Before the

PERMANENT COURT OF ARBITRATION (PCA)

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

v.

**REPUBLIC OF KOREA**
*Respondent*

**PCA Case N° 2018-51**

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# REPUBLIC OF KOREA'S REBUTTAL SUBMISSION ON THE REMITTED ISSUE

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**13 August 2026**

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## I. INTRODUCTION

1. Whether to vote the Fund's SC&T shares in favor of the Merger was a weighty decision for the NPS that "did not have a precedent" (R-153, p. 45), requiring consideration of a complex range of factors and exposing fully one-fourth of the Fund's entire portfolio of domestic equities to risk. Before the NPS had had the opportunity to finish collecting, reviewing, and analyzing the information it needed to make that decision, the government intervened—in an effort to *ensure* that the NPS would vote for the Merger, which the government considered to be a matter of national interest. The intervention took the form of instructions to NPS officials to ensure that the matter would be decided by the Investment Committee ("**IC**") and that the vote would be in favor. The Tribunal has already decided that the giving of those instructions was an internationally wrongful act. The main question before the Tribunal in these Remitted Proceedings is whether that wrongful intervention caused loss or damage to Claimant. To prove that it did, Claimant must demonstrate, to the standard required by international law, that the NPS—a non-State actor—would have voted differently but for that intervention. Claimant accepts that it has such burden, and yet has utterly failed to discharge it.

2. Claimant's difficulty is not, as it suggests, that its burden is unfair or too demanding. Its difficulty is that the record contains a mass of evidence pointing in the direction of an NPS vote in favor of the Merger even absent the government's interference. The ROK has catalogued that evidence in its written submissions, at the Hearing, and in its Demonstrative D, which the ROK has further supplemented and is resubmitting with this Rebuttal Submission. Claimant has barely engaged with that mass of affirmative evidence demonstrating the range of untainted factors that supported the IC's decision in the actual scenario. Instead, Claimant devoted much of its presentation at the Hearing to reprising its "best hits" of evidence of wrongdoing by the government—evidence that, while relevant to the already-determined breach, has little to no bearing on the question of how the NPS likely would have voted absent that breach.

3. Claimant's other main strategy has been to pose rhetorical questions, such as why the government felt the need to intervene if the NPS was likely to vote in favor of the Merger in any event (the evidence supplies the answer: the government was not satisfied with a reasonable likelihood that the NPS would vote yes; it wanted a "100% guarantee"); and to mischaracterize the ROK's position, for example by claiming that the ROK is

relying on "hypothetical factors" or that it is insisting that Claimant prove a negative (neither is true).

4. To the extent that Claimant engages at all with evidence of the real-world factors that were important to the NPS's decision-making, it focuses heavily on criminal investigation reports, which are of limited evidentiary value. Claimant even invited the Tribunal to prefer such reports to the considered factual findings of the Korean courts, made on a full evidentiary record—an invitation to error, as the Tribunal no doubt appreciates. The reality, which Claimant has tried so hard to obscure, is that the findings of the Korean courts in the Additional Judgments are of tremendous assistance in relation to the disputed issues of causation in these Remitted Proceedings, and the ROK again commends those findings to the Tribunal.

5. In the remainder of this submission, the ROK addresses each of the Tribunal's questions of 30 July 2026, before rebutting Claimant's key assertions on the evidence, legal causation, and loss of chance.

