IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA

BETWEEN

ELLIOTT ASSOCIATES, L.P.

Claimant

AND

REPUBLIC OF KOREA

Respondent

CLAIMANT'S REBUTTAL SUBMISSION

13 AUGUST 2026

THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. Korea's position in these remitted proceedings can be summarized in one sentence. Korea can subvert a Yes/No voting process so that the outcome is Yes, and when caught, say that Elliott cannot prove it would have been No. And so, as Korea would have it: heads it wins; tails, Elliott loses.

2. This position is wrong on the law, wrong on the facts, and it would give carte blanche to criminal misconduct by a sovereign government. It would amount to a perverse answer to the narrow question that the English Court remitted to this Tribunal.

3. The English Court confirmed this Tribunal's jurisdiction to rule on all matters save the breaches of Korea's National Pension Service (***NPS***). It confirmed the Tribunal's findings on breaches of the Treaty by the Blue House, the Ministry of Health and Welfare (***MHW***) and the Minister of Health and Welfare (***Minister Moon***). And it left intact most of the Tribunal's findings on the facts and law of causation. It effectively asked the Tribunal to determine whether its prior findings that Korea's breach caused Elliott's losses were disturbed, or not, by the Court's different finding as to NPS's legal status as a matter of international law. In asking that question, the Court did not set aside this Tribunal's relevant findings of fact, including that the NPS was under the control of the MHW, did not act independently of the MHW and that the MHW intervened in the vote "*to the effect that* the [NPS] Investment Committee (***IC***) voted in favor of the Merger".[1]

4. These findings of fact were not set aside because they were separate from this Tribunal's determination of NPS's legal status as a matter of international law. They remain in the Award and continue to bind the Parties and the Tribunal. And it would be a complete reversal for these binding findings to now be accompanied by further findings that the MHW's intervention was *not* "to the effect that" the IC voted in favor of the Merger, because the same outcome would have resulted anyway.[2]

5. Not only would such a new finding be contradictory, sitting side-by-side, as it would have to, with the Tribunal's earlier findings—but it cannot be reconciled with the evidence before this Tribunal. It would also contradict the decision of the *Mason* tribunal, which found that the breaches of the Blue House, the MHW and Minister Moon caused Mason's loss.[3]

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1 Award, ¶¶ 602, 623 (emphasis added) **{A/28/177–178,185}**.

2 *See* Remitted Issue Hearing Transcript (***RI Transcript***), Day 2, 51:3–51:6 and 105:24–113:9 (Counsel for ROK) **{L/6/14,28–30}**.

3 *See Mason v. Republic of Korea*, **Exh CLA-219**, ¶¶ 859–889 **{H/219/261–267}**.

6. For the *factual* evidence of the Government's illegal, indeed criminal, intervention in the NPS vote remains overwhelming, and none of it was dependent on the Tribunal's separate *legal* finding that the NPS was a *de facto* state organ under international law. That evidence was obtained conscientiously by Korea's own special prosecutor during a multi-year criminal investigation. It confirms an instruction cascading down from Korea's Blue House to the MHW, and from the MHW to the NPS: (i) for the NPS to make sure its vote supported the Merger; (ii) for the NPS to bypass the Experts Voting Committee (***EVC***) that, according to the NPS itself at the time, "was created for this reason";[4] (iii) for the NPS to have the more pliant IC vote on the Merger; and (iv) to have the IC vote in favor of the Merger.

7. The evidence also confirms that extraordinary lengths were resorted to in order to implement that instruction within the NPS and to conceal the significant loss that the Merger would cause to shareholders, by: (i) the EVC being bypassed despite the NPS's original view that the vote had to be decided by them; (ii) the NPS's internal valuations of the Merger being repeatedly doctored to make the Merger appear less value-damaging than it actually was; (iii) fabricating a synergy effect calculation that involved "arbitrarily multiplying numbers together" in a manner that did not "make any sense to anyone",[5] to cosmetically erase the remaining value damage that would accrue to the NPS, even on the basis of the doctored valuations; and (iv) the NPS's Chief Investment Officer Hong (***CIO Hong***) exceptionally handpicking the IC members who would decide the Merger vote, and pressuring them into voting in favor of the Merger.

8. The Governmental instruction was clear: "the Merger must be approved",[6] and the evidence of its implementation is overwhelming.[7] What is more, the intervention was deliberately concealed because it was so obviously improper that, to quote the MHW's Director General Jo, "even a mere child would know not to" publicize it.[8]

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4 Transcript of phone calls between Team Leader [redacted] and Deputy Director Jin-ju Baek, 18 April 2017, **Exh C-333**, p. 12 **{C/333/6}**. *See also* Elliott's Reply Submission on Remitted Issue (***RI Reply***), ¶ 50 **{B/23/22–23}**; Reply, ¶ 114(a) **{B/6/65}**; Elliott's PHB, ¶ 41(b) **{B/10/20}**.

5 Statement Report of [redacted] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16 **{C/477/10}**. *See also* Statement Report of [redacted] to the Special Prosecutor, 2 January 2017, **Exh C-478**, p. 12 **{C/478/8}**; RI Reply, ¶ 60 **{B/23/27}**; Reply, ¶ 131 **{B/6/98–99}**; Elliott's PHB, ¶ 42(c) **{B/10/23}**.

6 Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12–15 **{C/497/12–15}**. *See also* RI Reply, ¶¶ 46–48 **{B/23/19–21}**; Reply, ¶ 108 **{B/6/59–63}**; Elliott's PHB, ¶ 41 **{B/10/19–22}**.

7 *See* RI Reply, ¶¶ 46–67 **{B/23/19–32}**; Elliott's PHB, ¶¶ 40–43 **{B/10/18–24}**; Reply, ¶¶ 108–166 **{B/6/59–134}**.

8 Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 14–15 **{C/497/14–15}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, p. 14 **{C/79/14}**; Seoul Central District Court, Moon/Hong, **Exh C-69**, pp. 44–45 **{C/69/44–45}**; Award, ¶ 598 **{A/28/175–176}**.

9. And this is precisely why Korea had previously stipulated to the factual findings of the Seoul District Court and Seoul High Court in criminal proceedings against Minister Moon and CIO Hong (***Moon/Hong Proceedings***),[9] which themselves were based on the evidence that confirms this Governmental instruction, and its implementation.[10] Korea is of course estopped from now walking back on that prior stipulation, because, in the words of the *Chevron v. Ecuador* tribunal, in a part of its award quoted by Elliott in Geneva, a State cannot "blow hot and cold".[11] Nevertheless, Korea is now trying to walk back from that stipulation, not through evidence that the statement reports produced by its own prosecutor are inaccurate, but simply on the basis of self-serving comments from its counsel at the remittal hearing, who made them seated in front of five representatives of Korea's Prosecutor's Office, who attended that hearing as representatives of Korea. How can Korea now credibly disavow the statement reports prepared by its own prosecutor representatives with any credibility? It cannot. How can Korea now recant on its prior stipulation? Again, it cannot.

10. In response to that obvious inability, Korea now seeks to draw a distinction between its stipulation to the factual findings in the Moon/Hong Proceedings, and the underlying evidence on which those factual findings were based. But no such distinction can seriously be maintained; the factual findings in the Moon/Hong Proceedings were based on the statement reports prepared by Korea's prosecutor, which are detailed accounts of questions asked and answers given, and are—in each case—signed as accurate by the witnesses whose statements were taken.[12] It is simply unsustainable, and unworthy, for Korea now to attempt to cast doubt on the accuracy of its own prosecutor's statement reports, though it reveals the lengths to which Korea must go in order to invite this Tribunal to "revisit" a factual record that it has already considered and determined.

11. Is Korea now saying that its own prosecutors—by whom still-standing criminal convictions were obtained—produced false evidence? Of course, it is not, and it will not, because it throws all of its prosecutions (not to mention the competence and integrity of the prosecutors) in Korea into doubt. Were the Tribunal now to accede to this recanting, at a stage in the arbitration in which the opportunity to submit further evidence has long ended,

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9 *See below*, fn. 130.

10 *See* Seoul Central District Court, Moon/Hong, **Exh C-69**, pp. 58–60 **{C/69/58–60}**; Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 54, 56 **{C/79/54,56}**; Supreme Court, Moon/Hong Decision, 14 April 2022, **Exh C-781**, p. 9 **{C/781/9}**.

11 *Chevron v. Republic of Ecuador (II)*, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶ 7.106 **{H/183/444,451}**. *See also* Elliott's PHB, ¶¶ 104–110 **{B/10/44–46}**.

12 *See*, *e.g.*, Second Statement Report of [redacted] to the Special Prosecutor, 27 December 2016, **Exh C-467**, p. 16 **{C/467/7}**; Second Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-471**, p. 13 **{C/471/3}**. *See also* Elliott's PHB, ¶¶ 104–110 **{B/10/44–46}**.

that would give rise to profound due process concerns that we respectfully request the Tribunal should not tolerate.

12. Unable seriously to challenge the facts of the criminal Government intervention—indeed, conceding them—Korea nevertheless seeks to engage the Tribunal in a thought experiment rather than a causation inquiry. It asserts that it is for Elliott to prove—to a higher standard than for proving a historical fact—that the Merger could not or would not have been approved anyway in an alternative reality that was—by design—prevented from occurring by Korea's violations. That posture is offensive as a matter of law and principle, and it is futile, because the facts speak for themselves.

13. Before the Government's illegal intervention, it was perfectly clear what the NPS's direction of travel was. Prior to Samsung's Merger announcement, the NPS had informed Elliott directly, as described in Mr. James Smith's unchallenged evidence, that it would not be in favor of a Merger in the light of prejudicial distortions in the share prices of SC&T and Cheil.[13] After the Merger was announced, the NPS received advice from Korea's Corporate Governance Service (***KCGS***)—specifically engaged by the NPS to advise it on the Merger vote—that unequivocally advised the NPS to vote against the Merger.[14] In parallel, the NPS's EVC rejected the proposed merger between two affiliated companies within the SK *chaebol*, SK C&C Holdings and SK Holdings (***SK Merger***), in circumstances that the Blue House and the MHW considered to be comparable to the SC&T-Cheil Merger.[15]

14. All of these indicators are precisely what motivated the extraordinary criminal scheme that senior members of the Korean government engaged in to avoid an outcome that they considered more likely than not. One does not engage in a criminal scheme such as this, with the personal risks involved to individual Government officials (which eventuated, with heavy custodial sentences), simply to "leave nothing to chance"[16] in respect of something you consider is likely to occur in any event. This was the context for Korea's machinations

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13 *See* Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 3 **{C/187/3}**; First Smith Statement, ¶¶ 27–29 **{D1/1/11–12}**; Second Smith Statement, ¶ 43 **{D1/2/21–22}**. *See also* RI Reply, ¶ 44 **{B/23/19}**; Reply, ¶¶ 40–47, 450(b) **{B/6/26–29,303–304}**; Elliott's PHB, ¶ 26 **{B/10/11}**.

14 *See* KCGS Report, 3 July 2015, **Exh C-402**, pp. 1–3 **{C/402/1–3}** ("The present merger of SC&T and Cheil raises serious concerns in terms of shareholder value. We recommended that a vote be cast in disapproval of this merger."). *See also* RI Reply, ¶ 8(b) **{B/23/5}**; Elliott's PHB, ¶ 192(b) **{B/10/79}**; Reply, ¶¶ 69–70 **{B/6/41–42}**.

