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
REJOINDER SUBMISSION ON THE REMITTED ISSUE

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17 July 2026

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I. INTRODUCTION

1. In its Submission on the Remitted Issue dated 7 June 2026,[1] the ROK established that:

   a. The task before the Tribunal in these Remitted Proceedings is to determine whether Claimant has satisfied its burden to prove that the Blue House Measures were the factual and legal cause of loss or damage to Claimant and, if so, the relief to be awarded;

   b. Contrary to Claimant's contentions, the Tribunal in the Award did not answer those questions, and must do so now, without any predisposition to a particular outcome;

   c. Claimant's burden to establish factual causation requires proving that, but for the Blue House Measures, the NPS in all probability would have voted differently than it did in the actual world;

   d. The evidence before the Tribunal does not support such a finding;

   e. Claimant has not established that the Blue House Measures were the direct and proximate (legal) cause of its loss—the claimed loss being too remote from the Blue House Measures to be compensable;

   f. In the alternative, the Tribunal could properly apply a loss of chance analysis;

   g. Claimant's request for its costs of the Set-Aside Proceedings is barred; and

   h. The legal costs of the arbitration should be re-allocated based on the Parties' relative successes in the arbitration as a whole.

2. In its Reply on the Remitted Issue dated 30 June 2026 ("**Reply**"), Claimant doubles down on its argument that the Tribunal has already decided in the

[1] All references herein to the ROK's Submission on the Remitted Issue are to the corrected version the ROK submitted, with leave of the Tribunal, on 23 June 2026 ("**ROK's Submission on Remitted Issue**").

Award all relevant issues of factual and legal causation,[2] and that the only remaining task for the Tribunal is to "confirm the logical conclusions of its prior decisions."[3] To see why such assertions are wrong, one need only look to the English Court's Set-Aside Judgment and Ruling, in which the Judge rejected very similar contentions by Claimant and instead decided to remit the case back to this Tribunal to decide questions of factual and legal causation that had been raised in the Original Proceedings but had *not* been decided in the Award.[4]

3. But there is something more that must be said in relation to Claimant's repeated assertions in the Reply—more than thirty in total[5]—that the Tribunal has "already" decided a certain point or rejected a certain argument. In a striking number of instances, Claimant makes the assertion without pointing to any actual decision or finding by the Tribunal in the Award—and *could not* do so, for the simple reason that its assertion finds no support in the Award.[6] For example, on page 31 of the Reply, Claimant asserts that "the Tribunal made the following finding[] in its Award": "The Blue House and MHW ensured that the vote on the Merger was taken by the Investment Committee rather than the EVC, *because the EVC would have rejected the Merger*, given the recent precedent of the SK Merger" (emphasis added).[7] No reference is provided to a finding in the Award that the EVC "would have rejected the Merger"—and none *could* be given, because the Tribunal never made any such finding. The likely voting behavior of the EVC in the counterfactual scenario is one of the questions that

[2] *See, e.g.*, Claimant's Reply Submission on Remitted Issue, 30 June 2026 ("**Claimant's Reply on Remitted Issue**"), ¶¶ 1–9.

[3] Claimant's Reply on Remitted Issue, ¶ 10.

[4] *See generally* ROK's Submission on Remitted Issue, § II.

[5] *See* Claimant's Reply on Remitted Issue, ¶¶ 1, 3, 6–7, 9, 11, 14, 17, 26, 35, 37, 79, 96, 99, 104–106, 123, 125–126, 128, 134, and pp. 11, 14, 36–37, 41–42, 48, 50, 68 (subheadings).

[6] The ROK addresses a number of these non-existent Tribunal findings in subsequent sections of this Rejoinder, and reserves the right to comment on them further at the Hearing.

[7] Claimant's Reply on Remitted Issue, p. 31 (subheading).

remains open for determination in these Remitted Proceedings.[8] It is telling that, as to this and many other important points on which Claimant bears the burden of proof, Claimant has referred to non-existent Tribunal findings.

4. Throughout the Reply, Claimant accuses the ROK of "recycl[ing] its failed arguments of the past on causation."[9] Claimant is correct to observe that the ROK's position on causation in these Remitted Proceedings is consistent with the case it presented in the Original Proceedings. This is exactly as it should be. By contrast, Claimant's repeated characterization of the ROK's arguments as "failed" and "already rejected" is unsupported.[10]

5. A case in point is Claimant's new argument—presented for the first time in its Reply on the Remitted Issue, by reference to a new authority (*Amco II*)—that, in the context of factual causation, it is "wrong as a matter of law" to examine what *might* have happened in the absence of the wrongful conduct.[11] The argument itself is surprising for at least two reasons: (1) in the Original Proceedings, Claimant accepted that factual causation requires a counterfactual inquiry;[12] and (2) in the Award, the Tribunal held that "causation in fact . . . involves the determination of whether the claimant would have suffered the claimed loss or damage *in the absence of the alleged*

[8] *See* ROK's Submission on Remitted Issue, ¶¶ 118–132.

[9] *See, e.g.*, Claimant's Reply on Remitted Issue, ¶¶ 5, 79.

[10] Claimant submitted with its Reply an annex (Annex A), which it describes as a "comprehensive[]" compendium of causation arguments that the ROK made in the Original Proceedings and has "repeated," "recycled", or "rehearse[d] in these Remitted Proceedings. Claimant claims further that "the Tribunal has already considered and rejected" these arguments. Claimant's Reply on Remitted Issue, ¶ 79. What is striking about Claimant's Annex A, however, is that for many if not all of the causation arguments it lists, the column purporting to set out references to the Tribunal's discussion of such arguments in the Award fails to identify any actual *decision* by the Tribunal on the arguments in question.

[11] Claimant's Reply on Remitted Issue, ¶¶ 5–6.

[12] *See* Claimant's Statement of Reply and Defense to Preliminary Objections, 17 July 2020 ("**Claimant's Statement of Reply**"), ¶¶ 16, 504–505, 517; Claimant's Post-Hearing Brief, 13 April 2022 ("**Claimant's Post-Hearing Brief**"), ¶¶ 160–168.

breach" (emphasis added)[13]—a clear reference to a counterfactual inquiry. What is even more surprising is Claimant's false assertion that "this Tribunal has already determined" that "the ROK's attempt to resort to a hypothetical exercise of what might have been is wrong as a matter of law."[14] The Tribunal has made no such determination—indeed, as noted, it has described factual causation as involving precisely such a counterfactual exercise.[15] Claimant's argument by reference to *Amco II* is also wrong on the law, as discussed in **Section III.A** below.

6. It is not difficult to see why Claimant would prefer to avoid the counterfactual analysis: As the ROK demonstrated in its Submission on the Remitted Issue and develops further in **Section III.C** below, on the evidence before this Tribunal—which now includes extensive and detailed new findings by the Korean courts in the Additional Judgments—Claimant cannot show that the NPS would have voted against the Merger (or abstained) were it not for the Blue House Measures. That is true whether one applies the standard of proof required by international law for establishing causation of economic loss ("in all probability") or even the lower, "balance of probabilities," standard that Claimant incorrectly advances.

7. As the ROK predicted,[16] Claimant waited until its Reply to present its case on the merits of the counterfactual question at the heart of these Remitted Proceedings: Would the NPS have voted differently if the Blue House Measures had not occurred? Beyond arguing that any examination of what might have happened is "wrong as a matter of law," and repeating its flawed assertion that the entire issue of factual causation has already been decided in

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[13] **RLA-194**, Award (as corrected and partially set-aside) ("**Award**"), 20 June 2023, ¶ 815.

[14] Claimant's Reply on Remitted Issue, ¶ 6.

[15] *See* **RLA-194**, Award, ¶ 814. While the Tribunal said at paragraph 822 of the Award that "[a] chain of causation is not interrupted by a potential event; it can only be interrupted by an event that has actually taken place," this was in the context of legal causation, and has been set aside in any event.

[16] ROK's Submission on Remitted Issue, ¶ 11.

the Award,[17] Claimant finally asserts that the following constitute decisive evidence that the NPS would have voted against the Merger in the absence of the Blue House Measures: (a) "evidence of the NPS informing EALP directly before the government intervention that it would not support the Merger"; (b) KCGS's advice to NPS to vote against the Merger "because it was overwhelmingly destructive of value for the NPS"; (c) the EVC's recent vote against the SK Merger; and (d) "evidence of an overwhelming number of Investment Committee members" having purportedly "confirmed that, but for the fabricated synergy effect calculation that they were presented with, they would not have voted in favor of the Merger."[18]

8. The ROK responds to each of these points in detail in **Section III.C.3** below. In short: Claimant has largely ignored the extensive primary evidence that the ROK highlighted in its Submission on the Remitted Issue; misstated and mischaracterized the primary evidence on which Claimant relies; and either wholly ignored or failed to persuasively address detailed and specific factual findings by the Korean courts that undermine Claimant's assertions. Taking Claimant's four points in turn, the ROK demonstrates in **Section III.C.3** below that:

   a. The NPS itself did not express any intent or position to Claimant regarding the Merger at any time. Moreover, the alleged statements of individual NPS personnel to which Claimant refers are not probative of the NPS's likely position in the counterfactual scenario, including because they were alleged to have been made during a meeting that took place almost *four months before* the NPS determined its position in relation to the Merger—indeed, before the Merger had even been announced, before the Merger Ratio had been determined, before the NPS had undertaken any review of the Merger terms, and, critically, before the Seoul Central District Court had issued its Merger Injunction

[17] *See, e.g.*, Claimant's Reply on Remitted Issue, ¶¶ 1–4, 8.

[18] Claimant's Reply on Remitted Issue, ¶ 8(d).

Decision affirming that SC&T had reasonable grounds to enter into the Merger and rejecting Claimant's attempt to enjoin the Merger.[19]

b. KCGS's proxy advice was merely a recommendation. Contrary to Claimant's contention, KCGS never advised that the Merger was "overwhelmingly destructive of value for the NPS"—a typical overstatement of the evidence by Claimant; rather, KCGS expressed its view that the proposed Merger raised "concerns" in terms of shareholder value and suggested a marginally higher merger ratio. Importantly, however, the NPS had access to a range of valuation and merger ratio materials, including the report prepared by Deloitte Anjin for SC&T on 25 May 2015, which found that the Merger Ratio was within a fair range ("**Deloitte Anjin Report**"). The Korean courts have confirmed the Deloitte Anjin Report was prepared professionally and without undue influence.[20]

c. The ROK has already established, including by reference to the unrebutted testimony of Mr. Cho of the EVC, that the EVC's decision to vote against the SK Merger is not probative of how it would have voted on the Merger given material differences between the two situations—including without limitation the facts that (i) unlike the SK Merger, the Merger implicated the Fund's holdings in 17 Samsung Group companies, collectively comprising roughly one-quarter of the Fund's total equity holdings, such that a failure of the Merger could have had catastrophic consequences for the Fund; and, (ii) if the EVC had deliberated on the Merger, it would have done so against the backdrop of the Merger Injunction Decision, which Mr. Cho felt the EVC would

[19] *See* **Section III.C.3.a** below.

[20] *See* **Section III.C.3.c** below. *See also* ROK's Submission on Remitted Issue, ¶¶ 97, 106–107, 159.

need to respect; tellingly, Claimant's Reply does not engage with these points *at all*.[21]

d. Claimant's contention that an "overwhelming number of Investment Committee members" have confirmed that they "would not have voted in favor of the Merger" "but for" the tainted synergy projection is a misstatement of the evidence, as the ROK had already demonstrated in the Original Proceedings.[22] Following a careful review of the evidence—including the same primary evidence on which Claimant relies—the Korean courts have found as a matter of fact that the tainted synergy projection was *not* a decisive factor in the Investment Committee's decision. Claimant offers no reason why the Tribunal should prefer Claimant's cherry-picked quotations to the Korean courts' reasoned finding on this issue. In any event, a fair reading of the Investment Committee members' testimony confirms the Korean courts' finding that those members made their decision on the basis of a range of factors, without a decisive reliance on the tainted synergy projections.[23]

9. As for legal causation, Claimant's Reply makes three main submissions, none of which have merit.

a. *First*, Claimant persists in arguing that foreseeability alone is sufficient to establish legal causation, while at the same time acknowledging that the test it has advanced throughout this arbitration entails two *additional* elements: (a) directness/proximity between the wrongful act and the harm suffered, and (b) the requirement that the harm was "the natural consequence of the wrongful act."[24] In **Section IV.A** below, the ROK

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[21] *See* **Section III.C.3.b** below.

[22] *See* ROK's Opening Presentation, Demonstrative C; ROK's Post-Hearing Brief, 13 April 2022 ("**ROK's Post-Hearing Brief**"), ¶¶ 18(d), 59, 92; ROK's Reply Post-Hearing Brief, 18 May 2022 ("**ROK's Reply Post-Hearing Brief**"), ¶¶ 31–33.

[23] *See* ROK's Submission on Remitted Issue, ¶¶ 136–137 (and evidence discussed therein); **Section III.C.3.e** below (and evidence discussed therein).

[24] Claimant's Reply on Remitted Issue, ¶ 111. *See also id.*, § IV.A.

again demonstrates that the requirement of proximity is not satisfied by a showing of foreseeability alone.

b. *Second*, Claimant advances its case that the Tribunal's existing findings in the Award already establish a proximate, unbroken chain of causation between the Blue House Measures and Claimant's loss.[25] In **Section IV.B** below, the ROK again demonstrates that the Tribunal has not yet had occasion to assess the length, complexity, uncertainty, and remoteness of the asserted causal chain running from the Blue House Measures, through the NPS Vote, through the Merger Vote, through subsequent market movements, to Claimant's loss as identified in the Award, and that Claimant's persistent focus on alleged evidence of "targeting" does not satisfy its burden to prove directness/proximity.

c. *Third*, Claimant asserts that the Additional Judgments are irrelevant to legal causation. In **Section IV.C** below, the ROK demonstrates that the factual findings of the Additional Judgments *are* relevant, as are the logic and reasoning of the Korean courts' legal causation analysis in the Shareholder Claims Judgments.

10. Notably, Claimant has no answer to the ROK's alternative position that a loss-of-chance analysis could apply, other than (a) to assert—incorrectly—that the Tribunal "has already rejected the ROK's loss-of-chance argument"[26]; and (b) to argue that a loss-of-chance analysis would in any event "remain inappropriate" because the evidence "confirms" that the NPS would not have approved the Merger but for the Blue House Measures.[27] In **Section V** below, the ROK demonstrates that:

a. The Tribunal has not, in fact, addressed (much less rejected), the ROK's argument—strictly in the alternative—that uncertainty concerning the

[25] *See* Claimant's Reply on Remitted Issue, § IV.B.

[26] Claimant's Reply on Remitted Issue, p. 68 (subheading).

[27] Claimant's Reply on Remitted Issue, ¶¶ 131–132.

outcome of the NPS Vote in a Treaty-compliant counterfactual (where the NPS is understood to be a non-State actor, and the Blue House Measures never occurred) could be resolved through a loss-of-chance analysis; and

b. While Claimant may contend that but for the Blue House Measures, an NPS vote against the Merger was a *certainty*, the evidence does not remotely support such contention.

11. Finally, in the last paragraph of the introduction to its Reply, Claimant refers to "the ROK's success in delaying the enforcement of an award rendered against it now some three years ago."[28] But this potshot against the ROK misses the mark. The ROK's success has *not* been in delaying enforcement of the Award, but in obtaining a necessary correction to it (whereas Claimant's requested correction was denied), and then obtaining a necessary set-aside of parts of the Award that had been rendered in excess of jurisdiction (over Claimant's vigorous and ultimately unsuccessful opposition—as the English Court recognized in ordering Claimant to bear most of the costs of those proceedings). What remains of this arbitration is not, as Claimant self-servingly asserts, for the Tribunal to simply confirm its prior award of damages "without any further delay." Rather, what remains is for the Tribunal to "approach its renewed task, free of preconceptions and with an open mind."[29] The ROK has no doubt that the Tribunal will do so.

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12. In the remainder of this Rejoinder on the Remitted Issue, the ROK demonstrates that:

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[28] Claimant's Reply on Remitted Issue, ¶ 10.

[29] **RLA-213**, *Sinclair Roche & Temperley & Ors v Heard & Anor* [2004] IRLR 763, 22 July 2004, ¶ 47.3.

a. Claimant continues to misstate the scope of the Remitted Issue, which encompasses all of the questions that the ROK identified in its Submission on the Remitted Issue (**Section II**);

b. Claimant has not established factual causation (**Section III**);

c. Claimant has not established legal causation (**Section IV**);

d. Claimant has no answer to the ROK's alternative position regarding loss of chance (**Section V**); and

e. Claimant's requests for additional costs and interest are procedurally barred and in any event without merit (**Section VI**).

13. In **Section VII**, the ROK restates its request for relief, as set out in its Submission on the Remitted Issue.

14. This Rejoinder Submission on the Remitted Issue is accompanied by legal authorities **RLA-213** to **RLA-227** and an updated version of the summary of the Additional Judgments that the ROK submitted with its Submission on the Remitted Issue ("**Additional Judgments Annex**").

II. THE PROPER SCOPE OF THE REMITTED ISSUE

15. Claimant continues to maintain its flawed position as to (i) the scope of the Remitted Issue and (ii) findings of fact that it claims the Tribunal already has made and that supposedly delimit the issues in dispute in the Remitted Proceedings. Much of what Claimant says in Section II of its Reply repeats points that Claimant had made in its earlier Submission and which the ROK addressed in its responsive Submission.[30] The ROK refers to its earlier pleadings and limits its discussion to the following additional points.

16. *First*, Claimant persists with its assertion that "[t]he sole issue before the Tribunal . . . is narrow, straightforward and largely one of confirmation: 'Does the determination by the Court that the NPS may not be regarded as a State organ alter the Tribunal's finding that the legal requirement of causation is

[30] *See* ROK's Submission on Remitted Issue, § II.

met?'."[31] But, to recognize the erroneous nature of Claimant's assertion, one need only compare Claimant's formulation of the "issue before the Tribunal" with the language of the *actual* issue that the English Court remitted to the Tribunal:

> The following issue is remitted to the Tribunal: '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?'.[32]

17. Put simply, if the English Court had intended to pose to the Tribunal only the "sole," "narrow," and "straightforward" issue suggested by Claimant, it would have done so. But, as the ROK explained in Section II of its Submission, the actual scope of the Remitted Issue is broader and more complex than Claimant likes to admit.

18. *Second*, Claimant repeatedly contends that the Tribunal has already made findings in the Award that have not been set aside and that allegedly confirm that the Blue House Measures caused loss to Claimant.[33] The ROK addresses such contentions in more detail in **Section III** below, in the context of factual causation. However, given the weight Claimant places upon two particular paragraphs of the Award[34]—paragraphs 602 and 623—the ROK notes at the outset the following: In those paragraphs, the Tribunal addressed questions of liability and made findings only as to what happened in the *actual* world. The paragraphs do not contain any findings regarding what would have happened in the counterfactual ("but-for") world. The ROK has already addressed this

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[31] *Compare* Claimant's Reply on Remitted Issue, ¶ 15 *with* Claimant's Submission on Remitted Issue, ¶¶ 10, 63.

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

[33] Claimant's Reply on Remitted Issue, ¶¶ 14, 22, 25 (cross-referring to § III of Claimant's Reply on Remitted Issue).

[34] *See* Claimant's Reply on Remitted Issue, ¶¶ 23, 70(c), 76, 112(a)–(b).

point in its Submission, by reference to the Set-Aside Judgment and the Ruling.[35] Claimant offers no response.

19. *Third*, at paragraphs 16–21 of its Reply, Claimant seeks to portray the ROK's position on the scope of the Remitted Issue as turning on a particular reading of paragraph 265 of the Set-Aside Judgment. There, the Judge noted that he was "not persuaded that it [was] open to [him] 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."[36] Claimant contends that the paragraph "must be understood in context."[37] The "context" on which Claimant relies is that (i) Section 67 of the English Arbitration Act 1996 "gives a court discretion *not* to set aside any part of an award, *even if* it reaches a different view from the Tribunal on an issue of jurisdiction, where the court determines that its different decision on jurisdiction would not have made any difference to the outcome of the Award" (emphasis in original)[38] but, (ii) according to certain English case law (principally, *Integral Petroleum v Melars Group)*—"[t]he English Court will only exercise that discretion [not to set aside a part of an award] where it is beyond doubt that its own different finding on jurisdiction would not have affected the outcome"[39] ("***Integral Petroleum* point**"). It relies on this to argue that paragraph 265 of the Judgment reflects a decision on that point of English law, i.e. that the Court in that paragraph set out its decision regarding whether to exercise a discretion not to set aside the Award, which would only be done if it was "completely clear" /

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[35] *See* ROK's Submission on Remitted Issue, ¶¶ 40, 55(b)–55(d) (citing **CLA-222**, *Republic of Korea v. Elliott Associates, L.P.* [2026] EWHC 368 (Comm) ["**Set-Aside Judgment**"], ¶¶ 260, 264(i)–(ii); ¶ 5(c)).

[36] *See* Claimant's Reply on Remitted Issue, ¶ 16 (quoting **CLA-222**, Set-Aside Judgment, ¶ 265).

[37] Claimant's Reply on Remitted Issue, ¶ 18.

[38] Claimant's Reply on Remitted Issue, ¶ 18.

[39] Claimant's Reply on Remitted Issue, ¶ 19 (citing **CLA-239**, Integral Petroleum SA v. Melars Group Ltd [2015] EWHC 1893 (Comm), ¶¶ 26–27).

"beyond doubt" that the excess of jurisdiction would not have affected the outcome in the arbitration. The ROK offers the following response.

a. By way of preliminary point, contrary to Claimant's contention,[40] the ROK's case as to the scope of the remission does *not* depend upon paragraph 265 of the Judgment. Instead, it depends on the plain text of the Remittal Order, read together with (a) the accompanying Ruling and (b) the preceding Judgment.

b. As for the substance of Claimant's argument, Claimant is wrong to suggest that paragraph 265 of the Set-Aside Judgment reflects the Court's consideration of the *Integral Petroleum* point. As is apparent from the Judgment itself, once the Court had decided that certain findings in the Award had been made in excess of jurisdiction, the question to which the Court next turned was whether such findings could be "severed" from other findings in the Award—namely, the findings of breach and (as relevant for the purposes of this remission) those regarding causation. This was to determine whether the causation findings could stand unaffected by the excess of jurisdiction, or whether they were "tainted" by the excess of jurisdiction (in which case the findings needed to be set aside). The Court discussed authorities regarding severance at paragraphs 249 to 253 of the Judgment, before setting down its formulation of the "severance test" at paragraph 254. It then noted in passing at paragraph 255, referring to *Integral Petroleum* and another authority, that it was common ground that relief under Section 67 was discretionary and that the court can decline to grant relief if it is satisfied that the excess of jurisdiction has had no effect on the relief granted.[41] The Court then moved on, in the following paragraphs,

[40] Claimant's Reply on Remitted Issue, ¶¶ 16–17.