## II. THE SCOPE OF THE REMITTED ISSUE (INCLUDING ANSWER TO TRIBUNAL QUESTION 1)

6. Claimant at the Hearing persisted with its misjudged argument that, following the "very limited set aside of [the] Award," "the question before [the Tribunal] remains a narrow one," and the Tribunal should simply "confirm[] [its] prior findings and the outcome that they have led to." (D1 10:5; D1 23:24; D1 108:16–17) In doing so, Claimant made little reference to the English Court's Judgment, Remittal Order, and Ruling. By contrast, the ROK discussed those decisions in considerable detail and explained that: (i) if the English Court had intended to remit to the Tribunal only the "narrow question" postulated by Claimant, it would not have formulated the Remitted Issue in the way it did (D1 23:25; D2 14:20–25); (ii) indeed, at paragraphs 242–265 of the Judgment, the Court held that the Award contained no existing findings of factual and legal causation connecting the Blue House Measures to the loss (D2 21:5–10); (iii) that holding rested in part on the content of the Award's causation section, which the Court found to be addressing causation "downstream from the NPS" only (D2 21:18–22:4); (iv) at paragraph 264(i) of the Judgment, the Court held that paragraphs 602 and 623 of the

Award—on which Claimant places heavy reliance[1]—do not address but-for causation in respect of the Blue House Measures at all, but rather, as the Court expressly stated, "simply involve[] a factual finding as to what the NPS did and under whose direction it acted" (CLA-227, Ruling, 5(c)); and (v) it follows that both factual and legal causation, as well as loss, in relation to the Blue House Measures fall squarely within the Remitted Issue.[2]

7. The Tribunal in its Question 1 has asked the Parties for their reading of the third sentence of paragraph 5(l) of the Court's Ruling. The ROK offers the following comments.

   a. In paragraphs 5(h)–(k) of the Ruling, the Court set aside certain paragraphs of the Award's causation section. The Court did so because those findings were connected to the Tribunal's conclusion that the NPS was part of the State.

   b. At paragraph 5(l), the Judge explained that he was not persuaded that *all* paragraphs of the causation section needed to be set-aside. In the second sentence, he explained that the Tribunal's findings about what the causation test required did not need to be set aside because the Tribunal had jurisdiction to find breaches at the level of the Blue House, MHW, and Minister, and thus also had jurisdiction to make findings about what the causation test required.

   c. In the third sentence of paragraph 5(l), the Judge clarified the status of the findings that he was not setting aside. He recognized that, because the causation test now has to be applied to the Blue House Measures, not the NPS Vote, it is possible that *either* (i) the Tribunal's existing findings will not be apposite to the causation issue remitted to the Tribunal, *or* (ii) such findings will not address every issue which arises in relation to the remitted causation issue. The Judge explained that, in either case, the non-set-aside findings do

[1] Claimant argued at the Hearing that it cannot be "seriously suggest[ed]" that paragraphs 602 and 623 of the Award do not "contain a finding of fact as to cause and effect." (D1 89:11–14) But the English Court expressly rejected Claimant's argument that paragraphs 602 and 623 contain a finding of but-for causation. (CLA-222, ¶ 264) As the ROK explained, it is not open to Claimant to now pursue again the same, already-rejected argument. (D2 22:5–23:9)

[2] Claimant's invocation of *Integral Petroleum* fares no better, for the reasons the ROK explained at the Hearing. (D2 23:24–24:13)

not preclude the Tribunal from determining issues which the Tribunal is persuaded do arise but have not been addressed adequately in the Award.

8. To illustrate the relevance of the third sentence of paragraph 5(l): in the non-set-aside paragraphs 814 and 815, the Tribunal did not comment on the potential applicability of a loss-of-chance framework in circumstances where the claimant is unable to prove factual causation to the requisite "sufficient degree of certainty" standard. The Tribunal would not be precluded from applying the loss-of-chance framework by the fact that those points had not been addressed at paragraphs 814 and 815 of the Award.

9. Paragraph 5(l) thus further illustrates the fallacy of Claimant's position that the Remitted Issue is "a narrow one," and the Tribunal need only "confirm" its existing findings. (D1 10:5; D1 23:24) The English Court plainly envisaged that the Tribunal's existing non-set-aside findings may prove inapposite to the causation issues that it remitted to the Tribunal, or that they may not address every relevant issue. The scope of the Remitted Issue is clearly broader than Claimant would have the Tribunal believe.