15 *See* NPS Press Release, 24 June 2015, **Exh C-204 {C/204/1}** ("[W]hen considering the merger ratio, the timing of retirement of treasury stock, and other such factors, [the EVC] determined that there were concerns that it would damage SK Holdings' shareholder value, so it decided to oppose the merger."). *See also* [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, p. 1 **{C/385/1}**; RI Reply, ¶¶ 41–45 **{B/23/17–19}**; Elliott's PHB, ¶¶ 32–33 **{B/10/14–15}**; Reply, ¶¶ 98–103, 113–114 **{B/6/53–55,64–78}**.

16 RI Transcript, Day 2, 8:8–8:9 (Counsel for ROK) **{L/6/3}**.

that began on 24 June 2015 and the resulting direct intervention in the processes of the NPS from 30 June 2015.

15. The hypothetical world that Korea now constructs of all the allegedly good reasons why the NPS could have, or would have, voted in favor of the Merger collapses anyway under the weight of one simple fact. The NPS, whether through the EVC or the IC, was statutorily unable to vote in favor of the Merger if it resulted in a loss of value for the NPS.[17] Indeed, the NPS expressly confirmed to the MHW in early July 2015 that it was compelled to vote "against" the Merger if it would "cause a decrease in shareholder value".[18] And it is a simple fact that, without the doctored valuations and the fabricated synergy effect, the NPS's internal calculations would have confirmed that a 'yes' vote was impossible because the Merger would cause significant loss to the Fund. In the end, of the twelve IC members who voted, and with seven or more members needing to support the Merger for a 'yes' vote to be achieved, at least five of the eight who voted in favor have since confirmed that they would not have done so but for the fabricated synergy effect calculation.[19] Korea's attempts now to reinterpret their prior statements, without ever having presented any of those IC members as witnesses before this Tribunal, even though this issue was directly posed by Elliott's case and evidence prior to the Geneva hearing, are futile. Very simply, Korea ignores the reality that the IC members were statutorily bound not to vote in favor in the event of a value gap. These too-little, too-late gambits must be rejected.

II. THE SCOPE OF REMITTAL

16. Only 13 paragraphs of this Tribunal's 995-paragraph Award were set aside by the English Court.[20] The English Court left untouched all of the Tribunal's decisions on jurisdiction, save in relation to the legal status of NPS. It left untouched all of the Tribunal's findings against Korea on liability, save in relation to NPS attribution. And it preserved much of the

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17 *See below*, ¶¶ 38–39.

18 [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 **{C/420/1}**.

19 *See* Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-472**, pp. 10–11 **{C/472/2–3}**; Second Statement Report of [redacted] to the Special Prosecutor, 27 December 2016, **Exh C-467**, pp. 7–8, 14 **{C/467/3–4,6}**; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), **Exh C-502**, pp. 14–16, 38 **{C/502/5–6,10}**; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 10 April 2017, **Exh C-500**, pp. 8, 12, 48, 50 **{C/500/2–3,8,10}**; Transcript of Court Testimony of [redacted] and [redacted] (JY Lee Seoul Central District Court), 20 June 2017, **Exh C-515**, pp. 6, 25–26 **{C/515/10,12–13}**; Second Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-471**, p. 7 **{C/471/2}**; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 5 April 2017, **Exh R-291**, p. 55 **{R/291/19}**; Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-474**, p. 17 **{C/474/3}**. *See also* Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-473**, pp. 21–22 **{C/473/4–5}**; Elliott's Opening, slide 7 **{L/1/7}**.

20 *See Republic of Korea v. Elliott Associates, L.P.*, CL-2023-000395, Ruling on Consequential Issues, 18 March 2026, **Exh CLA-227** (***Ruling***), ¶ 5 **{H/227/2–4}**.

Tribunal's findings on causation and loss, which it considered again to be undisturbed by the Court's findings as to NPS attribution (this notwithstanding Korea's request that it set aside the entirety of the causation section in the Award)—a request that the Court rejected.

17. In rejecting Korea's request, and in preserving much of the Tribunal's findings on causation, the Court included at paragraph 5(l) of its ruling on consequential issues a paragraph that forms the basis of the **Tribunal's Question 1** to the Parties.[21] In response to that question, Elliott answers as follows:

(i) The Court recognized in that paragraph that the Tribunal's findings as to the test for causation survive the partial set-aside;

(ii) In so doing, it left open the possibility that additional findings as to the test for causation *may* be needed in the light of the issue that has been remitted;

(iii) However, any such supplementation would not replace the Tribunal's existing findings as to the test for causation that survive. In the words of the Court, "[t]he scope of the remission will not affect or allow Korea to revisit findings which have not been set aside."[22]

18. To the extent that Korea claims the Court was indicating that the Tribunal had not previously considered a 'but for' analysis, or a 'loss of a chance' framework for awarding damages, such that the Tribunal's findings now *require* supplementation, that is simply wrong.

19. The Parties have debated from the outset of this arbitration what the effect of the Government intervention has been.[23] The Tribunal heard the Parties and received evidence extensively on precisely that question before its Award.[24] In so doing, it considered evidence of how and why the NPS exercised its voting power in the way that it did, which inevitably involved an evaluation of whether the NPS's voting position was manipulated.[25] And the Tribunal addressed and rejected the suggestion that proving causation requires a claimant to exclude the uncertainties of 'what might have been' in the absence of the violative conduct.[26]

20. In the same way, the Tribunal rejected Korea's previous attempt to suggest a 'loss of a chance' framework in the context of the debate as to causation to loss.[27] Korea's submission

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21 *See ibid*, ¶ 5(l) **{H/227/3–4}**.

22 *Ibid*, ¶ 7 **{H/227/4}**.

23 *See, e.g.*, ASOC, ¶¶ 82–85 **{B/3/41–44}**; Reply, ¶¶ 505–523 **{B/6/331–351}**.

24 *See* Award, ¶¶ 724–823 **{A/28/213–245}**.

25 *See ibid*, ¶¶ 602, 623, 816–819 **{A/28/177–178,185,242–243}**.

26 *See ibid*, ¶ 822 **{A/28/244}**. The Tribunal's finding on this point was set aside on the limited basis that the English Court could not be sure that it was not premised on, or interrelated with, the Tribunal's finding that the NPS was a (*de facto*) State organ. It is open to the Tribunal to confirm that the language on causation in paragraph 822 was not dependent on its finding regarding the legal status of the NPS.

27 *See* ROK's PHB, ¶¶ 174, 182 **{B/11/76–77,79}**; ROK's Reply PHB, ¶ 68 **{B/13/33}**.

that the Tribunal did not need to decide this issue before is wrong; it does not arise for the first time simply because the NPS has now been found not to be a State organ. That is because the Tribunal's finding that the NPS was a *de facto* State organ involved it also recognizing that, in the exercise of its function, the NPS was required to make voting decisions independent of government.[28] The Tribunal's prior finding therefore proceeded on the basis that Elliott's entitlement was not to a particular outcome, but to a fair opportunity to achieve that outcome. And so, were a 'loss of a chance' framework appropriate, then it would have been appropriate in the scenario that followed from the Tribunal's prior finding. Yet the Tribunal did not adopt it—just as the *Mason* tribunal did not adopt it—rather finding other ways in which substantially to reduce Elliott's claimed loss. There is no basis or reason to "revisit[]", in the words of Korea,[29] that earlier decision now. Both this and the *Mason* tribunal were satisfied on the evidence that the NPS's vote on the Merger would have been No absent the directions from the Blue House and the Ministry.

21. As to this Tribunal's factual findings that go to satisfaction of the legal test for causation (in fact and law), those findings still feature in the Tribunal's Award; again, they have not been set aside; and, again, they remain binding on the Parties and the Tribunal. And nothing in the English Court judgment indicates otherwise; to the contrary, the English Court was clear that those findings that have not been set aside remain binding and cannot be revisited.[30]

22. This includes the following findings that go to causation in fact. At paragraph 602, and as discussed in greater detail in **Section III.E** below, the Tribunal found that Korea, through the MHW, intervened in the NPS's vote "to the effect that" the NPS voted in favor of the Merger.[31] At paragraph 623, again as discussed in greater detail below,[32] this Tribunal found that the NPS did not act independently or on the commercial merits of the Merger; rather, it acted under the MHW's direction and instructions as an instrument in the implementation of a governmental policy.[33]

23. This also includes the following findings that go to legal causation. As also discussed in greater detail in **Section IV.C** below, the Tribunal already found that the NPS held the casting vote on the Merger, which established "a direct causal link" between the NPS's vote on the Merger and the loss suffered by the NPS and other SC&T shareholders, including

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28 *See* Award, ¶¶ 602, 623 **{A/28/177,185}**.
29 ROK's Rejoinder Submission on Remitted Issue (***RI Rejoinder***), ¶ 120 **{B/26/95–96}**.
30 *See* Ruling, **Exh CLA-227**, ¶ 7 **{H/227/4}**.
31 Award, ¶ 602 **{A/28/178}**.
32 *See below*, ¶¶ 69–70.
33 Award, ¶ 623 **{A/28/185}**.

Elliott.[34] And it already found that there was no intervening act breaking the chain between the NPS vote and the claimed loss.[35]

24. At the hearing, Korea attempted to suggest that the English Court has somehow bound this Tribunal to treat these paragraphs of its Award as irrelevant to but-for causation and that it is therefore "not open" to Elliott to rely on them.[36] Again, that is wrong.

(i) *First*, paragraph 264 of the Judgment says only that Award paragraphs 602, 603 and 623 do not "on their face" allocate and apply the burden associated with a counterfactual inquiry.[37] It does not hold that the historical facts found there are irrelevant when the Tribunal now applies that inquiry.

(ii) *Second*, paragraph 265 of the Judgment expressly recognizes that the surviving passages "provide support for [Elliott]'s characterization of the Tribunal's assessment."[38] The Court declined itself to infer the ultimate, attribution-independent conclusion on causation, because paragraphs 814 and 821 of the Award addressing causation had relied expressly on the NPS's status,[39] which is why the Court remitted the issue of causation to the Tribunal. In short, while the Court was pronouncing on a "fair" reading of the Award to a third party such as the Court, it is obviously open to the Tribunal itself to confirm the meaning and effect of *its* existing findings in *its* Award.

(iii) *Third*, and consequently, it remains for this Tribunal, not the Court exercising jurisdiction under section 67 of the English Arbitration Act, to explain and apply the causal significance of the Tribunal's own findings that survived the set-aside order. Paragraph 602(b) of the Award was preserved precisely because it is a factual finding about what the NPS did, under whose directions it acted and with what "effect".[40] Confirming that those facts establish causation would neither reinstate the attribution findings that were set aside nor exceed the scope of remittal.

III. CAUSATION IN FACT

A. THE APPLICABLE TEST

25. The factual-causation test remains as stated in paragraph 815 of the Award, which was not set aside: whether Elliott would have suffered the claimed loss in the absence of Korea's

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34 *Ibid*, ¶ 819 **{A/28/243}**.
35 *See ibid*, ¶¶ 818–821 **{A/28/243–244}**.
36 RI Transcript, Day 2, 20:23–23:1, 23:15–24:25 (Counsel for ROK) **{L/6/6–7}**.
37 *Republic of Korea v. Elliott Associates, L.P.* [2026] EWHC 368 (Comm) (***Judgment***), **Exh CLA-222**, ¶ 264 **{H/222/72–73}**.
38 *Ibid*, ¶ 265 **{H/222/73}**.
39 *See ibid*, ¶¶ 265–266 **{H/222/73}**.
40 Ruling, **Exh CLA-227**, ¶ 5(c) **{H/227/2}**.

breaches.[41] In this case that entails two sequential questions: whether the NPS's affirmative vote was necessary for the Merger to pass, which the Tribunal has already answered affirmatively in findings that have not been set aside;[42] and whether, absent the Blue House Measures, the NPS would have voted in favor, in relation to which many of the Tribunal's existing findings of fact are highly relevant and arguably determinative.[43]

26. At the remittal hearing, Korea accepted the but-for inquiry as requiring the *subtraction* of the Blue House Measures from the factual matrix. But its ensuing analysis did something different: it *added* an imagined "untainted" valuation, an imagined synergy effect calculation and imagined IC deliberations that never occurred.[44] This approach is wrong.