[41] **CLA-222**, Set-Aside Judgment, ¶ 255 ("Finally I should record that it was common ground that the issue of whether to grant relief under s.67 is discretionary, and that the

to apply the *severance* test. That is clear from paragraph 256, where the Court states: "Korea argued that what I have found to be the excess of jurisdictions in relation to findings dependent on the NPS Measures 'taint' (using that verb as a shorthand for failing the severance test) the Tribunal's findings of breach in relation to the Blue House Measures, as well as the findings of causation."[42] At paragraphs 261–265, the Court then asked: "Are the Tribunal's findings of causation and loss 'tainted' by findings dependent on the NPS Measures?"[43] In other words, the Court's analysis focused on whether the Tribunal's findings on causation and loss were "tainted by" (i.e., not severable from) the findings regarding the NPS that had been made in excess of jurisdiction. The Court's analysis at paragraph 265 did not center on the *Integral Petroleum* point, as Claimant contends.

c. In any event, even if paragraph 265 were a decision on the *Integral Petroleum* point (quod non), it is unclear why that would assist Claimant's position. Plainly, the Court did not exercise such discretion here. Instead it remitted the issue of causation and loss *and* it set aside certain parts of the Award, including some parts of the causation section itself. One would still have to ask: (i) What is the scope of the Remitted Issue?; and (ii) To what extent are the surviving findings in the Award relevant to the questions of causation that have been remitted? The ROK has already addressed both questions in detail, and addresses the second further in **Sections III** and **IV** below.

20. At paragraph 20 of its Reply, Claimant characterizes paragraph 265 of the Set-Aside Judgment as concluding that (i) there were "numerous indications" in the Award that a different decision on NPS attribution would not have affected

court may decline to grant relief when satisfied that the excess of jurisdiction has had no effect on the relief granted: *Integral Petroleum SA v Melars Group Ltd* [2015] EWHC 189 (Comm), [26] and . . . .").

[42] **CLA-222**, Set-Aside Judgment, ¶ 256.

[43] **CLA-222**, Set-Aside Judgment, p. 70 (question heading above paragraph 261).

the Tribunal's findings on causation, (ii) the Court left such findings in place, but (iii) declined to exercise a discretion not to grant relief, because it supposedly accepted that it could only do so if it had been "'completely clear' that the Court's different decision on a jurisdictional issue would make no difference."[44] The Tribunal will not find any such reasoning in the Set-Aside Judgment, because it is not there.

21. *Finally*, Claimant misleadingly describes the ROK's position as being that "findings of both factual and legal causation are nowhere to be found in the Award, and . . . the Tribunal is entitled to consider the issue of causation entirely 'afresh'."[45] But the ROK has never so argued. Instead, the ROK has observed that there is no extant decision in the Award on the specific questions of whether the Blue House Measures caused the Merger (there being no extant finding that the Blue House Measures caused the NPS Vote), or whether the Blue House Measures can be treated as the legal cause of the loss or damage (if any) to Claimant.[46] It is these questions—concerning causation in relation to the Blue House Measures specifically—that the Tribunal must now consider afresh. It is imperative that the Tribunal does so without any predisposition to reach the same result as before (when it was asking the *different* question of whether the NPS Vote caused the Merger and loss to Claimant).[47]

III. CLAIMANT HAS NOT ESTABLISHED FACTUAL CAUSATION

22. In this Section, the ROK demonstrates that: (A) Claimant's assertion that factual causation does not require or permit a counterfactual analysis is wrong;

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[44] Claimant's Reply on Remitted Issue, ¶ 20.

[45] Claimant's Reply on Remitted Issue, ¶ 17.

[46] *See* ROK's Submission on Remitted Issue, ¶ 6(b).

[47] The Court of Appeal of England and Wales addressed an analogous situation in *Sinclair Roche & Temperley v Heard*, involving the question of whether, following a successful appeal, a matter should be remitted to the original decision-maker. There, the Court of Appeal was willing to remit to the same tribunal because it was satisfied that "this tribunal will approach its renewed task[] free of preconceptions and with an open mind." *See* **RLA-213**, *Sinclair Roche & Temperley & Ors v Heard & Anor* [2004] IRLR 763, 22 July 2004, ¶ 47.3.

(B) factual causation must be proven to a "sufficient degree of certainty"/"in all probability"; and (C) contrary to Claimant's contentions, the evidence does not support a finding that but for the Blue House Measures, the NPS in all probability (or even on a balance of probabilities) would have voted against the Merger or abstained.

A. Claimant's new argument that factual causation does not require a counterfactual analysis is wrong

23. Despite having previously acknowledged the need for a counterfactual inquiry,[48] Claimant in its Reply argues for the first time that the factual causation inquiry does not require, and does not *allow* for, an analysis of what would have happened in the hypothetical (counterfactual) Treaty-compliant scenario.[49] This new argument fails for several reasons, as demonstrated below.

1. *Claimant's argument is contrary to the Tribunal's description of the test for factual causation in the Award*

24. Claimant's argument is contrary to the Award. In paragraph 815 of the Award, the Tribunal held that "causation in fact . . . involves the determination of whether the claimant would have suffered the claimed loss or damage *in the absence of the alleged breach*" (emphasis added).[50] This statement of the test, which Claimant has acknowledged,[51] correctly frames the issue as requiring an inquiry into what would have happened in the hypothetical counterfactual scenario in which the alleged breach had not occurred.

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[48] *See* **RLA-001**, *Trail Smelter Case (United States v Canada)*, 3 UN Rep International Arbitration Awards 1905, ¶¶ 16, 504–505, 517; Claimant's Post-Hearing Brief, ¶¶ 160–168.

[49] *See* Claimant's Reply on Remitted Issue, ¶¶ 5–6, 29, 33–36, 77–78. Claimant at times seems to concede that a but-for or counterfactual analysis is required, but elsewhere argues that it is unnecessary and indeed improper to consider what might have happened (which is the essence of a counterfactual analysis). The best sense that the ROK can make of Claimant's position is that it is arguing that no counterfactual inquiry is appropriate.

[50] **RLA-194**, Award, ¶ 815.

[51] *See* Claimant's Submission on Remitted Issue, ¶ 21.

25. Claimant's argument that the Tribunal has "already considered and already rejected" the necessity of a counterfactual analysis[52] is mistaken. Claimant's sole support for this proposition is a reference to paragraph 822 of the Award, in which the Tribunal stated that "potential events" do not break the causal chain.[53] But that paragraph related to *legal* causation, *not* factual causation (and, in any event, has been set aside).[54]

26. Furthermore, Claimant's reliance on paragraph 822 of the Award rests on a conflation of two analytically distinct questions. Factual causation is not a matter of asking whether some subsequent, hypothetical event might have "broken" an otherwise-established causal chain; it is a matter of establishing, in the first place, that a causal chain exists between the wrongful act and the loss. The counterfactual inquiry is the established way to test whether such a chain has really been established. Paragraph 822 addressed something different: whether an *already-established* causal chain (there, running from the NPS's vote to the loss) could be said to be interrupted by a hypothetical EVC vote or by other shareholders hypothetically voting differently.

27. Nor is the ROK arguing, as Claimant suggests, that in order to establish factual causation, Claimant must posit and rule out every conceivable Treaty-compliant scenario in which the NPS might have approved the Merger.[55] The ROK's position is more modest, and entirely orthodox: it is Claimant that bears the burden of establishing, to a sufficient degree of certainty, that the *one* counterfactual *it* has itself posited—that the NPS would have voted against the

[52] Claimant's Reply on Remitted Issue, ¶¶ 35–36.

[53] Claimant's Reply on Remitted Issue, ¶ 35.

[54] **RLA-194**, Award, ¶ 822.

[55] *See* Claimant's Reply on Remitted Issue, ¶ 34 ("[T]hat analysis does not require positing all possible factual scenarios to rule them out . . . . The but-for analysis does not ask the Tribunal to speculate as to the basis on which an Investment Committee member might have supported the Merger, absent the ROK's unlawful intervention; rather, it asks the Tribunal to interrogate the evidence that the Investment Committee member did in fact support the Merger because of the ROK's unlawful intervention.").

Merger absent the Blue House Measures—is what would, in all probability, have occurred.

2. *International law requires a counterfactual inquiry*

28. The relevant inquiry already adopted by the Tribunal—that factual causation requires an analysis of "whether the claimant would have suffered the claimed loss or damage *in the absence of the alleged breach*" (emphasis added)[56]—is the correct test under international law. This principle is not novel; it is the ordinary operation of the customary international law standard of full reparation, applied consistently by investment tribunals construing the *Chorzów Factory* formula and Articles 31 and 36 of the ILC Articles.[57] It is widely accepted—including by the Tribunal[58]—that the question of causation involves two elements: first, factual causation and, second, legal causation.[59] A tribunal cannot determine what compensation is "due for" a wrongful act, nor construct the counterfactual world required to quantify that reparation, without first asking whether the loss claimed would have occurred regardless of the breach. The cases in support of this proposition are numerous and of impeccable pedigree, starting with the *Chorzów Factory* case itself and including the judgment of the International Court of Justice ("**ICJ**") in the *Bosnian Genocide* case.[60]

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[56] **RLA-194**, Award, ¶ 815.

[57] According to the ILC Articles, compensation is due only for and only to the extent of injury actually caused by the internationally wrongful act. *See* **CLA-017**, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the ILC* 2001/II(2), 26, Art. 31(1) ("The responsible State is under an obligation to make full reparation for the **injury caused** by the internationally wrongful act" (emphasis added)), Art. 36(2) ("The compensation shall cover any financially assessable damage including loss of profits **insofar as it is established**" (emphasis added)).

[58] **RLA-194**, Award, ¶ 815.

[59] *See* **CLA-125**, H. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985) (excerpt), p. 110.

[60] *See* **CLA-097**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928; **CLA-024**, *Application of the*

29. In *Bosnian Genocide*,[61] the ICJ found that Serbia had breached an obligation under Article 1 of the Genocide Convention to prevent genocide. In deciding the question of Serbia's responsibility to provide reparation for this violation, the Court conducted a rigorous but-for analysis and denied compensation because factual causation was not satisfied:

> The question is whether there is a **sufficiently direct and certain causal nexus between the wrongful act,** the Respondent's breach of the obligation to prevent genocide, and the **injury** suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and **with a sufficient degree of certainty** that the genocide at Srebrenica **would in fact have been averted if the Respondent had acted in compliance with its legal obligations.** However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt

Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Rep 2007 ["**Bosnian Genocide**"]. *See also* **RLA-214**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 (Kaufmann-Kohler, Stern, Drymer), ¶¶ 177, 357–358, 366 (Tribunal must "place Burlington in the position in which it would have been but for the expropriation"); **RLA-215**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (Beechey, Born, Stern), ¶¶ 549, 564–565 (full reparation requires "putting an investor into a position that would have existed but for the breach"); **RLA-216**, *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (Danelius, Bring, Smets), p. 78 (claimant "shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred"); **RLA-217**, *UAB E energija (Lithuania) v. Republic of Latvia,* ICSID Case No. ARB/12/33, Award, 22 December 2017 (Patocchi, Reinish, Wordsworth), ¶¶ 1129, 1136 (applying the *Chorzów Factory* standard to reject a lost profits claim for failure to prove that the loss was caused by the State's breach); **RLA-218**, *Excerpt from* Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2nd ed. 2017), pp. 37–38, ¶¶ 2.102–2.106 (full reparation requires constructing a hypothesis of the claimant's financial position absent the wrongful act).

[61] Claimant relies on *Bosnian Genocide* for a different point—that the presence of a third party in the causal chain does not in itself allow the State to escape international responsibility. Claimant's Submission on Remitted Issue, ¶ 77; Claimant's Reply on Remitted Issue, ¶ 121. The ROK does not dispute that uncontroversial proposition.

> to prevent the atrocities, but **it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought**. Since the Court cannot therefore regard as proven **a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica,** financial compensation is not the appropriate form of reparation.[62] (Emphasis added)

30. In other words, the ICJ (i) held that Serbia had breached a treaty obligation, (ii) found that Serbia had "significant means of influence" (if not control) over the independent actor that had directly caused the injuries, and (iii) nevertheless required—but could not find to a "sufficient degree of certainty"[63]—that the outcome would have been different if Serbia had acted in compliance with the treaty. On this basis, the Court declined to award any compensation, resting instead on a declaratory judgment of breach.[64]

31. The clear implication of *Bosnian Genocide* is that, in a case involving a request for compensatory damages for an internationally wrongful act (such as the present case), a counterfactual analysis is indeed required.

32. By contrast, Claimant's asserted proposition—that "[t]he but-for analysis does not ask the Tribunal to speculate" as to what "*might* have" happened but instead "asks the Tribunal to interrogate the evidence" of what did in fact happen[65]—is not supported by reference to any authority at all. This is not surprising, given the unusual and illogical nature of the proposition itself.

33. Claimant's unsupported position is not only contrary to established international law, it is also contrary to a principle of causation recognized

[62] **CLA-024**, Bosnian Genocide, ¶ 462.

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

[64] **CLA-024**, Bosnian Genocide, ¶¶ 462–463.

[65] Claimant's Reply on Remitted Issue, ¶ 34 ("The but-for analysis does not ask the Tribunal to speculate as to the basis on which an Investment Committee member *might* have supported the Merger, absent the ROK's unlawful intervention; rather, it asks the Tribunal to interrogate the evidence that the Investment Committee member *did in fact* support the Merger because of the ROK's unlawful intervention.").

across a number of legal systems. As Hart and Honoré explain in their seminal comparative study of causation, the law generally distinguishes between an "additional" cause, which is an actually occurring event sufficient to produce the same harm, and an "alternative" cause, which is a hypothetical one.[66] Where an *alternative* cause is shown, the wrongdoer's conduct may still be treated as the cause of the harm for purposes of *criminal* responsibility, because the wrong there consists in the interference with a protected state of affairs, not in the deprivation of an economic advantage.[67] Where, as here, compensation for economic loss is sought, however, the analysis is different: a claimant establishes an entitlement to compensation only by showing that, absent the wrongdoer's conduct, it would have enjoyed the economic advantage it claims to have lost.[68] An alternative cause can be used to demonstrate that factual causation is not satisfied.

34. Hart and Honoré illustrate this distinction with the Louisiana barge case, in which the defendant allegedly unlawfully maintained a bridge that obstructed a waterway and delayed the plaintiff's barge.[69] The court denied recovery because a lawfully maintained bridge farther along the same waterway would, in any event, have caused the same delay.[70] The allegedly unlawful bridge undoubtedly caused the delay in fact, but the plaintiff could not show that, absent the defendant's unlawful conduct, it would have avoided the loss.[71] Therefore, an alternative cause—the lawfully maintained bridge—broke the chain of factual causation. Hart and Honoré trace the same principle to Roman law, noting that Paul's gloss on the Digest denies compensation for a shipowner's goods lost in a shipwreck where a substitute ship carrying the

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[66] **RLA-143**, *Excerpt from* HLA Hart and T Honoré, *Causation in the Law* (2nd edn 1985) ("**Hart & Honoré, *Causation in the Law***"), p. 249.

[67] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 249.

[68] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 250.

[69] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 250.

[70] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 250.

[71] **RLA-143**, Hart & Honoré, *Causation in the Law*, pp. 250–251.

same goods would, in the same storm, have suffered the identical fate.[72] The principle occurs not only in the common law and Roman law traditions but also in German case law, where courts have applied the same counterfactual reasoning to deny recovery where the same harm would have resulted from lawful conduct.[73] Similarly, the Korean Supreme Court has held that, "even where an unlawful act has been committed, if there is no difference between the victim's actual financial position and the financial position that would have existed absent the unlawful act, no compensable damage resulting from the unlawful act can be found."[74]

35. This convergence confirms that the counterfactual inquiry required by *Chorzów Factory* and *Bosnian Genocide*, and applied in ISDS case law, reflects a causation principle recognized in various legal systems.[75]

3. *Claimant's new authority (Amco II) does not assist*

36. In the Introduction to its Reply, Claimant introduces a new authority, *Amco v. Indonesia II* ("***Amco II***"), which it deploys purportedly to support the proposition that "when a State has subverted a decision-making process, it is not open to it to cavil with causation by positing that an 'honest' or 'fair' decision-maker would have reached the same outcome."[76] *Amco II* is an inapposite authority here, for several reasons.

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[72] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 251.

[73] **RLA-143**, Hart & Honoré, *Causation in the Law*, p. 249, fns. 16–17 and p. 252, fns. 29–30.

[74] **RLA-219**, Supreme Court of Korea Case No. 2009Da30762 (Kor), 10 September 2009, ¶ 1.

[75] In domestic law, examples of a counterfactual analysis being applied to claims for compensation for economic loss are plentiful. *See, e.g.*, **RLA-220**, *Excerpt from* Andrew Tettenborn & Michael Jones (eds.), CLERK & LINDSELL ON TORTS (24th ed. 2025), ¶¶ 2.14–2.15.

[76] Claimant's Reply on Remitted Issue, ¶ 6 (citing **CLA-237**, Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award in Resubmitted Proceedings, 31 March 1990, ¶¶ 74–75, 139, 174).

37. *First*, the situation in *Amco II*—a 1990 award in an arbitration based not on a treaty, but on Indonesia's investment statute and a lease agreement—was materially different from the present.

a. In *Amco II*, an administrative organ of the State (BKPM) was found to have committed a denial of justice by arbitrarily revoking the claimant's license in a process that was tainted by bad faith. The license revocation was held to have caused loss. The State argued that causation was lacking because, even if the bad faith and denial of justice were removed, there were substantive grounds for denying the license in any event, and a "fair" process could still have resulted in revocation. The tribunal held that this argument misaddressed causality, stating that it "cannot pronounce upon what a 'fair BKPM' would have done."[77]

b. As discussed separately below, the *Amco II* tribunal's articulation of the relevant test for causation is inconsistent with international law and relevant jurisprudence. But even if it were a correct application of law on the facts presented in that case, it would not assist Claimant in *this* case in light of the materially different fact pattern of the two cases. The key distinguishing difference between *Amco II* and the present situation is that *Amco* featured a simple causal chain with only one step (i.e., there was no intervening conduct by a non-State actor), whereas the Parties agree that the present case presents a multi-step causal chain that runs through a non-State deliberative body, the NPS.[78] The "fair BKPM" language quoted above addresses only whether the tribunal needed to construct a hypothetical scenario in which the State actor that

[77] **CLA-237**, Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award in Resubmitted Proceedings, 31 March 1990, ¶ 174.

[78] *See* Claimant's Reply on Remitted Issue, ¶ 37 (identifying "three links in the causal chain between the ROK's breaches and EALP's loss": (i) the conduct of the Blue House, Minister Moon and the MHW causing the NPS to vote in favor of the Merger; (ii) the NPS causing the Merger to be approved; and (iii) the Merger causing EALP's loss), § III.B (structuring Claimant's factual causation case around these same three links), ¶ 123 (reiterating that "[i]n the present case, there were three links in the causal chain").

committed the wrongful act that directly caused the investor's loss (without intervening non-State actors) had instead acted lawfully. It says nothing about a scenario, such as the present, where the State's unlawful conduct (the Blue House Measures) is several steps removed from the ultimate loss-causing event (the Merger), and among the intervening steps is a decision by a non-State deliberative body (the NPS).

c. If the NPS were an organ of the ROK, and if the NPS's vote itself had been the relevant breach of Treaty (as was the position in the Award), then *Amco II* arguably could provide support for the view that there is no need to consider a hypothetical scenario in which the NPS had acted lawfully (albeit, as discussed below, *Amco II* does not accurately reflect the position under international law even in such circumstances). But per the Set-Aside Judgment, the NPS is *not* the ROK, and its vote is *not* the breach. Given that the breach occurred further upstream, at the level of the Blue House and MHW, the Tribunal must consider how the NPS—a third party that was entitled to pursue its own interests and owed no duties to other SC&T shareholders (such as Claimant) —would have acted in a Treaty-compliant counterfactual scenario.

38. *Second*, the discussion of the relevant international law principles in the 1990 award in *Amco II* is not an accurate statement of international law. It was doubtful (and the ROK says, wrong) when decided and is certainly not an accurate statement of the position in international law or investment treaty jurisprudence as it stands today, decades later.

a. It is now widely accepted that compensation for financial injury said to arise from a due process failing will not be granted absent a showing by the injured party that the outcome of the decision-making process would have been different but for the violation.[79] In other words, where—as here—the breach consists of distortion of an adjudicative or deliberative *process*, it does not suffice for the claimant to show that it suffered injury due to the decision that resulted from that process in the actual scenario; rather, the law of reparation requires that factual causation be satisfied, which means demonstrating that, in all probability, a different outcome would have been reached if the process violation had not occurred.[80]

b. As Professor Zachary Douglas has explained, the *Amco II* tribunal appears to have fallen into error by skipping over the first step in the causation analysis—factual causation:

> It is generally accepted that causation has two elements: a question of fact and a question of law: First: 'Would Y have occurred if X had not occurred?' Second: 'Is there any principle which precludes the treatment of Y as the consequence of X for legal purposes?'
>
> The [*Amco II*] tribunal appears to have approached causation as a question of law at the second stage of the

[79] *See, e.g.*, **RLA-090**, *Bilcon of Delaware, Inc. and others v The Government of Canada* (UNCITRAL), Award on Damages, 10 January 2019 ("***Bilcon* (Award on Damages)**"), ¶¶ 168–169; **RLA-221**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Fourth Partial Award on Track III, 17 November 2025 (van den Berg, Grigera Naón, Lowe) ("***Chevron*, Fourth Partial Award on Track III**"), ¶¶ 381–395 (expressly rejecting the claimants' assertion that a "but-for analysis is inappropriate in denial of justice cases," instead finding that *Chorzów Factory* required such an analysis, and ultimately concluding that the claimants' damages should be reduced "to re-establish the situation which would, in all probability have existed if the Respondent's Treaty breaches had not been committed"); **RLA-222**, *WWM v Kazakhstan (II)* [2025] EWHC 452, 28 February 2025, ¶¶ 75–76, 114, 126–130, 143 (in which the High Court confirmed that a respondent is entitled to deploy a counterfactual analysis to test whether the alleged injury was in fact suffered or caused by the breach; characterized Kazakhstan's counterfactual case as the "critical issue on causation" and a potential "knock-out" defense capable of being "a complete answer to the claim for loss"; and upheld Kazakhstan's section 68 challenge because the tribunal had failed to decide the counterfactual issue).

[80] **RLA-221**, *Chevron*, Fourth Partial Award on Track III, ¶¶ 381–395.

> test of causality and neglected to determine the antecedent question of fact."[81]

c. Jan Paulsson is also critical of *Amco II*'s analysis. He states that its treatment of quantum:

> began with the postulate that 'BKPM's decision . . . caused PT Amco to lose its licence to engage in business ventures in Indonesia' and proceeded without pause to assess the value of what the investors thus had lost. **Surely this was going too fast**.[82] (Emphasis added)

39. *Third*, as discussed above, the ICJ's judgment in the *Bosnian Genocide* case, which postdates *Amco II* by 17 years, confirms that international law requires a counterfactual inquiry in cases involving a request for compensation for economic loss.[83] Simply put, *Amco II* is not good authority with respect to the test for factual causation under international law as it stands today.

