") and also in other Samsung Group companies, consistent with the NPS's analysis of prior cases of *chaebol* governance reform.[124] Such enhancement of shareholder value was unrelated to any projection of synergies from the Merger, as it was expected to flow from the change in corporate governance structure itself (and the resulting reduction in the "Korea discount").

91. Such a view has recently been validated by the findings of the Korean courts in the JY Lee Unlawful Merger Judgments. Specifically, the Seoul Central District Court found that "[t]he objectives and anticipated effects of the Merger from a corporate governance perspective included enhancing stability of corporate control over [SC&T] by strengthening the Group's control of [SC&T], bolstering its status as a de facto holding company, resolving circular shareholdings and simplifying the corporate governance structure."[125] The court concluded that "[a]ll of these effects can be considered as [] aligning with the interests of both [SC&T] and **its shareholders**" (emphasis added).[126] In reaching this finding, the Seoul Central District Court relied in part on Claimant's contemporaneous acknowledgement that "[w]e understand and

[RESP011343], 10 April 2017 ["**Transcript of Court Testimony of** [redacted]"], p. 53 ("**Q.** Was there an awareness of the fact that this Samsung Merger may be a starting point for the Samsung Group's transition into a holding company structure? **A.** At the time, I did think that it was part of that plan.").

[124] *See, e.g.*, **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13 ("[A]ccording to the 'Analysis Relating to the Merger' materials provided to the Investment Committee, synergy effects were merely one of several criteria for assessing the effects of the Merger, with overall consideration also given to changes in governance structure . . . ."); **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 2, 7–9; **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 54 ("**Q.** I hear that there were opinions that the entire stock prices of Samsung would grow at least 20% if Samsung shifted to a holding company structure, even within the NPS itself. **A.** I can't remember the exact figures, but I think that there was a general consensus that there will be a synergy in the large sense.").

[125] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 369.

[126] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 369.

support the necessity of restructuring for the succession of corporate control of [Samsung] Group."[127]

92. Again, nothing suggests that the NPS would have taken a different view in the Treaty-compliant counterfactual scenario.

(ii) Protecting the interests of the Fund, long-term shareholder value, and stable returns against damage from a failed Merger

93. In a confidential report commissioned by Claimant in March 2015 (roughly two months before the Merger was announced), the corporate intelligence firm Spectrum Asia advised Claimant of the perceived importance within Korea of a successful merger of SC&T with Cheil:

> All sources interviewed agreed that the Samsung Group is in the midst of a restructuring process with the goal of keeping the Group, or at least its most valuable parts, under the control of the third generation of Lees while minimizing inheritance taxes. . . . **A merger of C&T with Cheil Industries forms part of all known options, is considered inevitable, and believed the only viable method of increasing the Lee family's stake in flagship Samsung Electronics**.[128] (Emphasis added)
>
> **[T]here is national consensus that the successful operation of Samsung Group companies is essential to the national economy** . . . . A strong leadership, even if it originates from family ownership, is necessary for the business continuity and the Korean government and economy . . . . **A merger between C&T and Cheil Industries is also perceived as a necessary and impactful event** . . . . **Samsung and the Lee family cannot afford to fail or the effect on the Group would be far-reaching, unpredictable and possibly destructive to the economy as a whole**.[129] (Emphasis added)

---

[127] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 371. The Seoul Central District Court's findings were subsequently upheld by the Seoul High Court. *See* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 131–142; **Annex** to this Submission.

[128] **Ex. R-255**, Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, p. 4.

[129] **Ex. R-255**, Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, pp. 24–25.

94. In the actual scenario, decisionmakers within the NPS shared the view that, in light of the importance of the Samsung Group to the Korean economy and given the perceived importance of the Merger to business continuity of the Samsung Group, a failure of the proposed Merger would likely have negative consequences for the performance and volatility of Samsung Group company stocks in the mid- to long-term, with associated losses in shareholder value for the Fund's USD 15 billion portfolio of holdings in those companies.[130] The international proxy advisor ISS had also warned that rejection of the Merger could lead to a sharp drop in the SC&T share price, by as much as 22.6% in the short term.[131] Multiple members of the Investment Committee testified during the Moon/Hong criminal case that, when deliberating on the Merger, they were aware of projections that a failure of the Merger would result in stock price volatility and associated losses to the Fund's shareholdings in Samsung Group companies, and that avoidance of such losses was an important consideration supporting their approval of the Merger.[132] The Korean courts

[130] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 7–10; **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67 ("Overall, the Investment Management, while concerned about the SC&T shares being undervalued, had to consider the overall profitability of the entire portfolio regarding the Samsung Group, which accounted to about 25% of the total shares under the Fund, which made it difficult to decide on a yes or no vote."); **Ex. R-265**, Email from [redacted] of Elliott Advisors (Hong Kong) to Joonho Choi and James Smith of Elliott Advisors (Hong Kong), 15 June 2015 (internal Claimant email enclosing press report that collapse of Merger plan may drive down Cheil stock price, making NPS opposition to Merger "unlikely"); **Ex. C-511**, Transcript of Court Testimony of Wan-seon Hong (Moon/Hong Seoul Central District Court) **[RESP021565]**, 17 May 2017 p. 110 ("From an emotional perspective, the first point of concern was that we had previously suffered considerable losses due to the fall-through of the merger between Samsung Heavy Industries and Samsung Engineering[.]").

[131] **Ex. C-030**, ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, p. 2.

[132] *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], pp. 25–26 ("**Q.** If this merger had fallen through, it was analyzed that not only would the share prices of Samsung C&T and Cheil Industries—which had risen due to the merger announcement—likely revert to or fall below pre-announcement levels, but it was also generally expected that the share prices of Samsung Group affiliates, including Samsung Electronics, would decline, correct? **A.** Yes, that is correct.") and at p. 53 ("**Q.** What would be the reason that you voted in favor of the Merger despite the existence of various negative factors? **A.** The

have given credit to such testimony—not only in the Moon/Hong case itself[133] but also in subsequent cases examining the NPS Vote on the Merger.[134] For example, in the Shareholder Claims case, the Seoul Central District Court found that the Investment Committee had given "overall consideration" to the Merger, including, in particular, "the impact on fund management in the event the Merger fell through." [135] There is no basis to assume that such considerations would not have factored in the NPS's decision-making in the Treaty-compliant counterfactual scenario.

(iii) Enhancing long-term shareholder value and stable returns through diversification and growth of the combined business of SC&T and Cheil

95. The strategic rationale of the proposed Merger advanced by the management of SC&T and Cheil and by the Samsung Group included at least the following elements: (a) enhancing the competitiveness of the construction business by

---

biggest one would be, as I've said multiple times, the NPS has one-fourth of its portfolio invested in Samsung shares, and there was an assessment that Samsung needed to dig up some new momentum for future growth consistently[.] . . . [I]f the Merger failed, that kind of development would be delayed and overall result in loss in share prices in the short-term and loss of growth momentum in the long-term, and I thought that was a very important issue."); **Ex. R-290**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 3 April 2017 ["**Transcript of Court Testimony of** [redacted]"], p. 16; **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, p. 27 (confirming contemporaneous view that if Merger fell through, SC&T share price would plummet); **Ex. C-511**, Transcript of Court Testimony of Wan-seon Hong (Moon/Hong Seoul Central District Court) **[RESP021565]**, 17 May 2017, at p. 110 ("[G]iven that Samsung[-related shares] account[] for nearly 23–25% of our total portfolio, we had some concerns regarding the portfolio, and thus when comparing factors such as the scenario where merger fell through against the situation where the merger had gone ahead, it seems that we were on the side that was slightly more concerned about the merger falling through."); **Ex. C-502**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011531]**, 17 April 2017 ["**Transcript of Court Testimony of** [redacted]"], p. 32 (confirming market expectation at the time was that share price would fall if Merger fell through), p. 35 (confirming Investment Committee considered this factor).

[133] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67.

[134] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 38–40; **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

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

combining the construction business units of the two companies; (b) capturing overseas business opportunities in fashion and food distribution business; (c) developing new growth opportunities in biotechnology by becoming the largest shareholder of Samsung BioLogics and leveraging the strengthened capital base of the merged entity to increase investments; and (d) diversifying business portfolios including construction, trading, fashion, leisure, food and beverages, and biotechnology.[136] In connection with the Merger, a joint SC&T and Cheil integration task force produced an analysis that projected synergies from the Merger of KRW 6 trillion.[137]

96. Immediately following the Merger announcement, the stock prices of both SC&T and Cheil rose sharply, approaching the legal maximum increase of 15% on the first day of trading after the announcement.[138] In the Original Proceedings, the Parties' respective quantum experts agreed that this stock price increase reflected the market's anticipation that some or all of the strategic benefits of the Merger described above would be achieved through the Merger[139] (they disagreed, however, as to whether that initial market

[136] *See, e.g.*, **Ex. C-017**, Samsung C&T Corporation, Press Release, "Merger Between Cheil Industries and Samsung C&T", 26 May 2015; **Ex. DOW-068**, p. 1; **Ex. DOW-051**, pp. 3, 10.

[137] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 724–725. *See also* **Ex. C-203**, SC&T Presentation, 24 June 2015, pp. 12–17.

[138] **RLA-194**, Award, ¶ 200. *See also* **Ex. R-084**, "Cheil Samsung C&T stock prices hit the ceiling … records 4th largest market cap", *The Daily Post*, 26 May 2015; **Ex. R-088**, "Samsung C&T share prices increase by 10%, prices likely to fluctuate", *Maeil Economy*, 4 June 2015, p. 1; **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 20; **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 33 ("**Q.** On 22 May 2015, just before the merger was officially announced, Cheil Industries' share price was KRW 163,500 and the former Samsung C&T's at KRW 55,300; on the following trading day immediately after the merger announcement (26 May 2015), they both rose to their respective daily upper limits of KRW 188,000 and KRW 63,500, correct? **A.** Yes.").

[139] **RER-1**, First Dow Report, ¶ 61 ("The combined increase in SC&T's and Cheil's market capitalisations suggests that the market anticipated synergies to be gained from the Merger. These could include operating or financial synergies, as well as benefits to the Samsung Group from progress in its organisational restructuring."); **CER-5**, Second Boulton Report, ¶ 8.2.5 ("Like Professor Dow, I consider it possible that the short-term increase in the Listed Prices of SCT and Cheil immediately following the Merger Announcement may have been due to expectations of potential Synergies.").

expectation later shifted[140]). In the Award, the Tribunal noted that the market's reaction to the Merger was "mixed."[141]

97. Assessments of the potential strategic benefits of the Merger by independent analysts included a substantial body of support for the view that the Merger should be approved. As noted in the Award, at least 21 Korean securities analysts viewed the Merger positively.[142] It is true that certain external proxy advisors, including KCGS and ISS, advised their institutional clients holding SC&T shares to vote against the Merger.[143] At the same time, ISS recommended that Cheil shareholders (which included the NPS) vote in favor of the Merger.[144] As noted above, ISS also warned that, if the Merger fell through, SC&T's share price could fall by as much as 22.6% in the short term.[145]

98. Excluding the Research Team's Merger synergy calculation (which was later determined to have been arbitrarily reverse-engineered), NPS documents from the relevant time period reflect that the NPS, for its part, viewed the potential strategic benefits of the Merger as credible, while acknowledging doubts as to the magnitude and achievability of certain of the potential synergies.[146] Those documents, as well as the testimony of the members of the Investment Committee in the Moon/Hong case, confirm a consensus view within the NPS that (a) SC&T had been suffering from a protracted period of stagnant profitability and growth and that the Merger presented an opportunity to

---

[140] **CER-5**, Second Boulton Report, ¶¶ 8.2.5–8.2.20; **RER-3**, Second Dow Report, ¶¶ 153–168.

[141] **RLA-194**, Award, ¶ 932.

[142] **RLA-194**, Award, ¶ 201. *See also* **Ex. R-019**, J Kim and G Lee, "Majority of Securities Companies that supported the Merger say 'I'd vote for the merger even now'", *Dong-A*, 25 November 2016 (same securities firms affirming they had not changed their opinion regarding the Merger even after Moon/Hong prosecution).

[143] **RLA-194**, Award, ¶ 202.

[144] **RLA-194**, Award, ¶ 202.

[145] **Ex. C-030**, ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, p. 2.

[146] **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 11–12; **Ex. C-408**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T" **[RESP014639]**, 6 July 2015, pp. 2, 7–8.

change that trajectory; (b) combination of the construction business units of the two firms had potential to generate revenue synergies; (c) the biotechnology sector was an expected driver of future growth for the Samsung Group, and New SC&T's status as the controlling majority shareholder of Samsung BioLogics would create opportunities for enhanced capital investment and revenue capture in that segment; (d) as the de facto holding company of the Samsung Group, New SC&T would enjoy a stronger financial standing and credit rating than SC&T and would receive brand royalties; and (e) there was an expectation, based on Cheil's announcement, that New SC&T would adopt shareholder value enhancement initiatives, including, inter alia, a gradual increase in the dividend payout ratio from 21% in 2014 to 30% by 2020.[147] Given

[147] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 11–12; **Ex. C-428**, [redacted], Minutes of the Investment Committee Meeting **[RESP020541]**, 10 July 2015, pp. 1–2; **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 53 ("[T]here was an assessment that Samsung needed to dig up some new momentum for future growth consistently[.]"); **Ex. R-290**, Transcript of Court Testimony of [redacted], p. 7 (noting importance he placed on value of Samsung BioLogics shares), p. 17 (agreeing that "a huge deciding factor [for the Investment Committee members]" was that New SC&T "would possess all the shares for Samsung's core businesses such as Samsung Electronics, major finance corporations, bio-related sectors, thus becoming a holding company as the core affiliate of the Samsung Group"); **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, at p. 17 ("[G]iven that Samsung Biologics—which was due to be listed at the time—was a subsidiary of Cheil, we believed that if Samsung Biologics were to be listed, the corporate value would be significantly enhanced due to the synergies of the merged entity."), at p. 45 ("As I mentioned earlier, when the committee members made their decisions, they did not look solely at the synergy effect, but also at the portfolio invested in Samsung Group shares, followed by the growth potential of Biologics, and ultimately, the fact that if the merged entity becomes the holding company of the Samsung Group, it will receive brand royalties just like other holding companies—and so I believe they made their judgement after comprehensively considering all these factors."); **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 37 ("Yes, as I said, there were the synergy effects of the individual companies; and since we are financial investors who cannot participate in management, the effects on our portfolio, the impact on the stock market, the fact that transparency in governance and the move toward a holding-company structure is good for share prices over the long term; and, looking at our institution as a whole, we hold not only equities but also bonds. With Samsung C&T's credit rating going up — which would rank AA along with Cheil Industries — there were also benefits on the bond side. So of course we made our decisions taking all of those aspects into account."), at p. 53 (recalling statement to prosecutor that "'I believed that if Samsung C&T and Cheil Industries merged to form a

that numerous third-party stock analysts in Korea had reached substantially the same conclusions,[148] there is no basis to assume that, in the Treaty-compliant counterfactual scenario, the NPS would have taken a different view of the potential strategic benefits of the Merger.

(iv) The benefits actually realized through the Merger

99. The actual results of the Merger are also relevant.[149] With the benefit of hindsight, the proponents of the strategic benefits of the Merger have been proven correct. In its 5 February 2024 judgment in the JY Lee Unlawful Merger case, the Seoul Central District Court made the following findings of fact concerning the benefits actually realized by SC&T and its shareholders through the Merger (none of which were disturbed on appeal):

a. **Performance of the biotech business**. New SC&T's subsidiary, Samsung BioLogics, has experienced rapid growth, accounting for around 40% of New SC&T's total operating profit in 2022. As a result of the profitability of its biotech segment, New SC&T achieved an operating profit margin of 5.8% in 2022, compared to former SC&T's pre-Merger operating profit margin of 2.3%.[150] Moreover, the growth in

---

holding company, it would be beneficial for the pension fund in the long term', 'the brand royalty income received by the holding company, the fact that Samsung C&T could secure construction projects within the group, and new growth drivers arising from investments in biotechnology', 'the utilisation of overseas sales networks for the food and beverage and apparel businesses, as well as resort development and the Yongin site development by the Investment Management Division'.").