27. A but-for inquiry is subtractive. It removes the wrongful conduct but preserves the historical circumstances; it does not allow thought experiments as to what might have been. Hart and Honoré's reference to the *Louisiana Barge* case and the findings of the *Chevron* tribunal confirm the distinction. In the *Louisiana Barge* case, there were no losses resulting from delays navigating a river obstructed by an unlawfully maintained drawbridge because a lawfully maintained drawbridge *that already existed* would have obstructed navigation in any event. Causation was not rejected on the basis of a *hypothetical* bridge that was not built but could have been.[45] The *Chevron* tribunal likewise rejected positing hypothetical claims that were not pursued before the Ecuadorian courts as part of the counterfactual inquiry as to the outcome of untainted court proceedings.[46]

28. Here, there was no actual, untainted NPS valuation that was supportive of the Merger: the NPS valuation that preceded the improper doctoring revealed an even larger loss of value for the NPS than the doctored valuation presented to the IC. Nor was there an actual untainted synergy effect calculation; and if an untainted synergy effect calculation that was sufficient to offset the loss could be arrived at, a fabricated one would have been unnecessary. Korea cannot now, ex post, invent a synergy effect and then speculate how the IC might have reacted to it.

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41 *See* Award, ¶¶ 815, 817–820 **{A/28/241–243}**.

42 *See ibid*, ¶¶ 817–818 **{A/28/242–243}**.

43 *See* RI Transcript, Day 1, 65:15–66:9 (Counsel for Elliott) **{L/5/18}**.

44 *See* ROK's Opening, 29 July 2026, slides 129–132 **{L/2/129–132}**. *Cf.* Judgment, **Exh CLA-222**, ¶¶ 258–260 **{H/222/69–70}**.

45 *See* RI Transcript, Day 1, 73:7–78:9 (Counsel for Elliott) **{L/5/20–21}**.

46 *See Chevron v. Ecuador (II)*, Fourth Partial Award on Track III, **Exh RLA-221**, ¶ 389 **{I/221.1/216}**.

29. The decision of the *Amco II* tribunal confirms the policy underlying that rule. A State that has subverted the process cannot defeat liability to make compensation by asking what a hypothetical "fair" decision-maker could have done in the process the State subverted.[47]

30. The *Bilcon* case was different from the present in many respects: (a) the Joint Review Panel (***JRP***)'s decision was not a binary Yes/No answer resting on one decisive factor; (b) the JRP had misdirected itself, but its decision-making had not been subverted by the State to tip the scales; and (c) the JRP did have before it a range of evidence as to the environmental aspects.[48] Thus, in *Bilcon*, the tribunal could not answer the but-for question with confidence,[49] while in the present case the Tribunal was and remains able to do that.

31. This answers **<u>Tribunal Question 2</u>**. The Tribunal should ask whether, with the Blue House Measures removed but all other historical facts held constant, the NPS, through the EVC or an untainted IC, would have voted against the Merger. The answer is clearly 'Yes'.

B. THE BURDEN AND STANDARD OF PROOF

32. Elliott accepts, as it always has, that the burden of proving factual causation first falls on it.[50] But Korea is wrong to suggest that it bears no burden on matters of causation. This is because the burden falls on the party alleging that an act severed the causal chain to prove that it did so.[51] Thus, once Elliott has established factual causation in the normal way, the burden shifts from Elliott to Korea to prove that the causal chain is broken.

33. The applicable standard is the ordinary civil standard that the Tribunal recorded in paragraphs 266 and 581 of the Award: the balance of probabilities.

34. As in the original arbitration, Korea argues that "in all probability" and "sufficient certainty" mean "highly likely" and impose a standard "more demanding than a mere balance of probabilities."[52] They do not. Those formulations simply require a counterfactual conclusion to be proven rather than asserted; they do not create a second, higher standard of proof.[53] In

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47 *See Amco Asia v. Indonesia (II)*, Award in Resubmitted Proceedings, 31 March 1990, **Exh CLA-237**, ¶ 174 **{H/237/117–118}**.

48 *See Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 450–452, 502–587 **{H/3/139,156–184}**.

49 *See Bilcon v. Canada*, Award on Damages, 10 January 2019, **Exh RLA-90**, ¶¶ 168–175 **{I/90/51,54}**.

50 *See below*, ¶ 82.

51 *See Lemire v. Ukraine*, **Exh RLA-56**, fn. 158 **{I/56/51}**; *Mason v. Republic of Korea*, **Exh CLA-219**, ¶ 813 **{H/219/244}**.

52 RI Transcript, Day 2, 7:15–20, 59:4–18 (Counsel for ROK) **{L/6/3,16}**.

53 *See* Elliott's Reply on Remitted Issue (***Elliott's RI Reply***), ¶¶ 29–34 **{B/23/13–15}**.

any event, in the *Chorzów Factory* case, the standard of "in all probability" was only mentioned in the context of determining reparation, not causation.[54]

35. Korea's suggestion otherwise is offensive. It would require a victim of a breach to establish historical fact on the balance of probabilities but then to meet a yet-higher standard to prove counterfactual non-facts that did not occur due to the breach. That would reward a guilty State for any uncertainty created by its own subversion and make compensation illusory.

C. BUT-FOR THE BLUE HOUSE MEASURES, THE NPS WOULD HAVE VOTED AGAINST THE MERGER

36. The proper starting point for constructing the counterfactual is the evidence of what *actually* happened, with the Blue House Measures removed. What remains unchanged in the counterfactual includes: (***1***) the NPS's governing duty to vote in a way that avoided loss to the National Pension Fund (***Fund***); (***2***) the NPS's confirmation to Elliott's Mr. Smith on 18 March 2015 that it would *not* support a Merger between SC&T and Cheil given its destruction of SC&T shareholder value; (***3***) the 26 May 2015 announcement of a Merger Ratio of 1:0.35, which baked in a very significant undervaluation of SC&T shares and resulted in significant transfer of value away from SC&T shareholders; (***4***) the 24 June 2015 decision by the NPS to vote against the SK Merger in circumstances that the Blue House and the MHW considered to be indicative of the NPS's likely posture on the SC&T-Cheil Merger; (***5***) the late June 2015 Blue House assessment that, absent intervention by the Government, the NPS was expected to vote against the Merger, in accordance with its duty to avoid loss to the Fund; (***6***) the NPS's 30 June 2015 unmolested valuation of an "appropriate" merger ratio for the SC&T-Cheil Merger, showing an enormous loss of value for the Fund; and (***7***) the absence of any synergy or other factor that offset that value loss.

37. These factors, discussed in more detail below, also address the issues raised in **Tribunal Question 3**. The first known MHW engagement with the NPS for the purpose of influencing the NPS's vote occurred on 30 June 2015 at a meeting where MHW Directors Jo and [redacted] instructed CIO Hong to "have the Investment Committee decide on the [Merger]".[55] The Blue House also engaged directly with the NPS but at different times and to different extents: Senior Presidential Secretary [redacted] discussed the Merger vote and ISDS risk directly with the NPS CIO Hong in late June and early July 2015; and on 10 July 2015 CIO Hong reported

[54] *See Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, PCIJ Rep. Series A. – No. 17, 13 September 1928, **Exh CLA-97**, p. 47 **{H/97/89}**.

[55] *See* Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 7 **{C/69/7}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 29–33 **{C/79/29–33}**; Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 12–13 **{C/497/12–13}**; Transcript of Court Testimony of Wan-seon Hong (JY Lee Seoul Central District Court) (Part One), 21 June 2017, **Exh C-516**, p. 13 **{C/516/2}**. There is evidence that the Blue House was considering intervening in the NPS vote prior to the 30 June meeting. *See below*, ¶¶ 51–52.

the IC's decision to Senior Presidential Secretary [redacted].[56] As demonstrated below, the NPS's position prior to the Government's intervention was *against* the Merger.

1. The NPS's governing duty to avoid loss to the Fund

38. As the Tribunal's Award states, the NPS's decision was "governed by" the Fund Operational Guidelines and the Voting Guidelines.[57] The Guidelines' "cardinal principle" is the profitability of the Fund, which must be prioritized.[58] Article 4(1) of the Operational Guidelines ("Principle of Profitability") requires that "[r]eturns must be maximized".[59] Article 4 of the Voting Guidelines requires the NPS to exercise voting rights "so as to enhance long-term shareholder value"; Article 6 requires the NPS to vote against any proposal reducing shareholder value or contravening the Fund's interests.[60]

39. Although Korea seeks to highlight other investment principles that the NPS should observe,[61] the NPS itself confirmed to the MHW contemporaneously that "a decrease in shareholder value" alone would compel "a decision against" the Merger.[62] Similarly, Korea's own EVC witness in this arbitration, Mr. Young-gil Cho, agreed that the "primary mandate" was profit and that social or political considerations can be considered only insofar as they are expected to increase the Fund's returns.[63] Consequently, the obligation to avoid loss was front-of-mind for the NPS during the events in question, and ultimately drove the need for serious misconduct to disguise losses the Fund would suffer.

2. In March 2015, the NPS confirmed to Elliott that the NPS would not support a SC&T/Cheil merger that caused loss to SC&T shareholders

40. On 18 March 2015, Elliott's Messrs. Smith and [redacted] met with the NPS's Messrs. [redacted] and [redacted]. When Mr. Smith explained that "a merger at the current share prices would be highly detrimental to SC&T shareholders", the NPS officials agreed.[64] Elliott memorialized that

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56 *See* Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 7 **{C/69/7}**; Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 14–15, 29, 37–41 **{C/79/14–15,29,37–41}**; Award, ¶ 588 **{A/28/172}**. *See also* Reply, ¶¶ 108(c), 114(h), 121, 147(c) **{B/6/60–63,72–74,87–88,117–118}**.

57 Award, ¶ 222 **{A/28/58}**. *See also* First CK Lee Expert Report, **CER-1**, ¶¶ 98–100 **{F1/1/50–51}**; Second CK Lee Expert Report, **CER-4**, ¶ 57 **{F4/1/24}**; Reply, ¶ 416 **{B/6/267}**.

58 *See* First CK Lee Expert Report, **CER-1**, ¶ 99 **{F1/1/50–51}**.

59 Fund Operational Guidelines, **Exh C-194**, Article 4 **{C/194/6}** (Principles of Fund Management).

60 Voting Guidelines, **Exh C-309**, Arts. 3, 4 and 6 **{C/309/1–2}**. Similarly, Annex 1, Article 34(1), specifically requires the NPS to vote against a proposed merger "if it is expected that the shareholder value may be damaged." Voting Guidelines, **Exh C-309**, Annex 1, Art. 34(1) **{C/309/12}**.

61 *See* ROK's Opening, slides 86–87 **{L/2/86–87}**.

62 [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 **{C/420/1}**.