40. Nor can Claimant salvage its position by invoking the proposition—drawn from the same passages of *Amco II* addressed above—that a State that has "subverted a decision-making process" cannot rely on any resulting evidentiary uncertainty to defeat causation.[84] Taken to its logical end, that principle would eliminate factual causation as a requirement of State responsibility altogether: any respondent State facing an allegation of

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[81] **RLA-223**, *Excerpt from* Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), pp. 102–103 (¶¶ 188–190) (citing **CLA-125**, H. Hart and T. Honoré, *Causation in the Law* (2nd ed., 1985) (excerpt), p. 110).

[82] **RLA-224**, *Excerpt from* Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 222. Paulsson goes on to note, at p. 225, that "[i]f a foreigner's claim before a national court was thwarted by a denial of justice, **the prejudice often falls to be analysed as the loss of a chance – the possibility, not the certainty, of prevailing** at trial and on appeal, and of securing effective enforcement against a potential judgment debtor whose credit-worthiness may be open to doubt. The questions left open by Amco II suggest that this dimension of the inquiry was overlooked" (emphasis added). The ROK addresses the appropriateness of a loss of chance analysis in this case below in **Section V** below.

[83] **CLA-024**, Bosnian Genocide, ¶ 462.

[84] *See* Claimant's Reply on Remitted Issue, ¶ 6 (citing **CLA-237**, Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Award in Resubmitted Proceedings, 31 March 1990, ¶¶ 74–75, 139, 174).

wrongful interference with a decision-making process could be required to make full reparation for the process's outcome on proof of the interference alone, regardless of whether the interference actually changed the decision that would otherwise have been taken. That is not the law, and it is inconsistent with the widely-accepted rule, discussed above, that in a case alleging a due process violation, the claimant must show that the violation was outcome-determinative. Tellingly, Claimant cites no authority for its proposition beyond *Amco II* itself, and appears to raise it here for the first time in these Remitted Proceedings.

B. Factual causation must be proven to a sufficient degree of certainty ("in all probability")

41. Claimant argues that the Tribunal has already rejected any standard of proof for causation higher than a bare balance of probabilities. Claimant does so by mischaracterizing the Award's findings in three ways: (i) it claims that Award paragraphs 266 and 581 constitute a rejection of a standard higher than a balance of probabilities, (ii) it attributes to Award paragraph 581 language that the Tribunal never adopted and (iii) it argues that the Tribunal's finding of a higher standard in Award paragraph 931 was confined to a discrete quantum inquiry unrelated to causation.[85] None of these points withstands scrutiny.

42. *First*, paragraphs 266 and 581 do not address the standard of proof applicable to the counterfactual causation-in-fact inquiry at all. Paragraph 266 recites the Parties' agreement concerning the standard of proof in international arbitration for affirmative findings of historical fact—i.e., the determination of what happened in the actual world.[86] Paragraph 581 similarly recites the

[85] *See* Claimant's Reply on Remitted Issue, ¶¶ 29–32.

[86] **RLA-194**, Award, ¶ 266 ("There is no dispute between the Parties that the Tribunal may rely on the factual findings of the Korean courts unless the Tribunal has been presented with evidence to the contrary, in which case it should weigh the evidence to reach its own factual conclusions. There is also no dispute between the Parties that **in reaching affirmative findings of fact** in criminal matters the Korean courts apply a higher standard of proof (*i.e.* beyond a reasonable doubt) than the standard applicable in this arbitration (*i.e.* balance of probabilities)" (emphasis added; footnotes omitted)).

Parties' agreement concerning the standard of proof for determining whether the evidence as a whole supports a finding of breach (liability).[87] Neither paragraph purports to address, still less resolve, the standard of proof applicable to factual causation. On that issue, the Parties did *not* agree—as Claimant concedes in its Reply.[88]

43. As recited in the Award, the ROK has consistently maintained that, under international law, a high standard of factual certainty is required to establish factual causation.[89] Contrary to Claimant's contention, the Tribunal did not rule on this point expressly in the Award (it did, however, apply the "in all probability" standard to the question of establishing the but-for world for purposes of reparation, as discussed below).[90] Claimant's characterization of the ROK's position as a previously rejected argument[91] is therefore misplaced.

44. *Second*, Claimant compounds this mischaracterization by the manner in which it quotes the Award. In paragraph 31 of its Reply on Remitted Issue, Claimant introduces a block quotation with the assertion that the Tribunal "cited to a footnote in EALP's Reply supporting the position that a single standard of proof applies to breach and to causation," and attributes the quoted language to Award paragraph 581. That attribution is misleading. The Tribunal's citation

[87] **RLA-194**, Award, ¶ 581 ("The Tribunal considers that the starting point in determining whether, on the facts, the Respondent's conduct can be **said to amount to a breach of its MST obligation under the Treaty** is the decisions of the local Korean courts dealing with the criminal proceedings arising out of the NPS's approval of the Merger . . . . The Parties agree that the applicable standard of proof in making this determination is balance of probabilities, and not one applicable in criminal proceedings, which the Parties agree is, in the Republic of Korea, proof beyond a reasonable doubt" (emphasis added; footnotes omitted)).

[88] *See* Claimant's Reply on Remitted Issue, ¶ 30 and fn. 37.

[89] **RLA-194**, Award, ¶ 719.

[90] *See* **CLA-222**, Set-Aside Judgment, ¶¶ 264(i)–(ii) (holding that paragraphs 602–603 and 623 of the Award, which Claimant had said amounted to a finding of causation, "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.").

[91] *See* Claimant's Reply on Remitted Issue, ¶ 29.

in paragraph 581 refers only to footnote 1501 of Claimant's Reply (on the Merits), which contains a string citation to authorities addressing the standard of proof for historical fact—and does so solely in support of the Tribunal's own statement that "[t]he Parties agree that the applicable standard of proof in making this determination is balance of probabilities."[92] The Tribunal did not cite, and still less adopt, the language that appears in paragraph 95 of Claimant's Reply (on the Merits), to which footnote 1501 attached. Claimant cannot convert its own prior submission into a Tribunal finding by attaching a quotation to a citation the Tribunal used for a different, narrower purpose.

45. *Third*, Claimant mischaracterizes the significance of paragraph 931. The Tribunal there did not express a standard applicable only to a narrow, free-standing "quantum" inquiry. It applied the *Chorzów Factory* principle—that reparation must restore the situation that would, "in all probability," have existed absent the wrongful act—to the question of whether the claimed increase in SC&T's share value would have occurred at all, given the counterfactual premise that the Merger had been rejected. That is not a quantum-computation exercise in the narrow sense (i.e., putting a dollar figure on an established loss); rather, it is a counterfactual inquiry of the same character as the causation-in-fact question that is now before the Tribunal: namely, whether the NPS would have voted differently absent the Blue House Measures. Both inquiries ask what would have happened in a hypothetical world absent the wrongful act and—critically—both are animated by the same underlying principle of international law: the obligation to provide full reparation for economic loss is limited to loss that the claimant has proven—through a counterfactual analysis—was caused by the wrongful act.[93]

[92] Claimant's Reply on Remitted Issue, ¶ 31 (quoting Claimant's Reply, ¶ 506; *see also* **RLA-194**, Award, ¶ 581.

[93] *See* **Section III.A** above.

46. Finally, contrary to Claimant's suggestion, this standard is not supported only by a single, isolated citation to *Bilcon.*[94] The standard is confirmed by a convergent and persuasive line of authority: the Permanent Court of International Justice in *Chorzów Factory*, the ICJ in *Bosnian Genocide*, and the investment treaty tribunals in *Bilcon v. Canada* and *Nordzucker v. Poland*—each requiring that factual causation be proven to a "sufficient degree of certainty" standard that is materially more demanding than a bare balance of probabilities standard.[95] Claimant's own authorities on this point—*Glencore*, *Gold Reserve*, *Bear Creek*, and *Kardassopoulos*—are inapposite for the reasons already given in the ROK's Submission on Remitted Issue: they address either the standard for proving historical fact or the standard for computing quantum once loss is established, neither of which is the question presented here.[96] Claimant does not respond.

C. Claimant has not established that the Blue House Measures were a cause in fact of the NPS Vote

47. In its Submission, the ROK demonstrated that the evidence before this Tribunal—which now includes the Additional Judgments—does *not* support a finding that, but for the Blue House Measures, the Merger and any consequent loss to Claimant would have been avoided because the NPS in all probability (or even on a balance of probabilities) would have voted against the Merger or abstained.[97]

48. In its Reply, Claimant argues that the Tribunal has already found that the Blue House Measures caused the NPS Vote;[98] that the evidentiary record in the

[94] Claimant's Reply on Remitted Issue, ¶ 31, quoting Claimant's Reply Post-Hearing Brief, ¶ 506.

[95] *See* ROK's Submission on Remitted Issue, ¶¶ 70–77. *See also* **RLA-221**, *Chevron*, Fourth Partial Award on Track III, ¶¶ 384, 394 requiring a showing of injury that would "in all probability" have occurred in the treaty-compliant but-for scenario.

[96] *See* ROK's Submission on Remitted Issue, ¶ 77 and fn. 101.

[97] ROK's Submission on Remitted Issue, §§ III.B, III.C.

[98] Claimant's Reply on Remitted Issue, § III.B.1.ii.

Original Proceedings supports such alleged finding;[99] that the Tribunal has already rejected the ROK's arguments to the contrary;[100] and that the Additional Judgments do not disturb the Tribunal's findings in the Award.[101]

49. Below, the ROK demonstrates that: (1) Claimant refers to purported findings and decisions that the Tribunal did not in fact make; (2) Claimant has avoided engaging with the factual findings of the Additional Judgments that undermine its case on factual causation; and (3) Claimant still has not met—and, on the evidentiary record before this Tribunal, cannot meet—its burden to prove causation in fact.

1. *Claimant refers to purported Tribunal decisions that are nowhere to be found in the Award*

50. As mentioned in the Introduction, the Reply is replete with Claimant's assertions that the Tribunal has already decided a point that the Tribunal has not, in fact, decided.

51. By way of illustration only, Claimant makes the following incorrect assertions of Tribunal findings with respect to factual causation:

    a. "[T]he Tribunal made the following findings in its Award": "The Blue House and MHW ensured that the vote on the Merger was taken by the Investment Committee rather than the EVC, *because the EVC would have rejected the Merger, given the recent precedent of the SK Merger*" (emphasis added).[102] Nowhere in the Award did the Tribunal find that the EVC "would have rejected the Merger." The likely voting behavior of the EVC is a question that remains open for determination in these Remitted Proceedings—and as to which Claimant bears the burden of proof.

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[99] Claimant's Reply on Remitted Issue, § III.B.1.i.

[100] Claimant's Reply on Remitted Issue, § III.B.1.iii.

[101] Claimant's Reply on Remitted Issue, § III.B.1.iv.

[102] Claimant's Reply on Remitted Issue, ¶ 68 (and following subheading).

b. "[T]he Tribunal made the following findings in its Award":[103] "CIO Hong achieved this [the Investment Committee's vote in favor of the Merger] by doctoring the valuation of the merging companies and directing that a synergy effect be fabricated *to deceive the Investment Committee members who would not otherwise have supported the Merger*" (emphasis added).[104] Nowhere in the Award did the Tribunal find that CIO Hong had acted to deceive Investment Committee members "who would not otherwise have supported the Merger." Whether the relevant decision-makers at the NPS would have supported the Merger in the absence of the tainted synergy projection is a question that remains open for determination in these Remitted Proceedings—and as to which Claimant bears the burden of proof.

c. "[T]he Tribunal has rejected[] the failed argument that various factors purportedly 'weighed in favor of approving the Merger' and would have caused the NPS to vote in favor of the Merger in any event."[105] No support is offered for this assertion and no such decision by the Tribunal can be found in the Award.[106]

d. "[T]he Tribunal has already rejected[] the failed argument that some proxy advisors recommended supporting the Merger."[107] No support is offered for this assertion and no such decision by the Tribunal can be found in the Award.[108]

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[103] Claimant's Reply on Remitted Issue, ¶ 68.

[104] Claimant's Reply on Remitted Issue, p. 33 (subheading).

[105] Claimant's Reply on Remitted Issue, p. 41 (subheading).

[106] As to Claimant's assertions in relation to the underlying evidence, *see* **Section III.C.3** below.

[107] Claimant's Reply on Remitted Issue, p. 42 (subheading).

[108] As to Claimant's assertions in relation to the underlying evidence, *see* **Section III.C.3** below.

52. It is telling that, as to the foregoing and other important points on which Claimant bears the burden of proof, Claimant has referred to nonexistent Tribunal findings.

2. Claimant stubbornly avoids engaging with the factual findings of the Additional Judgments that undermine its case

53. In its Submission, the ROK demonstrated that in the Additional Judgments, the Korean courts made a number of affirmative findings that bear on the likely analysis and decision-making of the NPS in a Treaty-compliant scenario. Those affirmative findings include the following, among others:

a. ***The Merger had a legitimate purpose from the perspective of SC&T and its shareholders.*** Prior to the Merger, SC&T was in need of a new driver of growth to overcome stalled growth, had "unstable" corporate control rendering it a target for a hostile acquisition, and stood to gain from the corporate governance benefits of the Merger.[109] The 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. All of these effects can be considered as aligning with the interests of SC&T and its shareholders.[110] The decision to proceed with the Merger was made following adequate review and deliberation by SC&T and its board.[111] SC&T's directors—including its independent directors—unanimously approved the Merger according to their business judgment that the Merger would benefit SC&T and its shareholders through business

[109] **Ex. R-391**, Seoul Central District Court, Case No. 2020GoHap718, 920 (consolidated) ("**JY Lee Unlawful Merger District Court Judgment**"), 5 February 2024, pp. 292–296, 370–371.

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

[111] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 334–365, 874–879. *See also* **Ex. R-392**, Seoul High Court, Case No. 2024No635 ("**JY Lee Unlawful Merger High Court Judgment**"), 3 February 2025, pp. 124–128, 830, 834.

diversification, synergies, and new growth opportunities including biotechnology.[112]

b. ***Contemporaneous market data and other available information did not give the relevant decision-makers on the Merger a reason to believe that the statutorily-derived Merger Ratio failed to reflect the objective fair market value of the merging companies.*** Market evidence does not support the allegation that, at the time of the Merger announcement, Cheil shares were overvalued and likely to fall whereas SC&T shares were undervalued and likely to rise.[113] The causes of SC&T's poor stock performance included macroeconomic factors, poor revenue results, and the company's large shareholding in Samsung Engineering, which was in deteriorating financial health.[114] The evidence does not support the assertion that SC&T's share price was suppressed due to speculation of a merger with Cheil.[115] SC&T's low price-to-book ratio reflected the market's dim view of SC&T's prospects;[116] SC&T's undervaluation relative to net asset value was a long-term condition that was not expected to reverse;[117] absent the Merger, SC&T's stock price was expected to fall further, such that a delay in the Merger timing likely would have led to an even lower merger ratio.[118] The evidence does not support the allegation that the timing of the Merger announcement was manipulated to favor Cheil or disadvantage SC&T.[119] There is no basis for concluding that the share prices of SC&T and Cheil used to determine the Merger Ratio were influenced by improper means—such

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[112] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 354–356.

[113] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 322, 382–389.

[114] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 390–391.

[115] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 397–405.

[116] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 391–393.

[117] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 407–408, 882. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 156.

[118] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 391–396, 885–887.

[119] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 419–422.

as share price manipulation—that would have impeded the functioning of the market; there is no objective evidence to view the Merger Ratio as inappropriate or disadvantageous to the shareholders of SC&T.[120] In light of the Merger Injunction Decision, SC&T's directors would not have considered the Merger Ratio or timing to be unfair.[121]

c. ***The evidence does not support the allegation that the Deloitte Anjin report—which found the Merger Ratio to be within a reasonable range—was manipulated or fabricated.*** The evidence does not support the prosecutor's allegation that the Deloitte Anjin Report (prepared for SC&T on 25 May 2015) reflected fabricated or manipulated results: Deloitte Anjin arrived at the results after reviewing and applying various valuation directions and methodologies while keeping in mind the stock prices of the two companies, without going against the accounting standards and practices related to valuation, based on market information as well as the materials provided by the company; moreover, the Samsung Group did not demand that Deloitte Anjin use a particular valuation direction.[122] The Samsung Group did not make false statements when it provided a copy of the Deloitte Anjin Report to the NPS on 1 July 2015 as a reference valuation material.[123]

d. ***The Samsung Group's KRW 6 trillion Merger synergy target was not arbitrary, false, or manipulated.*** The Merger Integration Task Force's 5-year revenue target for New SC&T was calculated conservatively by incorporating existing business plans of the merging companies, and

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[120] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 880, 882–883. *See also* **Ex. R-389**, Seoul Central District Court, Case No. 2020GaHap600079 ("**Shareholder Claims District Court Judgment**"), 25 November 2022, p. 14.

[121] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 888.

[122] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 602, 725, 881.

[123] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 725–737.

cannot be considered arbitrary, false, or manipulated.[124] The Task Force's KRW 6 trillion synergy target—which was provided to the NPS and separately published on a public website on 24 June 2015—resulted from a thorough review based on extensive materials and interviews of the persons in charge of each business unit; shareholders who encountered these figures understood them to be uncertain projections and forecasts; and such projections cannot be deemed arbitrary, false, or fabricated.[125]

e. ***The evidence does not support the allegation that the Samsung Group unlawfully interfered in securities analyst reports or press reports concerning the Merger.*** There is no evidence that Samsung interfered in the preparation of reports issued by Hanwha Investment & Securities or Korea Investment & Securities, or that Samsung requested either analyst to prepare its report in a manner favorable to the Merger.[126] There is also no evidence that the Samsung Group exerted any unlawful pressure on the press.[127]

f. ***The evidence does not support the allegation that JY Lee or the Samsung Group used unlawful means to solicit the NPS Vote.*** At the 7 July 2015 meeting between JY Lee and CIO Hong (and others), Mr. Lee truthfully explained the background and purpose of the Merger, including that Merger synergies were expected;[128] at that meeting, Mr. Lee did not engage in any deception when he explained to CIO Hong that the Samsung Group's legal advisers had counseled that a premium or

[124] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 350–351. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 139–140.

[125] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 634, 724–725. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 294–295.

[126] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 643–655.

[127] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 655–666.

[128] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 739–740.

discount to the Merger Ratio was not legally feasible;[129] the evidence establishes that it would indeed have been difficult and unprecedented to apply a premium or discount to the Merger Ratio.[130] CIO Hong's vote in favor of the Merger was not caused by any solicitation by the Samsung Group; to the contrary, CIO Hong was already predisposed toward the Merger independent of any outside solicitation and was acquitted in the Moon/Hong case of having breached any duties in relation to his own vote in favor of the Merger.[131] There was no explicit or implicit act by JY Lee to solicit the President's wrongful intervention in order to secure the NPS's voting rights in favor of the Merger.[132]

g. ***The unlawful acts of Moon and Hong did not affect the outcome of the Investment Committee's decision.***[133] (This finding is addressed in further detail below.[134])

h. ***SC&T and its shareholders benefitted from the Merger and cannot be said to have suffered loss from the Merger.*** As projected, New SC&T's biotechnology business has achieved strong growth, which has offset losses in the construction and trading segments; New SC&T's debt ratio and financial structure is substantially improved vis-à-vis pre-Merger SC&T; the Merger helped to resolve circular shareholding loops and improve the corporate governance structure of the Samsung Group, benefiting New SC&T; New SC&T's credit rating is improved compared

[129] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 743–744.

[130] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 883–884, 895–896.

[131] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 741–743. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 413. *See also* **Ex. R-153**, Seoul High Court Case No. 2017No1886 ("**Moon/Hong High Court Judgment**"), 14 November 2017, pp. 66–67; **Ex. C-069**, Seoul Central District Court Case No. 2017GoHap34, 183 (Consolidated) ["**Moon/Hong District Court Judgment**"], 8 June 2017, p. 63.

[132] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment pp. 745–749. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 421–422.

[133] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–14. *See also* **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 748–749.

[134] *See* ¶¶ 54–55 below.

to pre-Merger SC&T; and New SC&T was able to recognize and absorb a massive loss suffered by the SC&T construction business, which a standalone SC&T would not have been able to absorb without a sharp drop in its share price.[135] It is difficult to conclude that SC&T and its shareholders suffered loss due to the Merger; and there is no reasonable ground to view that an alternative to the Merger would have been more beneficial to SC&T and its shareholders.[136]

54. Contrary to its enthusiastic embrace of the findings by the Korean courts in the Moon/Hong case, Claimant strenuously avoids engaging with the findings summarized above, instead attempting to brush off the Additional Judgments as "judicial decisions of other fora addressing different causes of action, different legal standards applied to different evidentiary records."[137] Claimant then goes further, by mischaracterizing the Additional Judgments and the ROK's reliance on them:

   a. At paragraph 94(a) of the Reply, Claimant describes the Shareholder Claims District Court Judgment (Ex. R-389) as follows: "Contrary to the ROK's characterization, the court *did not* find that the NPS voted independently of the MHW's intervention. Rather, it held that the NPS' act of voting in favor of the Merger was 'an independent exercise of rights as a shareholder' and so could not be a 'joint' tort with the actions of ROK's public officials, including Minister Moon" (emphasis in original). [138] Such description is incorrect and misleading. Separate and apart from its holding on the joint tort issue, the court made the following affirmative findings on the question of whether the unlawful acts of Moon and Hong affected the outcome of the Investment Committee's decision:

[135] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 373–377, 879.

[136] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 890–898.

[137] Claimant's Reply on Remitted Issue, ¶ 91.

[138] Claimant's Reply on Remitted Issue, ¶ 94(a) (emphasis in original).

(3) *It is acknowledged that the Defendant's public officials exercised a certain degree of influence over the decision-making process of the [NPS]'s Investment Committee*, in that Hyung-pyo Moon and others instructed Wan-seon Hong, Chief Investment Officer of [NPS], to have the Investment Committee decide whether to approve or oppose the Merger, and Wanseon Hong, having determined that the Investment Committee would decide the matter, directed the preparation of analyses on the projected synergy effects of the Merger and encouraged the Investment Committee members to vote in favor of the Merger.