[148] *See, e.g.*, **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 367–368; **Ex. R-011**, S Yoon, "How do the domestic securities analysts view the 'Samsung C&T Merger'?", *Digital Daily*, 8 July 2015, p. 1 (21 of 22 domestic securities analysts expressed positive view on Merger); **Ex. C-650**, Shinhan Investment Corp Report, 27 May 2015, p. 1; **Ex. R-086**, "The Merger is not the end but a new beginning", *HMC*, 27 May 2015, pp. 1, 5, 8; **Ex. R-087**, "Implications of the merger and considerations on the direction of the stock price", *KB*, 27 May 2015, pp. 1, 7; **Ex. DOW-68**, p. 1; **Ex. R-107**, Hyundai Research, "From a long term perspective, the Merger is beneficial to shareholders of both companies", 22 June 2015, pp. 1–3 ("[I]f the merger succeeds, Cheil and Samsung C&T shareholders are forecasted to enjoy the benefits of increased shareholder value through sustained growth."); **Ex. DOW-51**, pp. 3, 10.

[149] *See* **RLA-194**, Award, ¶¶ 932–947 (considering post-Merger stock price movements).

[150] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 373.

profitability of its biotech business has offset declining profitability in New SC&T's construction and trading segments, reflecting the benefits of the post-Merger diversified business portfolio.[151]

b. **Improvement to the financial structure**. In addition to the enhanced profit margin noted above, New SC&T has a debt ratio that is significantly lower than the pre-Merger debt ratio of former SC&T, "which indicates an improvement in the financial structure."[152]

c. **Resolving the circular shareholding structure.** Through the Merger, the Samsung Group reduced the number of circular shareholding loops from ten to seven, all of which have since been resolved.[153] The Merger thus "served as laying the ground for resolving the circular shareholding structures," resulting in a cleaner and more simplified Group structure.[154] Moreover, through the Merger, former SC&T has essentially become the de facto holding company of the Samsung Group, which positions it for "a great deal of advantages" from a business perspective.[155]

d. **Upward movement in credit ratings.** As compared to former SC&T's pre-Merger credit rating of AA-, New SC&T enjoys a credit rating of AA+, which is two levels higher.[156] The basis for the upgraded credit rating included factors such as enhanced resilience to economic fluctuations through a diversified business structure; excellent market position of key operating businesses; strong financial stability; and increased importance within the Samsung Group governance structure and business strategy.[157] The Court thus found: "This appears to affirm that the objectives and expected effects of the Merger were indeed

---

[151] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 374.
[152] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 374.
[153] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.
[154] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.
[155] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.
[156] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.
[157] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.

materialized."[158] This stands in contrast to former SC&T's peer construction companies, which have since seen their credit ratings downgraded.[159] The higher credit rating has enabled New SC&T to enjoy lower interest rates on financing and to be more competitive in international construction projects.[160]

e. **Realization of losses immediately after the Merger.** New SC&T maintained its AA+ credit rating even after recognizing and absorbing huge dormant losses of former SC&T after the Merger.[161] The losses were of such a magnitude (KRW 2.6 trillion) that former SC&T would not have been able to recognize them without experiencing "a substantial deterioration of the company's financial health."[162] As a result of the Merger, former SC&T avoided a sharp drop in its stock price from recognition of the KRW 2.6 trillion loss.[163]

c. Factors potentially weighing against approval

100. Two factors were identified as potentially weighing against approval—both relating to the Merger Ratio. To recall, the Merger Ratio of 1 Cheil share to 0.35 SC&T shares was set pursuant to a statutorily-mandated formula under the Korean Capital Markets Act by reference to the publicly-traded stock prices of SC&T and Cheil during the relevant reference period.[164] The first concern was whether the Merger Ratio adequately reflected SC&T's fair value, given that SC&T shares were trading at a discount relative to the company's asset value.[165] The second concern related to controversy concerning the process and

[158] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.

[159] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 375.

[160] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 376. In addition, SC&T's improved credit rating and lower interest rates also benefitted the NPS's bond investments. **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 37.

[161] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 376.

[162] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 376.

[163] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 376–377.

[164] **RLA-194**, Award, ¶ 198.

[165] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 15–18.

timing of the companies' decision to pursue the Merger and whether unlawful market manipulation may have occurred.[166] These two concerns are addressed below, in turn.

(i) Whether the Merger Ratio would damage shareholder value

101. As noted above, the Fund held sizable shareholdings in both SC&T (11.2%) and Cheil (4.8%). Given those shareholdings, the NPS assessed whether the Merger Ratio (which by statutory formula was derived from stock prices alone) adequately reflected the relative per-share value of the two companies as estimated using other valuation methodologies.[167] If the Merger Ratio placed too low a value on SC&T shares relative to such benchmarks, as Claimant and some analysts had asserted, that would imply a transfer of value from SC&T shareholders to Cheil shareholders, and any resulting loss to the Fund in its capacity as an SC&T shareholder would be only partially offset by a gain in its capacity as a Cheil shareholder.[168]

102. To assess the net impact of the Merger Ratio on the Fund's holdings in the two companies, the NPS compared the value of the Fund's holdings implied by (A) the per-share values of SC&T and Cheil used to derive the Merger Ratio; and (B) the per-share values of SC&T and Cheil estimated by various analysts (including third-party analysts and the NPS Research Team) using other valuation techniques.[169] The outcome of this comparison varied widely depending on the benchmark valuation selected. For example, using the valuations performed by Deloitte Anjin and KPMG for the boards of SC&T and

[166] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 16, 19.

[167] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 18.

[168] In the Original Proceedings, Claimant's expert Mr. Boulton calculated that, because of the 6.4% differential in the National Pension Fund's ownership stake in the respective companies, for every dollar transferred from SC&T shareholders to Cheil shareholders, the NPS stood to make an economic loss of 6.4 cents. **CER-5**, Second Boulton Report, ¶ 8.3.4. That is correct as a matter of arithmetic.

[169] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 18.

Cheil, respectively, yielded little to no net "loss" to the Fund's combined holdings in the two companies because the Merger Ratio was within the range of benchmark exchange ratios calculated by those firms.[170] By contrast, the valuation performed by the international proxy firm ISS implied a net "loss" to the Fund's combined holdings in the two companies of KRW 508.8 billion.[171] The NPS Research Team's own valuation implied a net "loss" to the Fund's combined holdings in the two companies of KRW 138.8 billion (approximately USD 88.83 million).[172] (Notably, the Korean courts have not found any impropriety in relation to the NPS Research Team's benchmark merger ratio calculations—as distinct from its synergy projections, discussed below.)

103. It is important to emphasize the subjective and imprecise nature of all of the foregoing valuations. As ISS explained with respect to its own valuation analysis: "The following analysis is not intended to definitively determine the per-share value. **Valuation is as much art as science and is highly dependent on the underlying assumptions over which reasonable people can disagree**" (emphasis added).[173] The imprecision of ISS's own calculations is highlighted by the fact that ISS made a large, material revision to its benchmark exchange ratio over the course of six days just prior to the NPS's decision on the Merger.[174] With respect to the Merger, the imprecision was compounded by

---

[170] *See* **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 18; **Ex. R-386**, Deloitte, "Review Report of Merger Ratio Between Samsung C&T and Cheil Industries", 25 May 2015, p. 12.

[171] **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 18.

[172] **Ex. R-123**, NPS document titled "For reference" containing data relating to the Merger, 8 July 2015, p. 58. Approximate USD figure calculated using an exchange rate of KRW 1 = USD 0.00064, obtained from Oanda Currency Converter (last accessed on 7 June 2026).

[173] **Ex. R-122**, ISS Proxy Advisory Services, "Cheil Industries Inc.: Proxy Alert", 8 July 2015, p. 14.

[174] *See* **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 48–49 ("The [ISS] merger ratio was 1:0.95 in the initial report, which was amended by considering changed value of Samsung Life Insurance and Samsung Biologics stocks (9 July)."); **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, p. 4. *See also* **Ex. C-**

the fact that each estimated "reasonable" exchange ratio depended on a valuation of not one but two large and diversified companies. Harder still was valuing Cheil's non-listed minority stake in Samsung BioLogics, a start-up with potential for exponential growth.[175] Analyst reports by 12 domestic securities firms showed an extremely wide range of valuations of the company, from KRW 5.9 trillion to KRW 36 trillion.[176] The record reflects that decision-makers within the NPS were well aware of the highly subjective and imprecise nature of this entire exercise.[177] Moreover, as the Korean courts have explained,

030, ISS Special Situations Research, "SC&T: proposed merger with Cheil Industries", 3 July 2015, pp. 2, 17 (showing ISS's original 1:0.95 ration).

[175] *See, e.g.*, **Ex. R-122**, ISS Proxy Advisory Services, "Cheil Industries Inc.: Proxy Alert", 8 July 2015, p. 15 (describing Samsung BioLogics as "the business that generates the most expectations").

[176] **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 26. *See also* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 52.

[177] *See, e.g.*, **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, pp. 7–8; **Ex. C-428**, [redacted], Minutes of the Investment Committee Meeting **[RESP020541]**, 10 July 2015, p. 3; **Ex. C-500**, Transcript of Court Testimony of [redacted], at p. 32 ("**Q.** In corporate valuation, the valuer's subjective judgement can influence factors such as economic outlook, economic indicators, industry conditions and the performance outlook of the company being valued, correct? **A.** Yes, that aspect exists. **Q.** As there can be significant variation in the results depending on whether the valuer takes a positive or negative view of the future, valuation firms typically assess corporate value by setting a range (from a positive outlook to a negative outlook) rather than a specific figure. Correct? **A.** Yes, that is correct. [. . .] **Q.** Furthermore, the results of such a corporate valuation can vary significantly depending on the valuation methodology employed by the evaluator, correct? **A.** Yes,"); **Ex. C-511**, Transcript of Court Testimony of Wan-seon Hong (Moon/Hong Seoul Central District Court) **[RESP021565]**, 17 May 2017, pp. 65–66 ("**Q.** There are various methods for calculating corporate value using a company's financial accounting information; each method has its own advantages and disadvantages, and it cannot be categorically stated that the results obtained using a particular method are superior or inferior to those obtained using other methods, correct? **A.** Yes. […]. **Q.** Ultimately, a valuation based on a company's financial and accounting information differs from the market share price, so different conclusions may be reached depending on the valuation methodology, the valuer, and the timing of the valuation, correct? **A.** Yes."), at p. 69 ("**Q.** Unlike the valuation of a company's intrinsic value, the valuation carried out to determine the merger ratio is, by its very nature, conducted within a short period following the announcement of a merger, is it not? **A.** Yes. **Q.** It is precisely because of this short timeframe that the valuation is likely to be even more inaccurate, correct? **A.** Yes, that is one aspect of it. **Q.** In fact, didn't ISS make a mistake in its valuation of Samsung C&T's

Korean law provides for a statutory formula to determine the exchange ratio for mergers between listed companies that is based on publicly traded stock prices for the very reason that such prices are an *objective* measure of the fair market value of the shares.[178]

104. In the actual scenario, the NPS approached its assessment of the economic consequences of the Merger from two perspectives.

a. *First*, it performed a qualitative comparison of expected outcomes in two alternate scenarios—successful Merger and failed Merger. This comparison showed the NPS's view that, with respect to every driver of long-term shareholder value—the stock price of SC&T and Cheil, the stock price of other Samsung Group companies, the overall stock market, and the national economy—the successful Merger scenario was expected to outperform the failed Merger scenario.[179] In the Moon/Hong criminal case, multiple members of the Investment Committee testified that they in fact had taken these bigger-picture considerations into account in voting for the Merger,[180] and that testimony has been given credit by the Korean courts in multiple cases concerning the Merger.[181]

---

shares by failing to apply any discount rates to the shares of listed subsidiaries held by the company, thereby overestimating the value of those listed shares? **A.** Yes.").

178 **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 17.

179 *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 7–10.

180 *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], pp. 23, 25–27, 53–54, 61; **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 16–17, 27–28, 32–33, 37; **Ex. R-290**, Transcript of Court Testimony of [redacted], pp. 7, 15–17, 29–31, 33–34, 41, 43; **Ex. R-291**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 22–23, 31–32, 51, 57–58, 65–66; **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 17, 45.

181 *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 67; **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 38–40, 45; **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

b. *Second*, the NPS also sought to perform a quantitative comparison between, on the one hand, the net "loss" from the Merger Ratio implied by the NPS Research Team's benchmark exchange ratio (KRW 138.8 billion), and, on the other hand, projected synergies from the Merger. Projected merger synergies are notoriously difficult to quantify,[182] and the NPS Research Team lacked experience performing such calculations.[183] As the Tribunal will recall, the NPS Research Team nevertheless was instructed to simply reverse-engineer a projection to show synergies large enough to offset the aforementioned KRW 138.8 billion net "loss."[184] On the basis of those directions, a synergy of roughly KRW 2.1 trillion was produced, implying a roughly KRW 140.7 billion value to the Fund's 6.7% shareholding in New SC&T ("**tainted synergy projection**").[185]

105. In a counterfactual scenario in which no pressure had been applied by the MHW to guarantee a particular outcome of the NPS Vote, NPS officials would not have directed the Research Team to model synergies in an arbitrary manner, and the tainted synergy projection would not have been created or presented to the Investment Committee. Instead, one can reasonably expect that an independent NPS would have either adopted a different approach to the quantitative component of its assessment (keeping in mind the inherent difficulty in quantifying projected merger synergies) or commissioned a methodologically sound synergy projection. In that regard, it is worth recalling that the Samsung Group had provided the NPS and other SC&T shareholders with a report projecting KRW 6 trillion in Merger synergies—three times the size of the tainted synergy projection.[186] In the JY Lee Unlawful Merger case,

---

[182] **RER-3**, Second Dow Report, ¶ 154 ("[S]ynergies are notoriously hard to prove and to value. Because objectively measuring synergies is difficult, often detailed information about them is not provided when mergers are announced.").

[183] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 53.

[184] **RLA-194**, Award, ¶¶ 589–591.

[185] **RLA-194**, Award, ¶¶ 589–591.

[186] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 724–725.

the Seoul Central District Court held that the evidence did not support a conclusion that the Samsung Group's KRW 6 trillion synergy projection had been fraudulent, fabricated, or groundless.[187] Indeed, as noted above, the Court also held that the Merger in fact had enhanced rather than decreased shareholder value for SC&T and its shareholders.[188] The Court further held that such shareholders cannot be said to have suffered a loss of opportunity to increase shareholder value through alternative options to the Merger, and that there is "no reasonable ground" to view that, if an alternative to the Merger had been selected, it would have been more beneficial to SC&T and its shareholders relative to the situation where the Merger was carried out.[189]

(ii) Alleged market manipulation/ illegality

106. In the course of its opposition to the Merger, Claimant raised serious accusations concerning an alleged "unlawful conspiracy" in relation to the Merger,[190] and various controversies arose concerning the process and timing by which the Merger proposal had been decided and announced.[191] In its proxy report prepared for the NPS, KCGS identified as reasons supporting its recommendation to vote against the Merger concerns relating to whether the true purpose of the Merger was to consolidate control by the Lee family over the Samsung Group, possible breach of duty by the management of SC&T and Cheil, as well as concerns relating to the Merger Ratio.[192]

107. In its deliberations on the Merger, the NPS acknowledged these controversies, but took comfort in the fact that the Seoul Central District Court had, in the Merger Injunction Decision, rejected Claimant's attempt to enjoin the

---

[187] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 724–725.

[188] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 374–377, 896–897.

[189] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 896–897.

[190] **RLA-194**, Award, ¶ 204.

[191] *See, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, pp. 14–16 (summarizing various controversies).

[192] **Ex. C-402**, KCGS, "Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T" **[RESP000162]**, 3 July 2015, pp. 2–3, 12, 21.

Merger.[193] In that Decision, the District Court held among others that: (a) for a listed company such as SC&T, the stock price reflects the objective market value of the company;[194] (b) the stock price differential between SC&T and Cheil "was not exceptionally greater" at the Merger Ratio date than at any other time, "so it cannot be concluded that the Date was an especially disadvantageous time period for [SC&T]";[195] (c) the fact that the SC&T stock price increased significantly after the Merger was announced "shows that the market positively evaluated the Merger";[196] and (d) it was "not unreasonable to consider" that SC&T had "sufficient motive to offset its decline in sales in the construction and trading business with [Cheil's] strength or potential in the leisure, fashion, foods and beverage, and biotechnology sectors."[197]

108. Although it post-dates the Investment Committee's meeting to decide the exercise of the Fund's voting rights on the Merger (by one week), the Seoul High Court's decision affirming dismissal of the injunction is also relevant, as it reinforces the contemporaneous conclusion of the Korean courts that the conspiracies then swirling around the Merger had not been substantiated. Specifically, the High Court held, among others, that: (a) the Merger Ratio had properly been established pursuant to the applicable statutory formula;[198] (b) although SC&T's stock was trading below book value per share, that was not unusual in the construction sector and that fact alone did not establish either that the stock price failed to reflect fair market value or that the stock

---

[193] *See, e.g.*, **Ex. C-428**, [redacted], Minutes of the Investment Committee Meeting **[RESP020541]**, 10 July 2015, p. 1; **Ex. R-290**, Transcript of Court Testimony of [redacted], p. 7; **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 27; **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 23.