63 Second Cho Statement, ¶ 7 **{E/2/4–5}**.

64 First Smith Statement, ¶ 28 **{D1/1/11}**. *See also* Reply, ¶ 40 **{B/6/26}**; Elliott's PHB, ¶ 26 **{B/10/11}**.

understanding in a letter to the NPS.[65] Mr. Smith's evidence as to the contents of the 18 March 2015 meeting stands uncontested, as noted in Mr. Thomas KC's Separate Opinion.[66]

41. Korea tries to downplay the significance of this meeting, pointing to the NPS's 15 June 2015 letter stating it had not yet taken a position on "the Proposed Merger", and arguing that the NPS's comments in March would in any event be irrelevant to the NPS's actual voting behavior in July.[67] Neither argument assists Korea. The NPS's 15 June letter was prompted by separate correspondence from Elliott on 3 June (sent just one day before Elliott publicly announced its shareholding in SC&T[68]) asking the NPS to reconfirm that it would not support the now-announced SC&T-Cheil Merger.[69] The NPS's 15 June letter said that it had not taken a position on the "Proposed Merger" but did not deny what had been discussed and agreed on 18 March (a fact expressly noted by the English Court[70]). Moreover, the passage of time from 18 March (the meeting) to 26 May 2015 (the Merger announcement) had only made the Merger economics *even more* damaging for SC&T shareholders.[71] As Elliott recorded in its 3 June letter, "[n]o part of the Proposed Merger provides any basis upon which NPS could or should change its views on merger proposals which so unfairly undervalue [SC&T]".[72] As described below, the record shows that the NPS had not changed—and had no basis to change—its views on the loss the Merger would cause.[73]

3. The 26 May 2015 announcement of the harmful Merger Ratio

42. The Merger Ratio was a matter of mandatory law, prescribed by a statutory formula set out in the Enforcement Decree of the Financial Investment Services and Capital Markets Act for a merger of two listed companies based on their share trading prices during the month preceding the Merger announcement.[74] SC&T and Cheil could not change, jointly or separately, the Merger Ratio.

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65 *See* First Smith Statement, ¶ 29 **{D1/1/11–12}**; Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 3 **{C/187/3}**.

66 *See* Separate Opinion of J Christopher Thomas KC, 20 June 2023, ¶ 56 **{A/29/14}**.

67 *See* RI Rejoinder, ¶¶ 60–61 **{B/26/47–49}**.

68 *See* Elliott Press Release, 4 June 2015, **Exh C-20 {C/20}**.

69 *See* Letter from Elliott to NPS, 3 June 2015, **Exh C-187 {C/187}**; Letter from NPS to Elliott, 15 June 2015, **Exh C-201**, p. 1 **{C/201/1}**.

70 *See* Judgment, **Exh CLA-222**, ¶ 39 **{H/222/13}** ("The rather careful nature of the NPS's response leads me to conclude that statements of the kind alleged by Elliott were made by the NPS at that meeting").

71 *See* SC&T and Cheil Share Prices 1 January 2014 to 31 December 2015, **Exh C-256**, p. 9 **{C/256/9}** (showing the respective share prices of Cheil and SC&T on 18 March 2015 of KRW 152,000 and KRW 57,400, i.e., a ratio of 1:0.38, slightly higher than the Merger Ratio of 1:0.35). *See also* [[redacted]], "Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with respect to the Merger", [26 May 2015], **Exh C-378**, p. 1939 **{C/378/1}**.

72 Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, p. 3 **{C/187/3}**.

73 *See below*, ¶¶ 51–61.

74 *See* Financial Investment Services and Capital Markets Act, 1 July 2015, **Exh C-213**, Article 165–4(1) **{C/213/148}**; Enforcement Decree of the Financial Investment Services and Capital Markets Act, 8 July 2015, **Exh C-222**, Article 176–5(1), sub-paragraph 1 **{C/222/171}**. *See also* SH Lee Expert Report, ¶ 17 **{F2/1/6}**.

43. Set by statute in this way, the Merger Ratio was susceptible to manipulation by a controlling shareholder in the context of a predatory merger: short-term fluctuations in share prices could be influenced by a controlling shareholder who then timed a merger announcement (and thus the application of the statutory formula) to maximize the disparity in share price between the merging companies.[75] Thus, in the present case, the Merger Ratio resulted from the announcement of the Merger at a time—as independent market analysts confirmed[76]—when the market price of SC&T was almost half its fair value, and the market price of Cheil was more than double its fair value.[77] The resulting Merger Ratio would thus cause a transfer of value from SC&T shareholders to Cheil shareholders that was "a textbook example of … 'tunneling'"—a transaction described by Professor Milhaupt between two related companies designed to expropriate corporate value from minority shareholders for the benefit of the controlling shareholder.[78] Korea's own expert, Professor Bae, agreed that the Merger was a tunneling transaction.[79]

44. In Response to **<u>Tribunal Question 4:</u>** Changes to merger terms are limited to a statutory adjustment, which has almost never been used in practice.[80] Samsung could also withdraw the Merger proposal and reintroduce it at a later date upon which the statutory merger ratio would be recalculated by reference to the latest month of share prices. But the factual evidence confirms that such a hypothetical possibility of Samsung taking such steps would not have occurred. For after the Merger Ratio was announced, and recognizing how damaging it would be, the NPS's CIO Hong and the NPS Head of Research, Mr. [redacted], did in actual fact seek to convince Samsung to take such steps.[81] But Samsung's JY Lee refused, stating "*there is no Plan B*", he said, "[*the Merger*] *must go through at all cost*".[82]

4. The 24 June 2015 decision by the NPS to vote *against* the SK Merger

45. The SK Merger was the closest contemporaneous comparator to the Merger. It established how the NPS itself understood it should approach mergers involving chaebol restructurings and merger ratios that were expected to harm shareholders of one of the merging entities.

46. After the SC&T Merger was announced, a 10 June 2015 NPS internal memorandum concluded that the SK Merger was "the same as the Samsung merger in essence despite the

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75 *See* SH Lee Report, ¶¶ 32–37 **{F2/1/13–15}**.

76 *See, e.g.*, ISS Report, 3 July 2015, **Exh C-30**, p. 2 **{C/30/2}**.

77 *See* Letter from Elliott to NPS, 3 June 2015, **Exh C-187**, pp. 2–3 **{C/187/2–3}**. *See also below*, fn. 104.

78 *See* Milhaupt Report, ¶ 61 **{F6/1/22}**; SH Lee Report, ¶ 18(ii) **{F2/1/6–7}**. *See also* Reply, ¶ 68 **{B/6/40–41}**; Elliott's PHB, ¶¶ 176, 192 **{B/10/72–73,78–79}**.

79 *See* Arbitration Transcript, Day 6, 95:1-3, 7-11 (Professor Bae) **{J/30/25}**.

80 *See* SH Lee Report, ¶¶ 25–28 **{F2/1/9–12}**; Elliott Reply on Remitted Issue, ¶¶ 53–55 **{B/23/24–26}**.

81 *See* [[redacted]], NPS CEO Meeting Notes, 7 July 2015, **Exh C-413**, p. 1 **{C/413/1}**.

82 *Ibid*. *See also* Seoul High Court, Park, **Exh C-286**, p. 67 (item 4) **{C/286/19}**.

difference in degree"[83] and that, because the SK Merger would establish "clear standards" for future chaebol restructurings (i.e., the now-announced Merger), the SK Merger vote should be referred to the EVC.[84] The NPS memorandum identified the same core concern that arose with the Merger: although the merger ratio complied with the statutory formula, there was substantial controversy because it was damaging to one group of shareholders.[85]

47. As with the SC&T Merger, the materials presented to the IC for the SK Merger referred to "business opportunities", "growth drivers" and synergies anticipated over the long term, and positive views from some proxy advisors.[86] But in the face of a damaging merger ratio and clear, immediate loss to the Fund, the IC referred the vote to the EVC, identifying the key issue as being harm to shareholder value due to the merger ratio.[87] The EVC voted against the SK Merger because of "concerns that it would damage … shareholder value."[88]

48. The SK Merger is significant because it confirms how—in an untainted world—the NPS applied its own Guidelines to a materially similar transaction and cast its vote in the face of expected loss. Contemporaneous evidence shows that the Blue House and the MHW were worried that the SK Merger vote signaled how the NPS, and in particular the EVC, would vote when it turned to consider the Merger just days later.[89]

49. Korea seeks to distinguish the SK Merger vote from this Merger on the grounds that, per Mr. Cho, the EVC voted against the SK Merger because the merger proposal anticipated retiring both entities' treasury shares, and that this would disproportionately impact the company with more treasury shares.[90] But Mr. Cho's evidence only underscores that what caused the NPS to vote against the SK Merger was Fund profitability because the treasury stock disparity between the two entities would cause the Fund to suffer loss. Contemporaneous evidence confirms this: a NPS memorandum shared with the MHW on or around 7 July 2015

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83 On the parallels between the Merger and the SK Merger, *see also* Letter from Elliott to NPS, 8 July 2015, **Exh C-225**, p. 4 **{C/225/4}**; First Smith Statement, ¶ 45 **{D1/1/18}**; ASOC, ¶ 63 **{B/3/31}**.

84 *See* [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, p. 1 **{C/385/1}**. *See also* Seoul Central District Court, Moon/Hong, **Exh C-69**, pp. 43–44 **{C/69/43–44}**; Reply, ¶¶ 98–100 **{B/6/53–55}**; RI Reply, ¶¶ 41–45 **{B/23/17–19}**.

85 *See* [NPSIM], "Review of Referral of SK-SK C&C Merger to the Experts Voting Committee", [10 June 2015], **Exh C-385**, pp. 1–2 **{C/385}**. *See also* Reply, ¶ 99 **{B/6/54}**.

86 *See* "Exercise of Voting Rights for Domestic Share Management", 17 June 2015, **Exh R-102**, p. 5 **{R/102/5}**.

87 MHW, "Report on the 2015 2nd Special Committee on the Exercise of Voting Rights Meeting Result", 24 June 2015, **Exh R-109**, p. 1 **{R/109/1}**.

88 *See* NPS Press Release, 24 June 2015, **Exh C-204** **{C/204/1}**.

89 *See, e.g.*, Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 8 **{C/488/5}** ("Given [the EVC vote on the SK Merger], the Cheil Industries and Samsung C&T merger could have been opposed if nothing was done"); Transcript of Court Testimony of Nam-kwon Jo (Moon/Hong Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 12 **{C/497/12}**; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 12 **{C/508/5}**. *See also* Elliott's PHB, ¶¶ 32–35 **{B/10/14–16}**; RI Reply, ¶¶ 41–45 **{B/23/17–19}**.

90 *See* First Cho Statement, ¶ 15 **{E/1/6–7}**; ROK's Submission, ¶¶ 129–131 **{B/21/73–74}**.

confirmed that "[t]he [EVC] voted against the SK merger on the grounds that the merger ratio was disadvantageous to SK, thereby undermining the shareholder value."[91]

50. The SK example is compelling evidence of what, absent the unlawful intervention, the NPS would have done: it would have asked itself if the Merger would cause it to suffer loss, answered that affirmatively, and voted against the Merger—exactly as it did for the SK Merger a mere 16 days before the IC voted on the SC&T Merger. Korea's self-serving efforts now to distinguish the SK Merger carry far less weight than the evidence of the Blue House, the MHW and the NPS considering it a relevant benchmark at the time.