However, in light of the following, ***it is difficult to find that the acts of Hyung-pyo Moon and Wan-seon Hong actually affected the exercise of voting rights by the [NPS]'s Investment Committee***: (i) the *voting method* adopted by the Investment Committee was a roll-call vote in which each member selected one of 'Agree / Disagree / Neutral / Abstain / Abstain to Vote,' and where none of Agree, Disagree, Neutral, or Abstain reached a majority, or where 'Abstain to Vote' reached a majority, the matter would be referred to the Expert Voting Committee—a procedure that *cannot be regarded as necessarily favorable to securing a vote in favor* at the Investment Committee; (ii) as to the synergy materials, *the Investment Committee members, being experts, were all aware that synergy effects, which involve assessing future value on a present-day basis, could not be accurately quantified*, and certain members in fact raised the issue, leading to discussion within the Investment Committee—*such that it cannot be said that the members believed the losses that would be caused by the reduction of the number of shares as a result of the Merger could be recovered on basis of the synergy analysis alone*; and (iii) according 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, the impact on the share prices of relevant securities, the impact on the share prices of Samsung Group affiliates, the impact on the stock* *market, the impact on the economy, and the impact on fund management in the event the Merger fell through.*

> (4) As demonstrated above, ***it cannot be found that [NPS]'s consent to the Merger was a result of the Defendant's control over [NPS]'s conduct so much so that [NPS] served as an instrument for the Defendant's unlawful acts***. It also ***cannot be found that the Defendant through deceit or coercion actually affected [NPS]'s decision in a manner exceeding that of an instruction or a suggestion, so much so that [NPS] did not exercise its voting rights based on its free will***. As long as [NPS] exercised its voting rights independently, it cannot be found that the Defendant was in breach of any other shareholder's freedom to exercise their voting rights or freedom to form a collective opinion. (Emphasis added)[139]

Claimant has no answer to these findings.

b. At paragraph 94(b) of the Reply, in an apparent attempt to minimize the Judgment's importance, Claimant asserts that the ROK relies on only a "single passage" of the JY Lee Unlawful Merger District Court Judgment.[140] Such assertion is mistaken—the ROK's Submission refers to dozens of passages of the JY Lee Unlawful Merger Judgments, including without limitation those summarized above.[141] Claimant has chosen to simply ignore all of those aspects of the Judgments that support the ROK's case in the Remitted Proceedings.

55. Finally, contrary to Claimant's suggestion,[142] the ROK is not seeking through the Additional Judgments to reopen findings by the Tribunal in the Award that have not been set aside. Rather, as is evident from the summary above, the Additional Judgments contain numerous findings that are relevant to

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[139] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–13.

[140] Claimant's Reply on Remitted Issue, ¶ 94(b).

[141] *See, e.g.*, ROK's Submission on Remitted Issue, ¶¶ 13, 91, 95, 98–99, 105, 109–110, 163–164, 167, 183, and accompanying Annex.

[142] Claimant's Reply on Remitted Issue, ¶¶ 90–95.

answering the counterfactual question that remains open for decision in these Remitted Proceedings: Absent the Blue House Measures, how would the NPS (a non-State actor) have voted on the Merger?

56. The ROK appreciates that the factual finding in the Shareholder Claims Judgments (also endorsed in the JY Lee Unlawful Merger District Court Judgment) that the unlawful conduct of Moon and Hong did not—as a factual matter—affect the outcome of the Investment Committee's decision may seem *prima facie* in tension with the following factual findings by the Tribunal in the Award (not set aside):

   a. In Award paragraph 602, the Tribunal held (emphasis added): "*The factual findings of the Seoul Central District Court and the Seoul High Court*, and the key supporting evidence relied upon by the Courts, therefore establish that: . . . (b) The NPS, under the direction and instructions of the MHW, took steps to ensure that the vote would be conducted by the Investment Committee rather than the Experts Voting Committee, influenced the vote conducted by the Investment Committee, including by fabricating a synergy effect of the Merger that had no basis in fact and meeting with members of the Investment Committee, to the effect that the Investment Committee voted in favor of the Merger."

   b. In Award paragraph 623, the Tribunal held (emphasis added): "As established above, when voting on the Merger, the NPS did not act independently and for commercial purposes; *as the Korean courts have determined*, the NPS did not take its decision independently, based on the commercial merits of the Merger, but acted under the direction and instructions of the MHW and thus effectively as an instrument of the MHW in the implementation of a government policy."

57. The ROK makes the following comments:

a. As an initial matter, as the ROK explained in its Submission on the Remitted Issue,[143] and as the English Court has expressly noted,[144] the Tribunal's factual findings quoted above describe what happened in the *actual* world and do not address what would have happened in the *but-for* world (specifically, whether the NPS would have voted differently in the absence of the Blue House Measures). There is therefore no tension at all between Award paragraphs 602/623 and the arguments the ROK advances regarding but-for causation.

b. Moreover, the findings quoted above were made for the purpose of, and pursuant to the relevant evidentiary standards concerning, breach (liability). They were not made in the context of, or pursuant to the relevant evidentiary standards required for, causation. They are not, in short, causation findings.

c. By contrast, the factual findings in the Shareholder Claims District Court Judgment quoted at length above address causation specifically and engage the counterfactual question in a way that the Tribunal's findings do not. Specifically, the court acknowledged the same factual findings from the Moon/Hong Judgments that the Tribunal quoted in the Award,[145] and acknowledged further that the ROK had "exercised a certain degree of *influence* over the decision-making *process* of the [NPS]'s Investment Committee" (emphasis added).[146] Because the court—unlike the Tribunal in the Award—was addressing the question of *causation*, the court then went a step further and engaged in an analysis of the following question: Was the unlawful influence exerted by Moon and Hong so extensive as to have determined the outcome of the Investment Committee's decision? To answer this question, the

[143] ROK's Submission on Remitted Issue, ¶ 55.
[144] **CLA-222**, Set-Aside Judgment, ¶¶ 264 (i)–(ii), 260.
[145] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 3–6.
[146] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 12.

court carefully examined the findings in the Moon/Hong case—which were themselves based on the evidence on which Claimant relies here—and concluded that the facts, as confirmed, could not support an affirmative answer.[147] Rather, the evidence showed that the Investment Committee had: (1) adopted a voting method that allowed members to vote their conscience and also allowed for a potential referral of the matter to the EVC; (2) understood that the tainted synergy projection was inherently uncertain and did not place dispositive reliance on it; and (3) actively considered and ultimately based their decision on a range of factors beyond the quantified synergy effect.[148]

d. In the ROK's respectful submission, in the context of addressing the causation issues remitted to it by the English Court, it is open to the Tribunal to consider the above-described assessment of the facts by the Korean courts without needing to revisit its findings in paragraphs 602 and 623 of the Award, which addressed different questions and were made for a different purpose, at a different level of generality, and to a different standard of proof. Put differently, the two sets of factual findings can be reconciled. Moreover, because the findings in those paragraphs of the Award were expressly premised (at least in part) on the findings of the Korean courts, it seems only natural that the Tribunal may find it helpful to consider subsequent findings by those same courts examining the same facts in the light of a causation analysis.

3. The evidence does not support a finding that, but for the Blue House Measures, the NPS in all probability (or even on a balance of probabilities) would have voted against the Merger or abstained

58. In its Submission, the ROK demonstrated that: (1) an objective analysis of the relevant factors under the NPS Voting Guidelines pointed toward a vote in favor of the Merger, irrespective of whether the decision was to be taken by

[147] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–13.

[148] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–13.

the Investment Committee or the EVC;[149] (2) the course of events in the actual scenario supports the conclusion that the NPS would have voted for the Merger in the but-for scenario;[150] and (3) many sophisticated investors voted for the Merger in the absence of any interference.[151] Claimant hardly engages with the first and third of these points (beyond the incorrect assertion that the Tribunal has already considered and rejected the ROK's position), instead focusing the bulk of its Reply (i.e., Section III.B.1(i)) on a tendentious and in many respects inaccurate description of what it describes as "the most relevant . . . contemporaneous evidence of why the NPS voted as it did and how the NPS would have voted in the absence of any unlawful ROK intervention in that voting process."[152]

59. Below, the ROK examines each of Claimant's main assertions in Section III.B.1(i) of its Reply and demonstrates again that the evidence does not support Claimant's contention that the NPS would have voted against the Merger but for the Blue House Measures.

a. <u>The NPS did not "inform[] EALP that it would be voting against [the] Merger"</u>

60. Claimant asserts that, during a meeting in Seoul on 18 March 2015, NPS representatives "informed EALP that [the NPS] would be voting against [the] Merger"[153] and "made clear to EALP directly" the "NPS's anticipated voting intentions with respect to the [Merger]."[154] Claimant refers to a letter that EALP sent to the NPS on 3 June 2015 (Ex. C-187), in which EALP asserted that, at the 18 March 2015 meeting, NPS representatives had "recognised" the view that an all-shares merger between SC&T and Cheil on the basis of then-current

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149 ROK's Submission on Remitted Issue, § III.B.1.

150 ROK's Submission on Remitted Issue, § III.B.2.

151 ROK's Submission on Remitted Issue, § III.B.3.

152 Claimant's Reply on Remitted Issue, ¶ 40.

153 Claimant's Reply on Remitted Issue, p. 15 (subheading).

154 Claimant's Reply on Remitted Issue, ¶ 44.

share prices would not be beneficial to SC&T's shareholders.[155] The NPS responded to EALP's letter on 15 June 2015, clarifying that "NPS has not expressed its intent or position regarding the Proposed Merger to you in any way shape or form"; warning EALP that "NPS takes circulation of any misleading or inaccurate information regarding NPS' position with respect to the Proposed Merger very seriously"; and concluding firmly: "For all intents and purposes, your views expressed in the Letter are not and should not be construed as NPS' official position regarding the Proposed Merger."[156] Thus, even if NPS personnel had made statements to EALP in March 2015 expressing agreement with negative sentiments concerning a possible all-shares merger between SC&T and Cheil (as Foxton, J. concluded was likely the case[157]), such statements cannot fairly be said to reflect any official position of the NPS—much less an official statement of the NPS's "voting intentions" with respect to a theoretical merger that had not yet been announced.

61. In any event, the timing of the alleged statements (18 March 2015) renders them irrelevant to a determination of the NPS's likely voting behavior nearly four months later (mid-July 2015) in a Treaty-compliant scenario, for at least two reasons:

    a. *First*, as of March 2015, the Merger had not yet been announced and the NPS had not yet undertaken a review of the impact of a possible merger on shareholder value of the Fund's holdings in SC&T, Cheil, and the 15 other Samsung Group companies in the Fund's portfolio.[158]

    b. *Second* and critically, the views of key decision-makers within the NPS concerning the Merger Ratio were impacted in a material way (and would, in the but for world, have been impacted) by an event that long

[155] **Ex. C-187**, Letter from Elliott to NPS (*redacted*), p. 3.

[156] **Ex. C-201**, Letter from NPS to Elliott, 15 June 2015, p. 1.

[157] **CLA-222**, Set-Aside Judgment, ¶ 39.

[158] *See generally* ROK's Submission on Remitted Issue, ¶¶ 87, 90, 94, 97–98, 101–102 (and evidence referenced therein) (describing NPS's comprehensive review of the Merger).

post-dated the March meeting—the issuance of the Merger Injunction Decision on 1 July 2015. As the ROK demonstrated in its Submission, that Decision played a pivotal role in shaping the position on the Merger of multiple members of the Investment Committee and of Mr. Cho of the EVC.[159]

62. Accordingly, Claimant's attempt to use the purported March 2015 statements as evidence of the NPS's likely position in a Treaty-compliant counterfactual scenario fails.

b. <u>The EVC's decision to vote against the SK Merger was not a "benchmark" or "signal" of how the NPS would likely vote on the Merger</u>

63. Claimant argues that the EVC's decision to vote against the SK Merger should be seen as a "benchmark" and "signal" of how the EVC would have approached the Merger had the matter been referred to it.[160] In its Submission, the ROK demonstrated, by reference to Mr. Cho's testimony and other evidence, that the EVC's decision to vote against the SK Merger is not probative of the EVC's likely decision on the Merger given material differences between the two situations,[161] including 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; (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

[159] *See* ROK's Submission on Remitted Issue, ¶¶ 107, 126–128, 130, 137, 151, 153 (and evidence referenced therein). *See also* **Ex. C-419**, [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee" **[RESP010084]**, 8 July 2015, p. 1 ("The court has also determined that there are no problems with regard to the legality of the merger, fairness of the merger ratio, market manipulation, etc.").

[160] Claimant's Reply on Remitted Issue, ¶¶ 41–43.

[161] *See* ROK's Submission on Remitted Issue, ¶¶ 129–132, 152–154.

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 for being attentive to legal issues), which—given the findings and rationale of the Decision—can only have supported a vote in favor of the Merger.[162]

64. Tellingly, Claimant's Reply does not engage with these points *at all*. Instead, Claimant refers to three documents, none of which assists:

a. An NPS document from 10 June 2015, reviewing whether the Investment Committee should refer the SK Merger to the EVC, and noting that such referral was necessary "[c]onsidering the need to set clear standards for exercising voting rights on mergers in cases of restructuring of *chaebol* corporate governance in the future."[163] Such document is not probative of the likely outcome of an EVC deliberation on the Merger.

i. Pursuant to the Voting Guidelines, the exercise of voting rights in relation to proposed mergers must be decided on a case-by-case basis.[164]

ii. Unlike the SK Merger, the Merger implicated the Fund's holdings in 17 Samsung Group companies, collectively comprising roughly one-quarter of the Fund's total equity holdings, such that a failure of the Merger could have had catastrophic consequences for the Fund.[165] Indeed, in the Moon/Hong case, the Seoul High

[162] ROK's Submission on Remitted Issue, ¶ 153.

[163] **Ex. C-385**, [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee" **[RESP014059]**, 10 June 2015, p. 1.

[164] **Ex. R-057**, Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014, Art. 7.

[165] ROK's Submission on Remitted Issue, ¶¶ 87, 94, 111, 131 (and evidence referenced therein).

Court noted that "the Merger was an important matter and *did not have a precedent*" (emphasis added).[166]

iii. If the EVC had deliberated on the Merger, it would have done so against the backdrop of the Merger Injunction Decision, which had rejected EALP's application for an injunction of the Merger on grounds that the Merger Ratio was unfair and that the Merger's true purpose was to benefit the controlling shareholders of Cheil (the Lee family) at the expense of SC&T's shareholders.[167] As noted above, Mr. Cho's unrebutted testimony is that he considered the Merger Injunction Decision to be very significant and considered, further, that it would be difficult for the EVC to make a decision departing from that of the court.[168]

b. Text messages exchanged between Samsung Group employees on the day of the SK Merger vote (24 June 2015), noting that the EVC's vote against the SK Merger "may be a signal regarding the Samsung case."[169] Claimant does not mention the very next message in the thread, which states: "NPS is against the SK merger *but the SC&T merger case is different*, and *I was told from a reliable source that the internal consensus is to vote* ***for*** *the merger*" (emphasis added).[170]

c. A "suspect examination report" in which a Blue House official is reported to have stated to the Korean prosecutors that, in light of the EVC's vote against the SK Merger, the SC&T-Cheil merger "could have

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166 **Ex. R-153**, Moon/Hong High Court Judgment, p. 45.

167 *See* ROK's Submission on Remitted Issue, ¶¶ 107–109, 126–131 (and evidence referenced therein).

168 *See* ROK's Submission on Remitted Issue, ¶¶ 126–128 (and evidence referenced therein).

169 Claimant's Reply on Remitted Issue, ¶ 43 and fn. 56 (quoting **Ex. C-421**, Record of text messages between [redacted] and various recipients **[RESP016329]**, 24 June-9 July 2015, p. 13231).

170 **Ex. C-421**, Record of text messages between [redacted] and various recipients **[RESP016329]**, 24 June-9 July 2015, p. 13231.

been opposed if nothing was done."[171] Such statement conveys nothing more than a view that the outcome of a decision on the Merger by the EVC was uncertain.

65. In its Submission, the ROK demonstrated, by reference to the underlying evidence, that the reason the MHW pushed to have the Merger decided at the Investment Committee was because the outcome at the EVC was considered *uncertain* and *difficult to guarantee*—a position that in no way suggests the EVC was likely to vote against the Merger.[172] In the Reply, Claimant describes the evidence in the same way: "The MHW, however, concluded based on internal assessments that, given the independence and track record of the EVC (notably, its recent vote against the similar SK Merger), it would be *difficult to* ***ensure*** *the approval of the Merger via the EVC*" (emphasis added).[173]

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[171] Claimant's Reply on Remitted Issue, ¶ 43 (quoting **Ex. C-488**, Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor **[RESP015896]**, 9 January 2017, p. 8).

[172] ROK's Submission on Remitted Issue, ¶¶ 119–125.

[173] Claimant's Reply on Remitted Issue, ¶ 50. In a later section of the Reply, Claimant adopts a different position, asserting that "[t]he record demonstrates that the MHW and NPS considered that the EVC *would oppose the Merger*" (emphasis added). *See* Claimant's Reply on Remitted Issue, ¶ 82(f). Claimant cites to two pieces of evidence: (1) Court testimony by a MHW official, who answered "Yes" to the following question in relation to the MHW's contemporaneous prediction that four members of the EVC had a disposition in favor of the Merger, four (including Mr. Cho) had a disposition against, and one was expected to abstain: "So, it seems it was difficult to secure the approval if it went to the Experts Voting Committee, correct?," **Ex. C-497**, Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court) **[RESP010896]**, 22 March 2017, pp. 26–27; and (2) a "statement report" to the Korean prosecutor, in which a Blue House official, who admitted to having had difficulty "accurately remember[ing] the situation at the time," is reported to have said that one or another person told him it would be difficult to obtain a favorable vote of the EVC "given that there were many members of the [EVC] who had opposing dispositions," **Ex. C-481**, Fourth Statement Report of Ki-nam Kim to the Special Prosecutor **[RESP020645]**, 4 January 2017, pp. 12–13. Neither piece of evidence supports the assertion that the MHW and NPS considered that the EVC "would oppose the Merger." Rather, both refer to the same underlying evidence the ROK examined in detail in its Submission, which shows that the MHW considered the outcome of an EVC decision uncertain and difficult to guarantee. *See* ROK's Submission on Remitted Issue, ¶¶ 119–125.

c. The NPS did not stand to "lose . . . an enormous amount of value from the Merger"

66. In its Submission, the ROK demonstrated that contemporaneous assessments of the Merger Ratio varied widely and that, independent of any pressure from MHW, the NPS had reasonable grounds to consider that potential short-term loss in value to the NPS's shareholdings as a result of the Merger Ratio would be more than outweighed by a combination of (1) expected long-term gains in shareholder value resulting from the Merger; and (2) avoidance of steep losses to the Fund's portfolio expected if the Merger were to fail.[174]

67. In its Reply, Claimant contends that none of the factors identified by the ROK as favoring approval of the Merger addresses "the simple fact that the NPS stood to lose—even by its own padded estimates—an enormous amount of value from the Merger."[175] Claimant also asserts—based on a misreading of the primary evidence—that the MHW and NPS "understood" that the NPS would "refuse" to support the Merger if the NPS Research Team's valuation materials were provided to the Investment Committee "without more,"[176] and that this was the reason the tainted synergy projection was prepared.[177] Claimant goes further and asserts—again incorrectly—that the Tribunal has "found" that CIO Hong directed the NPS Research Team to "fabricate a synergy effect *in order to neutralize the economic harm to the NPS that*, under its own Voting Guidelines, *would have required the NPS to vote against the Merger*" (emphasis added).[178] The implication of these assertions appears to be that it would not have been possible under the Voting Guidelines for the NPS to vote in favor of the Merger

[174] ROK's Submission on Remitted Issue, ¶¶ 88–105, 111–112. The ROK notes that the reference in footnote 116 to paragraph 86 of its Submission on the Remitted Issue should read "**Ex. R-127**, pp. 7–8, 12," rather than "**RLA-127**, pp. 7–8, 12."

[175] Claimant's Reply on Remitted Issue, ¶ 84.

[176] Claimant's Reply on Remitted Issue, ¶ 58 (quoting **Ex. C-506**, Transcript of phone calls between Team Leader [redacted] and Deputy Director Jin-ju Baek on 2 July 2015 around 5:52PM **[RESP016234]** ["[redacted]**/Baek Call Transcript**"], 25 April 2017).

[177] Claimant's Reply on Remitted Issue, ¶ 59.

[178] Claimant's Reply on Remitted Issue, ¶ 73 (citing **RLA-194**, Award, ¶¶ 286, 595–597).

without the tainted synergy projection. However, as demonstrated below, neither the findings of the Korean courts nor the underlying evidence supports Claimant's contentions, and the Tribunal has not made the findings that Claimant asserts.

(i) The findings of the Korean courts do not support Claimant's contentions

68. In support of its contention that the NPS stood to suffer economic harm as a result of the Merger Ratio, Claimant cites extensively to the decisions of the Korean courts in the Moon/Hong case and to paragraphs of the Award quoting verbatim from those decisions.[179] However, the Tribunal should note that at the appeal stage of that case, the Seoul High Court *vacated* the District Court's finding that the NPS had suffered a loss in shareholder value "generated by the disparity between the value of shares in case of Merger approval and the value of shares in case of nullification,"[180] and further *rejected* the prosecutor's theory that the NPS had suffered a loss corresponding to the difference between the value of its shareholdings (A) under the Merger Ratio and

[179] *See, e.g.*, Claimant's Reply on Remitted Issue, fns. 93, 95, 134, 135, 173 and accompanying text. At footnote 65 of the Reply (p. 18), Claimant notes that it has not adopted the ROK's corrections to certain phrases and passages in the Korean court judgments, submitted with the ROK's Submission. As a result, Claimant continues to rely on translations that are materially inaccurate. To give one example, Claimant quotes the Moon/Hong District Court Judgment as having found that CIO Hong "actively *induced*" the Investment Committee members to vote in favor of the Merger, Claimant's Reply on Remitted Issue, ¶ 64 (emphasis in original), when in fact the relevant term used by the court is "encouraged" rather than "induced." *See* **Ex. C-069**, Moon/Hong District Court Judgment, p. 17.

[180] **Ex. C-069**, Moon/Hong District Court Judgment, p. 18; **Ex. R-153**, Moon/Hong High Court Judgment, pp. 2, 67–69; Additional Judgments Annex, ¶ 10(vi). The ROK notes that page references to the Moon/Hong District Court Judgment in the Moon/Hong High Court Judgment (Exhibit R-153) do not always match the relevant page number in Exhibit C-069 because of pagination differences between the unredacted and redacted versions of the District Court Judgment.

(B) under an "appropriate" merger ratio (such as that computed by the NPS Research Team).[181]

69. Indeed, no Korean court has held that the NPS or any other SC&T shareholder suffered economic loss *as a result of the Merger or the Merger Ratio*. To the contrary, as noted above, in the JY Lee Unlawful Merger case, the Seoul Central District Court found that SC&T and its shareholders ultimately were better off in the Merger scenario than they would have been had the Merger not gone through, and cannot be said to have suffered loss from the Merger Ratio.[182] These findings were not disturbed on appeal.[183] (As to the Tribunal's finding at Award paragraph 931 that the Merger entailed a transfer of value (unquantified) from SC&T's shareholders to Cheil's shareholders, the ROK has already explained that such finding does not address how the NPS, in the counterfactual scenario, would have weighed any loss arising from such transfer of value against (a) expected long-term increases in shareholder value

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[181] **Ex. R-153**, Moon/Hong High Court Judgment, pp. 65–66. In doing so, the Seoul High Court rejected (i) the Prosecutor's modified primary charge, which had alleged that CIO Hong caused NPS a loss of at least KRW 138.7 billion, corresponding to the difference between a purportedly appropriate merger ratio and the Merger Ratio; (ii) the first alternative charge, which had alleged that CIO Hong caused NPS a loss of at least KRW 5 billion (the threshold for aggravated punishment) on the same basis; and (iii) in part, the second alternative charge, which had alleged that CIO Hong caused NPS an unquantifiable loss corresponding to the difference between a purportedly appropriate merger ratio and the Merger Ratio. The Seoul High Court ultimately upheld only the portion of the second alternative charge alleging that CIO Hong caused NPS an unquantifiable loss through the lost opportunity to try to obtain greater profit for the Fund through "active leveraging" of NPS's casting vote on the Merger. *See* **Ex. R-153**, Moon/Hong High Court Judgment, pp. 49–50, 61, 64–66. The loss was deemed unquantifiable because there was no objective basis on which to determine whether or to what extent such efforts (if any) would have yielded any additional profit to the Fund. **Ex. R-153**, Moon/Hong High Court Judgment, pp. 61, 65–66; **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 896–897; **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, p. 838.