[194] **Ex. R-009**, Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, p. 11.

[195] **Ex. R-009**, Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, p. 13.

[196] **Ex. R-009**, Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, p. 14.

[197] **Ex. R-009**, Case No. 2015KaHab80582, Seoul Central District Court, 1 July 2015, p. 14.

[198] **Ex. C-235**, Seoul High Court Case No. 2015Ra20485, 16 July 2015, pp. 8–9.

price had been manipulated unlawfully by the majority shareholder;[199] (c) a proxy advisor's recommendation to vote against a merger does not mean that the merger is unlawful or unfair in a legal sense;[200] (d) SC&T had experienced a slowdown in growth due to long-term stagnation in the construction sector and therefore was justified in pursuing the Merger to diversify its business and enhance its growth potential;[201] and (e) the SC&T stock price had risen by the daily maximum after the announcement of the Merger, suggesting that the stock market had at least to a certain extent formed a positive evaluation of the Merger.[202]

109. The foregoing demonstrates that, in the actual scenario, decision-makers at the NPS made their decision on the Merger against the backdrop of a decision by the Korean court to the effect that Claimant's allegations of market manipulation, unlawful purpose, unfair Merger Ratio, and other illegality in relation to the Merger had not been substantiated and that, to the contrary, SC&T had sufficient reasons to pursue the Merger. The same would also have been true in the Treaty-compliant counterfactual scenario. Significantly, in the JY Lee Unlawful Merger case (discussed below), the Seoul Central District Court held that "in light of" the Merger Injunction Decision, the defendants (in this instance, Mr. JY Lee, senior employees of the Samsung Group, and accountants at an external accounting firm) could not be deemed to have considered the Merger Ratio or timing to be unfair at the time when the Merger votes were held.[203]

110. For completeness, the ROK notes that allegations of illegality in relation to the Merger were decisively rejected in two subsequent cases (one civil, one criminal), as follows:

[199] **Ex. C-235**, Seoul High Court Case No. 2015Ra20485, 16 July 2015, pp. 8–9.

[200] **Ex. C-235**, Seoul High Court Case No. 2015Ra20485, 16 July 2015, pp. 9–10.

[201] **Ex. C-235**, Seoul High Court Case No. 2015Ra20485, 16 July 2015, p. 12.

[202] **Ex. C-235**, Seoul High Court Case No. 2015Ra20485, 16 July 2015, pp. 12–13.

[203] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment pp. 887–888.

a. **Merger Annulment Judgment (Ex. R-020).** The Seoul Central District Court held that the plaintiffs had failed to establish that the Merger had an improper purpose, including because SC&T's earnings had been deteriorating and it therefore had a reason to seek diversification through merger with Cheil as a way to overcome stagnation;[204] the stock price increased after the Merger announcement; [205] succession of management rights was not the only reason behind the Merger, nor was it improper—indeed, stabilizing management through corporate restructuring contributed to the interests of the Samsung Group and its affiliates (including SC&T) and was therefore a proper purpose.[206] In relation to the Merger Ratio, the Court held that, even if it could be considered somewhat unfavorable to SC&T, the Merger Ratio was not manifestly unfair, including because it had been calculated based on a statutory formula that was designed to protect investors and there were no indications of circumstances such as market manipulation or unfair trading.[207] The Court also held that there was "no evidence to support the claims" of market manipulation by the Samsung Group.[208] The Court further rejected the allegation that the Merger timing was unfair, noting that the share price differential was not unusually large compared to other dates, and found no evidence of systematic share price manipulation.[209]

---

[204] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 11.

[205] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 12.

[206] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 12.

[207] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 17. In the more recent Shareholder Claims Case, the Seoul Central District Court concurred in the conclusion that the Merger Ratio cannot be considered to have been grossly unfair. **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14.

[208] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 18–19.

[209] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 20.

b. **JY Lee Unlawful Merger Judgments (Exs. R-391, R-392).** The Seoul Central District Court and Seoul High Court dismissed all criminal charges against all defendants in these consolidated cases involving charges that JY Lee and other defendants had engaged in unlawful market manipulation and unfair trading in relation to the Merger (among other charges). After comprehensively taking into account the available evidence and the prior criminal/civil judgments, the Courts held that the Merger did not have an illegitimate purpose aimed at benefiting the Lee family at the expense of SC&T shareholders; and that the prosecutors had failed to prove that the Merger timing, process, and Merger Ratio were illegal, unfair, or inappropriate.[210] Among many other noteworthy findings, the Court concluded that Samsung had not disseminated false information when persuading SC&T shareholders to vote for the Merger, nor did it conceal the purposes of strengthening management rights or succession;[211] that the 25 May 2015 Merger Ratio report prepared by Deloitte Anjin for SC&T, which concluded that the Merger Ratio was within a fair range, could not be characterized as having been manipulated or fabricated;[212] and, as noted above, that the Samsung Group's KRW 6 trillion Merger synergy projection also could not be characterized as arbitrary or false.[213]

d. Conclusion on the relevant factors

111. As explained above, the NPS's mandate under the Voting Guidelines was to avoid damage to long-term shareholder value and to enhance the long-term and stable rate of return on the Fund's investments, nearly one-quarter of which were held in Samsung Group companies. The Merger served those objectives: it was an essential step in the necessary reform of the Samsung

[210] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 365–421.

[211] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 511–525, 596–643.

[212] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 602. *See also* **Ex. R-386**, Deloitte, "Review Report of Merger Ratio Between Samsung C&T and Cheil Industries", 25 May 2015, p. 12.

[213] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 634.

Group's corporate structure and also created new pathways for growth and stability for SC&T outside of the stagnating construction sector. Importantly, failure of the Merger was expected to lead to volatility and losses to the Fund's USD 15 billion portfolio of Samsung Group holdings. Although the Merger Ratio was structurally disadvantageous to SC&T in the short term, it had been determined by a statutory formula, and any estimate of "loss" to the Fund's holdings in the two companies as a result of the Merger Ratio was necessarily subjective and uncertain and would, in any event, have to be weighed alongside (1) the considerable expected long-term benefits of the Merger and (2) the concerning expected losses to the Fund's overall portfolio from failure of the Merger. It bears emphasis that the NPS, unlike Claimant, had a mandate to prioritize long-term benefits to shareholder value and stable returns rather than seeking to maximize profit in the short-run. In addition, the NPS's decision was (and in the counterfactual scenario would have been) made against the backdrop of the Merger Injunction Decision, which among other things confirmed that SC&T had a valid justification for pursuing the Merger and that allegations of illegality and unfairness in the Merger had not been substantiated.

112. In sum, the objective evidence substantiates that the balance of relevant factors weighed in favor of a decision to vote for the Merger.

113. In the following section, the ROK analyzes the evidence establishing the likely decision-making process in the counterfactual scenario.

2. *The course of events in the actual scenario supports the conclusion that an independent NPS likely would have voted for the Merger*

a. Uncertainty regarding which committee would have made the decision

114. As an initial matter, there is uncertainty as to whether the Investment Committee or the EVC would have taken the ultimate decision regarding how to vote the Fund's shares on the Merger in the counterfactual scenario. Under the Voting Guidelines, it is the Investment Committee that exercises the voting

rights of equities held by the Fund following "deliberation and resolution."[214] Article 8(2) of the Voting Guidelines provides that the Investment Committee may request a decision from the EVC when it finds it "difficult to choose between an affirmative and a negative vote."[215]

115. In the case of the SK Merger (June 2015), the Investment Committee referred the decision to the EVC without itself first deliberating on the merits of the decision.[216] The basis for the referral in that instance was that the transaction was controversial and the decision was "difficult" to decide.[217] There is evidence suggesting that, prior to the unlawful interference of the MHW, CIO Hong may have intended to follow the same procedure with respect to the Merger—that is, to present to the Investment Committee an agenda item asking (yes/no) whether to refer the Merger decision to the EVC pursuant to Article 8(2) of the Voting Guidelines.[218]

116. In the event, the MHW raised objections to this procedure and it was not followed.[219] In its place, the Investment Management Division of the NPS ("**NPSIM**") developed an alternative "open voting" procedure, whereby the Merger decision was presented to the Investment Committee in the first instance, but with the option for each Committee member to choose between multiple options (NPS to vote For; NPS to vote Against; NPS to remain Neutral; NPS to Abstain; or the Investment Committee member to Abstain) and with the express understanding that the decision would be referred to the EVC in the event that none of the first four items garnered a majority of votes in the

---

214 **RLA-194**, Award, ¶ 223 (*quoting* **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014).

215 **RLA-194**, Award, ¶ 223 (*quoting* **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014).

216 *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 44.

217 **RLA-194**, Award, ¶ 226.

218 *See, e.g.*, **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 15, 17–18, 33.

219 *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 7.

Investment Committee.[220] Importantly, the Korean courts held in the Moon/Hong case that the development and adoption of this open voting method was in better compliance with the Voting Guidelines than the prior practice; did not have the intention or effect of avoiding a referral to the EVC or ensuring a vote in favor of the Merger; was taken following legal review; and could not be considered unlawful or improper.[221] In the actual scenario, a majority of eight Investment Committee members voted in favor of the Merger, and accordingly the decision was not referred to the EVC.[222]

117. It is difficult to say with any certainty whether, in the Treaty-compliant counterfactual, the NPSIM would have adopted a closed voting method by which the decision would have been referred to the EVC directly; or—as in the actual scenario—an open voting method, whereby the Investment Committee would have deliberated and sought to resolve the matter in the first instance.[223] In the latter scenario, there is of course the further question of whether, in the absence of unlawful interference, the Investment Committee would have reached a majority decision on the matter or deemed it too difficult to decide. Below, the ROK addresses the counterfactual scenario first on the assumption

[220] *See* **RLA-194**, Award, ¶ 238; **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, pp. 13–15; **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 49, 60–61; **Ex. C-499**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011118]**, 3 April 2017, p. 38; **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

[221] *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 49, 60–61, 68; **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 44–45. *See also* **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 38.

[222] **RLA-194**, Award, ¶ 238.

[223] Part of the reason for such difficulty is that some aspects of the MHW's objections to the procedure adopted in the SK Merger case (direct referral to the EVC, without deliberation of the Investment Committee) were not in substance wrongful and could have been raised as suggestions without violating Korean law or the Treaty. Entirely apart from the Blue House Measures, the EVC's handling of the SK Merger had come under withering criticism from various quarters. *See, e.g.*, **Ex. C-499**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011118]**, 3 April 2017, p. 10 (Investment Committee member testimony describing such criticism); **Ex. C-518**, Transcript of Court Testimony of [redacted] (JY Lee Seoul Central District Court) **[RESP013167]**, 27 June 2017, pp. 24–25 (same).

that the decision would have been referred to the EVC (**Section III.B.2.b**), and then on the assumption that the Investment Committee would have decided the matter itself (**Section III.B.2.c**).

b. The EVC likely would have voted for the Merger

118. The evidence does not support a finding that, had the matter been referred to it, the EVC in all probability would have decided to vote against the Merger or to abstain. To the contrary, the course of events in the actual world supports a finding that the outcome of a decision of the EVC was uncertain but more likely to favor approval than disapproval. Even if the MHW's contemporaneous prediction of EVC voting behavior could be relied upon, it was predicting a 4-4-1 split because it characterized Mr. Cho as being likely to vote against. However, Mr. Cho's unrebutted evidence was that he had no plan to vote against the Merger and, to the contrary, his tentative opinion was that the then-recent Merger Injunction Decision (which had dismissed allegations of illegality in the Merger) was a very important development that the EVC needed to respect. Indeed, the issuance of that Decision is one of several circumstances strongly distinguishing the Merger decision from the EVC's prior decision on the SK Merger.

(i) The MHW's contemporaneous prediction of the EVC vote

119. To recall, in the Award, the Tribunal summarized the findings of the Seoul Central District Court in the Moon/Hong case in relation to the background to Minister Moon's instruction to the NPSIM to have the Investment Committee decide on the Merger, in the following terms:

> As it became evident that a referral of the matter to the Expert Voting Committee, which had decided on the earlier SK/SK C&C merger, **would not "guarantee" the approval of the Merger**, in the morning of 8 July 2015, Minister Moon "instructed [Mr. Nam-kwon Jo] to have the Merger motion reviewed by the Investment Committee

instead of Experts Voting Committee."[224] (Emphasis added)

120. Because the question of how the EVC may have decided the matter in the counterfactual scenario is squarely before the Tribunal in this Remitted Proceeding, it is worth examining the underlying evidence in relation to these events in greater detail.

121. As of early July 2015, NPSIM officials were resisting the MHW's instructions to have the Investment Committee decide the Merger.[225] Given the possibility that the matter could be referred to the EVC, the MHW "began seeking solutions to successfully complete this merger at the Experts Voting Committee."[226] The efforts included among others the formation of a joint MHW/NPSIM taskforce dedicated to analyzing the expected predisposition of each member of the EVC, predicting the voting result at the EVC based on direct or indirect outreach to EVC members and/or the organizations that appointed them, and seeking to steer that result toward a guaranteed approval.[227] Documents prepared by the taskforce showed that, until the evening of 7 July 2015, an "advance screening of voting intentions" purportedly had revealed that a majority of five EVC members (including Mr. Young-gil Cho) were in favor of the Merger, with three anticipated to be against, and one likely to abstain, leading the taskforce to anticipate that the EVC would approve the Merger.[228]

---

[224] **RLA-194**, Award, ¶ 587 (*quoting* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 8). *See also* **CLA-222**, Set-Aside Judgment, ¶ 62 ("The conclusion reached by Nam-kwon Jo and others by 6/7 July was that the approval of the EVC for the Merger **was not guaranteed**." (emphasis added)).

[225] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 45.

[226] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 45.

[227] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 45–46.

[228] *See, e.g.*, **Ex. C-409**, [Ministry of Health and Welfare], "Scenarios for Responding to Experts Voting Committee's Discussion on Exercise of Voting Rights" **[RESP015135]**, 6 July 2015, p. 2; **Ex. C-420**, [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger" **[RESP015129]**, 7 or 8 July 2015, p. 4.

122. Then, at some point on 7 July 2015, the taskforce's prediction as to Mr. Cho's expected stance changed from "For" to "Against," leaving the predicted vote count at four in favor, four against, and one abstention.[229] That evening, Deputy Minister Tae-han Lee reported to Minister Moon that the situation with respect to the EVC had become "a little unstable."[230] After receiving this report and "fe[eling] that such analysis was **not enough to 100% guarantee** the approval of the Merger" (emphasis added), Minister Moon instructed that a way needed to be found to have the Investment Committee decide the matter.[231] Documents prepared the following day, 8 July 2015, explain that a disadvantage of having the EVC decide was that "**[p]rediction of the conclusion is uncertain**" (emphasis added).[232]

123. The above chronology demonstrates that Minister Moon decided to insist on having the Investment Committee determine the Merger vote because it could not be guaranteed that the EVC would vote in favor of the Merger. That material does not support a conclusion—even on the balance of probability, let alone to the "sufficient degree of certainty" standard, that the members of the EVC would have voted to oppose the Merger or to abstain.

124. This is all the more so given that, in reality, the situation was not as difficult for proponents of the Merger as the MHW imagined it to be. Mr. Cho, who the MHW erroneously predicted was opposed to the Merger, has testified in this arbitration that he had not yet made up his mind to be in favor or against the

---

229 *See* **Ex. C-586**, [Ministry of Health and Welfare], "Strategies for Responding to Each Committee Member" **[RESP015134]**; **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 8, 46–47.

230 **Ex. C-496**, Transcript of Court Testimony of Tae-han Lee (Moon/Hong Seoul Central District Court) **[RESP010835]**, 22 March 2017, p. 14; **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, p. 30.

231 **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 8. *See also* **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, p. 30.