5. The late June 2015 Blue House assessment that the NPS would vote to preserve the Fund's profitability

51. Further contemporaneous evidence that the NPS would have voted against the Merger can be seen in an internal Blue House memorandum, entitled "Direction of the National Pension Service's Exercise of Voting Rights Regarding the Samsung C&T Merger" and understood to briefly predate the 30 June meeting at which the MHW first intervened in the NPS vote.[92]

52. In that memorandum, the Blue House records the NPS's pre-intervention position, namely that: "[c]urrently, the NPS is only reiterating the basic principle that 'the decision will be made from the perspective of maximization of shareholder profit'".[93] As it was obvious that taking the decision from this perspective could *only* cause the NPS to vote against the Merger, the Blue House memorandum goes on to consider whether and how to "intervene in the NPS's exercise of voting rights", observing that if the Government were to "set" the direction of the vote *in favor* of the Merger, then this would be "*at the expense of shareholder value and Samsung C&T*."[94]

6. The NPS's 30 June 2015 valuation of an "appropriate" Merger Ratio

53. The NPS knew the Merger Ratio was harmful to SC&T shareholders and that this compelled it to vote against the Merger. On 30 June 2015, prior to the Government's intervention, the NPS's Head of Research, Mr. [redacted], prepared an untainted valuation of what the NPS

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[91] [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p.1 **{C/420/1}** (emphasis in original removed).

[92] *See* [Blue House], "Direction of the National Pension Service's Exercise of Voting Rights regarding the Samsung C&T Merger", undated, **Exh C-588**, p. 41 **{C/588/1}**. The precise date of this document has not been confirmed by the Korean courts. However, from its contents it can be understood to postdate 9 June 2015 and predate the steps taken by Korea to "intervene in" and "set" the NPS's vote on the Merger.

[93] *Ibid* **{C/588/1}**.

[94] *Ibid* (emphasis added) **{C/588/1}**. *See also* Reply, ¶¶ 95–96 **{B/6/52–53}**.

considered to be an "appropriate" merger ratio of 1:0.64, using the neutral fair values of SC&T and Cheil.[95]

54. The valuation evidence in the record confirms that a 1:0.64 merger ratio would cause the NPS to suffer loss of approximately KRW 552–617 billion (~USD 490–550 million).[96] The record therefore shows that, but-for the Government's unlawful intervention, the NPS would have to decide whether it would be consistent with the mandatory principle of profitability and maximizing shareholder value for it to support a Merger that it knew would result in more than KRW 550 billion in losses for the Fund. The answer to that question is obvious.

7. The absence of any factor that would compensate the NPS for its loss

55. The final element of the counterfactual is the absence of any reliable evidence showing that the known losses to the Fund caused by the Merger Ratio could be offset by other anticipated financial gains. Korea has not identified any such evidence, because there is none.

56. *First*, at the hearing, Korea referred to evidence showing that the IC considered factors other than the synergy effect when deliberating on the Merger, including the NPS's interests across the Samsung portfolio and the wider economic impact of the Merger.[97] What is clear is that none of the factors, either individually or in combination, was enough to compensate for the loss that the Merger Ratio would cause to the Fund. That is precisely why the NPS valuation had to be doctored and the still-remaining loss offset by an entirely fabricated synergy effect calculation.[98] Once these two factors are removed from the counterfactual scenario, as they must be, no other factor supporting the Merger was enough to allow the NPS to vote in favor of the Merger, in the light of the cardinal principle of profitability.

57. *Second*, Korea argued at the remittal hearing that, if the Merger had been so clearly detrimental to SC&T shareholders, then it could not possibly have achieved a two-thirds supermajority vote.[99] At the hearing, Korea described domestic institutions and sovereign wealth funds as useful proxies.[100] But Korea ignored the evidence that, as the Claimant already submitted before the Geneva hearing, domestic investors followed the NPS's lead

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95 *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, p. 21 **{C/79/21}**; Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 51 **{C/69/51}**; [NPSIM Research Team], "Exhibit 7 Comparison of Fair Value Assessment", [30 June 2015], **Exh C-393**, p. 26 **{C/393/1}**; Statement Report of [redacted] to the Special Prosecutor, 2 January 2017, **Exh C-478**, pp. 6–7 **{C/478/4–5}**. *See also* Elliott's RI Reply, ¶¶ 54–55 **{B/23/25–26}**; Elliott's PHB, ¶ 42(a) **{B/10/22}**; Reply, ¶ 128(a) **{B/6/91–92}**.

96 *See* Second Boulton Report, ¶ 8.3.5 and Figure 24 **{F5/1/79}**. *See also* Reply, ¶ 74 **{B/6/43}**.

97 *See* ROK's Opening, slides 89 *et seq*. **{L/2/89}**.

98 *See below*, ¶¶ 62–68.

99 *See* ROK's Opening, slide 78 **{L/2/78}**.

100 *See* RI Transcript, Day 2, 62:11–65:16 **{L/6/17–18}**; ROK's Opening, slide 79 **{L/2/79}**.

on shareholder votes.[101] Korea also ignores the unique situation of the NPS, the largest shareholder in SC&T and the entity exposed to the greatest loss: unlike other SC&T shareholders (many of whom held tiny interests), the NPS managed public pension assets under mandatory profitability and independence rules, held SC&T and Cheil in a unique proportion, and held the casting vote on the Merger.

58. *Third*, Korea claims that the risk of harm caused by the Merger Ratio was "subjective" and "imprecise".[102] It relies on its Demonstrative E to suggest that the Merger Ratio fell within the range of what the NPS Research Team, KPMG and Deloitte Anjin considered reasonable.[103] But the NPS Research Team's assessment identified in Demonstrative E is not the unadulterated version produced on 30 June 2015 and should be removed from the counterfactual.[104] The NPS's unadulterated range assessed an "appropriate" merger ratio of 1:0.64, ranging between 1:0.46 to 1:0.89, and that is the NPS assessment to consider in the counterfactual.[105] As noted, the value loss between that assessment, which the NPS would have had regard to, and 1:0.35 (which was well outside the range) was enormous—notwithstanding the misleading scale adopted by Korea in its Demonstrative E—and valued at USD 490–550 million.[106]

59. As for the Deloitte Anjin and KPMG reports, both were commissioned by Samsung (Deloitte Anjin to value SC&T and KPMG to value Cheil), and of course were not independent valuations that the NPS would have prioritized over its own internal valuation. On the Deloitte Anjin report in particular, it is astonishing (but revealing) that Korea still places significant weight on it, notwithstanding the extraordinary evidence confirming that Deloitte Anjin's valuation of SC&T was repeatedly manipulated downward by the Samsung Group to support Samsung's Merger Ratio. The lead Deloitte Anjin partner—Mr. [redacted]—confirmed that Deloitte changed its valuation of SC&T as many as *seventeen times in a ~two-week period* and admitted "we … could not but make up enterprise value figures which

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101 *See* Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 19 April 2017, **Exh C-504**, pp. 22–23 **{C/504/2–3}**. *See also* [Ministry of Health and Welfare], "Action Plans for Initiating Discussions at the Investment Committee", [8 July 2015], **Exh C-419**, p. 1 **{C/419/1}**; Reply, ¶¶ 149, 516 **{B/6/120,343–344}**.

102 ROK's Submission, ¶ 102 **{B/21/55–56}**.

103 *See* ROK's Opening, slides 117, 121 **{L/2/117,121}** and Demonstrative E **{L/4/1}**.

104 Highly respected proxy advisors ISS and Glass Lewis recognized the enormous loss that SC&T shareholders would suffer. ISS concluded that the Merger Ratio "significantly disadvantages Samsung C&T shareholders" and that "[p]otential synergies … even if credible, do little to compensate for the significant undervaluation implied by the exchange ratio." Glass Lewis considered that the Merger would cause a "substantial value transfer in favor of Cheil", and that "SCT investors have been provided very limited cause to support of accept the [SC&T] board's promulgated perspectives". *See* ISS Report, 3 July 2015, **Exh C-30**, pp. 2, 19 **{C/30/2,19}**; Glass Lewis Report, 17 July 2015, **Exh C-43**, pp. 5, 7 **{C/43/5,7}**. *See also* Reply, ¶ 68 **{B/6/40–41}**.

105 *See* [NPSIM Research Team], "Exhibit 7 Comparison of Fair Value Assessment", [30 June 2015], **Exh C-393**, p. 26 **{C/393/1}**.

106 *See above*, ¶ 54.

matched the merger ratio based on the reference stock price by decreasing Samsung C&T's value and pushing up Cheil Industries' value".[107] Deloitte internal emails confirmed it was "impossible" to arrive at valuations of the two entities that would match the Merger Ratio.[108]

60. Ultimately, the NPS would have prioritized its own (undoctored) internal valuation at the time, as well as the advice it received from the KCGS, which the NPS specifically engaged at the time to advise it on how to vote in accordance with the Fund Operational Guidelines. And, to recall, the KCGS advised the NPS in no uncertain terms that the Merger Ratio "raises grave concerns of value impairment for ordinary shareholders" and firmly recommended a vote against the Merger.[109] In the counterfactual, this advice—from the very expert advisors engaged to advise the NPS on how to vote on the SC&T Merger—together with its own undoctored valuation, would have been impossible for the NPS to ignore.

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61. Taken together, these facts leave no evidential basis for an independent "yes" vote, and certainly not on the balance of probabilities. Whether the vote went to the EVC or the IC, the evidence establishes that, in the counterfactual scenario: the NPS was governed by rules requiring it to protect the Fund's profitability; the NPS knew that the Merger Ratio caused a substantial loss to all SC&T shareholders, including especially itself; its key adviser told it to vote against because of "grave concerns of value impairment for ordinary shareholders"; and the broader considerations invoked by Korea now supplied the concrete countervailing value required to sanction a vote in favor of the Merger. Accordingly, in a properly construed counterfactual, a negative vote on the Merger would have been the only possible, and certainly overwhelmingly likely, outcome, because the NPS was duty-bound to so vote. Just as it did in the SK example.

D. THE BUT-FOR SCENARIO IS CONFIRMED BY THE BLUE HOUSE MEASURES THEMSELVES

62. This conclusion is confirmed by evidence of the extraordinary and illegal steps that the Government felt it had to take in order to *change* the clear direction of travel toward a vote against the Merger. If gross illegality—with all the personal risks involved for the perpetrators—had not been necessary to affect the NPS vote, it would not have occurred.

63. This is confirmed by the NPS memorandum shared with the MHW, dated 7 or 8 July 2015. In this memorandum, the NPS identified the necessary criteria for it to vote in favor of the

107 Second Statement Report of [redacted] to the Public Prosecutor's Office, 20 March 2019, **Exh C-779**, pp. 10, 17–18 **{C/779/5,9–10}**. *See also* Elliott's PHB, ¶¶ 196–197 **{B/10/81–82}**.

108 *See* Email from [redacted] (Deloitte) to Deloitte team members, 19 May 2015, **Exh C-776 {C/776}**; Deloitte 21 May Report, **Exh C-775**, pp. 2, 10 **{C/775/3,10}**. *See also* Email exchange between [redacted] (Deloitte) and Deloitte team members, 19 May 2015, **Exh C-777**, p. 2 **{C/777/2}**; Elliott's PHB, ¶ 198 **{B/10/82}**.

109 *See* KCGS Report, 3 July 2015, **Exh C-402**, pp. 3, 7 **{C/402/3,7}**.

Merger under the Voting Guidelines and confirmed that if any condition was not met, the vote must be against.[110] The NPS explained that the Merger is "even more controversial than the SK merger with respect to the merger ratio" and that "there needs to be *a clear rationale* for the fairness of the merger ratio" in order to contradict the SK Merger precedent and have the IC vote in favor of the Merger.[111] The NPS also observed that ISS and KCGS advised against the Merger because of the harm the Merger Ratio would cause to SC&T shareholders and that, accordingly, there "*need[ed]* to be *clearer rationale*" for supporting the merger.[112] The problem was, however, that no such clear rationale existed. And so, the NPS manufactured one.