[182] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 373–377, 889–898. *See also* **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14.

[183] The Seoul High Court dismissed all appeals against the relevant parts of the JY Lee Unlawful Merger District Court Judgment. *See* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 137–140, 834–835, 837–838.

to the Fund's portfolio as a result of the Merger; and (b) the losses to the Fund's portfolio expected to result from failure of the Merger.[184])

70. Claimant's repeated attacks on the integrity of the NPS Research Team's valuation and benchmark merger ratio calculations[185] are misdirected, for at least the following reasons:

a. The ROK does not rely (and never has relied) on the NPS Research Team's estimates as a reliable basis for valuing SC&T and Cheil at the time of the Merger announcement. Rather, the ROK's position has always been that the companies' public-traded market prices are the most reliable measure of fair market value.[186] The NPS Research Team's estimates, by contrast, are one among many different *subjective* valuations prepared at the time.[187]

b. More importantly, when deliberating on the Merger, the Investment Committee had access to a range of valuation and merger ratio materials, including the Deloitte Anjin Report, which had calculated a fair merger ratio range of 1:0.31 to 1:0.49—which encompasses the actual Merger Ratio.[188] As noted above, the Korean courts have held that,

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[184] ROK's Submission on Remitted Issue, ¶ 165.

[185] *E.g.*, Claimant's Reply on Remitted Issue, ¶¶ 57–59, 72.

[186] *See, e.g.*, ROK's Reply Post-Hearing Brief, ¶ 71; ROK's Post-Hearing Brief, ¶¶ 126, 171; ROK's Statement of Defence, 27 September 2019, ¶ 626(a); **RER-1**, First Dow Report, § III.B.

[187] The Korean courts have held that the NPS Research Team's benchmark merger ratio calculations do not provide a reliable, objective basis for determining a fair or neutral merger ratio. *See* **Ex. C-069**, Moon/Hong District Court Judgment, p. 69; **Ex. R-153**, Moon/Hong High Court Judgment, pp. 65–66.

[188] **Ex. R-386**, Deloitte, "Review Report of Merger Ratio Between Samsung C&T and Cheil Industries", 25 May 2015, p. 12. The report of the NPS's proxy adviser, KCGS, stated that, based on an analysis of comparable companies, the merger ratio should be at least 1:0.429, **Ex. C-402**, KCGS, "Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T" **[RESP000162]**, 3 July 2015, p. 33, which is within the range indicated by the Deloitte Anjin Report. *See also* **Ex. R-153**, Moon/Hong High Court Judgment, p. 20.

unlike the NPS Research Team's materials,[189] the Deloitte Anjin Report was prepared independently, by valuation professionals, and in accordance with generally applicable valuation standards.[190] As also noted, the Korean courts rejected the allegation that the Deloitte Anjin Report had been manipulated or fabricated.[191]

71. Moreover, neither the Korean court judgments nor the underlying evidence support Claimant's repeated assertion that the Voting Guidelines would have dictated a vote against the Merger in the counterfactual scenario because the NPS Research Team was projecting a "loss" to shareholder value from the Merger Ratio.[192] Claimant ignores that (a) rejection of the Merger was expected to cause *even greater losses* to the value of the Fund's portfolio;[193] and (b) the NPS was projecting long-term gains in shareholder value from the Merger, separate and apart from the tainted synergy projections.[194] The Korean courts have consistently affirmed that the Investment Committee in fact took such broader considerations into account,[195] and that it was justified in doing so.[196] It follows that a vote in favor of the Merger was compatible with the Voting Guidelines even in the absence of the tainted synergy projections.

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[189] **Ex. C-069**, Moon/Hong District Court Judgment, p. 69; **Ex. R-153**, Moon/Hong High Court Judgment, pp. 65–66; **Ex. R-020**, Case No. 2016GaHap510827, Seoul Central District Court ("**Merger Annulment Judgment**"), 19 October 2017, p. 37.

[190] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 602 ("[Deloitte Anjin] arrived at the results after reviewing and applying various valuation directions and methodologies while keeping in mind the stock prices of the two companies, without going against the accounting standards and practices related to valuation, based on market information as well as the materials provided by the company.").

[191] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 602, 725, 881.

[192] *See, e.g.*, Claimant's Reply on Remitted Issue, ¶¶ 73, 84.

[193] *See* ROK's Submission on Remitted Issue, ¶¶ 93–94 (and evidence cited therein).

[194] *See* ROK's Submission on Remitted Issue, ¶¶ 89–90, 95–98 (and evidence cited therein).

[195] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13; **Ex. R-020**, Merger Annulment Judgment, pp. 39–40.

[196] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 13; **Ex. R-020**, Merger Annulment Judgment, p. 40.

72. In short, the findings of the Korean courts do not at all support the contention that the net effect of the Merger on the Fund's portfolio would have been negative, let alone that the NPS stood to "lose . . . an enormous amount of value from the Merger."[197]

(ii) The underlying evidence does not support Claimant's contentions

73. After overstating the evidence of "manipulation" of the Research Team's merger ratio calculations, Claimant states the following:

> ***The MHW and NPS therefore understood*** that a focus on the Merger Ratio at the Investment Committee meeting would compel opposition to the Merger, and ***that if the NPS's then-current calculations of the neutral ratio were to be sent to the Committee without more, the NPS "will refuse" to support the Merger***.[198] (Emphasis added)

74. The quoted language (the NPS "will refuse") is from a transcript of a phone call between Mr. [redacted] of the NPS Research Team and Mr. Jin-ju Baek, a Deputy Director of the MHW's National Pension Fund Policy Division (Ex. C-506). However, Claimant has plainly misunderstood the meaning of the cited transcript. During the call, Mr. Baek did ***not*** say that *the NPS* will refuse *to support the Merger*. Rather, he said that, if the Research Team's materials were sent to the Investment Committee as they were (without an in-depth consideration of the "overall picture" of the Merger[199]), the Investment Committee might refer the matter to the EVC without first engaging in an in-depth discussion of the Merger (as it had done in the SK Merger case), and Mr. Baek's Director at the MHW ("our Director") had indicated that *the MHW* would refuse to accept *such a procedure* ("our Director said that, 'We will refuse,' if, if I do it like that").[200] Mr. Baek's point, as he reiterated later in the

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[197] Claimant's Reply on Remitted Issue, ¶ 84.

[198] Claimant's Reply on Remitted Issue, ¶ 58 (citing **Ex. C-506**, [redacted]/Baek Call Transcript).

[199] **Ex. C-506**, [redacted]/Baek Call Transcript, p. 7.

[200] **Ex. C-506**, [redacted]/Baek Call Transcript, p. 7.

call, was that the MHW "feel as though merger-related things right now have not been sufficiently examined by the Investment Management so far, so we feel like there's a need to do this a bit [more] thoroughly."[201] In short, Mr. Baek expressed that the MHW wanted the Investment Committee to have sufficient review materials to enable its members—as experts in fund management, shareholder value, and M&A-related matters—to deliberate on the substance of the Merger decision rather than simply referring such decision to the EVC, which lacked such expertise.[202]

75. By erroneously changing the subject of the "will refuse" language from a director of the MHW to "the NPS," Claimant has distorted the meaning of the evidence and invented a non-existent "understanding" by the MHW and the NPS concerning the likely voting behavior of the NPS in a counterfactual scenario without the tainted synergy projection.

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[201] **Ex. C-506**, [redacted]/Baek Call Transcript, p. 9.

[202] In relation to the comparative expertise of the EVC and Investment Committee, respectively, *see also, e.g.*, **Ex. C-524**, Transcript of Court Testimony of Jin-ju Baek (Moon/Hong Seoul High Court) **[RESP012738]**, 26 September 2017, p. 20; **Ex. C-499**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011118]**, 3 April 2017, pp. 6, 32, 40; **Ex. C-511**, Transcript of Court Testimony of Wan-seon Hong (Moon/Hong Seoul Central District Court) **[RESP021565]**, 17 May 2017, p. 113. Notably, the Moon/Hong courts held that the solution ultimately adopted by the NPS, which entailed having the Investment Committee engage in a substantive deliberation on the Merger pursuant to an open voting system that allowed for the matter to be referred to the EVC if no majority consensus was reached on any of five voting options, was an effort to *better adhere* to the Voting Guidelines. *See* **Ex. R-153**, Moon/Hong High Court Judgment, p. 45; **Ex. R-020**, Merger Annulment Judgment, p. 38. Claimant's assertion at paragraph 82(c) of the Reply that the Fund Operational Guidelines required the matter to be referred to the EVC because the EVC Chairman considered that the matter was "difficult" for the Investment Committee to decide is mistaken (and also relies on an incorrect translation, as the ROK has previously highlighted, *see* **RLA-194**, Award, ¶ 766 and fn. 1217). The decision to refer a voting decision to the EVC on grounds of difficulty is within the discretion of NPSIM. *See* **Ex. C-583**, [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level" **[RESP015145]**, p. 3 (reflecting MHW's contemporaneous understanding that pursuant to Fund Operational Guidelines, NPSIM "may request" a decision to be made by the EVC).

(iii) The Tribunal's findings in the Award do not support Claimant's contentions

76. Claimant compounds its error by asserting incorrectly that the Tribunal has already "found" that CIO Hong directed the NPS Research Team to "fabricate a synergy effect *in order to neutralize the economic harm to the NPS that*, under its own Voting Guidelines, *would have required the NPS to vote against the Merger*" (emphasis added).[203] An inspection of the cited paragraphs of the Award—286 and 595–597—reveals no finding by the Tribunal that the NPS stood to suffer economic harm from the Merger and would have been required by the Voting Guidelines to vote against it. Rather, the cited paragraphs merely recite certain findings of the District Court in the Moon/Hong case without making independent findings of fact. Notably, the parts of the District Court Judgment that are quoted in the Award include portions that *did not survive appeal*. For example, at paragraph 597 of the Award, the Tribunal quoted the District Court's Determination of Sentence that "the NPS suffered losses, such as no longer having the casting vote for the Merger, *and suffering a decrease in share value*" (emphasis added).[204] As discussed above, however, on appeal, the Seoul High Court *vacated* the District Court's finding that the NPS had suffered a decrease in share value,[205] and instead sentenced CIO Hong on the basis that his breach of professional duty "caus[ed] unquantifiable losses in potential profit that may have been attained with an active use of [the NPS]'s casting vote."[206]

77. Moreover, as also discussed above, the NPS was not (and, in the but-for scenario, would not have been) considering "loss" solely by reference to the Merger Ratio alone; rather, gains and losses to shareholder value for purposes

[203] Claimant's Reply on Remitted Issue, ¶ 73 (citing **RLA-194**, Award, ¶¶ 286, 595–597).

[204] **RLA-194**, Award, ¶ 597 (quoting **Ex. C-069**, Moon/Hong District Court Judgment, p. 67).

[205] **Ex. R-153**, Moon/Hong High Court Judgment, pp. 2, 67–69.

[206] **Ex. R-153**, Moon/Hong High Court Judgment, p. 72.

of application of the Voting Guidelines had to be considered by reference to a comparison of the value of the Fund's overall portfolio with and without the Merger.

78. The implication that Claimant seeks to draw from the Tribunal's quotations of the District Court's findings is therefore erroneous.

d. The Merger was expected to produce synergies

79. Claimant asserts that the Research Team was "directed to fabricate a Merger 'synergy effect' of 'roughly KRW 2 trillion' to plug the anticipated KRW 138.8 billion of losses for the NPS and justify the Merger Ratio."[207] As it made clear in its Submission, the ROK does not contest that the tainted synergy projection was reverse-engineered in an arbitrary manner.[208] To the extent that Claimant is suggesting, however, that the NPS Research Team invented a "synergy effect" in circumstances where the NPS did not honestly believe that the Merger would produce synergies, such a suggestion would be contrary to the evidence and to the findings of the Korean courts. As the ROK has demonstrated, there is ample evidence that the NPS, including members of the Investment Committee, believed that the Merger would produce synergy effects in addition to other important benefits to shareholder value (and also that a failure of the Merger would pose serious risks to the value of the Fund's portfolio of Samsung Group holdings).[209] The challenge the NPS Research Team faced was that quantifying projected synergies is difficult—and it was this difficulty that was overcome by the (wrongful) expedient of reverse engineering the numbers.[210]

80. The NPS Research Team's projection of a KRW 2.1 trillion synergy effect is tainted because it was derived in an arbitrary, reverse-engineered manner, *not* because the size of the projected synergy effect was considered problematic.

[207] Claimant's Reply on Remitted Issue, ¶ 59.

[208] ROK's Submission on Remitted Issue, ¶ 104(b).

[209] ROK's Submission on Remitted Issue, ¶¶ 89–90, 94–98, 104(a).

[210] *See* ROK's Submission on Remitted Issue, ¶ 104(b) and evidence cited therein.

The clearest evidence of this is that, as noted above, the Korean courts have held in the JY Lee Unlawful Merger case that the Samsung Group's announced Merger synergy target of KRW 6 trillion—three times the size of the tainted synergy projection—had been prepared in a diligent manner and cannot be said to have been arbitrary, fabricated, or false (especially given that anyone encountering such figures would understand them to be uncertain projections and forecasts).[211]

81. The implication of the foregoing is that, in constructing the counterfactual for purposes of factual causation, the relevant question is *not* (A) how the NPS would have voted on the Merger in the absence of any expectation of synergy effect at all, but rather (B) how the NPS would have voted if it had considered synergy effects in the absence of interference and pressure from the MHW. As the ROK has demonstrated, the answer is that the NPS likely would have voted in favor of the Merger, as did many other institutional investors (both domestic and foreign).[212]

e. <u>The tainted synergy projection was not a decisive factor in the Investment Committee's decision</u>

82. Claimant asserts repeatedly in the Reply, as it did in the Original Proceedings, that "the Investment Committee members voted in favor of the Merger *because of the fabricated synergy effect*" (emphasis in original),[213] and that "[a] determinative number of NPS Investment Committee members have confirmed that they *would not have supported the Merger but for the forged synergy effect calculation* with which they were presented" (emphasis added).[214] The

[211] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 599–602, 634, 724–725, 877. *See also* **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 294–295.

[212] ROK's Submission on Remitted Issue, § III.B.

[213] Claimant's Reply on Remitted Issue, ¶ 85.

[214] Claimant's Reply on Remitted Issue, ¶ 88.

ROK has already demonstrated—both in the Original Proceedings and in these Remitted Proceedings—that such assertions distort the evidence.[215]

83. Several points bear emphasis:

a. Claimant puts great weight on a truncated quotation from the minutes of the Investment Committee's 10 July 2015 meeting, asserting: "The Investment Committee meeting minutes record that the Committee decided to '*agree to the merger in view of its synergy effect.*'"[216] The full quotation from the minutes is: "Based on the voting results on the agenda, it is deemed that the merger ratio has undergone due procedures, and we agree to the merger in view of the synergy effect, *etc.*"[217] Claimant's omission of the word "etc." (*deung*, in Korean, which can also be translated as "inter alia") is material, as that word is used in Korean writing to connote that there are additional items that have not been expressly listed. The minutes, in other words, state that the Committee agreed to the Merger in view of the synergy effect *among other factors*. Moreover, there is no basis to infer that this reference to "synergy effect" was meant to convey the tainted synergy projection exclusively, as opposed to synergies in the larger sense of beneficial effects of the Merger.[218]

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215 ROK's Submission on Remitted Issue, ¶¶ 136–139 and evidence cited therein. *See also* ROK's Opening Presentation, Demonstrative C (systematically demonstrating that Claimant's Opening Presentation, slide 68, had distorted the evidence).

216 Claimant's Reply on Remitted Issue, ¶ 63 (quoting **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, p. 16) (emphasis in original). *See also* Claimant's Reply on Remitted Issue, ¶ 85.

217 **Ex. R-128**, NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, p. 16 (emphasis added).

218 *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011343]**, 10 April 2017 ["**Transcript of Court Testimony of** [redacted]"], p. 54 (testimony of Investment Committee member [redacted] confirming that there was a general consensus within the NPS that the Merger would facilitate the Samsung Group's transition from a cross-shareholding system to a holding company system, and that this would result in "a synergy in the large sense").

b. Claimant asserts that the ROK "still has no answer to" slide 68 of Claimant's Opening Presentation at the Geneva Hearing, which purported to show "[t]he number of Investment Committee members who confirmed that but for the fabricated synergy effect calculation they would not have voted in favor of the Merger."[219] But the ROK already provided an answer to that slide (Demonstrative C to the ROK's Opening Presentation), which systematically dismantled the assertions made therein with reference to verbatim quotations from the record.[220]

c. It is Claimant that has no answer to the express factual finding of the Korean courts that the tainted synergy projection was *not* a decisive factor in the Investment Committee's decision.[221] The courts reached that finding after a careful review and assessment of a robust evidentiary record that included much of the evidence on which Claimant relies.[222] Among other points, the courts found that (i) as experts in investment matters, the 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 10 July 2015 meeting[223]—and they did not rely on the tainted synergy projection as the only way to offset losses from the Merger Ratio; and (ii) the Investment Committee members comprehensively considered a range of factors beyond the synergy projections, including changes in governance structure, the impact on share prices of relevant securities, the impact on the stock market and broader economy, and the

[219] Claimant's Reply on Remitted Issue, ¶ 66.

[220] ROK's Opening Presentation, Demonstrative C.

[221] *See* ROK's Submission on Remitted Issue, ¶ 138 and Korean court findings discussed therein (**Ex. R-389**, Shareholder Claims District Court Judgment, p. 13 and **Ex. R-020**, Merger Annulment Judgment, pp. 36–40).

[222] *See* ROK's Submission on Remitted Issue, ¶ 138 and Korean court findings discussed therein (**Ex. R-389**, Shareholder Claims District Court Judgment and **Ex. R-020**, Merger Annulment Judgment).

[223] **Ex. R-020**, Merger Annulment Judgment, p. 39.

consequences for the overall Fund portfolio if the Merger were to fail.[224] Having relied heavily on other findings of the Korean courts, Claimant cannot now ignore or wish away findings of those same courts that undermine its case on the Remitted Issue.

d. The testimony of the Investment Committee members in the Moon/Hong proceedings fully supports the above findings. To give an example, Claimant asserts that Investment Committee member Mr. [redacted] "testified in court that his vote in favor of the Merger *was decisively based on* his reliance on the synergy effect presented by the NPS Research Team" (emphasis added).[225] But compare that assertion to the following excerpt from Mr. [redacted]'s testimony, which shows that his vote in favor of the Merger in fact was based predominantly on factors other than the tainted synergy projection:

> **Q.** What would be the reason that you voted in favor of the Merger despite the existence of various negative factors?
>
> **A. The 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, and if the situation required that this future item be identified by pooling the efforts of the entire group through **a Merger**, then such factors **would provide positive in the Fund's long-term shareholder value**. Conversely, **if 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**

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

[225] Claimant's Submission on Remitted Issue, ¶ 65(c) (citing **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 8).

growth momentum in the long-term, and I thought that was a very important issue.[226] (Emphasis added)

e. To give another example, Claimant refers to two statements that Investment Committee member Mr. [redacted] is reported to have made to Korean prosecutors, without mentioning that Mr. [redacted] testified in court (under oath) that the prosecutors' summary of his statements was materially incomplete.[227] In his court testimony, Mr. [redacted] clarified that in voting for the Merger, he had taken into account "many other factors that were more important than [the tainted synergy projection]":

> **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

[226] **Ex. C-500**, Transcript of Court Testimony of [redacted] (ROK's expanded translation), p. 53. The ROK excerpted this part of Mr. [redacted]'s testimony in its Demonstrative C, and yet Claimant continues to ignore it. *See* ROK's Opening Presentation, Demonstrative C, p. 2. Numerous other portions of Mr. [redacted]'s testimony support the ROK's positions on the Remitted Issue. *See, e.g.*, **Ex. C-500**, Transcript of Court Testimony of [redacted], p. 23 (confirming that decline in share prices of Samsung Group affiliates "would inevitably lead to fatal losses for NPS"), p. 24 (confirming that if Merger did not go through, there was a risk of a decline in share prices of entire Samsung Group; and confirming that another "important basis for the decision" in favor of Merger was consideration of impact on Samsung Group holdings, impact on stock market, the economy, and the NPS's KRW 500 trillion asset portfolio), p. 25 (confirming that he "voted with careful consideration of the impact on all shares of Samsung Group affiliates held by the NPS in the event of both the merger's success and its failure"; and agreeing that loss to NPS from failure of Merger could have been substantially larger than loss to NPS from Merger Ratio), 37 (confirming he voted in favor of Merger based on his own expert judgment regarding NPS's profitability and without any pressure from CIO Hong or anyone else), 54 (confirming "there was a general consensus" that corporate governance changes flowing from Merger would result in "a synergy in the large sense").

[227] **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 37–38.

of the increase in the NPS's return value and shareholder value, and the like?

A. Yes, as I said, there are 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.**

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 . . . .

Q. So not everything that you testified on was recorded?

A. As I mentioned, it's not entirely complete; a few parts are missing.[228] (Emphasis added)

f. It is true, as the ROK has always acknowledged,[229] that several members of the Investment Committee gave statements or testimony to the effect that, if they had learned that the Research Team's synergy projection had been fabricated and was without basis, that fact would have impacted their vote. But, as the ROK has explained,[230] that is an entirely different question to the question posed by the counterfactual analysis,

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[228] **Ex. C-502**, Transcript of Court Testimony of [redacted], pp. 37–38.

[229] ROK's Submission on Remitted Issue, ¶¶ 55(e), 136.

[230] ROK's Submission on Remitted Issue, ¶¶ 55(e), 137.

which focuses on how the NPS likely would have voted in a scenario in which it had been left free to evaluate the synergy effect and other effects of the Merger (and to compare those to the effects on the Fund's portfolio if the Merger were to fail) without interference by the MHW. In that scenario, the relevant decision-makers would not have been reacting to learning that their colleagues had fabricated or reverse-engineered any part of the analysis.

84. Put simply, Claimant has not identified any basis or reason for the Tribunal to disagree with the express finding by Korean courts that the tainted synergy projection was not a decisive factor in the Investment Committee's decision.

f. Claimant has no answer to the relevance of the voting behavior of institutional investors unaffected by the Blue House Measures

85. In its Submission, the ROK demonstrated that numerous sophisticated institutional investors—including non-Korean investors—voted for the Merger in the absence of any unlawful interference. In its Reply, Claimant labels this as a "failed argument"—without pointing to any finding or ruling by the Tribunal to support such characterization.[231] Claimant's only substantive response is to suggest that certain domestic investors may have "followed the lead of the NPS," although no evidence is offered to prove that this in fact happened.[232] Significantly, Claimant has no answer to the fact that a number of sophisticated foreign investors, including large sovereign wealth funds, voted for the Merger in the absence of government interference and without having had any reason to "follow the lead" of the NPS. The reality is: If the Merger were as self-evidently harmful to SC&T and its shareholders as Claimant contends, these sophisticated investors would not have voted as they did.