232 **Ex. C-416**, [Ministry of Health and Welfare], "Report on Measures to Address NPS's Exercise of Voting Rights" **[RESP020749]**, 8 July 2015, p. 2; **Ex. C-583**, [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level" **[RESP015145]**, p. 1.

Merger, and "definitely did not have plans to vote against the Merger."[233] (Indeed, as discussed in the following section, Mr. Cho's evidence—entirely rational—is that his inclination at the time was to place great importance on the decision of the Seoul Central District Court in the Merger Injunction Decision, which had rejected an attempt by Claimant to enjoin the Merger.) Moreover, the MHW's concern that one of the expected "For" votes might be required to recuse himself in light of a prior consulting engagement for Samsung[234] was likely unwarranted, given that (unbeknownst to the MHW), Mr. Cho—the sole lawyer on the EVC and a confidant of the EVC's Chairman—had already advised the Chairman that he did not think it was necessary to "go that far" by requiring recusal in a such circumstance.[235]

125. Thus, although the MHW was correct that it was not possible to guarantee the outcome of a vote of the EVC, this in no way suggests—to any degree of certainty—that the EVC was likely to vote against the Merger. To the contrary, the opposite is true.

(ii) Mr. Cho's unrebutted testimony concerning the importance of the Merger Injunction Decision

126. In his testimony in this arbitration, Mr. Cho explained that, although he had not yet decided whether to vote for or against the Merger, as the relevant materials had not yet been presented to him, he had already formed a "tentative opinion" that the EVC "had to respect" the determination of the Seoul Central District Court in the Merger Injunction Decision that "that there were no illegalities in the procedure of the Merger or in the determination of [the Merger Ratio]."[236] He testified further that, at the time, he "thought that the decision rendered by the Court, which was a judgment on the various arguments that Elliott had raised opposing the Merger in applying for an

233 **RWS-1**, First Cho Witness Statement, ¶ 30.

234 **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, p. 17; **Ex. C-420**, [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger" **[RESP015129]**, 7 or 8 July 2015, p. 4.

235 **Ex. C-469**, Statement Report of Young-gil Cho to the Special Prosecutor **[RESP015303]**, 28 December 2016, p. 17.

236 **RWS-1**, First Cho Witness Statement, ¶ 21.

injunction, was going to have significant bearing on the [EVC]'s considerations if the Committee were to deliberate."[237]

127. He further reiterated:

> I did believe that the decision of the Seoul District Court on the injunction was of considerable importance, and therefore had planned to explain the contents of the decision to the [EVC] members and to distribute copies of it to them had the [EVC] convened. **My tentative personal opinion was that it would be difficult to make a decision departing from that of the Court's**, unless there was material the [EVC] could consider that was more authoritative than the Court decision.[238] (Emphasis added)

128. The foregoing testimony is important, including because the primary function of the EVC, as understood by the NPS at the time, was precisely to decide on matters raising legal and policy controversies.[239] Despite conducting a lengthy cross-examination spanning two hearing days, Claimant chose not to ask Mr. Cho any questions about the tentative opinions he had formed in relation to the Merger decision or the importance of the Merger Injunction Decision. His evidence therefore remains unrebutted.[240] It is, moreover, entirely logical that such a judicial decision would have weighed very heavily on the minds of the various individuals on the EVC.

---

[237] **RWS-1**, First Cho Witness Statement, ¶ 21.

[238] **RWS-1**, First Cho Witness Statement, ¶ 34.

[239] *See, e.g.*, **RWS-1**, First Cho Witness Statement, ¶¶ 7, 11, 19; **Ex. R-290**, Transcript of Court Testimony of [redacted], pp. 26–27.

[240] At paragraph 820 of the Award, the Tribunal stated that Mr. Cho's evidence was "inconclusive." It is important to emphasize the context of that statement. This was in support of the conclusion that "[t]here is no evidence before the Tribunal . . . that would cause the Tribunal to second-guess the findings of the Korean courts." **RLA-194**, Award, ¶ 820. The findings of the Korean courts in question were those described in the immediately preceding sentence—viz., the findings "that the NPS held a casting vote, and that there was therefore a direct causal link between the NPS's vote on the Merger and the loss suffered by the NPS . . . ." **RLA-194**, Award, ¶ 819. In other words, this was assessing Mr. Cho's evidence in the context of considering an argument that the potential for a different EVC outcome could have meant that the NPS vote should not be treated as a cause of the Merger. Now, however, the issue is whether the Blue House Measures can be said to have caused the NPS Vote, a point on which Claimant bears the burden of proof.

(iii) The SK Merger 'precedent'

129. As noted above, in June 2015, the EVC (with Mr. Cho's participation) decided that the NPS would vote against the proposed SK Merger. Claimant has placed considerable weight on a supposed analogy between the Merger and the SK Merger.

130. Having participated actively in the EVC's deliberations and decision on the SK Merger, Mr. Cho was uniquely placed to assess the accuracy of such predictions. He testified in this arbitration that it was incorrect to assume that the EVC would reach the same decision with respect to the Merger as it did on the SK Merger:

> The [EVC] considers every merger on its own facts and merits. I recall there being differences between the circumstances of the SK Merger and those of the Merger. For example, to my knowledge, the treasury stock issue in the SK Merger [which had led the EVC to vote against the transaction[241]] did not exist in the Merger. Also, there was a Court decision [Merger Injunction Decision] addressing issues that had been raised as controversial in the Merger, in the period before the shareholder vote on the Merger. In that decision, the Seoul District Court had found that there were no illegalities in the procedure of the Merger or in the determination of the [Merger Ratio]. As far as I recall however, no such court decision had approved the SK Merger terms like this.[242]

131. On cross-examination, Mr. Cho was pressed at length concerning his prior statement to the Korean prosecutor that the SK Merger case was "identical to the merger between Samsung C&T and Cheil Industries in terms of it being related to the strengthening of control by the Group's founding family."[243] However, there is nothing inconsistent in Mr. Cho's evidence. He was not saying previously that the two situations were identical in all respects, but in the respect he identified. They were also different in critical respects, as

[241] *See* **RWS-1**, First Cho Witness Statement, ¶¶ 15, 33.

[242] **RWS-2**, Second Cho Witness Statement, ¶ 6.

[243] *See* Tr. Day 3, 193:2–194:1, 194:16–197:3.

Mr. Cho explained.[244] There were other important differences as well, including that the NPS had not had a casting vote in the SK Merger,[245] and the risks to the Fund's overall portfolio from a possible failure of the SK Merger were nowhere near the same magnitude as those at issue in the Merger.[246] The importance of this latter point cannot be overemphasized.

132. In short, the evidence does not support a finding—to any degree of certainty—that the EVC would have voted against the Merger, had the matter been referred to it.

c. <u>Free from unlawful interference, the Investment Committee would still have voted for the Merger</u>

133. In this section, the ROK addresses what would likely have happened in the but-for world if that is being assessed on the hypothesis that the matter would still have been decided upon by the Investment Committee.

134. In the actual world, the twelve members of the Investment Committee met on 10 July 2015 and, as recounted in the Award, "deliberated for three hours on, *inter alia*, the Merger Ratio, the anticipated economic benefits of the Merger, opposition to the Merger (including Elliott's position), and the market reactions following the announcement of the Merger."[247] To facilitate those deliberations, the Committee members were provided with a range of materials and opinions—both supportive and critical of the Merger.[248] Critical viewpoints were raised and discussed, and ultimately an open roll-call vote

[244] *See* Tr. Day 3, 193:2–194:1, 194:16–197:3.

[245] **Ex. C-444**, NPS, "Materials Requested by Assemblyman Jae-won Kim" **[RESP005690]**, 2 October 2015, p. 3.

[246] **Ex. R-290**, Transcript of Court Testimony of [redacted], p. 39 ("**A.** As I mentioned earlier, when the SK case came up, I thought, 'Since this involves the group chairman, I suppose they're just referring it to the Expert Voting Committee.' Regarding the Samsung case, I believe the chair explained that, in the case of SK, our stake was not particularly high, so whether the committee approved or rejected it would have had little impact; whereas the Samsung case needed to be handled with a little more caution.").

[247] **RLA-194**, Award, ¶ 235.

[248] *See generally* **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015; **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015.

was taken, with members having the option to vote in favor, against, for a neutral position, for the NPS to abstain, or to themselves abstain.[249] None of the foregoing aspects of the meeting would necessarily have been different in a Treaty-compliant counterfactual scenario.

135. One aspect that would have been different is that, in the absence of pressure from the MHW, there is no reason to believe that the NPS Research Team would have prepared and presented to the Investment Committee the tainted synergy projection. However, that does not mean there would have been no synergy projection at all. As discussed above, numerous independent analysts were projecting synergies from the Merger, and the stock market reaction to the Merger announcement had suggested an expectation of synergies.[250] Rather, it simply means that the tainted synergy projection itself would not have been introduced into the deliberations.

136. In the Original Proceedings, Claimant asserted that six of the members of the Investment Committee had stated in the Moon/Hong case that they would not have voted for the Merger but for the tainted synergy projection.[251] As the ROK demonstrated at the time,[252] that assertion rested on a distortion of the evidence: A faithful reading of the statements and testimony of the Investment Committee members shows that they were reacting to having been told that the Research Team had arbitrarily manipulated the synergy projection. In that context, several Investment Committee members stated that they would have had difficulty voting in favor of the Merger had they learned of the deception.[253]

---

[249] *See generally* **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015; **Ex. C-428**, [redacted], Minutes of the Investment Committee Meeting **[RESP020541]**, 10 July 2015.

[250] *See* **Section III.B.1.b(iii)**.

[251] *See* Claimant's Opening Presentation, Slide 68.

[252] *See* ROK's Opening Presentation, Demonstrative C.

[253] *See, e.g.*, **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 15 ("[W]hen I made that statement, I was asked 'If the conclusion is reached that the [NPS] employees fabricated it and that's how the synergy effect was made, would you have

137. That is an entirely different question to whether there existed reliable grounds (independent of the tainted synergy projection) to believe that the Merger would protect and enhance long-term shareholder value at New SC&T and the 15 other Samsung Group companies in the Fund's portfolio. For a person to say that he would not have voted at the Investment Committee meeting in favor of the Merger if he had been told that the synergy calculation had been manipulated is *not* the same thing as saying that, if there had been another more accurate calculation, he would have voted differently. The Investment Committee members testified consistently that they had, in fact, taken multiple factors into account (in addition to the tainted synergy projection),[254] including the potential negative impacts of a failed Merger on the Fund's shareholding

approved the merger?' So I stated, if that was indeed the process that was undertaken, if the number had indeed been fabricated, I wouldn't have voted in approval.").

[254] *See, e.g.*, **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 37 ("**Q.** Isn't the gist of that — that you, based on your own independent judgment, took into account: the share-price trajectory of Samsung C&T and Cheil Industries if the merger fell through; the impact on the NPS's overall portfolio from the share-price trends of Samsung Group companies and the ripple effects on the economic and financial markets; and, further, the synergy effects from the bio industry and so forth if the merger went through as one factor to be considered — and voted in favor in light of the increase in the NPS's return value and shareholder value, and the like? **A.** Yes, as I said, [I considered] the synergy effects of the individual companies; and since we are financial investors who cannot participate in management, the effects on our portfolio, the impact on the stock market, the fact that transparency in governance and the move toward a holding-company structure is good for share prices over the long term; and, looking at our institution as a whole, we hold not only equities but also bonds. With Samsung C&T's credit rating going up — becoming AA along with Cheil Industries — there were also benefits on the bond side. So of course we make our decisions taking all of those aspects into account. **Q.** Are you saying that, while the synergy effect was one factor, there were many other factors that were more important than that? **A.** Yes. When I testified before the Special Prosecutor, I mentioned those aspects as well. I said that we look at everything, and that the steps that follow — Samsung Electronics moving toward a holding-company structure, and so on — would all have an impact. But because Samsung Electronics is not really related to this case, [the prosecutors] said let's take that part out, so at that time…"); **Ex. R-290**, Transcript of Court Testimony of [redacted], pp. 15–17, 29–31, 33–34, 41, 43 (testifying to the effect that various factors were presented to the Investment Committee and considered via discussion, and the synergy effect was only one such a factor).

in the Samsung Group[255] and on the national economy;[256] the benefits expected from corporate governance reforms of the Samsung Group;[257] and the findings of the Seoul Central District Court in the Merger Injunction Decision,[258] among others. They also testified that they understood that the synergy projection was inherently subjective and imprecise, and that the KRW 2.1 trillion figure was never presented as a precise synergy effect.[259] The upshot of such testimony is that the tainted synergy projection number itself was not decisive, and its removal (and replacement with an objectively-derived number) would not necessarily have made any difference to the outcome of the Investment Committee vote.

138. The Tribunal need not take the ROK's word on this point. The Korean courts have carefully examined this precise question—by reference to the complete evidentiary record of the Moon/Hong case (including the complete testimony of the Investment Committee members in its original language), as supplemented by the evidentiary record of subsequent civil and criminal cases involving the Merger—and have determined in two separate cases that the unlawful acts of Minister Moon and CIO Hong, including the tainted synergy

---

[255] *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted] pp. 23, 25–26; **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 27–28, 32–33; **Ex. R-291**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 22–23, 31–32, 57–58, 65–66; **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 17, 45.

[256] *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 61; **Ex. R-291**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, p. 51.

[257] *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], pp. 53–54; **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 16–17; **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 32–33.

[258] *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 27; **Ex. R-290**, Transcript of Court Testimony of [redacted], p. 7.

[259] *See, e.g.*, **Ex. C-499**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011118]**, 3 April 2017, pp. 20, 42–43; **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 47; **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 51; **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, p. 27.

projection, did not have a decisive influence on the Investment Committee's decision.

a. **The Merger Annulment Judgment (Ex. R-020).** The Seoul Central District Court rejected the argument that, as a consequence of the Moon/Hong breaches of trust, the Investment Committee's decision in favor of the Merger and consequent exercise of voting rights by the NPS were unlawful.[260] Without minimizing the seriousness of the MHW's unlawful intervention in the NPS's decision-making process, the Court held that such misconduct, when weighed against the totality of the evidence, was insufficient to establish that the Investment Committee's decision itself was tainted.[261] The court cited the following reasons: (i) the "fairness" of the Merger Ratio depended on valuation assessments that were subjective and varied widely;[262] (ii) under the Voting Guidelines, it was for the Investment Committee itself, rather than any individual NPSIM executive or team, to decide whether to refer the matter to the EVC;[263] (iii) the Investment Committee meeting adopted an open voting method that did not steer the vote in favor of any particular outcome, and the Court held in the Moon/Hong case[264] that the Investment Committee's vote itself could not be regarded as part of CIO Hong's breach of duty;[265] (iv) the Investment Committee

[260] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 36–40.

[261] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 37.

[262] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 37.

[263] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 38.

[264] *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 63 (holding that, although some aspects of the decision-making process ran counter to the principle of independence, the open voting method allowed each member to vote in favor, against, neutral, abstention or even to refer the matter to the EVC, and thus the Investment Committee's affirmative vote itself cannot constitute a breach of duty of CIO Hong).

[265] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 38.

members were experienced professionals with responsibility for ensuring a return on the Fund's investments and, even though Elliott had threatened each of them with breach of duty, "it appears more likely that the Investment Committee members would make their decisions based on earnings or the shareholder value rather than be swayed by an individual's influence"; [266] (v) the members of the Investment Committee all understood that merger synergies were projections only, not precise calculations, and the existence of merger synergies was in any case only one of many criteria considered, alongside factors such as stabilizing the Samsung Group's governance structure to the benefit of the Fund's earnings, increasing long-term shareholder value through New SC&T's status as the de facto holding company of the Samsung Group, and avoiding loss to the Fund's shareholdings in Samsung Group companies, which accounted for roughly one-quarter of the Fund's portfolio;[267] and (vi) valuation of high-growth companies such as Samsung BioLogics is difficult and subjective, and it was not unreasonable for the Investment Committee to have placed a high value on the biotechnology business.[268]

b. **The Shareholder Claims Judgment (Ex. R-389).** The Seoul Central District Court similarly held that the criminal conduct of Moon and Hong could not be said to have determined the Investment Committee's decision, including for the following reasons: (i) the open voting method was not designed to secure an "Agree" vote at the Investment Committee; (ii) all members of the Investment Committee were experts in investment and fully aware that the synergy figures could not be accurately quantified and, in fact, concerns raised by certain members

[266] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 38–39.

[267] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, pp. 39–40.