64. After the 1:0.64 valuation on 30 June 2015, and with the Ministerial instruction ringing in his ear, CIO Hong repeatedly told the NPS Research Team to "try harder" with their valuation, which Mr. [redacted] understood to mean that the valuation should be "steer[ed]" in favor of the Merger.[113] Revised assumptions—deriving from the manipulated Deloitte Anjin valuation—moved the ratio first to 1:0.39 on 6 July,[114] and then to 1:0.46 on 8 July.[115] While Korea made much of the fact that the 8 July valuation was higher than the 6 July valuation, the fact is that both were substantially lower than the NPS's untainted valuation.

65. The NPS was left to manufacture an offset large enough to conceal the (still resulting) loss caused by the Merger Ratio. To do so, as the Tribunal knows, the Research Team contrived a "synergy effect", which calculation started with the required answer and worked backwards, as the author would later admit, by "arbitrarily multiplying numbers together" and engaging in an exercise that did not "make any sense to anyone."[116]

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110 [[redacted]], "Issues in Case the Investment Committee Votes on the SC&T Merger", [7 or 8 July 2015], **Exh C-420**, p. 1 **{C/420/1}** (emphasis added) ("For a decision in favor of an agenda item under the Voting Guidelines, the **following three conditions must all be met**: 1) it shall contribute in the long run to enhancement of shareholder value; 2) it may not cause a decrease in shareholder value; and 3) it may not be against the interests of the Fund. **For a decision against** an agenda item, only one of the above three conditions needs be met") (original emphasis).

111 *Ibid* **{C/420/1}** ("[I]f consent is given to the merger without a clear rationale, such would run contrary to the resolution of the [EVC] (on the SK case) in defiance of the Fund's decision-making system.").

112 *Ibid* (emphasis added) **{C/420/1}**.

113 Statement Report of [redacted] to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7279 **{C/487/2}**. *See also* Award, ¶ 589 **{A/28/172}**.

114 *See* [NPSIM Research Team], "Exhibit 7 Comparison of Fair Value Assessment", [6 July 2015], **Exh C-411**, pp. 25–26 **{C/411/1–2}**; NPSIM, "Analysis Regarding the Merger of Cheil Industries and Samsung C&T", 6 July 2015, **Exh C-408**, pp. 25–26 **{C/408/14}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 20–21, 34, 55 **{C/79/20–21,34,55}**; Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 50 **{C/69/50}**.

115 *See* NPSIM Research Team, "Report on Appropriate Valuation Calculation of Cheil Industries and SC&T", 10 July 2015, **Exh C-426**, p. 2 **{C/426/2}**; Statement Report of [redacted] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 9 **{C/477/3}**; Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 23, 33 **{C/79/23,33}**; Seoul Central District Court, Moon/Hong, **Exh C-69**, pp. 51–52 **{C/69/51–52}**.

116 Statement Report of [redacted] to the Special Prosecutor, 2 January 2017, **Exh C-477**, p. 16 **{C/477/10}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 23–24 **{C/79/23–24}**; Award, ¶ 589 **{A/28/172}**.

66. Mr. [redacted] then presented that reverse-engineered figure to the IC as if it were the product of professional analysis. The Tribunal will recall that several IC members had been (exceptionally) handpicked for the meeting by CIO Hong, and many had been subjected to pressure to support the Merger leading up to and during the IC meeting.[117] What is more, the IC meeting minutes themselves confirm that members repeatedly identified the Merger Ratio loss and the need for concrete countervailing proof that shareholder value would not be diluted.[118] Mr. [redacted] answered those concerns by insisting that "what is important is the synergy effect," that synergies of at least KRW 2 trillion would be achieved and would overcome the loss created by the Merger Ratio.[119] The IC's recorded conclusion was to "agree to the merger *in view of its synergy effect*, etc."[120]

67. As Elliott already set out in detail in its Post-Hearing Brief after the Geneva hearing,[121] the evidence of individual IC members further confirms the important role played by the synergy effect. Mr. [redacted] testified that he voted for the Merger because he trusted the Research Team's analysis and that, without reliable figures offsetting the loss, it was "not possible" to vote in favor.[122] Mr. [redacted] said that Mr. [redacted]'s confident presentation of the KRW 2 trillion figure "very much influenced" his vote and that, without it, approval would have been difficult because the numbers showed a loss to the Fund.[123] Mr. [redacted] said that he cast his vote on the strength of the Research Team's analysis and would "surely not" have approved if the offset were unjustified.[124] The Seoul High Court in the Moon/Hong Proceedings accordingly found that at the very least two affirmative voters would have voted against the Merger had they known that the synergy effect was fabricated, eliminating the IC's majority and requiring

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117 *See* Award, ¶¶ 586–598 **{A/28/171–175}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 20, 25–26, 53 **{C/79/20,25–26,53}**; Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), 19 April 2017, **Exh C-505**, pp. 23–24 **{C/505/7–8}**; Statement Report of [redacted] to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 7 **{C/463/5}**; Statement Report of [redacted] to the Special Prosecutor, 27 December 2016, **Exh C-468**, p. 26 **{C/468/2}**.

118 *See* [redacted], Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, pp. 3–4 **{C/428/3–4}**; NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, pp. 9, 11–12 **{R/128/10,12–13}**.

119 NPSIM Management Strategy Office, "2015-30th Investment Committee Meeting Minutes", 10 July 2015, **Exh R-128**, pp. 10–11 **{R/128/11–12}**.

120 *Ibid*, pp. 9–16 (emphasis added) **{R/128/10–17}**. *See also* [redacted], Minutes of the Investment Committee Meeting, 10 July 2015, **Exh C-428**, pp. 3–4 **{C/428/3–4}**.

121 *See* Elliott's PHB, ¶ 169(a)–(f) **{B/10/67–69}**.

122 *See* Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), **Exh C-500**, pp. 8, 12, 27 **{C/500/2–3}** **{C/500.1/13}**. *See also* Transcript of Court Testimony of [redacted] and [redacted] (JY Lee Seoul Central District Court), 20 June 2017, **Exh C-515**, pp. 25–26 **{C/515/12–13}**; Seoul High Court, Moon/Hong Decision, **Exh C-79**, p. 60 **{C/79/60}**.

123 Second Statement Report of [redacted] to the Special Prosecutor, 27 December 2016, **Exh C-467**, pp. 7–8, 14 **{C/467/3–4,6}**. *See also* Transcript of Court Testimony of [redacted] (Moon/Hong Seoul Central District Court), **Exh C-502**, pp. 14–15, 16–17, 35, 37–38, 53, 54 **{C/502/5–7,9–10,13–14}**; Seoul High Court, Moon/Hong Decision, **Exh C-79**, p. 60 **{C/79/60}**.

124 Statement Report of [redacted] to the Special Prosecutor, 28 December 2016, **Exh C-472**, pp. 10–11, 13 **{C/472/2–4}**. *See also* Seoul High Court, Moon/Hong Decision, **Exh C-79**, p. 60 **{C/79/60}**.

referral to the EVC.[125] Korea's suggestion now that the evidence of those individual IC members is to be doubted, not on any positive evidence, but because the questions put to them were leading, is back to front: they gave direct answers to direct questions that they were not obliged to give, and there is no basis to impugn answers they confirmed were accurate once the notes of their meetings with the prosecutor were presented to them.[126]

68. The NPS's own internal audit of these events in June 2018 only confirms that the NPS's decision-making process on the Merger was improper.[127] The June 2018 special audit, following a 62-day investigation by ten auditors, found that the original 1:0.64 valuation had been distorted to 1:0.39 in a single day and confirmed that the KRW 2.1 trillion synergy was reverse-engineered to supply the precise offset required for the KRW 138 billion loss caused by the Merger Ratio.[128] The special audit further found that several NPS officers were responsible for significant violations of duties of care. Mr. [redacted], the head of the NPS Research Team, was terminated for "severe … misconduct" with "malicious intent", in breach of the "duty to oblige to the Guideline[s] for Operation of the National Pension Fund."[129] It is simply implausible that the NPS's decision-making process on the Merger was subverted by such serious misconduct simply to "leave nothing to chance" in respect of a vote that, according to Korea, would have been a 'yes' anyway. Nowhere in the NPS's own audit will the Tribunal find a trace of Korea's self-serving submission today that there were in any event other compelling reasons for the NPS to vote in favor of the Merger.

E. THE TRIBUNAL REFLECTED THESE UNDISPUTED FACTS IN ITS AWARD

69. Korea stipulated in the underlying arbitration that it was "stuck with" the decisions of its own courts, did "not deny" the facts underlying the convictions and did not seek to resile from them.[130] The Tribunal proceeded on that basis: it found the "essential facts" undisputed, reviewed the judgments and supporting evidence, and concluded that there was no basis to second-guess the Moon/Hong courts.[131] Those findings include the following:

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125 *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 60–61 **{C/79/60–61}**; Seoul High Court Case No. 2020Na2021570 ("Seoul High Court, [redacted]"), **Exh C-773**, pp. 19–20, 26 **{C/773/7–8,12}**.

126 *See above*, ¶¶ 10–11. *See also* Elliott's PHB, ¶ 169 **{B/10/67–69}**.

127 *See* NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, submitted with a screenshot of the NPS website showing publication of the NPS Internal Audit taken on 5 July 2018, **Exh C-84**, pp. 5–8 **{C/84/5–8}**.

128 *See* NPS Internal Audit Results related to the Samsung C&T/Cheil Industries Merger, 21 June 2018, **Exh C-84**, pp. 2–4 **{C/84/2–4}**.

129 NPS Internal Audit taken on 5 July 2018, **Exh C-84**, pp. 3–4 **{C/84/4–5}**. *See also* Seoul High Court, [redacted], **Exh C-773**, pp. 19–20, 22–26, 30 **{C/773/7–13}**.

130 *See* RI Transcript, Day 1, 7:5–9:11 (Counsel for Elliott) **{L/5/3,4}**; Arbitration Transcript, Day 2, 17:10–12, 16:17–19 (Counsel for the ROK) **{J/26/5–6}**; Arbitration Transcript, Day 9, 87:10–12 (Counsel for the ROK) **{J/33/23}**; ROK's PHB, ¶ 45 **{B/11/21}**. *See also* Award, ¶ 266 **{A/28/72}**.

131 *See* Award, ¶¶ 266, 581–582, 598, 820 **{A/28/72,169,170,175,243}**.