[231] Claimant's Reply on Remitted Issue, ¶ 87.

[232] Claimant's Reply on Remitted Issue, ¶ 87(a).

86. Claimant's reliance on the recommendations of "major proxy advisors"[233] fails for similar reasons: many sophisticated domestic and international institutional investors voted for the Merger notwithstanding such recommendations, and the voting pattern of such institutional investors is far more probative of the NPS's likely voting behavior in the Treaty-compliant counterfactual scenario than is the recommendations of proxy advisors. Moreover, Claimant's allegation that the views in favor of the Merger that were prevalent amongst Korean securities analysts at the time may have been improperly influenced by the Samsung Group was examined and rejected in the JY Lee Unlawful Merger Judgments, as noted above.[234]

g. Claimant's approach to the evidence requires caution

87. As demonstrated above, Claimant has taken significant liberties with its citation to evidence and authority in these Remitted Proceedings.

88. Another illustrative example can be found at paragraph 50 of the Reply, where Claimant mischaracterizes the content of certain MHW documents by quoting from them selectively and in a misleading way. Claimant asserts: "The MHW described the Investment Committee as 'fit for purpose' *because it could be subjected to greater MHW pressure and influence*" (emphasis added).[235] However, when one reads Exhibits C-583 and C-419, which are the sources of the phrase "fit for purpose," one finds that the reason the MHW considered the Investment Committee as "fit for purpose" is the opposite of what Claimant asserts. Both documents state that a decision by the Investment Committee will "[a]llow for expert decision-making that is fit for purpose *from the perspective of the Fund's profitability*" (emphasis added).[236] The Investment Committee's

[233] Claimant's Reply on Remitted Issue, ¶ 86.

[234] *See* **Section III.C.2** above.

[235] Claimant's Reply on Remitted Issue, ¶ 50.

[236] **Ex. C-583**, [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level" **[RESP015145]**, p. 1; **Ex. C-419**, [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee" **[RESP010084]**, 8 July 2015, p. 1.

members were experts in management of the Fund's assets and were better suited to decide questions of long-term profitability of the Fund than the EVC members, who lacked expertise in finance, stock performance, and M&A, etc.[237]

89. Claimant's approach to the evidence is regrettable. It means that the Tribunal cannot safely rely on any characterization by Claimant of the evidence—even direct quotations have been used in a misleading way. It is necessary in each case to look at the cited evidence directly.

D. Conclusion on factual causation

90. For the foregoing reasons and those set out in detail in the ROK's Submission on Remitted Issue, Claimant has failed to meet its burden to show that the Blue House Measures were a cause in fact of the NPS Vote.

IV. CLAIMANT HAS NOT ESTABLISHED LEGAL CAUSATION

91. In its Submission, the ROK demonstrated that Claimant has failed to establish legal causation with respect to the Blue House Measures.[238] In the Reply, Claimant makes essentially three points on legal causation: (1) first, it purports to disagree with the ROK's position that the test for legal causation adopted by

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[237] **Ex. R-291**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, pp. 36–37 ("**Q**: When comparing the Expert Voting Committee and the Investment Committee, which of the two do you consider having greater expertise when it comes to exercising voting rights in relation to investments or mergers? **A**: I believe the members of the Investment Committee possess greater expertise in asset management. **Q**: Mergers are also closely related to asset management, aren't they? **A**: Yes. . . . **Q.** It is true that the members of the Special Committee, such as professors and lawyers, have outstanding academic knowledge in their respective fields, but they do not have prolonged experience or expertise in large-scale investments in shares, bonds and alternative instruments as well as the analysis required for such matters themselves, unlike the members of the Investment Committee, wouldn't you say? **A.** Yes.); **Ex. R-292**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, p. 28. Indeed, one of the learnings that had emerged from the EVC's SK Merger decision, which was widely criticized, was that the EVC was not well suited to deciding on M&A issues. *See* **Ex. C-518**, Transcript of Court Testimony of [redacted] (JY Lee Seoul Central District Court) **[RESP013167]**, 27 June 2017, pp. 24–25; **Ex. R-290**, Transcript of Court Testimony of [redacted] pp. 19–20; **Ex. C-499**, Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court) **[RESP011118]**, 3 April 2017, p. 32.

[238] ROK's Submission on Remitted Issue, § IV.

the Tribunal in the Award is not satisfied by a finding of foreseeability (though the reason why Claimant makes this argument is unclear, given that it then concedes that legal causation requires not only that the harm was foreseeable, but also that it was "not too remote" and was "the natural consequence of the wrongful act");[239] (2) it argues—by reference (it says) to factual findings in the Award—that the Blue House Measures proximately caused the NPS Vote and Claimant's loss;[240] and (3) it contends that the Additional Judgments are "irrelevant to legal causation."[241] Below, the ROK addresses these points in turn.[242]

A. As Claimant appears to concede, legal causation is not established through a showing of foreseeability alone

92. In Section IV.A of its Reply, Claimant attempts to make good on its assertion that "the Tribunal has already held . . . that foreseeability is relevant" to legal causation,[243] and disputes the ROK's observation that "the Tribunal did not hold that the test for legal causation is satisfied by foreseeability and did not apply a foreseeability test."[244] But Claimant fails at what it sets out to do; its discussion at Section IV.A merely confirms the ROK's position that foreseeability was absent from the Tribunal's discussion of legal causation in the Award. Moreover, Claimant itself endorses a three-part cumulative test for legal causation, requiring a showing of (i) foreseeability, (ii) proximity/directness, *and* (iii) the injury being "the natural consequence" of the breach.[245]

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[239] Claimant's Reply on Remitted Issue, § IV.A (especially ¶ 111).

[240] Claimant's Reply on Remitted Issue, ¶¶ 112–126.

[241] Claimant's Reply on Remitted Issue, ¶¶ 127–129.

[242] Claimant also includes within Section IV of its Reply an argument concerning the ROK's alternative loss-of-chance argument. Claimant's Reply on Remitted Issue, § IV.B.4. That issue is addressed separately below, in **Section V** below.

[243] Claimant's Reply on Remitted Issue, ¶ 104.

[244] *See* Claimant's Reply on Remitted Issue, ¶ 106 (quoting ROK's Submission on Remitted Issue, ¶ 173(a)).

[245] *See* Claimant's Reply on Remitted Issue, ¶ 111.

93. To recall, the Tribunal set out the applicable test for legal causation at paragraph 815 of the Award. It observed that "[t]he required link [between the alleged breach and the claimed loss or damage] may be determined in terms of whether the claimed loss or damage is a 'direct' result of the alleged breach, or whether it is 'proximately' caused by the alleged breach."[246] The English Court did not set aside this paragraph, noting that it is "concerned with the general legal test for causation" and is "relevant to the issues which are remitted."[247]

94. The ROK in its Submission noted that the Tribunal did not hold that legal causation may be satisfied through foreseeability alone and did not apply a foreseeability test. Claimant describes the ROK's observation as a "strained and incorrect reading of one paragraph of the Award."[248] But Claimant does not substantiate its argument. The ROK's position can hardly be described as strained or incorrect, in circumstances where (i) the Tribunal indisputably did not mention foreseeability in discussing legal causation, (ii) the Tribunal did not do so *despite* Claimant's arguments in the Original Proceedings that foreseeability was relevant to legal causation,[249] and (iii) the Tribunal *did* refer to foreseeability in other sections of the Award, as further discussed below.

95. Claimant claims that "numerous tribunals" have "made clear" that "proximity and foreseeability are related concepts"[250] because (quoting the award by majority in *Lemire v. Ukraine*) "a chain of causality must be deemed proximate[] if the wrongdoer could have foreseen that[,] through successive links[,] the irregular acts finally would lead to the damage."[251] The ROK makes the following observations.

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[246] **RLA-194**, Award, ¶ 815.

[247] **CLA-227**, Ruling, ¶ 5(l)(i).

[248] Claimant's Reply on Remitted Issue, ¶ 106.

[249] *See* Claimant's Reply, ¶¶ 528–531; Claimant's First Post-Hearing Brief, ¶¶ 179–180; Claimant's Reply Post-Hearing Brief, ¶ 52.

[250] Claimant's Reply on Remitted Issue, ¶ 107.

[251] Claimant's Reply on Remitted Issue, ¶ 107.

a. It is not clear which "numerous tribunals" Claimant is referring to, as it only refers to the awards in *Lemire* and *Kardassopoulos v. Georgia*.[252]

b. The *Kardassopoulos* award simply does not support Claimant's abovementioned position and it is not clear why Claimant refers to this authority.

c. The *Lemire* award (issued by majority over a lengthy dissent[253]) is thus the only case cited by Claimant to support its position that foreseeability should be equated with what the tribunal in *Lemire* referred to as proximity. It is unclear why Claimant considers this assists its position, however, given that other authorities stress a requirement that the loss be sufficiently direct;[254] and Claimant itself has endorsed a test that involves three separate (cumulative) elements: foreseeability, proximity/directness, *and* "natural consequence."[255]

96. Claimant notes that the Tribunal referred to foreseeability elsewhere in the Award (namely, in the section of the Award discussing whether the Treaty's "relating to" requirement was satisfied).[256] However, as noted above, the fact that the Tribunal referred to foreseeability in *another* part of the Award—but chose not to do so in the context of legal causation—*undermines*, rather than supports, Claimant's position.

97. In any event, as noted above, Claimant confirms at paragraph 111 of its Reply that its case on legal causation has never relied solely on foreseeability, and that its position instead has always been that legal causation requires

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[252] *See* Claimant's Reply on Remitted Issue, ¶ 107, fn. 232. *See also id.*, ¶ 107 (referring to an approach "routinely taken by other tribunals").

[253] *See* **RLA-056**, *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶¶ 32–33 (referring to "lengthy separate dissenting opinion" of one tribunal member and noting that the majority appended footnotes throughout the award responding to such separate opinion).

[254] *See* discussion at ¶ 98 below (and authorities cited therein).

[255] Claimant's Reply on Remitted Issue, ¶ 111.

[256] *See* Claimant's Reply on Remitted Issue, ¶ 108 (quoting **RLA-194**, Award, ¶ 360).

satisfaction of *three* elements: the harm must have been (1) foreseeable; (2) not too remote; *and* (3) the natural consequence of the wrongful act.[257] Claimant asserts further that such a cumulative, three-pronged test is "consistent with [the test] set out in the ILC's Articles on State Responsibility and the United States' Non-Disputing Party Submission."[258] It thus appears that the Parties are in agreement that the element of proximity/directness is separate from, and *not* satisfied by, a showing of foreseeability.

98. It should also be noted that the Tribunal's approach of referring to a requirement of directness is in line with ICJ jurisprudence. In *Bosnian Genocide*, the Court required a "sufficiently direct and certain causal nexus,"[259] an approach also adopted in *Armed Activities in the Congo*,[260] *Costa Rica v. Nicaragua*,[261] and *Diallo*.[262]

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[257] Claimant's Reply on Remitted Issue, ¶ 111. Claimant quotes language from paragraph 504 of its Statement of Reply and Defense to Preliminary Objections dated 17 July 2020 ("**Statement of Reply**"), which the Tribunal reproduced at paragraph 707 of the Award. The relevant sentence in Claimant's Statement of Reply reads: "With respect to legal causation, international law requires that the injury falls within the scope of injury that can, as a matter of law, result from the wrongful act, namely, injury that is [1] foreseeable, [2] not too remote, and [3] is the natural consequence of the wrongful act—referred to as 'proximate' causation" (internal numbering added). In support of this sentence, Claimant in its Statement of Reply cited inter alia to paragraphs 10–11 of the United States' Non-Disputing Party Submission, where the United States noted: "[A]ny loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. Injuries that are not sufficiently 'direct,' 'foreseeable,' or 'proximate' may not, consistent with applicable rules of international law, be considered when calculating a damage award."

[258] Claimant's Reply on Remitted Issue, ¶ 111.

[259] **CLA-024**, Bosnian Genocide, ¶ 462.

[260] **CLA-215**, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment (Reparations), ICJ Rep 2022, ¶ 93.

[261] **RLA-225**, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, ICJ, Judgment on Compensation, 2 February 2018, ¶ 32.

[262] **RLA-226**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment on Compensation, 19 June 2012, ¶ 14.

B. Claimant has not established a direct and proximate causal chain connecting the Blue House Measures to Claimant's loss

99. In Section IV.B of its Reply, Claimant seeks to advance its position that "[t]he causal chain between the ROK's breaches and EALP's loss is proximate, unbroken and foreseeable."[263] As demonstrated below, Claimant fails to make good on this proposition.

100. At paragraph 112, Claimant sets out five findings in the Award that, it claims, "establish that the causal chain between the unlawful conduct of the President, Minister Moon or the MHW was the proximate cause of EALP's loss."[264] These findings do not establish legal causation in relation to the Blue House Measures.

a. The findings relied on at (a) to (c)[265] are (again) paragraphs 602 and 623 of the Award. As discussed above,[266] these findings were made in the context of determining liability and do not address, let alone establish, that causation has been established—with respect to either particular links in the asserted causal chain or the causal chain in its entirety. Moreover, the findings are expressly stated to reflect the Tribunal's recitation of the findings of the Korean courts in the Moon/Hong case—without the benefit of the Additional Judgments.[267] However, as noted above, in the Moon/Hong case, the Seoul High Court *vacated* the District Court's finding that CIO Hong's conduct had caused the NPS to suffer

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[263] Claimant's Reply on Remitted Issue, § IV.B (section heading).

[264] Claimant's Reply on Remitted Issue, ¶ 112.

[265] *See* Claimant's Reply on Remitted Issue, ¶ 112(a)–(c) (citing **RLA-194**, Award, ¶¶ 602(a), 602(b), 623).

[266] *See* ¶¶ 56–57 above.

[267] Claimant's quotation of these paragraphs, at paragraph 112 of the Reply, omits language showing that the findings described therein are premised on findings of the Korean courts, as understood by the Tribunal at the time of the Award based on the then-existing record. *Compare* Claimant's Reply on Remitted Issue, ¶ 112 *with* **RLA-194**, Award, ¶¶ 602 ("The factual findings of the Seoul Central District Court and the Seoul High Court, and the key supporting evidence relied upon by the Courts, therefore establish that . . . ."), 623 ("[A]s the Korean courts have determined . . . .").

a decrease in share value,[268] and the Moon/Hong Judgments do not otherwise examine matters from the perspective of causation between (A) the acts of Moon or Hong and (B) any asserted loss in share value by SC&T's shareholders, nor do they encompass findings necessary to address the elements of such an inquiry.[269] By contrast, the Korean courts did just that in the Shareholder Claims Judgments, which were issued *in light of* the existing Moon/Hong Judgments, and ultimately found that causation was not established.[270] Given that the Korean courts in the Shareholder Claims Judgments were dealing with the types of causation questions that now arise before the Tribunal, their factual findings and reasoning are worthy of consideration.

b. Findings (d) and (e) relate to the downstream *consequences* of the NPS Vote.[271] Of course, the causal analysis must now encompass the entire chain of causation alleged to run from the Blue House Measures, through the NPS Vote, and through the Merger Vote, to Claimant's loss.

101. At paragraphs 113 and 114, Claimant makes a series of factual points, principally addressing foreseeability of harm and an allegation of intentional breach.

a. Claimant's repeated references to foreseeability do not assist its case, given that the Tribunal did *not* hold that foreseeability is the relevant test for legal causation. Moreover, even on Claimant's own test for legal causation, foreseeability is only one of three cumulative elements that must be established (along with remoteness/directedness and the injury being the natural consequence of the wrongful act).[272]

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[268] **Ex. R-153**, Moon/Hong High Court Judgment, pp. 2, 67–69.

[269] *See* ¶¶ 56–57 above.

[270] *See* ROK's Submission on Remitted Issue, ¶¶ 183–184.

[271] *See* Claimant's Reply on Remitted Issue, ¶¶ 112(d)–(e) (citing **RLA-194**, Award, ¶¶ 819–820, 821).

[272] *See* Claimant's Reply on Remitted Issue, ¶ 111.

b. At paragraph 114, Claimant asserts that "the Tribunal . . . concluded that *EALP's loss* as a result of the conduct of the Blue House, Minister Moon and the MHW was both foreseeable and foreseen" (emphasis added; other emphasis omitted). But the Tribunal's actual finding—made in the different context of the Treaty's "relating to" requirement—was different. The Tribunal held: "In the circumstances of the present case, this ['relating to'] test is clearly met. Not only was *the effect of the Respondent's intervention in the NPS's vote on the Claimant's investment* reasonably foreseeable at the time the intervention occurred; as a matter of fact, the Respondent foresaw at the time that *the Claimant's investment would be adversely affected by the intervention*, as it was very much a matter in the public domain, and well known to the Blue House, the MHW, and the NPS, that the Claimant opposed the Merger" (emphasis added).[273] The nature of the foreseen "adverse effect" on Claimant's investment is not elaborated, beyond that the Merger was something Claimant opposed. There is no evidence the ROK *agreed* with Claimant's view that the Merger would cause loss or damage to SC&T's shareholders, and there is no finding by the Tribunal that the ROK contemplated or intended to cause economic loss to Claimant, much less the specific loss for which compensation was ultimately awarded by the Tribunal in the Award (which arose from post-Merger movements in the SC&T stock price).

c. As for Claimant's allegations of a specific "targeting" of Claimant[274] and of an intention to cause Claimant the loss found by the Tribunal in the Award:[275] the Tribunal has (rightly) made no finding that the breach constituted by the Blue House Measures involved "targeting" Claimant

[273] *Compare* Claimant's Reply on Remitted Issue, ¶ 114 *with* **RLA-194**, Award, ¶ 360.

[274] Claimant's Reply on Remitted Issue, ¶ 113(c) (alleging "specific targeting of EALP").

[275] Claimant's Reply on Remitted Issue, ¶ 114 (alleging that "EALP's loss . . . was intended or at least assumed").

or was done with the intention of harming Claimant. There is no basis to either such allegation and both are denied. The fact that, as the Tribunal found, the Blue House was aware of Claimant's opposition to the Merger and foresaw that approval of the Merger would be adverse to Claimant given its avowed opposition to the Merger,[276] does not mean that the Blue House Measures were undertaken with the intention of causing Claimant loss—much less with the intention of causing the specific loss that the Tribunal found Claimant to have incurred. There is thus no basis for a finding of breach with the intention of harm. This may be why Claimant now pleads in the alternative that its loss was "intended *or at least assumed by the ROK*" (emphasis added).[277] Even that lower assertion is not made out and would not in any event be sufficient for purposes of Claimant's own test for legal causation.

102. At paragraphs 115 to 120, Claimant responds to the ROK's submissions about the impact of the Set-Aside Judgment on the Tribunal's findings.

a. At paragraph 118, Claimant engages in a red herring, by contending that "[t]he ROK is wrong to argue that all of the Tribunal's findings on legal causation should be ignored because they start from the assumption that the NPS's conduct was attributable to the ROK."[278] The ROK has not argued that all of the Tribunal's findings on legal causation should be ignored, and indeed accepts that the Tribunal has already set out a test to apply for legal causation.[279]

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[276] **RLA-194**, Award, ¶¶ 359–361.

[277] Claimant's Reply on Remitted Issue, ¶ 114.

[278] Claimant's Reply on Remitted Issue, ¶ 118.

[279] *See* ROK's Submission on Remitted Issue, ¶¶ 46 (accepting that paragraph 815 of the Award sets out the applicable legal test), 172–173 (applying and relying on the framework set out at paragraph 815 of the Award as the governing standard for legal causation), 181 (identifying only the Tribunal's specific finding at paragraph 821 of the Award—which was expressly premised on NPS attribution, and was set aside—as no longer available, and arguing that "the question of legal causation now needs to be asked **by reference to the Blue House Measures alone**" (emphasis added)).

b. At paragraph 120, Claimant emphasizes that findings as to the connection between the NPS Vote and Claimant's loss were not set aside. There is no dispute about that. However, the conclusion which Claimant draws is not correct. Claimant asserts that, in light of such findings, "what falls to be confirmed now is whether the unlawful conduct of the President, the Minister of Health and Welfare, and the MHW was the proximate cause of the NPS's vote on the Merger."[280] That is not the relevant question. As the Tribunal acknowledged in the Award, the Treaty's wording confirms that causation must be established *in relation to the breach*.[281] The relevant question in respect of legal causation is thus whether the Blue House Measures were the "proximate cause" of Claimant's loss. A claimant cannot establish legal causation in relation to a specific measure by showing that the breach was the proximate cause of A, and A was the proximate cause of B, and B was the proximate cause of loss. Instead, the claimant must show that the breach itself was the proximate cause of loss. In other words, proximity must be established with respect to the entire chain of alleged causation, from the Blue House Measures to Claimant's loss.

103. At paragraph 121, Claimant states that a State does not automatically avoid responsibility because the causal chain involved acts by third parties.[282] The ROK has not argued otherwise. Rather, the ROK's position is that the asserted causal chain between the Blue House Measures and Claimant's loss—traversing the sequential decision-making of numerous individuals and

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[280] Claimant's Reply on Remitted Issue, ¶ 120.

[281] *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)).

[282] Claimant's Reply on Remitted Issue, ¶ 121 (*CME v. Czech Republic* and the *Bosnian Genocide* case).

institutions, each with an obligation to exercise their judgment—is too long, too attenuated, and too aleatory to satisfy the requirement of legal causation.

104. At paragraph 122, Claimant submits that the causal chain in this case is "not especially long" and that "its length did not prevent the Tribunal from finding that causation had clearly been established."[283] Of course, the Tribunal previously made a causation finding only in relation to the NPS's conduct, whereas the question that arises now is whether there is a chain of causation between the Blue House Measures and the loss which the Tribunal held to be established. It is therefore not correct for Claimant to argue that the Tribunal had already found causation to be established in respect of the causal chain which the Claimant must now establish.

105. Also at paragraph 122, Claimant relies on a passage from a 1923 decision of the US-German Mixed Commission (as quoted in the *Lemire* tribunal's 2011 award). But the decision does not assist Claimant, as it sets a particularly high standard for demonstrating legal causation: "the loss [must] be **clearly**, **unmistakably**, and **definitively** traced, **link by link**, to [the State's wrongful] act" (emphasis added).[284] Claimant does not even attempt to meet this standard in respect of the asserted causal chain between the Blue House Measures and the loss identified in the Award. For the reasons given in the ROK's Submission[285] and this Rejoinder, the standard is not met here.

106. At paragraph 123, Claimant asserts that, in the present case, "there were three links in the causal chain that the Tribunal has already had no difficulty contemplating: (i) the conduct of the President, the Minister of Health and Welfare, and the MHW in causing the NPS to vote in favor of the Merger;

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[283] Claimant's Reply on Remitted Issue, ¶ 122.

[284] **RLA-056**, *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶ 166 (quoting **RLA-002**, *Administrative Decision No. II*, 7 RIAA, 1 November 1923). *See also* **RLA-056**, *Joseph Charles Lemire v Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶ 166 (noting that "the victim must prove that the chain of events is neither too remote nor too aleatory").