## III. THE APPLICABLE TEST FOR FACTUAL CAUSATION (INCLUDING ANSWER TO TRIBUNAL QUESTION 2)

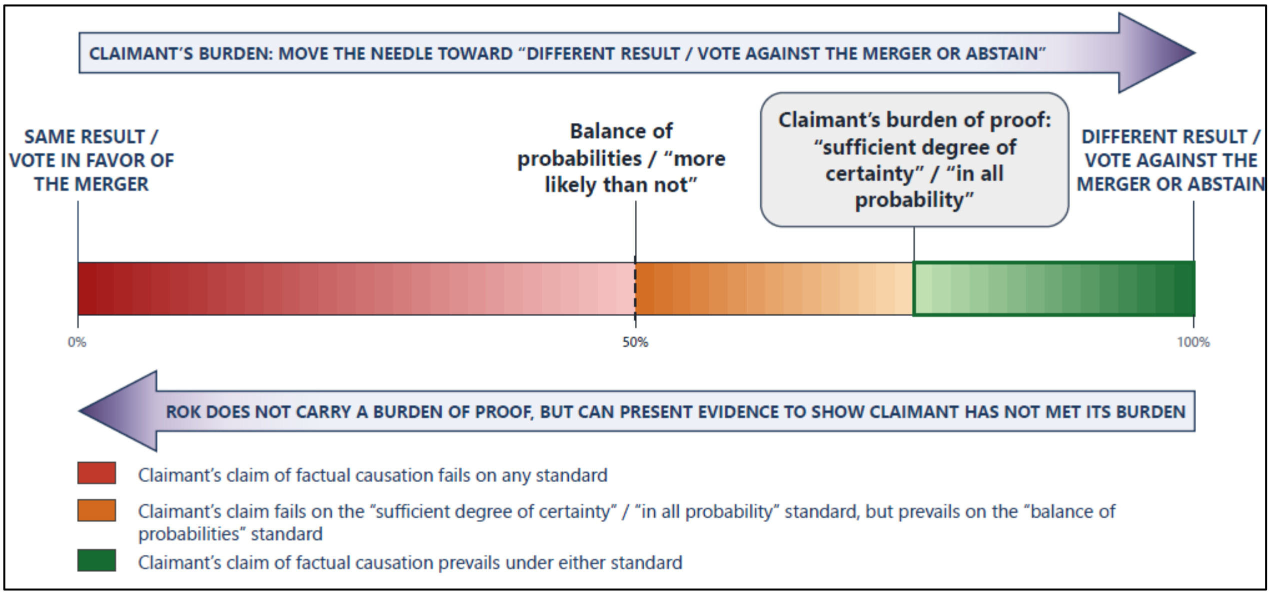
### A. Claimant bears the burden of proving that, but for the Blue House Measures, the NPS would have voted against the Merger or abstained

10. Factual causation requires the claimant to establish—with a sufficient degree of certainty, or "in all probability"—that, but for the breach, the asserted loss would not have occurred. (*See, e.g.,* Republic of Korea's Submission on the Remitted Issue, 7 June 2026 ("**ROK Submission**"), § III.A; Republic of Korea's Rejoinder Submission on the Remitted Issue, 17 July 2026 ("**ROK Rejoinder**"), § III.B) Here, the test requires Claimant to prove that, absent the Blue House Measures, the NPS would have voted against the Merger or abstained, with the effect that the Merger would not have been approved at the SC&T general shareholders meeting on 17 July 2015 and Claimant's loss from approval of the Merger would not have materialized. Apart from the standard of proof, as to which the Parties disagree, the foregoing statements are common ground between the Parties, as discussed further below.