Issue	Moon/Hong findings stipulated to by Korea	Binding findings in the Award
Route of decision	The Responsible Investment Team favored EVC referral; the SK Merger was "similar in essence"; and EVC opposition was anticipated. The MHW nevertheless instructed: "Do not refer" the matter and "have the [IC] vote in favor." (**Exh C-79**, pp. 12–15 **{C/79/12–15}**; **Exh C-69**, pp. 7–8, 43–44 **{C/69/7–8,43–44}**)	When EVC referral would not "guarantee" approval, Minister Moon directed use of the IC. The NPS, under MHW directions, ensured that the IC rather than the EVC decided. (Award, ¶¶ 586–588, 602(b) **{A/28/171–172,177}**)
Merger economics	The Research Team calculated 1:0.64, 1:0.39 and 1:0.46. At 1:0.46, the proposed ratio caused a KRW 138.8 billion loss. "[U]nless the synergy effect would clearly offset the loss," voting yes was difficult. The KRW 2.1 trillion figure was back-solved to supply that offset. (**Exh C-79**, pp. 23–24, 33–35, 68–69 **{C/79/23–24,33–35,68–69}**)	CIO Hong was told the ratio caused at least KRW 138.8 billion in loss and ordered a fabricated synergy "needed to offset" it. The Voting Guidelines prohibited support unless shareholder value and the Fund's interests were protected. (Award, ¶¶ 589, 595–598 **{A/28/172,174–175}**)
Influence on IC members	CIO Hong asked members to view the Merger positively, invoked "selling out national wealth," and used the fabricated synergy to induce approval. His conduct "ultimately caus[ed]" the favorable decision; the vote occurred against the backdrop of his "orchestration and authority." (**Exh C-69**, pp. 16–17, 62–63 **{C/69/16–17,62–63}**; **Exh C-79**, pp. 68–69 **{C/79/68–69}**)	CIO Hong "actively induced" affirmative votes; Minister Moon exerted pressure; and the NPS influenced the IC, including through the baseless synergy and meetings, "to the effect that" it voted in favor. (Award, ¶¶ 591, 594, 596, 602(b) **{A/28/173–174,178}**)
IC independence	The members were required to decide autonomously on accurate information, free from MHW influence. Moon and Hong undermined those safeguards, and Hong breached his duty to permit "independent and autonomous decisions." (**Exh C-79**, pp. 68–72 **{C/79/68–72}**)	The NPS "did not act independently and for commercial purposes" or decide on the Merger's commercial merits; it acted under the MHW's directions. (Award, ¶ 623 **{A/28/185}**)
Members' evidence on synergy	At least two affirmative voters would have voted against had they known the synergy was fabricated. Without those votes, no majority existed and the matter would have gone to the EVC. The court found a "great likelihood" that the NPS would not have supported the Merger absent Hong's inducement. (**Exh C-79**, pp. 59–61 **{C/79/59–61}**)	"A number" of members testified that they likely would have voted against had they known the synergy was fabricated. That evidence supported the finding that the intervention produced the favorable vote. (Award, ¶¶ 598, 602(b) **{A/28/175,178}**)

70. These findings by the Tribunal were not dependent upon the legal status of NPS. They remain binding, and they would look absurd side-by-side with an additional finding now that the Government's intervention, in fact, did not affect the NPS vote.

F. THE ADDITIONAL JUDGMENTS PROVIDE NO BASIS FOR DEPARTING FROM THE FACTUAL FINDINGS IN THE AWARD

71. Korea introduced the Additional Judgments as a "wealth" of new evidence.[132] That is an utter mischaracterization. Rather, they are decisions in different proceedings involving different parties, causes of action, burdens and evidentiary records. They do not replace the primary evidence before this Tribunal, nor the findings this Tribunal has arrived at on the basis of that evidence. And, as detailed below, there are multiple reasons why the Additional Judgments do not justify revisiting findings already made.

1. The factual findings in the Additional Judgments are repetitive or duplicative of the findings in the Merger Nullification Judgment

72. Many factual findings in the Additional Judgments—the Merger's business purpose, the statutory Merger Ratio, broader factors considered by IC members during their deliberations, and the absence of a duty on SC&T's directors to negotiate different terms of the Merger—repeat or elaborate upon the 19 October 2017 Merger Nullification Judgment, which had already reached findings more supportive of Samsung and the Merger,[133] and which was already before the Tribunal prior to its Award. The Tribunal already addressed why those more Merger-supportive findings did not alter its decision in its Award at paragraphs 605 to 614. In so doing, the Tribunal held that the Nullification Judgment's different remedy, legal issues and standard explained the factual findings in those proceedings, which did not displace the factual findings in the Moon/Hong Proceedings.[134] The same reasoning applies to each of the Additional Judgments, particularly where they make factual findings that overlap with those of the Merger Nullification court.

2. The Additional Judgments do not impact the Moon/Hong Proceedings

73. Notwithstanding these Additional Judgments, none of the convictions underlying the Award has been overturned. Minister Moon's and CIO Hong's convictions remain, as do President Park's corruption conviction and JY Lee's separate bribery conviction.[135] The Additional Judgments neither vacate nor replace the judgments in the Moon/Hong Proceedings, which were focused—as is this Tribunal's mandate—on the conduct of Government officials.[136]

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132 RI Transcript, Day 2, 10:1–9 (Counsel for ROK) **{L/6/4}**.

133 *See* RI Transcript, Day 2, 27:12–19, 34:21–35:17 (Counsel for ROK) **{L/6/8,10}**; ROK's Opening, slides 10, 38–39 **{L/2/10,38–39}**.

134 *See* Award, ¶¶ 605–614 **{A/28/178,182}**.

135 *See ibid*, ¶¶ 270–273, 277–280, 284–288 **{A/28/74,76,77,78,79}**.

136 *See ibid*, ¶¶ 581–582 **{A/28/169,170}** (demonstrating that the Tribunal had before it the primary evidentiary record that underlay the Additional Judgments and concluded on the basis of its own review of the evidence that it had no reason to doubt the factual findings in the *Moon/Hong* Judgments).

3. The Additional Judgments turn on distinct issues of Korean law

74. In particular, the Shareholder Claims courts addressed Korean law theories of liability, including joint-tort principles, such as whether one shareholder's vote created domestic-law liability to others,[137] under the test of a high degree of probability, which is the civil standard of proof under Korean law.[138] The same court itself expressly distinguished the international-law inquiry in this international arbitration and *Mason*.[139] The JY Lee second criminal action of market manipulation (to recall, he was already convicted of corrupting government officials, which conviction remains) asked whether specific criminal charges against Samsung executives and accountants were proved beyond reasonable doubt.[140] None was focused on the Government's unlawful interference in, and its impact on, the NPS vote, to the same extent as in the Moon/Hong Proceedings. And none applied Treaty Article 11.16(1), this Tribunal's causation test or the balance of probabilities.

4. The Additional Judgments did not consider the same evidential record as is before this Tribunal

75. It is far from clear that the Additional Judgments were based on the same evidential showing that the Tribunal benefited from in preparing its Award, and Korea has not argued otherwise. Rather, all Korea offers is that the JY Lee Merger case "duly considered all of the relevant prior criminal proceedings".[141] However, as Elliott noted at the hearing,[142] Korea notably falls short of confirming that the primary evidence before the Korean courts was as extensive as that before this Tribunal and the Korean courts in the Moon/Hong Proceedings. Indeed, given how difficult it is to reconcile a number of the conclusions reached by the Korean courts in those and the Shareholder Claims proceedings, it almost certainly was not.[143]

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137 *See* Shareholder Claims District Court Judgment, Case No. 2020GaHap600079, 25 November 2022, **Exh R-389**, pp. 12–14 **{R/389/12–14}**; Shareholder Claims High Court Judgment, Case No. 2023Na2000796, 12 February 2026, **Exh R-390**, pp. 6–7 **{R/390/5–6}**.

138 *See* Supreme Court of Korea Case No. 2012Da65331, 29 November 2012, **Exh RLA-184**, p. 1 **{I/184/1}** ("[I]t requires proof of a high degree of probability sufficient to, absent special circumstances, recognize the existence of a fact ... to a level of certainty where an ordinary, reasonable person would [not doubt].").

139 *See* Shareholder Claims High Court Judgment, Case No. 2023Na2000796, 12 February 2026, **Exh R-390**, p. 7 **{R/390/6}**.

140 *See* JY Lee Unlawful Merger District Court Judgment, Case No. 2020GoHap718, 920 (Consolidated), 5 February 2024, **Exh R-391 {R/391}**; JY Lee Unlawful Merger District Court Judgment, Case No. 2024No635, 3 February 2025, **Exh R-392 {R/392}**; JY Lee Unlawful Merger District Court Judgment, Case No. 2025Do2805, 17 July 2025, **Exh R-393 {R/393}**; Seoul High Court Case No. 2019No1937, 18 January 2021, **Exh C-712**, pp. 25–26 **{C/712/24–26}**.

141 RI Rejoinder, ¶ 118 **{B/26/93}**.

142 *See* RI Transcript, Day 1, 103:21–104:16 (Counsel for Elliott) **{L/5/27}**. *See also* Elliott's Opening, slides 83 and 84 **{L/1/83,84}**.

143 *See, e.g.*, Shareholder Claims District Court Judgment, **Exh R-389**, p. 13 **{R/389/13}** ("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."). *See also* Elliott's Opening, slide 84 **{L/1/84}**.

5. The Additional Judgments contain findings that are irreconcilable with the underlying evidence and the Tribunal's findings in the Award

76. Korea's presentation of the Additional Judgments contains a number of propositions that are simply irreconcilable with the primary evidence before this Tribunal, and that cannot coexist with the surviving findings in the Award. For example:[144]

(i) Independence and effect. Korea claims that, per the Additional Judgments, the NPS exercised free will in deciding on the Merger and that Minister Moon and CIO Hong did not affect the vote.[145] That finding is irreconcilable with the evidence identified in **Section III.C** above and set out in detail in Elliott's written submissions. On the basis of that evidence, the Seoul High Court in the Moon/Hong Proceedings found beyond reasonable doubt that the NPS's approval of the Merger occurred against the backdrop of CIO Hong's orchestration and the fabricated synergy;[146] similarly, the Tribunal's Award paragraphs 596, 602(b) and 623 find that the intervention caused or influenced the outcome and that the NPS did not decide independently.[147]

(ii) IC Member reliance on the fabricated synergy effect. Korea claims that, per the Additional Judgments, the synergy effect was just one non-decisive consideration by the IC.[148] Again, this finding is irreconcilable with the evidence identified in **Section III.C** above and set out in detail in Elliott's written submissions. On the basis of that evidence, the Seoul High Court in the Moon/Hong Proceedings found beyond reasonable doubt that at least two IC members would have voted against had they known the truth, eliminating the majority and triggering EVC referral;[149] Award paragraph 598 also adopts the IC members' evidence regarding the influence of the synergy effect on their vote.[150]

(iii) Valuation of the Merger Ratio and the loss posed to the NPS. Korea claims that, per the Additional Judgments, SC&T could not be regarded as undervalued and that the Ratio was not harmful.[151] That is not what the underlying record establishes. On the basis of that evidence, the Seoul District Court in the Moon/Hong Proceedings found that "SC&T was indeed undervalued",[152] and the Seoul High Court found beyond

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144 *See* Elliott's RI Reply, ¶¶ 39–95 **{B/23/17–50}**; Elliott's PHB, ¶¶ 161–171 **{B/10/64–70}**; Reply, ¶¶ 108–159 **{B/6/59–128}**.

145 *See* ROK's Opening, slides 53, 143, 145 **{L/2/53,143,145}**.

146 *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 35–36, 53–56, 60–61, 69 **{C/79/35–36,53–56,60–61,69}**; Seoul Central District Court, Moon/Hong, **Exh C-69**, pp. 7–9, 14–15 **{C/69/7–9,14–15}**; Award, ¶¶ 598, 602, 623 **{A/28/175,177,185}**.

147 *See* Award, ¶¶ 596, 602(b), 623 **{A/28/174,177,185}**.

148 *See* ROK's Opening, slides 143, 146 **{L/2/143,146}**.

149 *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 60–61 **{C/79/60–61}**; Seoul High Court, [redacted], **Exh C-773**, p. 26 **{C/773/12}**.

150 *See* Award, ¶ 598 **{A/28/175}**. *See also* Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 54 **{C/69/54}**.

151 ROK's Opening, slides 49–50 **{L/2/49–50}**.

152 Seoul Central District Court, Moon/Hong, **Exh C-69**, p. 4 **{C/69/4}**. *See also* Award, ¶ 584 **{A/28/171}**.

reasonable doubt that CIO Hong regarded the Ratio as unjust and that the NPS calculated a KRW 138.8 billion loss were the Merger to be approved on its terms.[153] Similarly, the Tribunal's Award found that the NPS fabricated an offset precisely because of that loss.[154]

77. Korea cannot reconcile those conflicts by labeling the Award the "actual world" and the Additional Judgments the "counterfactual."[155] The Additional Judgments, as Korea presents them, deny that the intervention affected the vote in the "actual world".[156] That is the opposite conclusion of Award paragraphs 602(b) and 623.