[268] **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court, 19 October 2017, p. 40.

led to discussions on this issue during the Investment Committee meeting; and, therefore, it cannot be said that the members believed that the tainted synergy projections were necessary to recover losses from the Merger Ratio; and (iii) 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.[269]

139. The foregoing findings of the Korean courts support the view that removing the MHW's unlawful interference and replacing the tainted synergy projections with objectively-derived figures—as postulated in the Treaty-compliant counterfactual scenario—would not have changed the outcome of the Investment Committee vote from "For" to "Against."

3. *Many sophisticated investors voted for the Merger in the absence of any interference*

140. Another way to assess the likely outcome of the NPS's decision-making in the absence of any unlawful interference by the MHW is to look at the voting behavior of other SC&T shareholders that were not subject to any such interference. As recounted in the Award:

> At the EGM held on 17 July 2015, the SC&T shareholders approved the Merger . . . . A total of 84.73% of the issued and outstanding shares . . . were represented at the meeting.
>
> The Merger was approved by 69.53% . . . of the 132,355,800 shareholder votes attending the EGM, of which 13.23% . . . in favor were from the NPS's shareholding. The votes in favor corresponded to 58.91% of SC&T's total issued and outstanding shares . . . .
>
> Most of the domestic institutional investors and approximately one-third of foreign shareholders voted in favor of the Merger. The foreign shareholders that voted in favor of the Merger included sovereign wealth funds,

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

> such as Singapore's GIC (with 1.47% stake), the Saudi Arabian Monetary Agency's sovereign wealth fund, SAMA Foreign Holdings ("SAMA") (with 1.11% stake), and Abu Dhabi Investment Authority ("ADIA") (with 1.02%). Approximately 88% of the minority shareholders, who accounted for 24.43% of the outstanding shares, voted in favor of the Merger.[270]

141. The numbers speak for themselves: A large cross-section of large and small investors unaffiliated with Samsung or the NPS, including many domestic institutional investors and several foreign sovereign wealth funds, exercised their independent judgment in favor of the Merger notwithstanding Claimant's vocal and active opposition. It can be inferred that such investors carefully considered the position and determined it was in their financial interests as shareholders to support the Merger. Such voting behavior further undermines Claimant's contention that a rational NPS, acting free of unlawful interference, necessarily would have voted against the Merger.

C. The *Mason* tribunal's decision to the contrary is not supportable on the evidence before this Tribunal

142. As previewed in the Introduction, the *Mason* tribunal held that the claimants in that arbitration had proven to a sufficient degree of certainty that absent the breaches of treaty found in that case, the NPS would have abstained from or voted against the Merger.[271] For the reasons set out below, that conclusion is contrary to the evidence before this Tribunal and, with respect, not persuasive even on its own terms.

143. As an initial matter, the record before the *Mason* tribunal was not the same as the record that is presently before this Tribunal. One material difference is that the *Mason* tribunal declined to admit the Additional Judgments[272] and for that reason did not have the benefit of the Korean courts' most recent and comprehensive analysis and findings on important points. Regrettably, as

---

[270] **RLA-194**, Award, ¶¶ 240–242.

[271] **CLA-219**, *Mason Capital L.P. (U.S.A.) and Mason Management LLC (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-55, Final Award, 11 April 2024 ["***Mason*** **(Award)**"], ¶¶ 860–881.

[272] **CLA-219**, *Mason* (Award), ¶¶ 102–103, 108–109.

demonstrated below, this led the *Mason* tribunal to rely and place emphasis on a mistaken understanding of certain statements by the Seoul Central District Court in the Moon/Hong proceedings.

144. In the remainder of this section, the ROK addresses each of the *Mason* tribunal's relevant findings and demonstrates that its ultimate conclusion on factual causation is contrary to the weight of the evidence before this Tribunal and is otherwise not persuasive.

1. *The* Mason *tribunal's finding that the Merger vote in all probability would have been referred to the EVC*

145. The first element of the *Mason* tribunal's analysis is to conclude, at paragraphs 861 to 865 of the award, that "without Respondent's interference in the NPS' internal decision-making process, the Merger would have been referred to the Experts Voting Committee."[273] The *Mason* tribunal relies on the following circumstances: The SK Merger decision had recently been referred to the EVC; Minister Moon decided to bypass the EVC only after receiving a report predicting that the EVC's approval of the Merger had become uncertain; and the NPSIM had initially considered the Merger vote to be a difficult matter that should be decided by the EVC and had expressed its concerns to the MHW.[274] As discussed above, however, the procedure by which NPSIM had referred the SK Merger decision directly to the EVC was arguably inconsistent with the Voting Guidelines, and officials at the MHW could have legitimately (without breaching Korean law or the Treaty) raised their concerns about the suitability of that procedure, particularly for a decision as financially consequential as that on the Merger.[275] It is difficult to say with any certainty how NPSIM would have decided to proceed in that scenario.

146. In any event, as discussed above, the question of which NPS committee would have decided on the Merger in the counterfactual scenario is likely immaterial: either committee would have made the decision pursuant to the same Voting

[273] **CLA-219**, *Mason* (Award), ¶ 865.

[274] **CLA-219**, *Mason* (Award), ¶¶ 862–864.

[275] *See* **Section III.B.2.a** above.

Guidelines, in consideration of the same factors, and on the basis of the same information and data.[276]

2. *The* Mason *tribunal's finding that the EVC in all probability would have abstained from or voted against the Merger*

147. In paragraphs 866 to 880 of the award, the *Mason* tribunal considers how the EVC would have voted if it had been seized of the matter, and describes its reasons for concluding "that the Merger was detrimental to the value of SC&T's shares and that[,] when considering the positions on both sides impartially and independently, the Experts Voting Committee would have, in all probability, abstained from or voted against the Merger."[277] Three reasons are given, which are addressed in turn below.

a. <u>The MHW's contemporaneous prediction of the EVC vote</u>

148. At paragraph 868, the *Mason* tribunal recounts the MHW's assessment of the likely voting behavior of the members of the EVC—which had predicted four votes in favor, four votes against, and one abstention—and noted that, based on that analysis, Minister Moon had decided to let the Investment Committee decide on the Merger.[278] (A more detailed recounting of those facts, which are not substantially in dispute, is set out at **Section III.B.2.b(i)** above.) The *Mason* tribunal then drew the following inferences:

> If the MHW had been sufficiently confident that the Experts Voting Committee would approve the Merger, there would have been no reason for the MHW to interfere in the NPS's internal decision-making. **In the Tribunal's view, this is a strong indication that the Experts Voting Committee would have abstained from or voted against the Merger**.[279] (Emphasis added)

149. The second (bolded) sentence reflects an unsustainable leap of logic. As demonstrated above, Minister Moon decided to intervene after concluding that

[276] *See* **Sections III.B.2.b** and **III.B.2.c** above.

[277] **CLA-219**, *Mason* (Award), ¶ 880.

[278] **CLA-219**, *Mason* (Award), ¶ 868.

[279] **CLA-219**, *Mason* (Award), ¶ 868.

it was "not 100% guaranteed" that the EVC would approve the Merger.[280] That lack of a guaranteed outcome is not an indication—let alone a "strong" one—that the EVC was likely to vote against the Merger, and much less that it would "in all probability" do so. The bolded sentence also proceeds from a questionable premise: that the MHW's predictions were reliable and accurate.

150. In the following paragraph, the *Mason* tribunal addresses "Mr. Cho's testimony that there was uncertainty and that no one could make a prediction as to the likely outcome of the vote,"[281] and concludes as follows:

> However, Mr. Cho is only one (former) member of the Experts Voting Committee and could only speak for himself and in hindsight, without having actually deliberated on the Merger. In the Tribunal's view, his testimony does not contradict the above-mentioned analysis prepared by the MHW and the NPS shortly before the actual Merger vote.[282]

151. Such conclusion is not sustainable on the facts before this Tribunal. As demonstrated in **Section III.B.2.b** above, the MHW's "analysis" was in fact just a prediction. Further, Mr. Cho's unrebutted, consistent, and credible testimony is that the MHW's prediction as to *his* likely voting disposition—i.e., that he was expected to vote against the Merger—was incorrect in two respects. First, he "definitely did not have plans to vote against the Merger."[283] He should not therefore have been included as someone who could be predicted to vote against the Merger. Second, he felt that the recent Merger Injunction Decision, dismissing Claimant's challenges to the Merger, was very significant, and his tentative view had been that it would be difficult for the EVC to make a decision departing from that of the Court.[284]

---

[280] *See* **Section III.B.2.b(i)** above.

[281] **CLA-219**, *Mason* (Award), ¶ 869.

[282] **CLA-219**, *Mason* (Award), ¶ 869.

[283] **RWS-1**, First Cho Witness Statement, ¶ 30.

[284] *See* **Section III.B.2.b(ii)** above. As noted above, the Investment Committee was also aware of the Merger Injunction Decision and took it into consideration in the course of deciding to vote in favor of the Merger. **Ex. C-500**, Transcript of Court Testimony of [redacted]

b. The SK Merger 'precedent'

152. The *Mason* tribunal's second reason in support of its conclusion as to the likely outcome of a vote at the EVC was that the EVC "had already rejected the SK Merger."[285] The *Mason* tribunal's reasoning in this regard is set out in a single sentence:

> Given the parallels between the two mergers, the coincidence in time, the heightened concerns about the Merger Ratio of the current Merger and the NPS'[s] comparatively higher stake in SC&T, it seems highly likely that the Experts Voting Committee would not have approved the current Merger either.[286]

153. As already demonstrated above, such an inference is not supported by the evidence before this Tribunal.[287] Among other critical differences between the two situations are that: (a) because of the size of the Fund's holdings in Samsung Group companies, a failure of the Merger posed a risk of massive loss to the Fund that was not a consideration in relation to the SK Merger;[288] (b) Mr. Cho had opposed the SK Merger after discovering unfairness in relation to the disposition of treasury stock in that transaction, but no such issue was present in relation to the Merger; (c) when it deliberated on the SK Merger, the EVC did not have before it a judgment of the Korean courts rejecting challenges to the transaction, as it would have had in relation to the Merger (the Merger Injunction Decision); and (d) Mr. Cho's unrebutted testimony in this case establishes that he considered the Merger Injunction Decision to be very significant and intended to print copies of it and explain its significance to the other members of the EVC (a body that had a reputation

[redacted], p. 27 (Investment Committee was aware of substance of Merger Injunction Decision); **Ex. C-502**, Transcript of Court Testimony of [redacted], p. 23 (same); **Ex. R-290**, Transcript of Court Testimony of [redacted], p. 7 (confirming he cast his vote in favor of Merger on basis of several factors, including that Merger Injunction Decision had "settled that there was no issue with the valuation of listed shares in connection with the merger ratio").

[285] **CLA-219**, *Mason* (Award), ¶ 870.

[286] **CLA-219**, *Mason* (Award), ¶ 870.

[287] *See* **Section III.B.2.b(iii)** above.

[288] *See* **Section III.B.2.b(iii)** above.

for being attentive to legal issues[289]), which—given the findings and rationale of the Decision—can only have supported a vote in favor of the Merger.

154. In light of these circumstances, it is simply not tenable to infer from the EVC's vote on the SK Merger that the EVC would likely have opposed the Merger.

c. The economics of the Merger

155. The *Mason* tribunal's third reason was that it was "not convinced that there were sound economic reasons, supported by reliable data, for the NPS to vote in favor of the Merger."[290] Importantly, the *Mason* tribunal reached such conclusion without the benefit of the JY Lee Unlawful Merger Judgments, the first-instance decision of which it had declined to admit into evidence or consider. As discussed above,[291] those Judgments contain important factual findings by the Korean courts—reached after careful review of an exhaustive evidentiary record—concerning the very question of "the economic viability of the Merger" that the *Mason* tribunal addresses in this part of its award.[292] By contrast, this Tribunal has admitted the JY Lee Unlawful Merger Judgments into the record of this case and will have the benefit of reviewing their findings.

156. This part of the *Mason* tribunal's analysis proceeds in three steps. First, the *Mason* tribunal describes the standards under the Voting Guidelines for voting in relation to mergers and acquisitions.[293] Second, the *Mason* tribunal describes the basis for its finding that the Merger Ratio was objectively unfavorable to, and thereby caused losses to, SC&T's shareholders.[294] Third, the *Mason* tribunal explains why it remains unconvinced that such losses caused by the Merger Ratio could be recouped in the long term by predicted synergies and

---

[289] **Ex. R-290**, Transcript of Court Testimony of [redacted], pp. 26–27; **Ex. C-501**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011408]**, 10 April 2017, p. 10.

[290] **CLA-219**, *Mason* (Award), ¶ 871.

[291] *See* **Section III.B.1.c** above.

[292] **CLA-219**, *Mason* (Award), ¶ 879.

[293] **CLA-219**, *Mason* (Award), ¶ 872.

[294] **CLA-219**, *Mason* (Award), ¶¶ 873–875, 878–880.

other positive effects of the Merger, which the *Mason* tribunal considers speculative.[295] The ROK addresses each of these points below.

(i) Voting Guidelines

157. The ROK has already addressed in **Section III.B.1.a** above the relevant considerations that would have guided the NPS's decision-making in the counterfactual scenario. The *Mason* tribunal's two-sentence treatment of this issue reduces the relevant considerations to a simple question of "if the proposal is deemed to damage shareholder value."[296] What is left unaddressed is how the NPS was to make such a determination. As discussed above, the Korean courts have confirmed that it was legitimate for the NPS to consider the fact that failure of the Merger was expected to adversely impact the stock prices of the Fund's holdings in SC&T, Cheil, and 15 other Samsung Group companies (collectively comprising almost one-quarter of the Fund's entire stock portfolio).[297] The *Mason* tribunal does not appear to have considered this critical factor at all.

(ii) Merger Ratio

158. The ROK has already addressed in **Section III.B.1.c(i)** above the data and information that would have been available to the NPS in the counterfactual scenario concerning the economic impact of the Merger Ratio on the Fund's shareholdings in SC&T and Cheil.

159. In its award, the *Mason* tribunal first notes that the NPS was aware of reports by two proxy advisors, ISS and KCGS, that had concluded that the Merger Ratio was unfavorable to SC&T shareholders.[298] The *Mason* tribunal does not mention, however, that the NPS was also in possession of benchmark merger ratios from other third-party valuation and securities firms that had reached the opposite conclusion (i.e., that the Merger Ratio was within a reasonable

---

[295] **CLA-219**, *Mason* (Award), ¶¶ 876–877, 879.

[296] **CLA-219**, *Mason* (Award), ¶ 872.

[297] *See* **Section III.B.1.a** above.

[298] **CLA-219**, *Mason* (Award), ¶¶ 873–874.

range).[299] Nor does the *Mason* tribunal acknowledge that all such benchmarks were derived from valuations of SC&T and Cheil that were themselves highly subjective, and ranged widely.[300]

160. The *Mason* tribunal next notes that the NPS Research Team calculated three different benchmark merger ratios, with the final calculation (1:0.46) resulting in a loss to the NPS of KRW 138.8 billion, and that the Research Team then came up with offsetting projected synergy effects later found to have been derived arbitrarily.[301] These facts are addressed at **Section III.B.1.c(i)** above.

161. The *Mason* tribunal next discusses (in a single, brief paragraph) certain expert evidence that is not on the record in this case and that appears inconsistent with the expert evidence this Tribunal has before it.[302]

162. At paragraph 879, the *Mason* tribunal concludes its discussion of the economic impact of the Merger Ratio by comparing and contrasting findings by the criminal and civil divisions of the Seoul Central District Court concerning the Merger Ratio:

> Based on the above-mentioned factual circumstances, the criminal division of the Seoul Central District Court concluded in the Moon/Hong case that "there were multiple events that objectively suggest the contention that the merger ratio announced by Samsung was unfair and unfavorable to the SC&T shareholders."[[303]] By contrast, as summarized above, the civil division of the Seoul Central District Court decided in the Elliott

---

[299] *See* **Section III.B.1.c(i)** above (*citing, e.g.*, **Ex. R-127**, NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 10 July 2015, p. 18; **Ex. R-386**, Deloitte, "Review Report of Merger Ratio Between Samsung C&T and Cheil Industries", 25 May 2015, p. 12").

[300] *See* **Section III.B.1.c(i)** above.

[301] **CLA-219**, *Mason* (Award), ¶ 875.

[302] **CLA-219**, *Mason* (Award), ¶ 878.