11. Claimant accepts that it bears the burden of establishing factual causation, like all other aspects of its claim. (*See* Claimant's Statement of Reply, 17 July 2020 ("**CL Reply (Original Proceedings)**"), ¶¶ 504, 521, 523; Claimant's Reply Submission on the

Remitted Issue, 30 June 2026 ("**CL Reply**"), ¶ 26) The ROK does not bear any burden of proof in respect of factual causation. However, the ROK can present the Tribunal with rebuttal evidence, to demonstrate that Claimant has not met its burden to the requisite degree of probability (the standard of proof is discussed in **Section III.B** below).[3] The jurisprudence illustrates that a claimant will have failed to establish factual causation if the evidence, taken as a whole, shows either: (i) that it is uncertain whether the loss *would have* been avoided in the absence of the wrongful act (CLA-024, ¶ 462); or (ii) in a due process or denial of justice-type case, that, on the facts, the decision-maker *could reasonably have* reached the same decision through a treaty-compliant process (a showing that was sufficient to defeat factual causation in *Bilcon*) (RLA-090, ¶¶ 168–169). (D2 51:17–54:12) Claimant's showing of factual causation in this case suffers from *both* defects.

**Figure 1. Burden and standard of proof**




12. Figure 1 illustrates the applicable burden and standard of proof, as described immediately above. As shown in the legend, the different colors on the bar identify the thresholds at which Claimant's claim of factual causation succeeds or fails, depending on the standard of proof adopted by the Tribunal. As discussed in **Section**

[3] The ROK has not argued in the Remitted Proceedings that the NPS's conduct constitutes an intervening cause that breaks the chain of causation (*causa interveniens*, a concept specific to legal causation). The *Lemire* and *Mason* authorities which Claimant has invoked for burden shifting on intervening causes are thus inapposite. (D1 84:22–86:11)

**VI** below, Claimant has failed to move the needle beyond the red section of the bar; as a result, its claim of factual causation fails under either standard.

13. Claimant accepts most aspects of the counterfactual inquiry described above, including that (i) "causation[] in fact[] is answered by asking[,] all other things being equal, would outcome Y have occurred but for breach X" (D1 65:7–11); (ii) "in the factual matrix of this case, . . . but-for enquiry a la Bosnian genocide is the appropriate enquiry" (D1 66:8–12); and (iii) "the but-for enquiry asks one to remove the unlawful conduct, the direction and the instructions by the Blue House and the Ministry, [and then to] ask[]: absent the direction and instructions of the politicians 'to ensure' that the vote would be in favour of the merger . . . , would the NPS have voted yes or would it have voted no" (D1 66:24–67:7). As mentioned above, Claimant also accepts that it bears the burden of proving factual causation. (CL Reply (Original Proceedings), ¶¶ 504, 521, 523; CL Reply, ¶ 26)

14. The Tribunal in its Question 2 has asked about the applicable test for factual causation under Article 11.16(1) of the Treaty and any applicable rules of customary international law. The above aspects of the test for factual causation apply equally under the Treaty and customary international law. Article 11.16(1) of the Treaty allows an investor to submit to arbitration a claim "that the claimant has incurred loss or damage by reason of, or arising out of, [a] breach." The ordinary meaning of that language, as the United States confirmed in its non-disputing party submission, is that a claimant must establish a causal nexus between the alleged breach and the claimed loss. (U.S. Submission, ¶ 9) The *Bilcon* tribunal, faced with the near-identical language of Article 1116 of NAFTA—providing that an investor may submit to arbitration a claim "that the investor has incurred loss or damage by reason of, or arising out of, [a] breach"—interpreted it as requiring the tribunal to consider, "[a]s a threshold question, . . . whether a causal link between the Respondent's breach of international law and any injury of the Investors has been established at all." (RLA-090, ¶¶ 94, 114, 323) The *Bilcon* tribunal proceeded to quote with approval the relevant tests formulated in *Bosnian Genocide* and *Chorzów Factory*. (RLA-090, ¶ 114 (quoting CLA-024, p. 234 and CLA-097, p. 47)) Similarly, here, Article 11.16(1) does not itself define the content of the necessary causal nexus. Rather, customary international law (as correctly summarized in *Bilcon*) supplies the applicable substantive test, and that

test has two cumulative components: factual causation and legal causation. The Tribunal confirmed as much in the Award (Award, ¶ 815), and Claimant has not argued otherwise. The ROK's position on the content of the factual causation component—the but-for/*sine qua non* standard, met to a "sufficient degree of certainty," or "in all probability"—has been clear and consistent throughout these proceedings. (ROK Submission, § III.A, ROK Rejoinder § III.B, D2 43:4–61:1)