[285] *See* Claimant's Submission on Remitted Issue, § IV.

(ii) the NPS, which held the casting vote on the Merger, causing the Merger to be approved; and (iii) the Merger causing EALP's loss."[286] The ROK does not disagree, but repeats its earlier observation that this manner of portraying things underplays the length and complexity of the causal chain, because each element of the chain involved numerous individual actors and considerable complexity, and that the test for legal causation requires examining the proximity/remoteness of the entire chain, from breach to loss.[287]

107. At paragraph 124, Claimant relies upon the fact that the *Mason* tribunal found legal causation to be satisfied despite finding that the conduct of the NPS was not attributable to the ROK. While the observation is true, the ROK respectfully submits that this Tribunal should not reach the same decision on the (different) evidence before it, for the reasons discussed below.

a. Despite relying on the *Mason* tribunal's finding on legal causation, Claimant does not engage with the underlying reasoning. That may be because (i) the reasoning relies on foreseeability as sufficient to establish legal causation[288]—a proposition that is not consistent with the test adopted by the Tribunal in this arbitration or the test that Claimant itself has advocated, and (ii) the *Mason* tribunal's reasoning is brief, and—with respect—unpersuasive.

b. The *Mason* tribunal: (i) considered whether the fact that the Merger Ratio was suggested by the boards of SC&T and Cheil broke the chain of causation, concluding that it did not; (ii) rejected, in a single paragraph (paragraph 915), an argument that the claimant's losses were too remote because the NPS did not owe a duty of care to other shareholders, and held that the losses suffered were within the ambit of the treaty rule breached; and (iii) it concluded, again in a single short

[286] Claimant's Reply on Remitted Issue, ¶ 123.

[287] *See* ROK's Submission on Remitted Issue, ¶¶ 175–177.

[288] *See* **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, ¶¶ 913, 926.

paragraph (paragraph 916) that the fact that NPS's conduct was not attributable to the ROK did not mean that such conduct could be considered a superseding cause breaking the chain of causation. The tribunal concluded that, because the ROK's conduct held to be a breach was directed at influencing the NPS vote, the NPS conduct could not be severed in causal terms from the breaches.

c. Some but not all of those points overlap with the ROK's submissions in these proceedings, but, as noted, (i) the *Mason* tribunal's reasoning is brief and often conclusory on the points which it did consider, and (ii) importantly, the *Mason* tribunal did not consider the factual findings or analysis of the Korean courts in the Shareholder Claims Judgments, which, as discussed above, grappled squarely with an asserted causal chain very similar to that asserted here and reached conclusions on the basis of the same factual matrix and much of the same primary evidence that is at issue here—ultimately concluding that the evidence could not support the asserted causal link.[289]

108. At paragraph 125, Claimant attempts to demonstrate that "[t]he ROK has . . . failed to establish a break in the causal chain between the Blue House Measures and EALP's loss."[290] However, it is important to note that, as Claimant concedes, *it* bears the burden of proving legal causation.[291] Moreover, Claimant's specific arguments are unpersuasive.

a. Claimant asserts that "it is irrelevant whether the NPS *could have* reached an independent decision in favor of the Merger in the but-for scenario."[292] But, as explained in **Section III.A**, this question is in fact critically important in respect of factual causation. If Claimant fails to

[289] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–14; **Ex. R-390**, Shareholder Claims High Court Judgment, p. 8 (dismissing all appeals against the District Court Judgment).

[290] Claimant's Reply on Remitted Issue, ¶ 125.

[291] *See* Claimant's Statement of Reply, ¶ 521; Claimant's Post-Hearing Brief, ¶ 179.

[292] Claimant's Reply on Remitted Issue, ¶ 125(a).

establish but-for factual causation, the issue of legal causation does not arise. That said, the ROK offers the following response to the points Claimant makes at paragraph 125(a):

i. The question of how the NPS would have voted in the but-for world is not a matter of "breaking" the causal chain as a matter of legal causation. Rather, the counterfactual question arises in the context of factual causation: Claimant must show that, but for the Blue House Measures, the NPS would have voted against the Merger or abstained. Unless Claimant can make such a showing, factual causation is not established and legal causation—and its various aspects, such as remoteness—need not be analyzed. In other words, unless Claimant has established factual causation, there is no causal chain for the ROK to contend is too remote or can be broken.

ii. Moreover, the inherent uncertainty of outcome in a deliberative process such as that undertaken by the Investment Committee is relevant to legal causation in that it reinforces the extent to which the asserted causal chain—traversing such deliberative processes—is attenuated and requires drawing too many inferences.

iii. Claimant argues that "[t]he onus is on the ROK to prove that an *actual* event occurred that severed the causal chain."[293] For the reasons just given, that is incorrect. In any event, the material cited by Claimant does not support its position. It cites the Commentary to the ILC Articles, Article 31, which in turn refers to the *Zafiro* Case for the proposition that "the onus [is] on the responsible State to show what proportion of the damage was *not*

[293] Claimant's Reply on Remitted Issue, ¶ 125(a).

attributable to its conduct" (emphasis in original).[294] But the tribunal in that case was considering the very different situation in which an injury is divisible and "an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone"—for example, like in the *Zafiro* Case, where injury to property is caused by two groups of people.[295] That is not the type of situation that arises here.

iv. Claimant refers again[296] to paragraph 822 of the Award (set aside in the Remittal Order and Ruling), where the Tribunal stated that "[a] chain of causation is not interrupted by a potential event; it can only be interrupted by an event that has actually taken place,"[297] and "invites the Tribunal to confirm this holding."[298] The ROK has already addressed this issue in its Submission. As it noted, the Tribunal made the quoted statement in a context in which it considered that the NPS Vote itself constituted a breach, and was considering 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 the breach (i.e., the NPS Vote).[299] As the ROK explained, the questions now before the Tribunal are different: namely, did the Blue House Measures cause the NPS to vote as it did (which requires a counterfactual analysis), and are the Blue House Measures a proximate cause of

[294] *See* Claimant's Reply on Remitted Issue, ¶ 125(a) (citing **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 ["**Commentary to the ILC Articles**"], Art. 31, ¶ 13).

[295] *See* **CLA-038**, Commentary to the ILC Articles, Article 31, ¶ 13.

[296] *See* Claimant's Submission on Remitted Issue, ¶ 35 and fn. 61.

[297] *See* Claimant's Reply on Remitted Issue, ¶ 125(a) (quoting **RLA-194**, Award, ¶ 822).

[298] Claimant's Reply on Remitted Issue, ¶ 125(a).

[299] *See* ROK's Submission on Remitted Issue, ¶ 59(d).

Claimant's loss (which requires examining the entire chain of causation for proximity/remoteness)?[300]

b. At paragraph 125(b), Claimant also relies[301] on (i) the fact that, in a portion of the Award that was not set aside (specifically, at paragraph 623), the Tribunal found that the NPS did not act independently but rather "effectively as an instrument of the MHW in the implementation of a governmental policy,"[302] and on (ii) the Ruling's characterization of this and similar findings as surviving because they amount to "a factual finding as to what the NPS did and under whose direction and instructions the NPS acted." [303] The ROK has discussed Award paragraph 623 above and refers to that discussion.[304] It highlights the following points:

   i. As discussed above, the finding in Award paragraph 623 was directed at a different question than causation.[305] The paragraph does not actually consider (as the Korean courts have subsequently done) whether the degree of influence exercised by Minister Moon and others at the MHW can be said to have caused the Investment Committee's decision.

   ii. Moreover, the Tribunal's finding at paragraph 623 was expressly derivative of what "the Korean courts have determined."[306] As also discussed above, the Moon/Hong Judgments did not address whether the conduct of Minister Moon or the MHW can for purposes of legal causation be considered a direct or

[300] *See* ROK's Submission on Remitted Issue, ¶ 59(d).
[301] *See* Claimant's Reply on Remitted Issue, ¶ 125(b).
[302] **RLA-194**, Award, ¶ 623.
[303] **CLA-227**, Ruling, ¶ 5(c).
[304] *See* **Section III.C.2** above.
[305] *See* **Section III.C.2** above.
[306] **RLA-194**, Award, ¶ 623.

proximate cause of any loss or damage to SC&T's shareholders. By contrast, the Korean courts did address and decide such questions in the Shareholder Claims Judgments, which this Tribunal now has before it and may wish to consider for their persuasive value. In that case, the Seoul Central District Court found that, although the unlawful conduct of Minister Moon and CIO Hong did influence the NPS's decision-making processes, such conduct did not ultimately have a decisive impact on the outcome of the Investment Committee's review and deliberation on the Merger sufficient to allow for a finding that such conduct was a legal cause of the SC&T shareholders' asserted loss.[307]

c. At paragraphs 125 (c) and (d), Claimant refers to the fact that two matters on which the ROK relies—namely, (i) the votes of other shareholders at the general meetings regarding the Merger and (ii) market movements—had already been the subject of consideration by the Tribunal in the causation section of the Award, when it was (of course) considering the question of whether the *NPS Vote* caused loss to Claimant. Regarding the former, as Claimant acknowledges, the relevant paragraph of the Award (paragraph 822) was set aside.[308] Moreover, the ROK's position, as articulated in its Submission on the Remitted Issue, is *not* that potential events at the shareholder meetings break the causal chain, but rather that such shareholder meetings involved a large number of shareholders exercising their votes independently, and thus constituted a further layer of independent, multi-party decision-making in the causal chain, which is relevant to the assessment of remoteness/proximity. Regarding the latter, Claimant asserts that, "[h]aving already put forward expert evidence on 'market

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[307] *See* **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–14; **Section III.C.2** above.

[308] *See* Claimant's Reply on Remitted Issue, ¶ 125(c) (acknowledging that paragraph 822 of the Award was set aside).

movements' in the but-for scenario, it is not open to the ROK to relitigate this issue before the Tribunal in these proceedings."[309] Claimant is incorrect. The Tribunal in the Award considered the relevance of market movements in a context in which it analyzed causation based on the NPS Vote itself as a breach. There is no reason why, in considering whether legal causation is established in respect of the Blue House Measures, the Tribunal cannot now take account of the fact that the loss identified in the Award arose as a result of the operation of the market. Moreover, there is no reason why the fact that the ROK submitted expert evidence on market movements would preclude it from arguing that causation is not established in respect of the Blue House Measures; Claimant provides none.

d. Finally, at paragraph 125(e), Claimant refers to various jurisprudence and commentary and contends that, "even if there were in fact multiple reasons for the Investment Committee to vote in favor of the Merger, and/or other SC&T shareholders that voted in favor of the Merger, and/or other market actors that affected the fair market value of [Claimant's] shares in SC&T, a State's international responsibility for its delict is not reduced or attenuated by the presence of concurrent causes."[310] But such argument is not responsive to the ROK's point, which is that the involvement of numerous third-parties and significant complexity at each stage of the supposed chain of causation means that the Blue House Measures cannot be deemed the proximate / direct cause of the loss that the Tribunal identified. Moreover, as discussed in **Section III.A**, there is a distinction (crucial here) between a finding of international responsibility (i.e., breach) and an award of compensation. The latter requires satisfying all elements of causation, whereas the former does not.

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[309] Claimant's Reply on Remitted Issue, ¶ 125(d).

[310] Claimant's Reply on Remitted Issue, ¶ 125(e).

C. The Additional Judgments clarify factual findings of the Korean courts that are relevant to legal causation

109. In Section IV.B.3 of its Reply, Claimant devotes four full pages to its assertion that the Additional Judgments are "irrelevant to legal causation."[311] Below, the ROK responds in turn to each of the seven points that Claimant makes in support of such contention.

1. *The factual findings of the Korean courts in the Additional Judgments are entitled to no less weight than the findings of the same courts on which Claimant relies*

110. Claimant's first point is that the Additional Judgments are not relevant to legal causation in this arbitration because they "do not amount to new primary evidence" and instead constitute "additional judicial decisions made on the basis of different evidentiary showings, applying different tests . . . to different causes of action."[312] And yet, as a preliminary point, exactly the same can be said of the Moon/Hong Judgments, on which Claimant has relied heavily throughout the arbitration. Claimant offers no reason why the more recent findings of the Korean courts in the Additional Judgments should be treated differently than the prior findings of the same courts in earlier judgments. The new findings are relevant and should be given weight: they provide clarity on the courts' findings in the earlier Moon/Hong Judgments; they address many of the same underlying facts at issue in these Remitted Proceedings; result from a rigorous examination of evidence through an adversarial process in which one side advocated vigorously for the interests of SC&T and its shareholders (viz., the shareholders themselves in the Shareholder Claims case, and the Korean prosecutor in the JY Lee Unlawful Merger case); were subjected to multiple levels of review and have become final and binding, through appeals to the Seoul High Court and, in the case of the JY Lee Unlawful Merger Judgments, to the Korean Supreme Court; and address a number of factual and legal issues that bear close similarity to those at play in these Remitted

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[311] Claimant's Reply on Remitted Issue, § IV.B.3 (section heading).

[312] Claimant's Reply on Remitted Issue, ¶ 128(a).

Proceedings—notwithstanding differences in the governing law and causes of action.

111. Contrary to Claimant's contentions,[313] the ROK does not rely on the Additional Judgments either to "displace" findings of the Tribunal in the Award or to "replace this Tribunal's right and responsibility" to address the Remitted Issue. Rather, the findings are offered to provide the Tribunal with a fuller picture of the ultimate disposition by the Korean courts of various criminal and civil disputes arising out of the NPS Vote and the Merger. It is surprising that, having placed so much reliance on the findings in the Moon/Hong Judgments, Claimant would seek to dissuade the Tribunal from considering subsequent findings by the same courts that clarify and shed light on the precise contours of those earlier findings. By contrast, the ROK's position is straightforward and consistent: *all* of the relevant findings of the Korean courts should be given due consideration and weight—without regard to which Party's case they assist.

2. *The fact that the Additional Judgments do not address Claimant's allegations of "targeting" does not render them irrelevant*

112. Claimant argues that the Additional Judgments do not address supposed evidence that the ROK's intervention in the NPS's decision-making was targeted at Claimant.[314] But the fact that the Additional Judgments may not have dealt with this specific issue does not mean they are irrelevant. In the Shareholder Claims case, the Korean courts analyzed whether the facts establish a proximate causal chain running from the misconduct of Moon and Hong to the alleged losses of dissenting SC&T shareholders as a result of the Merger Ratio.[315] Such analysis is relevant to the Tribunal's task in these Remitted Proceedings, for at least two reasons: (1) it involved examination of

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[313] Claimant's Reply on Remitted Issue, ¶ 128(a).

[314] Claimant's Reply on Remitted Issue, ¶ 128(b) (referring to Claimant's Reply on Remitted Issue, ¶ 113).

[315] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 10–14; **Ex. R-390**, Shareholder Claims High Court Judgment, p. 8 (dismissing all appeals against the District Court Judgment); Annex to ROK's Submission on Remitted Issue, ¶¶ 13(c)–(d).

much of the same evidence that this Tribunal must examine to answer the parallel question of whether Claimant has proven a proximate causal chain running from the Blue House Measures through Claimant's loss found in the Award; and (2) it involved legal reasoning and logic that the Tribunal may well find persuasive, notwithstanding that the two sets of claims arise under different bodies of law.

3. *The fact that the Additional Judgments did not "overturn[] the convictions of Minister Moon and CIO Hong" does not deprive them of relevance*

113. Claimant repeats[316] its argument that the Additional Judgments did not "overturn[]" the convictions of Moon and Hong or others.[317] This fact does not assist Claimant. One of the reasons why the Additional Judgments are so helpful is that they affirm the prior findings in the Moon/Hong Judgments while also explaining why those findings do not support claims that SC&T's shareholders suffered economic loss as a result of Moon and Hong's misconduct.[318]

114. Claimant asserts that, in the Moon/Hong Judgments, "the Korean courts *did find proximate cause and effect*" (emphasis added).[319] If by this Claimant means to assert that the Moon/Hong Judgments found a proximate causal link between the misconduct of Moon or Hong and economic loss suffered by SC&T shareholders as a result of the Merger or Merger Ratio, such assertion would be incorrect. As explained above, the Moon/Hong Judgments made no such finding.[320] Further, as already explained, in the Shareholder Claims Judgment, the courts held expressly that proximate cause is lacking between Moon and Hong's misconduct and any loss in value suffered by SC&T's shareholders

[316] *See* Claimant's Response to ROK's New Evidence Application, 22 May 2026, ¶ 23.
[317] Claimant's Reply on Remitted Issue, ¶ 128(c).
[318] Additional Judgments Annex, ¶¶ 12–13.
[319] Claimant's Reply on Remitted Issue, ¶ 128(c).
[320] *See* **Section III.C.3.c.(i)** above.

from the Merger Ratio.[321] Such finding was made with the benefit of, and in light of, the Moon/Hong Judgments.

4. *Claimant has not rebutted the persuasive value of the Korean courts' analysis of proximate cause in the Shareholder Claims Judgments*

115. Claimant asserts that, in the Shareholder Claims case, the Korean courts applied a test for legal causation that is "not the same as the test to be applied under international law."[322] But, as the ROK made clear in its Submission on the Remitted Issue,[323] it does not rely on the Additional Judgments to argue that the Tribunal should adopt the Korean courts' reasoning wholesale. Instead, as the ROK noted, the Shareholder Claims Judgments "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 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 . . . 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."[324] The ROK maintains this position, to which Claimant has not directly responded.

116. Moreover, Claimant has not identified any material difference in the legal causation tests applied by (respectively) the Korean courts and the Tribunal, nor is such a difference apparent from the analysis undertaken by the Korean courts in the Shareholder Claims case. As discussed above, in analyzing the proximity issue in that case, the Seoul Central District Court first acknowledged that the ROK had "exercised a certain degree of influence over the decision-making process of the [NPS]'s Investment Committee."[325] It then

[321] **Ex. R-389**, Shareholder Claims District Court Judgment, p. 14.

[322] Claimant's Reply on Remitted Issue, ¶ 128(d).

[323] *See* ROK's Submission on Remitted Issue, ¶ 184.

[324] ROK's Submission on Remitted Issue, ¶ 184.

[325] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–13.

went on to examine whether such influence had overridden the free will of the Investment Committee, ultimately determining that it had not.[326] The court thus reasoned that, because the individual members of the Investment Committee had exercised an independent judgment notwithstanding the ROK's unlawful interference with their decision-making process, the shareholder plaintiffs had failed to establish a proximate, unbroken chain of causation between the ROK's unlawful conduct and their claimed economic harm.[327] Claimant has not identified any aspect of such analysis that is materially different from the relevant analysis under international law.[328]

5. *The Tribunal's reasons in the Award for distinguishing the Merger Annulment Judgment do not apply to the Shareholder Claims Judgment*

117. Claimant argues that the conclusions on causation reached in the Shareholder Claims Judgments "are substantively identical to those in the [Merger Annulment Judgment (Ex. R-020)] that the Tribunal has already considered and dismissed."[329] The problem with this argument is that none of the Tribunal's reasons in the Award for distinguishing—or, as Claimant puts it, "dismiss[ing]"—the Merger Annulment Judgment apply to the Shareholder Claims Judgments. Specifically, in the Award, the Tribunal distinguished the Merger Annulment Judgment on three grounds: (a) that the court had applied a strict standard applicable to invalidating a merger;[330] (b) that the court had applied a "technical approach" to determining the NPS's intent (viz., equating the company's intent with that of its legal representative, the chairman of the

[326] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–13.

[327] **Ex. R-389**, Shareholder Claims District Court Judgment, pp. 12–14.

[328] It is true that in the Shareholder Claims case, the Seoul High Court distinguished the seemingly-contrary conclusions reached by the *Mason* tribunal on legal causation, by reference to the fact that the latter tribunal was addressing claims under a different body of law. *See* **Ex. R-390**, Shareholder Claims High Court Judgment, p. 7. Such an explanation was consistent with principles of comity.

[329] Claimant's Reply on Remitted Issue, ¶ 128(e).

[330] **RLA-194**, Award, ¶¶ 606, 612, 614.

board of the NPS);[331] and (c) that the court had rendered its decision without the benefit of subsequent criminal judgments.[332] None of these three grounds applies to the Shareholder Claims Judgments, which post-date all of the other relevant cases that the Tribunal considered in the Award and did not apply a strict merger invalidation standard or a technical approach to determining the NPS's intent. That the two courts nevertheless reached the same conclusion on the factual question of the extent to which the ROK's unlawful interference affected the outcome of the Investment Committee's decision is a reason to give more—not less—weight to that conclusion.

6. *Claimant's assertion that the Additional Judgments ignored evidence of illegality by President Park and the Blue House is unsubstantiated and its relevance unexplained*

118. Claimant contends that "the courts in the Additional Judgments largely declined to interrogate the evidence of illegality against President Park and the Blue House."[333] This contention is neither substantiated nor explained. In particular, Claimant does not specify what findings or evidence it believes were "ignor[ed]"—nor does it explain why its contention should diminish the relevance of the Additional Judgments to legal causation. Claimant does not explain, for example, why considering evidence "higher up" the chain (i.e., regarding President Park or the Blue House) in any way would affect the conclusion in the Shareholder Claims Judgments concerning events "lower down" the chain (i.e., regarding the MHW's interference with the NPS's decision-making process). In any event, the courts in the JY Lee Unlawful Merger case duly considered all of the relevant prior criminal proceedings that had involved charges related to the Samsung Group "succession plan" and the Merger, expressly acknowledging the judgments in those cases and the factual

[331] **RLA-194**, Award, ¶¶ 606, 613, 614.

[332] **RLA-194**, Award, ¶¶ 615–620.

[333] Claimant's Reply on Remitted Issue, ¶ 128(f).

and legal conclusions reached therein.[334] Notably, neither the former President nor any Blue House official was charged with any crime in relation to the NPS's exercise of voting rights concerning the Merger.[335] Mr. JY Lee was charged with crimes of market manipulation in relation to the Merger and was acquitted on all counts, in a sweeping and comprehensive judgment that assiduously examined not only the vast body of primary evidence before the court but also all of the relevant findings reached in related criminal cases involving Moon/Hong, Ms. Soon-sil Choi (President Park's confidante), and JY Lee.[336] President Park, for her part, was indicted on charges of receiving improper solicitation from JY Lee in relation to the Merger (as part of a larger Samsung Group succession plan), but this charge was dismissed on the basis that no quid pro quo had been proven in relation to government support for the Merger (as distinct from subsequent phases of the succession plan, which did involve improper solicitation).[337]

7. Claimant's attempt to cast doubt on Korean court judgments "that post-date the Award" is without basis

119. Finally, Claimant argues that "the Tribunal should be wary of adopting the findings of the Additional Judgments that post-date the Award."[338] Claimant's sole basis for such contention is a single sentence in the 1,000+ page JY Lee

[334] *E.g.*, **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 377–380, 397, 739–749, 891–892, 897–898; **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 140, 838.

[335] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 748 ("[The Special Prosecutor and the Prosecutor indicted the President and the Blue House staff on various charges under the crime of abuse of authority and obstruction of exercise of rights, but in relation to [NPS]'s exercise of voting rights, did not indict anyone including the President or the Blue House staff, and only indicted the Minister of [MHW].").