[303] The award cites here to page 3 of the English translation of the Seoul Central District Court decision in the Moon/Hong case that was on the record in the *Mason* arbitration. The corresponding sentence from the version of that Judgment that is on the record in the present case appears to be: "There were objective circumstances that provided for a reasonable doubt that Samsung's merger ratio was disadvantageous for SC&T shareholders." **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 4.

> injunction case that the Merger Ratio was calculated in accordance with Korean law and in the Merger Annulment Case that the purpose of the Merger could not be considered unfair. However, the Tribunal is not convinced by the civil court's conclusions on the economic viability of the Merger. . . .[304]

163. This discussion proceeds from an erroneous understanding of what the criminal division of the Seoul Central District Court concluded in the Moon/Hong case—an error that could have been avoided if the *Mason* tribunal had reviewed the subsequent decision of that same court (Seoul Central District Court, criminal division) in the JY Lee Unlawful Merger Case. In that case, the court rejected the prosecutor's allegation that the Merger Ratio had been unfair to the shareholders of SC&T and, as part of that decision, also rejected the prosecutor's assertion that the unfairness of the Merger Ratio had already been acknowledged in the Moon/Hong criminal judgments.[305] After reviewing the factual findings as confirmed by the Seoul High Court in the Moon/Hong case, the court concluded as follows:

> Therefore, **the appellate court's judgment [in the Moon/Hong case] 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 decision was upheld by the Supreme Court. Therefore, the Prosecutor's allegation above lacks merit.[306]
> (Emphasis added)

164. The first-instance judgment in the JY Lee Unlawful Merger case quoted immediately above was issued on 5 February 2024. The *Mason* award was issued not long thereafter, in April 2024. In its appeal from the first-instance judgment quoted above, the Korean prosecutor relied on findings in the *Mason* award (including paragraph 879 quoted above) in support of the prosecutor's argument that the first-instance court had erred by finding no unfairness in the

[304] **CLA-219**, *Mason* (Award), ¶ 879.

[305] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 396–397.

[306] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 397.

Merger Ratio.[307] After reviewing the relevant paragraphs of the *Mason* award, the Seoul High Court held that the *Mason* tribunal had quoted from a part of the "background facts" section of the Moon/Hong first-instance criminal judgment that, in turn, had relied (at footnote 3) on a Seoul High Court decision in the Merger Appraisal Price case that was later reversed by the Supreme Court as "inappropriate in that such facts had not been proven."[308] The Seoul High Court thus concluded that the *Mason* tribunal's determination on the unfairness of the Merger Ratio "is highly likely to have been made in a situation where sufficient review materials had not [been] presented."[309]

165. The ROK respects this Tribunal's finding in paragraph 931 of the Award (not set aside) that "approval of the Merger 'locked in' the Merger Ratio that reflected the discount in SC&T's share price and thus irreversibly transferred value from SC&T's shareholders to Cheil's shareholders."[310] It remains to be determined in these Remitted Proceedings, however, whether in the counterfactual scenario an independent NPS would have determined that any loss arising from such transfer of value (of which the NPS would have been both a transferee and a transferor, given its holdings in both companies) was outweighed by the expected benefits of the Merger (including not only synergy and governance benefits but also avoidance of the losses that failure of the Merger was expected to cause). On that question, the *Mason* tribunal's reliance on a mistaken understanding of the Moon/Hong criminal judgments does not assist.

(iii) Positive effects of the Merger

166. Finally, with respect to the potential synergy and other positive effects of the Merger, the *Mason* tribunal was dismissive, stating in paragraph 877:

---

307 **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 158–160, 162.

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

309 **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 162.

310 **RLA-194**, Award, ¶ 931.

> In the Tribunal's view, significant synergies between a fashion company and a construction company are not obvious and have not been proven.[311]

167. This statement ignores that Cheil was not simply a "fashion company"—it had a substantial construction business and held a large stake in the Samsung Group's most promising new business unit: Samsung BioLogics. Moreover, as demonstrated above, a broad range of serious securities analysts and the NPS itself assessed that the Merger would unlock gains in shareholder value, including stock price gains flowing from the Merger's partial resolution of Samsung Group circular shareholding links (i.e., an expected reduction in the "Korea discount"); revenue synergies from combining the two companies' construction units; revenue growth enabled by combination of the two companies' holdings in Samsung BioLogics; and financial synergies flowing from the stronger credit rating and financial condition of the combined company, among many others.[312] Moreover, as also demonstrated above, sophisticated domestic and international investors that were not subject to any governmental interference in their decision-making voted their shares in favor of the Merger.[313] As also noted above, after comprehensively reviewing all of the evidence, the Korean courts concluded in the JY Lee Unlawful Merger Judgments not only that the contemporaneous projections of Merger benefits were bona fide and reasonable,[314] but also that subsequent events prove that SC&T and its shareholders benefited greatly from the Merger and would not have been better off under any available alternative to the Merger.[315]

168. The *Mason* award does not seriously engage with any of the foregoing evidence. Instead, it summarily dismisses all predictions of benefits from the

---

[311] **CLA-219**, *Mason* (Award), ¶ 877.

[312] *See* **Section III.B.1.b** above.

[313] *See* **Section III.B.3** above.

[314] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 366–373; **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 137–140.

[315] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 373–377, 896–897; **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 837–838.

Merger as unsupported and speculative,[316] and summarily concludes (without reasoning or analysis) that "the fact that the Merger may have received positive market reactions cannot be taken as an indication of its long-term economic viability for SC&T's shareholders."[317] But, as demonstrated above, the positive stock market reaction to the Merger announcement and the successful two-thirds vote in favor of the Merger among participating SC&T shareholders are among a number of objective circumstances supporting the conclusion that the terms of the Merger were viewed by many market participants as net positive for SC&T.

169. Respectfully, the *Mason* tribunal's perfunctory analysis does nothing to undermine the conclusion, demonstrated in the sections above, that an independent NPS likely would have voted for the Merger.

D. Conclusion on factual causation

170. For the foregoing reasons, Claimant has not met its burden to prove, to the required degree of certainty, that the Blue House Measures were a cause in fact of its loss.

IV. CLAIMANT HAS NOT ESTABLISHED LEGAL CAUSATION

171. It is common ground that, following the Remittal Order, the Tribunal must determine the issue of legal causation, *i.e.*, whether, even assuming (contrary to the ROK's case) that the Blue House Measures can be considered a *factual* cause of Claimant's loss, the requirement of legal causation is satisfied.[318]

172. Claimant accepts that it bears the burden of proving legal causation.[319] Claimant also accepts that the Tribunal has set down a requirement of directness or proximity.[320] As the Tribunal stated in paragraph 815 of the Award, legal causation is "about whether the claimed loss or damage is sufficiently closely linked to the alleged breach." The required link may be

---

[316] **CLA-219**, *Mason* (Award), ¶¶ 877, 879.

[317] **CLA-219**, *Mason* (Award), ¶ 879.

[318] *See* **CLA-222**, Set-Aside Judgment, ¶ 266(ii); **CLA-226**, Remittal Order, ¶ 3.

[319] Claimant's Reply, ¶ 521; Claimant's Post-Hearing Brief, ¶ 179.

[320] *See* Claimant's Submission, ¶ 21(b).

determined in terms of whether the claimed loss or damage is a "direct" result of the alleged breach or is "proximately caused by the alleged breach"—two "technically distinguishable but in substance equivalent ways" of stating the applicable test.[321]

173. Three points are worth noting at the outset:

a. First, the Tribunal did *not* hold that the test for legal causation is satisfied by foreseeability and did not apply a foreseeability test. The fact that an impact upon Claimant was foreseen does not mean that the requirement of legal causation is satisfied. Claimant's repeated reliance in its Submission on foreseeability[322] is misplaced and does not assist it.

b. Second, a requirement of legal causation exists because there are circumstances in which the law holds that it is not appropriate as a matter of law to treat the party which carried out a particular act which constitutes a breach as legally responsible for *all* loss resulting from that breach, *even if* it can be said that the act is a factual cause of that loss.[323]

c. Third, Claimant accepts that legal causation encompasses such questions as whether the loss is too "remote" or "consequential," and

[321] **RLA-194**, Award, ¶ 815. *See also* **CLA-038**, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries), *Yearbook of the ILC* 2001/II(2), 31, Art. 31, Comment 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation [i.e., legal causality]. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.").

[322] *See* Claimant's Submission, ¶¶ 67, 72–74. Claimant appears to contend that the Tribunal's findings in respect of foreseeability mean that "it is simply not open to the ROK to relitigate in these proceedings whether the causal chain was sufficiently proximate." Claimant's Submission, ¶ 74. That is wrong, as foreseeability is not the determining test for legal proximity.

[323] *See* Statement of Defence, ¶ 401 (citing *inter alia* **RLA-022**, *Methanex Corporation v United States of America* (UNCITRAL), Partial Award, 7 August 2002, ¶¶ 137–139, 147).

whether it is appropriate for the State to bear the loss claimed in light of the "scope" or the "purpose" of the relevant rule.[324]

174. Even if the Tribunal were to accept that factual causation is made out in this case (which, for the reasons discussed in **Section III**, it should not), the Tribunal should hold that the burden of proving legal causation has not been satisfied. The claimed loss is too remote from the Blue House Measures to be compensable, for at least the following reasons.

175. *First*, the length, complexity, and uncertainty of the causal chain must be considered. On the hypothesis that the Tribunal accepts Claimant's case regarding factual causation, the chain of causation between the Blue House Measures and the claimed loss would be as follows:

a. The Blue House Measures involved Minister Moon and the MHW instructing and putting pressure on NPS officials—specifically, CIO Hong and [redacted]—to ensure that the NPS would vote in favor of the Merger.[325] But the NPS is not an abstraction: its decisions turn on the judgments of numerous individuals, each exercising, in the but-for world, independent assessment of a complex, multi-factorial question, with many other people in similar positions deciding to vote in favor of the Merger. The causal chain therefore runs from the Blue House Measures through those individuals' decisions, which involve a range of competing considerations and a vote whose outcome was not predetermined. As discussed in **Section III**, Claimant's alleged loss resulted (as a factual matter, in the actual scenario) from the combination of numerous factual matters: the Blue House Measures, NPS internal decision-making, the decisions of other market participants, and the Merger itself. The differing treatment of these matters across the Korean court judgments (civil and criminal), two

---

[324] *See* Claimant's Submission, fn. 104 (*quoting* **CLA-038**, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries), *Yearbook of the ILC* 2001/II(2), 31, Art. 31, Comment 10).

[325] *See* **RLA-194**, Award, ¶¶ 586–603.

investment treaty arbitration awards (the Award and the *Mason* award), and the subsequent court judgments that reviewed those awards illustrates the complexity and uncertain nature of the causal chain.

b. The Merger required approval at the shareholder meetings of SC&T and Cheil. Those meetings involved a large number of shareholders exercising their votes independently. The Merger was approved by a two-thirds majority of participating SC&T shareholders, with a significant number of sophisticated institutional investors voting in favor.[326] The causal chain thus extends through another layer of independent, multi-party decision-making.

c. Furthermore, Claimant's loss was calculated in the Award not by reference to the Merger outcome itself, but by reference to market movements—specifically, the difference in the value of Claimant's shares between the period just before the Merger and the dates on which Claimant later disposed of its shares. Market movements depend on numerous factors and the decisions of many participants over time, adding a further layer of complexity and indirectness to the chain.

176. The length and complexity of the chain therefore render it too indirect and insufficiently proximate for legal causation to be established. Claimant's assertion that there is a "direct and uninterrupted chain of causality"[327] treats the NPS Vote and the Merger approval as simple, binary events. They are not. Each involves considerable factual complexity, multiple independent actors, and genuine uncertainty of outcome.

177. Claimant's argument would suggest that the directness of the causal link between the Blue House Measures and an investor's loss turns on whether the ROK knew, at the time it acted, that the investor opposed the Merger. That cannot be the right test. The requirement of legal causation is an objective

---

[326] *See* **Section III.B.2.c** above. The ROK does not assert that the vote at shareholders' meetings amounts to an intervening act, but notes the length and complexity of the causal chain.

[327] Claimant's Submission, ¶ 70.

inquiry into the character of the causal chain—its length, complexity, and the degree to which it traverses independent decision-making—not a function of the State's subjective knowledge of the investor's position at the time of the breach. The Tribunal's finding that the ROK acted with knowledge that Claimant was opposed to the Merger[328] is relevant to the existence of the *breach* of the MST obligation. It does not shorten or simplify the *causal chain* between the Blue House Measures and the loss as quantified. That loss was calculated by reference to market price movements following the Merger—a form of loss shared with all SC&T shareholders who disposed of their shares after the Merger date—and one that depends on the decisions of an entire marketplace of participants over time. The ROK's knowledge of Claimant's opposition to the Merger did not render those market movements a proximate consequence of the Blue House Measures.

178. *Second*, as noted above, and despite Claimant's arguments to the contrary, foreseeability is only one component of the legal causation analysis and alone is not sufficient to establish legal causation. Moreover, the fact that a party foresaw an adverse effect does not mean that *the specific loss* itself was foreseen.

179. *Third*, Claimant asserts that "the ROK in fact breached its Treaty obligations intentionally, in order to ensure that the NPS voted in favor of the Merger."[329] The Tribunal did not find that the ROK "intentionally" breached its Treaty obligations, but merely that it took steps to ensure that the NPS would vote in favor of the Merger, with the knowledge that Claimant was opposed to the Merger.[330] Such a finding does not render the Blue House Measures a direct or proximate cause of Claimant's loss, which as discussed above resulted from the complex and uncertain interaction of the decisions and actions of an entire marketplace of persons and institutions.

---

[328] *See* **RLA-194**, Award, ¶ 360.

[329] *See* Claimant's Submission, ¶ 75.

[330] *See* **RLA-194**, Award, ¶ 602(a).

180. *Fourth*, Claimant argues that the Tribunal has already rejected the existence of an intervening act.[331] That argument is addressed in **Section II.C.5** above.

181. *Fifth*, the Tribunal's original finding of legal causation rested on attribution: it was *because* the NPS's conduct was attributable to the ROK that the Tribunal held Claimant's loss to be "a direct result of the Respondent's conduct."[332] The English Court has set aside that finding. It follows, then, that the Tribunal can no longer rely on the NPS's own conduct—the fabrication of synergy figures and active encouragement of Investment Committee members to vote in favor—as part of the causal chain connecting State conduct to Claimant's loss. The NPS Measures are not State conduct. Only the Blue House Measures are. Thus, the question of legal causation now needs to be asked by reference to the Blue House Measures alone.

182. To recall, the Blue House Measures comprised: (i) the intervention and instructions by President Park and the Blue House to the MHW to intervene in the Merger vote;[333] (ii) the MHW's intervention with, and instructions to, the NPS to ensure a vote in favor of the Merger;[334] and (iii) Minister Moon's unlawful exercise of his powers as a public official in relation to the foregoing.[335] Those Measures influenced the NPS's processes. However, they did not directly cause either the Merger outcome or Claimant's loss. The causal chain between the Blue House Measures and Claimant's claimed loss traverses the independent deliberative processes of the NPS, the decisions of its individual officers and committee members, the votes of numerous shareholders at two separate corporate meetings, and subsequent market movements. It is simply too attenuated to establish legal causation.

---

[331] *See* Claimant's Submission, ¶ 76 (cross-referencing Claimant's Submission, ¶¶ 33–39).

[332] **RLA-194**, Award, ¶ 821.

[333] *Se* **RLA-194**, Award, ¶ 618. *See also* **CLA-222**, Set-Aside Judgment, ¶ 244(v).

[334] *See* **RLA-194**, Award, ¶ 602(a). *See also* **CLA-222**, Set-Aside Judgment, ¶¶ 244(i), 244(iv).

[335] *See* **RLA-194**, Award, ¶¶ 603, 624. *See also* **CLA-222**, Set-Aside Judgment, ¶¶ 244(ii), 244(iv).