15. In the Remitted Proceedings, Claimant has done little to try to meet its burden to prove that, but for the Blue House Measures, the NPS would have voted differently. At the Hearing, Claimant devoted a large part of its presentation to discussing what the Blue House Measures entailed in the *actual scenario*. (D1 24:9–53:3) Claimant said relatively little about what would have happened *absent* the Blue House Measures (D1 86:25–104:17), arguing primarily that the Tribunal's existing findings are sufficient to dispose of the question of but-for causation (D1 88:8–23; D1 89:19–23; D1 90:15–20)—a position inconsistent with the English Court's Judgment and Ruling, as discussed in **Section II** above.

16. On the crucial question of how the NPS would have voted in the but-for scenario, Claimant's primary response was a rhetorical one: "Why did the Government go to the criminal effort it went to [i.e., engaged in the Blue House Measures] unless it reached the view that that criminal intervention was necessary?" (D1 92:13–18; *see* D1 66:21–68:6) But, as the ROK explained, the reason the government engaged in the Blue House Measures was not that, otherwise, the NPS necessarily (or even very likely) would have voted against the Merger; rather, it was to try to eliminate even a small possibility that the NPS might not approve the Merger. (ROK Submission, ¶¶ 121–125) Minister Moon's instruction was to "ensure" ("100% guarantee") the approval of the Merger. (C-511, p. 124; C-069, p. 8; *see also* ROK Submission, ¶¶ 121–122; ROK Rejoinder, ¶¶ 64(c), 65) The fact of the Government's intervention in the NPS's decision-making *process* thus does not prove that such intervention changed the *outcome* of that process.

### 1. *Claimant engages in a strawman by attacking a supposed need to "prove the negative" and "hypothetical causation"*

17. At the Hearing, Claimant repeatedly accused the ROK of advocating a causation test that requires Claimant to "prove the negative" and that involves "hypothetical

causation." (*E.g.*, D1 12:5–13; D1 54:11–55:2; D1 62:16–25; D1 76:20; D1 91:9–15) This misrepresents the ROK's position.

18. Claimant is wrong to describe the ROK's position as being that "it is for Elliott to disprove a negative possibility, namely that the NPS could not have voted in favour of the merger through proper process and on honest data and analysis." (D1 62:16–19) The ROK does not argue that Claimant must posit and disprove all hypothetical possibilities of approval through an honest process. Rather, the ROK's position is that Claimant must demonstrate to the requisite standard of likelihood that the NPS would have voted against the Merger or abstained but for the Blue House Measures.

19. Equally misleading are Claimant's contentions that the ROK relies on "*hypothetical* causation," "*hypothetical* grounds," and "*hypothetical* factor[s]." (D1 12:11; D1 72:24; D1 73:17–74:6) A but-for exercise necessarily considers a "hypothetical" world in which the breach had not occurred; this does not render the exercise inappropriate. Importantly, however, the ROK does not rely on "hypothetical" grounds or factors: its position is that evidence of the NPS's decision-making and other events *in the actual world* (including, for example, the nine real-world factors addressed in the ROK's Opening Submission and Demonstrative D (*see* Republic of Korea's Opening Presentation, 29 July 2026 ("**ROK Opening**"), p. 85)) shows *both* (a) that the NPS likely *would have* voted the same way in the but-for world, *and* (b) that the NPS *had reasonable grounds* to vote the same way in the but-for world. Such evidence demonstrates that Claimant has failed to meet its burden to prove factual causation.[4]

20. Using the now-familiar Louisiana barge analogy (*see* D1 12:25–13:17): the ROK is *not* inviting the Tribunal to conjure hypothetical "imaginary bridges" (i.e., reasons for the NPS's vote that did not exist in the actual scenario). Instead, the ROK points to real factors that existed in the actual world—such as the nine factors addressed in its Opening Submission (*see* ROK Opening, p. 85)—which demonstrate that the NPS likely would have reached the same decision even absent the Blue House Measures.