6. The Award is not based solely on the findings of the Korean courts

78. Korea suggests that these Additional Judgments are a counterweight to the findings in the Moon/Hong Proceedings on which the Tribunal relied (with the benefit of Korea's earlier stipulation that it could do so).[157] But even if Korea could now reverse its earlier stipulation (which it cannot), the Award did not infer liability from the Moon/Hong Proceedings alone. The Tribunal reviewed the underlying primary evidence, found the essential facts undisputed and concluded that the record supported the findings in the Moon/Hong Proceedings.[158] That evidence remains unchanged despite later judicial opinions.

7. The landscape of judicial findings relating to the Merger is still evolving and is broader than Korea's selective reliance on the Additional Judgments

79. The broader landscape of legal actions arising out of the Merger also includes the NPS's own 2024 proceedings against Samsung and NPS personnel alleging that the Merger Ratio was unfavorable, caused it loss, and was approved after pressure by Samsung on the Government leading it to put pressure on the NPS process.[159] These ongoing proceedings illustrate that the various Korean court cases proceeding from the Merger answer different legal questions on different records. But the Moon/Hong Proceedings are those that directly interrogated the governmental wrongdoing at the center of this arbitration on the same

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153 *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 35, 68 **{C/79/35,68}**; Award, ¶ 596 **{A/28/174}**. The ROK asserts that Moon/Hong High Court did not find that the NPS had suffered loss as a result of the Merger (*see, e.g.*, RI Rejoinder, ¶¶ 60–61 **{B/26/47–48}**). That is misleading. The High Court, in addressing the distinct question of whether the aggravated sentencing statute should apply to determine punishment, found that "there is no empirical evidence to calculate and prove" the actual loss incurred by the NPS following the Merger. That determination did not, however, displace the factual findings the Court made as to the loss calculated and anticipated by the NPS at the time, which is what is pertinent to the causal analysis in these proceedings. *See* Seoul High Court, Moon/Hong Decision, **Exh C-79**, pp. 64–66 **{C/79/64–66}**.

154 *See* Award, ¶¶ 589, 591 **{A/28/172,173}**.

155 *See* RI Rejoinder, ¶¶ 56–57 **{B/26/44–46}**.

156 *See* ROK's Submission, ¶ 55 **{B/21/29–31}**; RI Rejoinder, ¶¶ 56–57 **{B/26/44–46}**.

157 *See* RI Rejoinder, ¶¶ 55–56, 57(d), 125(b) **{B/26/43–44,46}**. *See also* RI Transcript, Day 1, 89:12–22 (Counsel for Elliott) **{L/5/24}**.

158 *See* Award, ¶¶ 266, 581, 598, 820 **{A/28/72,169,175,243}**. *See also* Elliott's RI Reply, ¶ 70 **{B/23/33–34}**.

159 As noted *above*, ¶ 68, the NPS's internal audits confirm that the NPS's decision-making process on the Merger was improper and involved "severe misconduct" and violations of obligations under the Voting Guidelines.

primary record before the Tribunal. Korea stipulated to their findings and the Tribunal adopted them after its own review. Selectively invoking later outcomes cannot undo that.

IV. LEGAL CAUSATION

A. THE APPLICABLE TEST

80. Legal causation asks whether Elliott's loss was sufficiently closely linked to Korea's breaches or instead too remote.[160] Award paragraph 815 expresses that inquiry in terms of directness and proximity, and the Court did not set it aside.

81. Korea claims that the causal chain is "too attenuated" and "too aleatory," and argues that foreseeability alone is insufficient.[161] However, Elliott does not advance (and did not advance in the original arbitration) foreseeability alone.[162] As Elliott explained at the hearing, and as the International Law Commission reflected in its Draft Articles on State Responsibility, there is no single test for legal causation, as it will depend on the specific facts and obligations breached.[163] In some cases, foreseeability may be dispositive. And that is because, as the *Lemire* tribunal summarized, "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."[164] That is, foreseeability is a methodological tool for assessing proximity (or directness). And here, the causal chain between the ROK's breaches and Elliott's loss was not merely direct, unbroken and foreseeable, but indeed foreseen.[165]

B. THE BURDEN AND STANDARD OF PROOF

82. Elliott accepts, as it always has, that it first bears the burden of proving the facts supporting legal causation on the balance of probabilities.[166] Once Elliott establishes a continuous causal pathway, however, Korea bears the burden of proving its affirmative case that an

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160 *See* Elliott's RI Reply, ¶¶ 105–111 **{B/23/54–56}**; Reply, ¶¶ 502–504, 521–532 **{B/6/330–331,349–354}**; Elliott's PHB, ¶¶ 179–186 **{B/10/73–76}**.

161 RI Transcript, Day 2, 8:21–9:13 (Counsel for ROK) **{L/6/3–4}**; ROK's Opening, slides 7, 163 **{L/2/7,163}**.

162 *See* Elliott's RI Reply, ¶¶ 110–111 **{B/23/56}**; Elliott's Submission on Remitted Issue, ¶¶ 66–68 **{B/20/29–30}**; Reply, ¶ 504 **{B/6/331}**; Elliott's PHB, ¶¶ 181–186 **{B/10/74–76}**.

163 *See* RI Transcript, Day 1, 80:10–81:15 (Counsel for Elliott) **{L/5/21–22}**; ILC Articles on State Responsibility, **Exh CLA-38**, Article 31, comment 10 **{H/38/63–64}**.

164 *Lemire v. Ukraine*, Award, 28 March 2011, **Exh RLA-56**, ¶ 170 **{I/56/52}**. *See also Kardassopoulos v. Georgia*, Award, 3 March 2010, **Exh CLA-133**, ¶ 469 **{H/133/161–162}**.

165 Award, 20 June 2023, ¶¶ 360, 819 **{A/28/103,243}**; Separate Opinion of J Christopher Thomas KC, 20 June 2023, ¶ 71 **{A/29/18–19}**.

166 *See* Award, ¶ 581 **{A/28/169}**.

actual event superseded the breach and broke the chain.[167] A hypothetical event, or a concurrent cause, is not an intervening cause.[168]

C. THE CAUSAL CHAIN WAS DIRECT, UNBROKEN AND FORESEEABLE

83. The relevant chain has three straightforward links: the Blue House Measures caused the NPS to vote in favor of the Merger;[169] the NPS's casting vote caused the Merger to pass;[170] and the Merger caused Elliott's loss.[171]

(i) <u>The Blue House Measures caused the NPS to vote in favor of the Merger</u>. The first link is established for the reasons in ***Section III*** above. The Tribunal found that, at the Blue House's direction, the MHW instructed the NPS to ensure a favorable vote; the NPS diverted the decision from the EVC, fabricated the synergy and influenced the IC "to the effect that" it voted yes; and the NPS did not decide independently. That the NPS's conduct is not attributable to Korea does not sever that already-established factual chain. A non-State actor's conduct may be the intended and foreseeable consequence of State wrongdoing.[172] The *Mason* tribunal reached that conclusion on the same intervention after treating the NPS's conduct as non-attributable to the State.

(ii) <u>The NPS's casting vote caused the Merger to be approved</u>. The second link is already decided in sections of the Award that survived the set-aside. The NPS held the *de facto* casting vote; without it the statutory majority would not have been achieved.

(iii) <u>The Merger caused Elliott's loss</u>. The third link is likewise established in the Award. After extensive expert and factual evidence, the Tribunal quantified the loss caused by the Merger while accounting for market performance, Elliott's disposals, recoveries and Korea's valuation case. Korea cannot relabel factors already incorporated into quantum as intervening causes.

84. Proximity is confirmed by Korea's purpose and foresight. The Government targeted the NPS because its vote was decisive, and it acted with Elliott directly in view from the genesis of its intervention, as confirmed by numerous references to Elliott in internal government

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[167] *See Lemire v. Ukraine*, **Exh RLA-56**, fn. 158 **{I/56/51}**; *Mason v. Republic of Korea*, **Exh CLA-219**, ¶ 813 **{H/219/244}**.

[168] *See Mason v. Republic of Korea*, **Exh CLA-219**, ¶ 816 **{H/219/245}**; *Lauder v. Czech Republic*, Final Award, 3 September 2001, **Exh RLA-20**, ¶ 234 **{I/20/52–53}**.

[169] *See* Award, ¶¶ 586–602, 623, 820 **{A/28/171–178,185,243}**.

[170] *See* Award, ¶¶ 817–818 **{A/28/242,243}**.

[171] *See* Award, ¶¶ 817–820, 932–933, 938 **{A/28/242–243,278–279,281}**.

[172] *See, e.g.*, *Vivendi v. Argentina (II)*, Award, 20 August 2007, **Exh CLA-106**, ¶ 7.6.2 **{H/106/237–238}**; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, **Exh CLA-159**, ¶¶ 471–472, 480–481 **{H/159/96–98}**.

communications that Korea does not contest.[173] Indeed, Government officials even anticipated Elliott launching an ISDS claim while implementing its illegal intervention.[174] It was the opposite of surprising that, on this evidential basis (which remains unchanged), the Tribunal already found not merely that harm to Elliott was foreseeable, but that Korea actually foresaw that its intervention would adversely affect Elliott's investment. Korea need not have foreseen the precise dollar amount or understood the Treaty characterization of its conduct. Rather, it is enough that Korea foresaw the very kind of injury that occurred.

D. KOREA'S REMOTENESS ARGUMENTS FAIL

85. Korea's eight-step graphic does not change the analysis. While it attempts to aggrandize the internal mechanics of each of the three links in the chain (two of which are irrelevant for present purposes as they remain untouched in the Tribunal's binding Award), it does not alter the directness of the chain nor the fact that there was no intervening act that severed it. Nor does Korea's graphic undercut the swaths of primary evidence, including internal Blue House and MHW records, demonstrating that Elliott was at the center of its illegal intervention and, indeed, was the impetus for it.

86. As for Korea's loss-of-chance argument, Korea already argued for loss-of-chance as a damages framework during the original arbitration proceedings.[175] And contrary to Korea's submissions, it is clear from the Award that the Tribunal did not accept this framework, as it was able to quantify—and indeed chose to significantly reduce—Elliott's damages without adopting that analytical framework.[176] The Tribunal did so even in circumstances in which it found that the NPS was a State organ whose decision-making was intended to be independent of the Government, i.e., that Elliott's entitlement was not to a particular outcome but to a fair opportunity to achieve that outcome.[177] Having already considered and rejected loss-of-a-chance in such circumstances, as did the *Mason* tribunal, there is no reason or basis for the Tribunal to revisit its prior finding, which remains binding on the Parties.

V. REQUEST FOR RELIEF

87. Elliott restates its Request for Relief as set out in paragraphs 140–141 of its Reply on the Remitted Issue dated 30 June 2026.

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173 *See* [Blue House], "Direction of the National Pension Service's Exercise of Voting Rights Regarding the Samsung C&T Merger", **Exh C-588**, p. 41 **{C/588/1}**.

174 *See* Transcript of Court Testimony of Wan-seon Hong (Moon/Hong Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 **{C/511/9}**; Transcript of Court Testimony of [redacted] (JY Lee Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32–33 **{C/520/8–9}**.

175 *See* ROK's PHB, ¶¶ 174, 182 **{B/11/76–77,79}**; ROK's Reply PHB, ¶ 68 **{B/13/33}**.

176 *See* Award, ¶¶ 931–948 **{A/28/277–284}**.

177 *See* RI Transcript, Day 1, 106:19–108:7 (Counsel for Elliott) **{L/5/28}**.

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