183. *Sixth*, in considering the issue of legal causation in the specific context of the Blue House Measures, the Tribunal may wish to consider the recent findings of the Korean courts in the Shareholder Claims Judgments and JY Lee Unlawful Merger Judgments. In the Award, the Tribunal relied extensively on the Moon/Hong judgments, but in doing so specifically mentioned that there was no further evidence (at that time) that would make the Tribunal second-guess the findings.[336] In these Remitted Proceedings, the Tribunal now has before it the Additional Judgments, which shed important light on the proper understanding of those findings:

a. **Shareholder Claims Judgments:** The Shareholder Claims proceedings were civil proceedings brought against the ROK by certain former shareholders of SC&T.[337] Those proceedings addressed inter alia a causation question closely analogous to the one now before the Tribunal: whether Minister Moon's abuse of his supervisory authority over the NPS was a direct and proximate (legal) cause of the loss the SC&T shareholders claimed to have suffered as a result of the outcome of the Merger vote.[338] The SC&T shareholders had claimed that, as a result of the Minister's unlawful conduct, they suffered loss equal to the difference between the fair value of their shares and the merger price, for which the ROK was required to compensate them.[339]

b. In the Shareholder Claims District Court Judgment, the Seoul Central District Court dismissed the shareholders' claim. It held that the presence of an independent third-party act—i.e., the NPS's exercise of its voting rights—ordinarily breaks the chain of legal causation unless one of three exceptions applies: (i) a joint tort between the ROK and the NPS; (ii) the ROK's deprivation of the NPS's freedom to make decisions such that the NPS acted merely as its instrument; or (iii) a defect in the

---

[336] *See* **RLA-194**, Award, ¶¶ 819–820.

[337] *See* **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 1–2.

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

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

NPS's expression of will (for example, due to deceit or coercion by the ROK).[340]

c. The Seoul Central District Court found that none of the above exceptions was established. As to the second and third exceptions—the ones most directly analogous to the causation question before this Tribunal—the court found that it was difficult to conclude that the conduct of Minister Moon and CIO Hong had *determined* the Investment Committee's resolution, given the facts that: (i) the open roll-call voting method adopted was not (by design or effect) favorable to securing an affirmative vote at the Investment Committee;[341] (ii) all members of the Investment Committee were aware that expected synergies from the Merger could not be accurately quantified—a concern raised and discussed during the meeting itself—and they did not rely on the tainted synergy projections as the only way to offset losses from the Merger Ratio;[342] and (iii) the Investment Committee members comprehensively considered a range of factors beyond the synergy analysis, including changes in governance structure, the impact on share prices of relevant securities and Samsung Group affiliates, the impact on the stock market and the broader economy, and the consequences for the overall National Pension Fund portfolio if the Merger were to fail.[343] The court accordingly held that no proximate causal link existed between the conduct of Messrs. Moon and Hong and the SC&T shareholders' alleged loss.[344] The Seoul High Court upheld that conclusion on appeal.[345]

---

340 *See* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 12.

341 *See* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

342 *See* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13.

343 *See* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13. Further details of the Seoul Central District Court's findings are set out in the **Annex** to this Submission.

344 *See* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14.

345 *See* **Ex. R-390**, Shareholder Claims High Court Judgment, p. 5.

d. The Seoul Central District Court dismissed the shareholders' claim despite acknowledging—and relying upon—the findings of the Korean courts in the Moon/Hong proceedings.[346] As the Tribunal is well aware, those courts found inter alia that (i) Minister Moon had abused his authority by "ha[ving] [CIO] Hong . . . report that the Merger resolution would be decided by the Investment Committee rather than the Expert Voting Committee, and encourage a decision to approve the Merger by suggesting to certain members of the Investment Committee to vote in favour and by having [redacted] explain based on fabricated figures on merger synergies";[347] and (ii) CIO Hong abused his occupational authority by "causing damages of an unquantified amount to [NPS] resulting from the loss of benefits that could have been obtained through the active use of the casting vote."[348] The Shareholders Claims judgments fully acknowledged the above criminal liability findings—as well as the underlying fact findings—but held that the shareholder-plaintiffs had no recoverable loss as against the ROK. While such outcome may appear prima facie contradictory, a closer examination of the judgments demonstrates that it is not, for two reasons that bear directly on the limits of the findings made by the courts in the Moon/Hong proceedings:

i. In the Moon/Hong judgments, the courts expressly determined that the open roll-call voting method—the very mechanism by which the Investment Committee resolved to approve the Merger—was neither a result of, nor affected by, Moon's abuse of authority or Hong's breach of duty.[349] The courts in that case came to such a conclusion after a thorough examination of the

[346] *See* **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 1–6, 10.

[347] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 5.

[348] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 6.

[349] *See* **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 60; **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 44–45.

testimonies of the Investment Committee members that the open vote "appears not to [have been devised] in order to prevent the matter being referred to the Experts Voting Committee under the pressure from the Ministry of Health and Welfare officials,"[350] but instead was intended "to be more faithful to the guidelines."[351]

ii. In addition, in the Moon/Hong proceedings, the courts needed to be satisfied that CIO Hong's conduct had caused loss to the entity that he was affiliated with (i.e., the NPS), loss being a constituent element of the offense of breach of occupational duty.[352] The second-instance court (the Seoul High Court) found a risk of such loss—namely, the possible loss suffered by the NPS, in its capacity as casting voter, in being deprived of the benefits it potentially could have secured through the active use of that position—but held that the amount of that loss could not be quantified.[353]

iii. In finding that the amount of loss could not be quantified, the Seoul High Court explicitly rejected the Prosecutor's amended indictment to the effect that the difference between the actual Merger Ratio and the "appropriate" Merger Ratio should be recognized as a loss to the NPS.[354] The appellate court rejected the first-instance court's finding that the NPS's loss should be assessed as "the difference between what the financial status of

[350] **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, p. 45.

[351] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 60.

[352] **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, p. 59.

[353] **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, p. 67.

[354] **Ex. R-153**, Seoul High Court Case No. 2017No1886, 14 November 2017, pp. 65–66.

NPS would have been had the Merger not been approved, and its financial status after the approval of the Merger."[355]

iv. The Seoul High Court's finding in the Moon/Hong proceedings that there was a *risk* of loss to the NPS, but that the amount of such loss could not be quantified, was as far as the court needed to go in that case: whether CIO Hong's conduct caused loss to other SC&T shareholders was not an element of the offense, and the courts therefore had no occasion to address it. They accordingly did not determine whether CIO Hong's conduct extended to the consummation of the Merger itself, still less whether it caused any loss that other SC&T shareholders are said to have incurred as a result of the Merger being consummated.

e. **JY Lee Unlawful Merger Judgments:** In the criminal proceedings against JY Lee and others for alleged market manipulation in connection with the Merger, the Seoul Central District Court found that "[i]t cannot be deemed that [the NPS]'s decision-making on the Merger voting was distorted as a result of the President's wrongful intervention."[356] The Seoul High Court and the Korean Supreme Court both affirmed that judgment.[357]

184. The ROK does not suggest that the Shareholder Claims Judgments or JY Lee Unlawful Merger Judgments are binding on the Tribunal, nor that the Tribunal should adopt the Korean courts' reasoning wholesale. Those judgments proceed, in certain respects, on a different basis from the surviving findings in the Award. But their value lies elsewhere: they demonstrate that a separate judicial body, applying a cognate framework of proximate causation to the same underlying Merger and NPS Vote, concluded that the causal chain between the ROK's unlawful conduct and the SC&T shareholders' alleged loss

---

355 **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated), 8 June 2017, pp. 63–64.

356 *See* **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 748.

357 *See* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 568, 856–857; **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, pp. 3–4.

was too attenuated to give rise to legal responsibility. That conclusion—reached by the domestic courts, seated at the locus of the factual events, and on the basis of an extensive body of evidence (including evidence not before this Tribunal—is consistent with, and reinforces, the ROK's submission that the Blue House Measures are not the proximate cause of Claimants' alleged loss or damage. Accordingly, the Shareholder Claims Judgments and the JY Lee Unlawful Merger Judgments merit the Tribunal's careful consideration.

185. *Seventh, and finally*, another reason why legal causation is not established as between the Blue House Measures and Claimant's alleged loss is because such loss falls outside the scope of the rule breached[358] and, as the Tribunal acknowledged in the Award, the Treaty's wording confirms that causation must be established *in relation to a specific breach*.[359]

186. Following the Remittal Order, the relevant breach is the breach, through the Blue House Measures, of the Treaty's MST obligation, i.e., the obligation to "accord to covered investments treatment in accordance with customary international law."[360] The ROK does not contest that it breached this obligation. But the fact that it breached the MST obligation does not mean that every loss that can be said to factually result from that breach is a loss that should be compensated. The MST obligation was not breached by the terms of the Merger—the ROK has not breached the Treaty by virtue of Korean law allowing for a merger on such terms. Consistent with the Judgment of the English Court in the Set-Aside Proceedings, the fact that the NPS voted in favor of the Merger is also not a breach of the Treaty, as the NPS is not a State organ and its conduct is not attributable to the ROK under the Treaty. Further, the

[358] *See* **CLA-038**, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries), *Yearbook of the ILC* 2001/II(2), 31, Art. 31, Comment 10 ("[O]ther factors may also be relevant [to legal causation]: for example, . . . whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.").

[359] *See* **RLA-194**, Award, ¶ 813; **Ex. C-001**, Treaty, Art. 11.16(1)(a) ("[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [an obligation under the Treaty] and that (ii) that the claimant **had incurred loss or damage by reason of, or arising out of, that breach**." (emphasis added)).

[360] **Ex. C-001**, Treaty, Art. 11.5(1).

MST obligation does not dictate any particular outcome of the NPS's vote. Nor does it dictate any particular decision by other shareholders, much less the outcome of the vote of the entirety of the SC&T (and Cheil) shareholders. Instead, the Tribunal held that the ROK breached the MST obligation because, through the Blue House Measures, government officials interfered with the internal decision-making process of another minority shareholder (i.e., the NPS) which, like Claimant, held shares in SC&T.[361] The treaty rule, as applied by the Tribunal, was breached because there was an interference with the integrity of the voting process of one of the minority shareholders of SC&T (i.e., the NPS), which is said to have affected the integrity of voting by that shareholder at the SC&T general meeting. To award damages based on predictions by the Tribunal as to the *outcome* of the NPS decision-making would not be consistent with the nature of the breach found, which concerned the government's interference with a *process*, and Claimant's opportunity to prevail in that process (i.e., to persuade other SC&T shareholders to vote against the Merger). A loss based on predictions as to the outcome of that meeting is not proximately linked to the breach found. What Claimant lost as a result of the Blue House Measures was, at most, the *opportunity* to have the process play out without governmental interference. As the ROK discusses immediately below (in **Section V**), the only loss that could be casually connected to the breach found is thus a *loss of chance*; not the loss of a particular outcome.

V. IN THE ALTERNATIVE, THE TRIBUNAL SHOULD APPLY A LOSS OF CHANCE ANALYSIS

187. In the Set-Aside Judgment, the Court identified "a 'loss of a chance' analysis" as one of the approaches to causation that the Parties had argued before the Tribunal.[362]

188. The ROK's primary position is that Claimant should be held to the usual standard of proof for factual causation, which requires Claimant to prove to a

[361] *See* **RLA-194**, Award, ¶¶ 602–603.

[362] **CLA-222**, Set-Aside Judgment, ¶ 263(v).

sufficient degree of certainty that, absent the Blue House Measures, the NPS would have voted against the Merger or abstained.[363] As demonstrated in **Section III.B**, Claimant has not satisfied this burden and its claim for compensation from the ROK should therefore be denied in its entirety.

189. As discussed in this section, loss of chance is an alternative framework. Below, the ROK describes the loss of chance framework as it has been applied in investment treaty jurisprudence and explains why, if (contrary to the ROK's primary position) the Tribunal declines to hold Claimant to the ordinary standard of proof applicable to factual causation, the Tribunal could alternatively apply the loss of chance framework (**Section V.A**). The ROK then discusses *how*, in that scenario, the Tribunal could apply the framework to the facts of this case (**Section V.B**).

A. The loss of chance framework and its applicability

190. Loss of chance is a framework that may be applied where, (i) due to some exogenous factor, the claimant is not able to prove, to the "sufficient degree of certainty" standard, a causal link between the breach and its claimed loss, but, nevertheless, (ii) the claimant is able to demonstrate, to a lower standard of proof (discussed below), that the breach deprived it of a valuable *opportunity* to potentially make a profit or avoid a loss.

191. *Bilcon v. Canada* illustrates the circumstances in which investment tribunals have applied the loss of chance framework. There, the claimants alleged that the respondent State had breached its treaty obligations by refusing approval for their project to develop a quarry and marine terminal.[364] The tribunal declined to award lost profits because, while "there [was] a realistic possibility that the Whites Point Project would have been approved as a result of a hypothetical NAFTA-compliant [p]rocess, it [could not] be said that this outcome would have occurred 'in all probability' or with 'a sufficient degree

[363] *See* **Section III.A** below.

[364] *See* **CLA-003**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 8, 11.

of certainty'."[365] The Tribunal then proceeded to award the claimants damages for "*the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner*, which it has found the Investors have lost as a result of the Respondent's breach of NAFTA" (emphasis added).[366]

192. As *Bilcon* illustrates, the loss of chance framework may be applied, for example, (a) where the investor did not have a *right* to a particular outcome, but instead had a right to a fair opportunity to achieve such outcome;[367] or (ii) where the counterfactual scenario is inherently difficult to prove, for example because it involves the exogenous conduct of third parties.[368]

193. Although a loss of chance framework may in certain cases allow for some compensation even where the claimant has not satisfied the usual "sufficient certainty" standard, speculative claims are still not allowed.[369] To succeed on a loss of chance claim, the investor must demonstrate at least a "reasonable possibility"[370] that, but for the disputed measure, the desired outcome would have been achieved.

---

[365] **RLA-090**, *Bilcon* (Award on Damages), ¶ 168.

[366] **RLA-090**, *Bilcon* (Award on Damages), ¶ 280.

[367] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 280 (applying the loss of chance analysis to assess "the value of **the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner**, which [the tribunal] ha[d] found the [claimants] have lost as a result of the Respondent's breach of NAFTA" (emphasis added)).

[368] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 277 (finding that an award of lost profits was inappropriate because, among other factors, the long-term future profitability of the investment project was uncertain "due to . . . possible new environmental regulations affecting quarry operations and/or shipping").

[369] **RLA-205**, *Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. v. Federal Democratic Republic of Ethiopia*, PCA Case No. 2020-08, Final Award (Save as to Costs), 29 August 2025 (Hwang, Williams, McConnaughay), ¶¶ 1115, 1117–1118, 1127.

[370] **RLA-205**, *Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. v. Federal Democratic Republic of Ethiopia*, PCA Case No. 2020-08, Final Award (Save as to Costs), 29 August 2025 (Hwang, Williams, McConnaughay), ¶ 1111 ("[A] claim for loss of chance still requires the ***reasonable*** possibility of the chance coming to fruition" (emphasis in original)).

194. There is no mandatory formula for calculating damages for a loss of chance. A typical framework involves (i) taking the full loss resulting from failing to obtain a certain result and (ii) multiplying that figure by the percentage likelihood that, but for the dispute measure, such desired result would have obtained.[371] However, tribunals enjoy discretion in this regard and can award damages for a loss of chance even where the probability of the chance coming to fruition is impossible to determine, but it is considered that the chance still had value.[372]

195. The loss of chance framework thus involves a "trade-off" of sorts: (i) on the one hand, the investor obtains the benefit of a lower standard of proof than the "sufficient certainty" standard that is otherwise required to prove factual causation; but (ii) on the other hand, the investor is entitled to a lower level of compensation, corresponding to only a loss of the opportunity to make profits (or avoid losses).

196. The loss of chance framework fits the circumstances of this case in two respects:

   a. Similar to *Bilcon*, the most that Claimant could be said to have lost as a result of the Blue House Measures was a *chance* to succeed in its persuasion campaign against the Merger. It is uncontested that Claimant did not have a right under the Treaty to any particular outcome in the vote by shareholders of SC&T and Cheil regarding the

---

[371] **RLA-206**, *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Final Award, 21 June 2024 (Verhoosel, Born, Vinuesa), ¶ 238 ("[A]ssessing damages . . . on the basis of a loss of chance . . . typically consist[s] of the application of a probability percentage to the NPV of the profits that the opportunity could hypothetically have yielded.").

[372] *See, e.g.*, **RLA-205**, *Akgun Insaat Makina Sanayii ve Dis Ticaret Ltd. Sti. v. Federal Democratic Republic of Ethiopia*, PCA Case No. 2020-08, Final Award (Save as to Costs), 29 August 2025 (Hwang, Williams, McConnaughay), ¶ 1122 ("While Claimant submits that loss of opportunity should be calculated 'as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition', it admits that in practice the quantification of the loss of opportunity by arbitral tribunals is based on the tribunal's discretion (especially where the probability of success is impossible to determine). Consequently, Claimant itself implicitly acknowledges that there is no framework for determining whether damages for loss of opportunity should be granted and that this head of claim is subject to the Tribunal's discretion." (Emphasis omitted)).