[336] *See* **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 3, 377–378, 397, 739–749, 891–892, 897–898; **Ex. R-392**, JY Lee Unlawful Merger High Court Judgment, pp. 2, 161–162, 838; **Ex. R-393**, JY Lee Unlawful Merger Supreme Court Judgment, p. 3.

[337] **Ex. R-169**, Seoul High Court Case No. 2018No1087, 24 August 2018, p. 112; **Ex. R-180**, Supreme Court of Korea Case No. 2018Do14303 (Ms Park), 29 August 2019, p. 6; **Ex. R-314**, Seoul High Court Case No. 2019No1962 (remanded proceeding), 10 July 2020, pp. 47–48.

[338] Claimant's Reply on Remitted Issue, ¶ 128(g).

Unlawful Merger District Court Judgment, in which the court took into consideration a position taken by the ROK in the Original Proceedings in this arbitration.[339] Claimant ignores that the relevant factual finding of the court on the point in question was not based exclusively, or even primarily on, the ROK's litigation position in the present arbitration; rather, the court relied on the final and binding conclusion of the Seoul Central District Court (Civil Division) in the Shareholder Claims Judgment, which had squarely addressed and decided the same question.[340] Claimant's attempt to cast doubt on the Additional Judgments is thus without merit.

V. CLAIMANT HAS NO ANSWER TO THE ROK'S ALTERNATIVE POSITION REGARDING LOSS OF CHANCE

120. In Section V of its Submission, the ROK set out in considerable detail its alternative position that, if the Tribunal (contrary to the ROK's primary position) declines to hold Claimant to the usual "sufficient degree of certainty" standard of proof applicable to factual causation, it could alternatively apply the loss of chance framework and compensate Claimant for the loss of a fair *opportunity* to have its campaign against the Merger decided without government interference.[341] Claimant offers no real response to the ROK's position, and instead merely asserts that "[t]he Tribunal has already rejected the ROK's loss-of-chance argument."[342] But such assertion is plainly incorrect:

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[339] Claimant's Reply on Remitted Issue, ¶ 128(g) (citing **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, pp. 748–749).

[340] **Ex. R-391**, JY Lee Unlawful Merger District Court Judgment, p. 748 ("In fact, the court has recently also found that, while it can be recognized that [Minister Moon], etc. had, to a certain extent, exerted influence on the decision-making process of the [NPS] Investment Committee, in the end, 'it is difficult to view that the acts of [Minister Moon] and [CIO Hong] had affected the [NPS] Investment Committee's exercise of its voting rights'.").

[341] The Tribunal should only apply the loss of chance framework if it is satisfied that Claimant has established the relevant chance to a reasonable degree of likelihood. Speculative claims are not allowed. *See* ROK's Submission on Remitted Issue, ¶¶ 193, 202.

[342] Claimant's Reply on Remitted Issue, § IV.B.4 (section heading). Claimant discusses loss of chance in the context of legal causation. However, the loss of chance framework is also relevant to factual causation, insofar as it allows the Tribunal to take account of uncertainty as to the relevant outcome in the but-for scenario.

the Tribunal in the Award did not rule on the ROK's loss of chance argument—and, specifically, the ROK's observation that Claimant's "claim amounts to nothing more than a loss of a chance, that chance being to have a Merger decision by the NPS that was not tainted by any governmental influence."[343] The Tribunal did not *need* to rule on such argument because it found that the NPS's conduct was attributable to the ROK and established causation on that basis.[344] Following the English Court's set-aside of the attribution finding, however, the applicability of the loss of chance framework now warrants revisiting.

121. In the context of the ROK's loss of chance argument, Claimant recycles its position that the NPS "would not have approved the Merger but for the ROK's illegal intervention."[345] But such argument does not respond to the ROK's position (in the alternative) that the Tribunal could apply a loss of chance analysis. While Claimant may insist that the counterfactual outcome was certain, the evidence demonstrates otherwise.[346] If the Tribunal accepts that there is inherent uncertainty as to the outcome of the NPS's vote in the counterfactual scenario—an exogenous factor, attributable to a third party—and assuming the Tribunal (contrary to the ROK's primary position) is not

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[343] ROK's First Post-Hearing Brief, ¶ 174. *See also* ROK's Reply Post-Hearing Brief, ¶ 68 ("[A]bsent the ROK's alleged Treaty breaches[,] the NPS may still have voted for the Merger because the NPS's decision was made by the Investment Committee independently of the NPS Research Team's calculations . . . . Thus, all the Claimant lost was a chance at a vote without governmental interference. If, absent any Treaty breach, the NPS may still have voted for the Merger . . . , all the Claimant would have lost was a chance for the Merger to be rejected—which the Claimant has not quantified.").

[344] *See, e.g.*, **RLA-194**, Award, ¶¶ 444–446, 623, 814 ("The Claimant therefore need not show that the Respondent caused the NPS to breach the Treaty; for the purposes of determining whether the Respondent breached the Treaty, the conduct of the NPS is attributable to the Respondent."), 821 ("As for legal causation, the Tribunal is satisfied that, as the acts of the NPS are attributable to the Respondent, the loss and damage claimed by the Claimant is a direct result of the Respondent's conduct and thus was proximately caused by the Respondent.").

[345] Claimant's Reply on Remitted Issue, ¶ 131.

[346] *See* ROK's Submission on Remitted Issue, § III; **Section III** above.

inclined to hold Claimant to its burden to prove the counterfactual to a sufficient degree of certainty, it could apply the loss of chance framework.

122. Claimant has failed to substantively engage with the ROK's position on loss of chance. In particular, Claimant has not disputed any of the following points in the ROK's Submission, among others:

a. The loss of chance framework "may be applied where, 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 [it is] nevertheless . . . able to demonstrate . . . that the breach deprived it of a valuable opportunity to potentially make a profit or avoid a loss."[347]

b. *Bilcon v. Canada* illustrates that the "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; or (ii) where the counterfactual scenario is inherently difficult to prove, for example because it involves the exogenous conduct of third parties" (emphasis omitted; other emphasis added).[348]

c. The framework "fits the circumstances of this case" because, *first*, "[s]imilar 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"; and, *second*, the causal chain between the Blue House Measures and Claimant's alleged loss traverses the decision-making of a non-State, deliberative body (the NPS), with its own set of interests and considerations.[349]

d. Under the framework, "the Tribunal could assess damages by multiplying (i) the Full Loss Amount [i.e., USD 48,490,438., which the

[347] ROK's Submission on Remitted Issue, ¶ 190 (internal numbering omitted).
[348] ROK's Submission on Remitted Issue, ¶ 192 (citations omitted).
[349] ROK's Submission on Remitted Issue, ¶ 196.

Tribunal awarded to Claimant in the Award[[350]] 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."[351]

123. As demonstrated in the ROK's Submission and above, Claimant cannot demonstrate to the "sufficient degree of certainty" standard that, in the absence of the Blue House Measures, the NPS would have voted against the Merger or abstained.[352] Claimant's claim for compensation should therefore be denied in its entirety. In the alternative, should the Tribunal nevertheless be inclined to award some compensation to Claimant, it could apply the loss of chance framework and compensate Claimant for the loss of a fair *opportunity* to have its campaign against the Merger decided without government interference.[353] Claimant has failed to engage with the issue and has presented no good reason why the ROK's alternative position should not be adopted.

VI. COSTS AND INTEREST

124. In this Section, the ROK demonstrates that: (A) as the Parties agree, the legal costs of the arbitration may need to be reallocated to reflect the Parties' relative successes in the overall proceeding; (B) Claimant's request for its costs of the Set-Aside Proceedings is barred; and (C) the Tribunal should not entertain

[350] The Tribunal calculated the Full Loss Amount in KRW and then converted the final figure into USD using the exchange date as of the date of the Award. *See* **RLA-194**, Award, ¶¶ 948, 952. The Tribunal should take the same approach to the calculation of any compensation awarded in the Award on the Remitted Issue, using the exchange date as of the date of that (forthcoming) additional Award.

[351] ROK's Submission on Remitted Issue, ¶ 202. *See also id.*, ¶¶ 198–199.

[352] *See* ROK's Submission on Remitted Issue, § III; **Section III** above.

[353] *See* **RLA-090**, *Bilcon* (Award on Damages), ¶ 280 (applying a loss-of-chance analysis in similar circumstances); **RLA-224**, *Excerpt from* Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 225 (in denial of justice claims, "the prejudice often falls to be analysed as the loss *of a chance*—the possibility, not the certainty, of prevailing" (emphasis in original)).

Claimant's attempt to revive its previously rejected challenge against the Award's basis of calculation of pre-award interest.

A. The Parties agree that legal costs of the arbitration can and may need to be reallocated based on relative success in the overall proceeding

125. The ROK explained in its Submission that, given the English Court's decision to set aside the Tribunal's decision and order concerning the allocation of the Parties' legal costs,[354] the Tribunal must now consider afresh how those costs should be apportioned—and, in doing so, should consider the Parties' relative successes in the arbitration, including in light of the outcome of the Remitted Proceedings.[355]

126. Claimant acknowledges that "[a]ny decision on legal costs will need to take into account which Party prevailed in the end."[356] And it accepts that the Tribunal's apportionment of legal costs may need to be revisited, in particular, "in light of its decision on the remitted issue."[357] It is therefore undisputed between the Parties that the legal costs of the arbitration can and may need to be reallocated to reflect the Parties' ultimate relative successes in the arbitration as a whole.

127. Notwithstanding the above, Claimant at paragraphs 138 and 139 of its Reply advances a series of additional arguments regarding the Parties' legal costs. Respectfully, those arguments are difficult to follow—but, in any event, they lack merit:

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[354] *See* **CLA-226**, Remittal Order, ¶¶ 2(i)–(j) (setting aside ¶¶ 993, 995(b)–999(h) of the Award); ROK's Submission on Remitted Issue, ¶¶ 208–209.

[355] *See* ROK's Submission on Remitted Issue, § VII.

[356] Claimant's Reply on Remitted Issue, ¶ 139.

[357] Claimant's Reply on Remitted Issue, ¶ 138. *See also* Claimant's Reply on Remitted Issue, ¶ 133 (recognizing the English Court's observation that "the Tribunal's conclusions on the remitted issue may have implications for its determination as to the apportioning of costs between the Parties").

a. *First*, Claimant argues that there is no "basis for the Tribunal to revisit its prior *quantification* of EALP's legal costs" (emphasis added).[358] It is unclear why Claimant makes such an argument. The ROK has never suggested that the Tribunal should revisit the quantification of the Parties' legal costs incurred in the Original Proceedings. To the contrary, the ROK has expressly maintained that the English Court set aside only the Tribunal's decision regarding the *allocation* of legal costs.[359]

b. *Second*, as to allocation of legal costs, Claimant contends that there is no reason to revisit the allocation as a result of the Tribunal's decision to correct the Award, which (Claimant argues) was made only to "correct an error by the Tribunal."[360] Claimant appears to argue that the Correction Decision is irrelevant to the assessment of the Parties' relative successes and, therefore, to the allocation of legal costs.[361] But Claimant cannot deny that the ROK succeeded in its request for correction of the Award,[362] and, as a result of such success, the Tribunal reduced the amount of compensation awarded to Claimant.[363] That outcome necessarily altered the balance of the Parties' relative success in the arbitration. Claimant, by contrast, failed outright in its request for correction.[364]

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[358] Claimant's Reply on Remitted Issue, ¶ 138.

[359] *See* ROK's Submission on Remitted Issue, ¶ 209. The ROK did note, at footnote 402 of its Submission on the Remitted Issue, that in reallocating costs, the Tribunal may wish to take into consideration the gross disparity between the overall costs incurred by Claimant and the ROK respectively. The ROK maintains that position, which relates to allocation and not quantification of costs.

[360] Claimant's Reply on Remitted Issue, ¶ 138.

[361] Claimant's Reply on Remitted Issue, ¶ 138.

[362] *See* Decision on Requests for Correction and Interpretation of the Award, 1 September 2023 ("**Correction Decision**"), ¶ 65(a) (granting the ROK's request for correction of the Award).

[363] *See, e.g.*, Correction Decision, ¶ 65(a)(13) (correcting the amount awarded to Claimant in the Award from "USD 53,586,931.00" to "USD 48,490,438.00").

[364] *See* Correction Decision, ¶ 65(c) (denying Claimant's request for correction of the Award).

c. *Third*, while accepting that the Tribunal's allocation of costs may need to be revisited in light of its determination of the Remitted Issue, Claimant nevertheless appears to contend that any such adjustment can only operate in its favor.[365] Claimant offers no basis for that position. As the ROK demonstrated in the Submission, if (as the ROK contends should be the position) the Tribunal accepts any aspect of the ROK's position on the remitted *causation* issue and/or the corresponding *quantum*, those developments must necessarily be reflected in the Tribunal's allocation of legal costs of the overall proceeding in the ROK's favor.[366]

d. *Finally*, Claimant disagrees with the ROK's position that the allocation of legal costs in the Original Proceedings should be adjusted in the ROK's favor in light of its success in the Set-Aside Proceedings.[367] It claims that the ROK only succeeded on "two of the five issues it raised in those proceedings," and that the English Court remitted only a narrow issue to the Tribunal.[368] Claimant's argument misses the point. The ROK does not contend that the Tribunal should reallocate the legal costs of the arbitration by reference to the Parties' relative success *in the Set-Aside Proceedings*. Rather, as the ROK demonstrated in its Submission, by succeeding in setting aside an important aspect of the Award and securing a remittal to the Tribunal for further determination, the ROK altered the outcome of the Original Proceedings and, consequently, the basis on which the Tribunal originally assessed the Parties' relative successes *in the arbitration*.[369] The ROK's success in the

[365] *See* Claimant's Reply on Remitted Issue, ¶ 138 (asserting that "[i]f anything, having defeated the ROK's arguments on causation for a second time, the percentages should be revised upwards in EALP's favor").

[366] *See* ROK's Submission on Remitted Issue, ¶ 211.

[367] *See* ROK's Submission on Remitted Issue, ¶ 211.

[368] Claimant's Reply on Remitted Issue, ¶ 139.

[369] *See* ROK's Submission on Remitted Issue, ¶¶ 210–211.

Set-Aside Proceedings therefore constitutes a relevant consideration when the Tribunal ultimately reallocates the legal costs in the arbitration. Whether the English Court accepted or rejected the ROK's other grounds of challenge is irrelevant.

128. The ROK reiterates its suggestion that, following the Hearing on the Remitted Issue, the Tribunal invite the Parties to submit updated statements of costs, thereby enabling the Tribunal to make a fully informed costs determination based on the final outcome of the arbitration.[370]

B. Claimant's request for its costs of the Set-Aside Proceedings is barred

129. As the ROK noted in its Submission, Claimant's extraordinary request that the Tribunal award it costs of the Set-Aside Proceedings effectively seeks to reverse the final costs orders issued by the English courts, is barred by the doctrine of *res judicata*, and falls outside the Tribunal's jurisdiction.[371] Claimant in its Reply professes that it "does not seek to overturn the Court's Ruling,"[372] but, in direct contravention of that position, insists that—notwithstanding the English courts' decisions that *Claimant* should bear the majority of *the ROK's* costs in the Set-Aside Proceedings—the Tribunal should order the ROK to compensate Claimant for its costs in the Set-Aside Proceedings.[373] Claimant makes four arguments, none of which has any merit.

a. First, Claimant asserts that it "is entitled to the costs arising out of the ROK's breach," which it claims "includ[e] costs of the set-aside proceedings."[374] But the relevant breach—Blue House Measures—is not even remotely connected to the legal costs Claimant incurred in the Set-Aside Proceedings. Claimant's request amounts, in effect, to a new claim for damages for breach (which cannot be entertained); and,

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[370] *See* ROK's Submission on Remitted Issue, ¶ 212.

[371] *See* ROK's Submission on Remitted Issue, § VI.

[372] Claimant's Reply on Remitted Issue, ¶ 137(a).

[373] Claimant's Reply on Remitted Issue, ¶¶ 137, 141(f).

[374] Claimant's Reply on Remitted Issue, ¶ 137(a).

unsurprisingly, Claimant cites no precedent or other authority for the proposition that an international investment tribunal may award a party the costs that it incurred in set-aside proceedings relating to the tribunal's award.

b. Second, Claimant posits that the Set-Aside Proceedings were an "empty exercise . . . that will quite clearly not alter the final outcome of this arbitration."[375] Whether they will change the final outcome (by which the ROK understands Claimant to mean the amount of damages awarded (if any)) remains to be seen. In any case, regardless of the outcome of the Remitted Proceedings, the ROK was plainly entitled to initiate the Set-Aside Proceedings, which led to the English Court setting aside an important aspect of the Award which otherwise could have had far-reaching consequences for the ROK (viz., the finding that the NPS is a de facto organ of the State).

c. Third, Claimant argues that "it is within the Tribunal's power to award EALP" its costs in the Set-Aside Proceedings because "the Tribunal has the authority under Article 40(e) [sic—apparently referring to Article 40(2)(e)] of the UNCITRAL Rules to award 'legal and other costs incurred by the parties *in relation to the arbitration*'" (emphasis in original).[376] But "costs . . . incurred . . . in relation to the arbitration" do not include costs incurred in relation to set-aside proceedings that a party initiated following the conclusion of the arbitration. Claimant cites no authority that would suggest otherwise. And it has no response to the ROK's observation that, under the English Arbitration Act 1996, the tribunal's powers concerning costs are confined to the "costs of the arbitration."[377]

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[375] Claimant's Reply on Remitted Issue, ¶ 137(b).
[376] Claimant's Reply on Remitted Issue, ¶ 137(c).
[377] *See* ROK's Submission on Remitted Issue, ¶ 205, fn. 379.

d. Finally, Claimant contends that, "as for the ROK's *res judicata* argument, there is no triple identity here: neither the relief sought nor the claims raised by the Parties are the same across the set-aside proceedings before the English courts and these arbitration proceedings."[378] But—even leaving aside the question of whether the "triple identity" test applies to *res judicata* at all[379]—triple identity *is* satisfied in relation to the specific claim at issue: namely, Claimant's claim for its costs of the Set-Aside Proceedings. Moreover, as the ROK noted in its Submission, the doctrine of *res judicata* under English law encompasses not just cause of action estoppel, but also issue estoppel: "the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties." [380] Whichever principle is applied, Claimant is barred from re-litigating the English courts' binding findings on the allocation of costs in the Set-Aside Proceedings.

C. Claimant is barred from attempting to revive its failed request to revise the Award's basis of calculation of pre-award interest

130. Claimant in its Reply seeks to resurrect an argument that it previously advanced during the correction phase of this arbitration and that the Tribunal rejected. Specifically, whereas in its Submission Claimant had asked for pre-award interest to be applied to the principal amount awarded to Claimant in the Award (i.e., USD 48,490,438),[381] in the Reply, Claimant now posits that pre-

[378] Claimant's Reply on Remitted Issue, ¶ 137(d).

[379] *See* **CLA-001**, *Apotex Holdings Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, ¶ 7.15 ("[C]ertain international tribunals and scholars have questioned [*res judicata*'s] division between *petitum* and *causa petendi*; and many cases have used a simpler analysis'. The British-U.S. Claims Arbitral Tribunal saw the doctrine as involving only two elements: 'res judicata applies only where there is identity [i] of the parties and [ii] of the question at issue.'") (internal citations omitted; internal numbering added).

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

[381] *See* Claimant's Submission on Remitted Issue, ¶¶ 82(a)–(b).

award interest should be applied instead to a much larger amount reflecting the alleged counterfactual fair market value of Claimant's *entire* SC&T shareholding (namely, KRW 771,026,741,100, equivalent to approximately USD 493,991,436[382]), adjusted over time to account for recoveries subsequently received by Claimant.[383] Claimant's request that the Tribunal reconsider its existing finding on the basis for calculation of pre-award interest—a finding that was not set aside—is procedurally barred.

131. To recall, Claimant advanced the very same argument during the correction phase of this arbitration, when it argued that the Tribunal had committed a "methodological error" by calculating pre-award interest on the amount of loss awarded, rather than on amounts derived from the alleged counterfactual fair market value of Claimant's shares.[384] The Tribunal unequivocally rejected the argument, holding that Claimant was seeking "a change of the basis of calculation of interest" and, in substance, a revision of the Award (rather than the correction of a computational error).[385] As the ROK explained at the time, Claimant's improper request would have allowed it to recover interest on amounts that did not constitute any part of the loss awarded by the Tribunal, and thus would have altered not only the basis for calculating pre-award interest, but also the methodology adopted by the Tribunal to quantify the principal amount of compensation due to Claimant.[386]

132. Claimant now attempts to revive the same baseless argument. In its Reply, Claimant asserts that, because the Tribunal is once again considering "the consequences of the ROK's breaches," it has "the power to consider and accept

[382] Indicative USD figures at exchange rate of KRW 1 = USD 0.00064, obtained from Oanda Currency Converter (last accessed on 7 June 2026).

[383] *See* Claimant's Reply on Remitted Issue, ¶ 141(b). *See also* Claimant's Request for Correction of the Award, 20 July 2023, ¶¶ 17–20.

[384] Claimant's Request for Correction of the Award, 20 July 2023, § III.

[385] Correction Decision, ¶ 63.

[386] *See, e.g.*, ROK's Response to Claimant's Request for Correction of the Award, 4 August 2023, ¶ 9.

EALP's submission on the proper determination of interest."[387] This contention is wrong. While the English Court set aside the Tribunal's findings on certain issues of causation—and, consequently, part of the dispositive relief awarded[388]—it did not disturb any of the Tribunal's findings on interest.[389] In particular, the English Court *did not* set aside the Tribunal's determination that pre-award interest should be computed on the "amount of compensation" only.[390] Those determinations therefore remain binding and fall outside the scope of the Remitted Proceedings.[391] Claimant's request to revise the Award's basis for calculating pre-award interest is therefore barred.

133. In light of the above, even if (quod non) the Tribunal ultimately decides to award any compensation to Claimant following the Remitted Proceedings, any corresponding pre-award interest should be calculated on the basis of such compensation ultimately determined by the Tribunal, consistent with the methodology the Tribunal adopted in the Award and which was left undisturbed by the English Court.

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[387] Claimant's Reply on Remitted Issue, ¶ 141.

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

[389] *See* **RLA-194**, Award, ¶¶ 958–962.

[390] **RLA-194**, Award, ¶ 961 ("[T]he Tribunal finds that the determination of the applicable interest rate should be based on the principle that the Claimant must be made whole and accordingly must be entitled to compensation based on what it would have obtained had it invested the funds corresponding to the amount of compensation during the period when it was deprived of such funds."). *See also* Correction Decision, ¶¶ 55–56.

[391] *See* **CLA-222**, Set-Aside Judgment, ¶ 254 ("I am satisfied that the court can set aside part of an award under s.67, while leaving the remainder of the award in place and capable of being enforced . . ."); **CLA-226**, Remittal Order, ¶ 3 (setting out the scope of the Remitted Issue).

VII. REQUEST FOR RELIEF

134. For the reasons set forth in this Rejoinder, the ROK respectfully reiterates the Request for Relief at paragraph 213 of its Submission on the Remitted Issue.

Respectfully submitted,

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