Merger or in the NPS's internal vote as to how to exercise its voting rights in respect of the Merger. Rather, Claimant had a right to an opportunity to try to persuade the other shareholders in SC&T to vote together with Claimant to defeat the Merger, free from unlawful interference by the Government. The Blue House Measures therefore did not deprive the Claimant of any particular *outcome* but merely (at most) of the *opportunity* to possibly achieve an outcome.

b. The causal chain between the Blue House Measures and Claimant's alleged loss was interrupted by an exogenous factor, namely the conduct of individuals within the NPS (a third-party, deliberative body). As discussed in **Section III.B**, the outcome of the NPS's internal decision-making in the absence of the Blue House Measures is inherently difficult to prove to the requisite degree of certainty. In the but-for world, NPS decision-making would have involved a number of officials, with a legal duty to exercise an independent discretion in the exercise of their voting rights, making a complex assessment in a highly contested environment involving competing interests, in which there was evidently room for different professionals to take different views.

197. The present case is therefore an example of a situation where the investor did not have a *right* to a particular outcome—but merely a right to an *opportunity* to achieve it—and, due to an exogenous factor, it is difficult to prove with sufficient certainty what decision would have been made but for the breach. Nevertheless, the Tribunal might consider that the *chance* that Claimant had to succeed in its campaigning efforts against the Merger was of some compensable value.

B. Application of the loss of chance analysis

198. The Tribunal in the Award (as corrected in the Correction Decision) determined the quantum of damages as USD 48,490,438.00.[373] The Tribunal arrived at this amount by calculating the difference between:

a. The market value of Claimant's SC&T shares as of 16 July 2015 (i.e., immediately before the approval of the Merger) in the *but-for scenario*, which the Tribunal defined as "the scenario where the Respondent did not breach the Treaty, i.e. **where the NPS did not vote in favor of the Merger and thereby cause the approval of the Merger**" (emphasis added);[374] and

b. The value at which Claimant disposed of its SC&T shares. Although the Tribunal considered that the "market's reaction to the Merger was mixed,"[375] it considered that, when Claimant sold the shares, it "'locked in' or realized, the reduction in value of the Claimant's investment in SC&T **as a result of approval of the Merger**" (emphasis added).[376]

199. The above-mentioned amount of approximately USD 48.5 million thus represents the *full loss* which, the Tribunal determined, Claimant incurred as a result of the NPS Vote for the Merger ("**Full Loss Amount**")—a measure taken by the NPS that the Tribunal attributed to the ROK, and which it found was a proximate cause of Claimant's loss or damage.[377]

200. As discussed in **Sections III** and **IV**, Claimant has not met its burden of proving factual causation and legal causation in respect of the Blue House Measures, and should thus be awarded no damages.

---

[373] *See* **RLA-194**, Award, ¶¶ 952, 995(b); Decision on Requests for Correction and Interpretation of the Award, ¶¶ 65(a)(12), 65(a)(13).

[374] **RLA-194**, Award, ¶ 929. *See also* **RLA-194**, Award, ¶¶ 919, 932.

[375] **RLA-194**, Award, ¶ 932.

[376] **RLA-194**, Award, ¶ 933. *See also* **RLA-194**, Award, ¶¶ 919, 932. The Tribunal converted the resulting KRW figures into USD as of the date of the Award. *See* **RLA-194**, Award, ¶ 952.

[377] *See* **RLA-194**, Award, ¶¶ 821, 823.

201. Nevertheless, if (contrary to the ROK's primary position) the Tribunal declines to hold Claimant to the usual "sufficient degree of certainty" standard of proof, the Tribunal could alternatively apply the loss of chance framework and compensate Claimant for the *opportunity* that it had to succeed in its campaigning efforts against the Merger.

202. Calculation of damages on a loss of chance basis inevitably involves an element of discretion, as the premise for the framework's use is that the outcome cannot be predicted with sufficient certainty. The ROK submits that the Tribunal could assess damages by multiplying (i) the Full Loss Amount by (ii) a suitable percentage figure corresponding to the likelihood that, absent the Blue House Measures, the NPS would have voted against the Merger or abstained, and the Merger consequently would not have been approved. For the avoidance of doubt, even under this alternative scenario, the ROK submits that any such percentage figure applied to the quantification should be based on an opportunity or chance that has been established with a reasonable degree of certainty, and not be speculative, otherwise any compensation— even on a loss of opportunity or chance basis—should not be granted to Claimant.

VI. CLAIMANT'S REQUEST FOR ITS COSTS OF THE SET-ASIDE PROCEEDINGS FALLS OUTSIDE THE TRIBUNAL'S JURISDICTION AND IS BARRED BY *RES JUDICATA*

203. Claimant in its Submission requests that "[t]he ROK [be] ordered to pay [Claimant] its costs of the set-aside proceedings before the English courts."[378]

204. It is not clear whether this point is seriously advanced, given that no submissions are made in support of it and there is simply a prayer for relief to that effect. If it is seriously claimed, this is a remarkable request by Claimant. The Tribunal does not have jurisdiction and/or power to allocate the costs of the Set-Aside Proceedings before the English Courts. Moreover, Claimant's request is inadmissible, as it seeks to relitigate a final costs orders issued, in the ROK's favor, by the English courts.

[378] *See* Claimant's Submission on the Remitted Issue, 26 April 2026 ("**Claimant's Submission**"), ¶ 82(f).

205. The Tribunal lacks jurisdiction to grant Claimant's requested order. It has the power to award the "costs of the arbitration" under Article 40 UNCITRAL Rules. As the Tribunal recognized in the Award, its power under Article 40(1) of the UNCITRAL Rules to "fix the costs of arbitration" is limited to categories of costs expressly enumerated in Article 40(2).[379] These categories include the costs of arbitration and legal costs, but do not include the costs of arbitration-related court proceedings. Similarly, under the English Arbitration Act 1996, the tribunal's powers concerning costs are confined to the "costs of the arbitration."[380] Allocation of costs of court proceedings is subject to English statutory provision[381] and is a matter for the relevant court.[382] Allocation of costs in the English Set-Aside Proceedings is not within the scope of the remission to the Tribunal and (with respect) the Tribunal would act in excess of jurisdiction if it sought to make any such order.

206. Moreover, the English courts have already finally determined the allocation of costs arising from the Set-Aside Proceedings. Following argument before those Courts about the appropriate costs orders to make in respect of those Court proceedings, the Courts have made a series of costs orders in the ROK's favor, awarding the ROK all of its costs incurred before the High Court and Court of Appeal in respect of the preliminary issue, and 70% of its costs of the Section 67 Claim incurred before the High Court. Specifically:

a. Following the Court of Appeal's judgment dated 17 July 2025 (allowing the ROK's appeal and remitting its Section 67 Claim to the High Court

---

[379] *See* **RLA-194**, Award, ¶ 987.

[380] **CLA-210**, English Arbitration Act 1996, § 61(1). Under the Act, "[t]he tribunal may make an award allocating the costs of the arbitration as between the parties." The relevant costs comprise "(a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal and other costs of the parties." (*id.*, § 59(1)) The tribunal may also allocate "the costs of or incidental to any proceedings **to determine the amount of the recoverable costs of the arbitration**" (emphasis added) (*id.*, § 59(2)), but *not* "the costs of other arbitration applications unrelated to the determination of recoverable costs" (**RLA-207**, Sweet & Maxwell, RUSSELL ON ARBITRATION (24th ed. 2015), ¶ 6-130 & fn. 462).

[381] *See* **RLA-208**, Senior Courts Act 1981, § 51.

[382] *See* **RLA-209**, English Civil Procedure Rules, 1998, Rule 44.2.

for determination on the merits), the Court of Appeal ordered that Claimant (i) "shall pay the [ROK's] costs of the appeal"; and (ii) "shall pay the [ROK's] costs of the Preliminary Issue before the Commercial Court."[383] Indeed, Claimant *accepted* before the English Court that it was in principle liable for the ROK's costs, disputing only the extent of recovery and seeking a percentage discount relating to one aspect of the appeal.[384]

b. Following the merits hearing before the High Court, the Court determined in its Remittal Order that "[Claimant] shall pay 70% of the [ROK]'s costs"[385] in the Set-Aside Proceedings. The Court expressly rejected Claimant's arguments (i) that the ROK was "unsuccessful on all but one issue,"[386] (ii) that the ROK's "partial success on one issue does not render it overall the 'successful' Party,"[387] and (iii) that the parties should therefore either bear their own costs or, alternatively, that the ROK should recover only 50% of its costs.[388] The Court held that there was "no doubt"[389] that the ROK was "substantially the successful party,"[390] because it had succeeded in setting aside the dispositive portions of the Award requiring it to pay substantial damages and costs.

207. The English courts' costs orders are *res judicata*, both as a matter of international law and English law. Numerous investor-State tribunals have confirmed that, in accordance with the principle of *res judicata*, a tribunal is

---

[383] *See* **RLA-210**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2024-002080, Court of Appeal Order, 25 July 2025, ¶ 3.

[384] *See* **RLA-211**, *Republic of Korea v. Elliott Associates, L.P.*, [2024] EWHC 2037 (Comm), Respondent's Submissions on Consequential Matters, 25 July 2025, ¶ 7.

[385] *See* **CLA-226**, Remittal Order, ¶ 5.

[386] *See* **RLA-199**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, ROK's Reply Submissions on Consequential Matters, 6 March 2026, ¶ 17.

[387] *See* **RLA-199**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, ROK's Reply Submissions on Consequential Matters, 6 March 2026, ¶ 18.

[388] *See* **RLA-199**, *Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, ROK's Reply Submissions on Consequential Matters, 6 March 2026, ¶ 16.

[389] *See* **CLA-227**, Ruling, ¶ 8.

[390] *See* **CLA-227**, Ruling, ¶ 8.

bound by the conclusions determined in prior legal proceedings between the same or related parties.[391] Under English law, the doctrine of *res judicata* encompasses cause of action estoppel and issue estoppel, which prevent parties from re-litigating claims or issues that have already been determined by a court of competent jurisdiction.[392] Claimant's attempt to have the Tribunal revisit—and effectively reverse—the final costs order issued by the English courts flagrantly disregards those principles, and is inadmissible.

VII. THE TRIBUNAL SHOULD AWARD THE ROK ITS LEGAL COSTS CORRESPONDING TO ITS RELATIVE SUCCESS

208. The English Court has set aside the Tribunal's decision and order on the allocation of the Parties' legal costs.[393] Given that the Tribunal's decision was based on the Parties' relative success in the Original Proceedings,[394] and the English Court has set-aside an important part of the Tribunal's Award, the existing decision in respect of costs could not stand. The Tribunal must therefore consider again afresh how legal costs should be allocated. In doing so, the Tribunal should consider the Parties' relative successes in the arbitration. Of course, such decision will need to be taken in light of the outcome of the Remitted Proceedings.

209. In the Award, the Tribunal decided that: (i) each Party should bear its own costs of arbitration;[395] (ii) of the USD 38.8 million in legal costs incurred by Claimant's counsel Kobre & Kim, only USD 8.8 million should be allowed;[396] (iii) in light of the Parties' relative successes, Claimant should be awarded 78% of its allowed legal costs (namely, USD 28,903,188.90) and the ROK should be

[391] *See, e.g.*, **CLA-001**, *Apotex Holdings Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, ¶¶ 7.10–7.36 (summarizing the widespread recognition by tribunals and scholars of the doctrine of *res judicata* as an applicable rule of international law).

[392] *See* **RLA-212**, *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, ¶¶ 17–18.

[393] *See* **CLA-226**, Remittal Order, ¶¶ 2(i)–(j) (setting aside ¶¶ 993, 995(b)–999(h) of the Award).

[394] *See* **RLA-194**, Award, ¶ 993.

[395] *See* **RLA-194**, Award, ¶ 990. *See also id.*, ¶ 995(e).

[396] *See* **RLA-194**, Award, ¶ 992.

awarded 22% of its legal costs (namely, USD 3,457,479.87)[397] and (iv) interest on legal costs awarded should accrue at the rate of 5 percent, compounded yearly, payable from 30 days of the date of the Award.[398] Of these decisions, the Court set aside only decision (iii), concerning the allocation of the Parties' legal costs.[399]

210. Claimant in its Submission requests that the Tribunal order the ROK to pay Claimant "no less than USD 28,903,188.90" in respect of legal costs in relation to the Original Proceedings (i.e., the same figure awarded to it in the Award).[400] It is unclear whether the wording "no less than" is intended to foreshadow some argument that Claimant should be paid *more* than that. There would self-evidently be no basis for that, given that the position, following the set-aside, is that Claimant has in fact *lost* on a key jurisdictional point and the existing costs order in the Award was made on the basis that it had succeeded.

211. In the Award, the Tribunal justified its costs allocation decision on the basis that, "as to the four main categories of issues addressed in this Award – jurisdiction, merits, causation, and quantum – the Claimant [had] prevailed on the first three of these issues (jurisdiction, merits and causation), and the Respondent [had] largely prevailed on the fourth one (quantum), the Claimant being awarded some 13-18% of the amount claimed (depending on the applicable holding company discount)."[401] The Tribunal now needs to decide costs of the Original Proceedings afresh. In doing so, it must take into account the position following the set-aside and also following these Remission Proceedings. Given (i) the ROK's success in the correction phase on issues of *quantum*, and given (ii) its success in the Set-Aside Proceedings on certain issues of *jurisdiction*, the existing costs award should be revised down.

[397] *See* **RLA-194**, Award, ¶ 993. *See also id.*, ¶¶ 995(f)–(g).

[398] *See* **RLA-194**, Award, ¶ 994. *See also id.*, ¶¶ 995(f)–(g).

[399] *See* **CLA-226**, Remittal Order, ¶¶ 2(i)–(j) (setting aside ¶¶ 993, 995(b)–999(h) of the Award). While the Court set aside almost the entirety of the dispositive section of the Award, it did not set aside the paragraphs in which the Tribunal arrived at the decisions (i), (ii), and (iv), as listed above.

[400] *Compare* Claimant's Submission, ¶ 82(d) *and* **RLA-194**, Award, ¶ 995(g).

[401] **RLA-194**, Award, ¶ 993.

Moreover, if (as the ROK contends should be the position) the ROK in the Remitted Proceedings prevails on any part of the undecided *causation* issue or the Tribunal finds that the *quantum* of damages due to Claimant should be zero (or that it should be reduced, compared to the damages awarded in the Award), the Tribunal should revise accordingly in the ROK's favour the percentages used to allocate the Parties' legal costs.[402]

212. The ROK suggests that, following the Hearing on the Remitted Issue, the Tribunal invite the Parties to submit their updated statements of costs.

VIII. REQUEST FOR RELIEF

213. For the reasons set forth in this Submission, the ROK respectfully requests that the Tribunal:

a. declare that Claimant has failed to meet the burden to prove causation and is not entitled to any compensation;

b. in the event that the Tribunal were to find that Claimant is entitled to compensation, determine the relevant compensation using the "loss of chance" framework;

c. order Claimant to pay the ROK's legal costs corresponding to the ROK's relative success in the Arbitration, with interest at the rate of 5 percent, compounded yearly, payable from 30 days of the date of the Award on the Remitted Issue;

d. deny Claimant all of the relief requested at paragraph 82 of Claimant's Submission; and

e. award the ROK any additional relief that the Tribunal may consider just and appropriate.

[402] In deciding on the appropriate percentages, the Tribunal should take into account the major discrepancy between the Parties' legal costs, even after the reduction in Claimant's allowed costs. In the earlier phase of the arbitration, Claimant's allowed legal costs exceeded USD 37 million, whereas the ROK's legal costs amounted to approximately USD 17 million. *See* **RLA-194**, Award, ¶¶ 976, 981, 992 (amounts converted using the exchange rates on the date of the Award using oanda.com).

Respectfully submitted,

Anton A. Ware
Jun Hee Kim
Charlotte Mallorie
Bart Wasiak
Joel Dahlquist
Grace Yang
ARNOLD & PORTER KAYE SCHOLER LLP

Kap-You (Kevin) Kim
John P. Bang
Mino Han
Saemee Kim
Sophie Oh
PETER & KIM