[4] Claimant's reliance on *Chevron v. Ecuador* is also misplaced. (D1 74:5–75:1) Claimant itself explained that Ecuador's hypothetical rested on abandoned individual claims that "were never adjudicated upon," and that "the Tribunal held that the but-for enquiry could not include hypothetical claims." (D1 74:12–75:3) The ROK, by contrast, does not rely on hypothetical events that did not occur in the actual scenario but could have occurred in the but-for scenario.

In any event, the barge analogy is of limited utility, because the counterfactual analysis in this case necessarily involves considering how a third-party decision-making body (the NPS) would have acted in the absence of unlawful interference.

### 2. *In contradiction to its own position, Claimant argues the Tribunal "cannot" consider what an independent NPS would have done*

21. Claimant at the Hearing argued that "you [the Tribunal] don't need to posit—in fact you cannot posit, and you should not posit—what might be the process of an independent and honest, not interfered with NPS." (D1 63:17–22) Such position is not only incompatible with the essence of the but-for inquiry, but also directly contradicts Claimant's own above-mentioned admission that the but-for inquiry in this case "asks one to remove the unlawful conduct, the direction and the instructions by the Blue House and the Ministry, [and then to] ask[]: would the NPS have voted yes or would it have voted no." (D1 66:22–67:7)

22. In arguing that the Tribunal "cannot posit" what an independent NPS would have done, Claimant appears to rely on the 1990 *Amco II* award, which it described as establishing that "states cannot avoid liability by positing that what they have, in fact, done unlawfully . . . they might have conceivably also have done in the alternative lawfully." (D1 77:3–7) But, as the President pointed out, the decision-maker in *Amco II*, BKPM, was a State organ. (D1 78:16–20) Here, by contrast, the NPS is a non-State third party, and the counterfactual inquiry must consider what that third party would have done absent the Blue House Measures. Unlike the respondent in *Amco II*, the ROK does not argue that the relevant question is whether it might have conceivably achieved the same outcome by acting in some alternative, hypothetical lawful way. The ROK identified at the Hearing multiple other reasons why *Amco II* should not be followed. (D2 54:23–59:2)

## B. Claimant must meet the "sufficient degree of certainty"/"in all probability" standard

23. The ROK in its written pleadings demonstrated, by reference to international law jurisprudence, that the standard of proof that a claimant must meet to establish factual causation is the "sufficient degree of certainty" standard, which is equivalent to "in all probability," and which requires a higher degree of likelihood than a mere "balance of probabilities." (*See* ROK Submission, § III.A; ROK Rejoinder, III.B) At the

Hearing, Claimant equated the former standards with the latter, and asserted that the Tribunal in the Award "adopt[ed] an 'all in probability' or 'balance of probability' [sic] standard as proof across all matters that are susceptible to [sic] proof." (D1 68:12–18) Claimant's position does not withstand scrutiny.

24. The *Bilcon* tribunal, chaired by former ICJ judge Bruno Simma, explained that "[a]uthorities in public international law require *a high standard of factual certainty* to prove a causal link between breach and injury: the alleged injury must 'in all probability' have been caused by the breach (as in *Chorzów* [*Factory*]), or a conclusion with a 'sufficient degree of certainty' is required that, absent a breach, the injury would have been avoided (as in [*Bosnian*] *Genocide*)." (RLA-090, ¶ 110 (emphasis added)) The tribunal referred to the distinction between (i) establishing causation and (ii) quantifying damage, and quoted with approval the *Lemire* tribunal's statement that, "[o]nce causation has been established, and it has been proven that the in *bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages." (RLA-090, ¶¶ 112–113)

25. As the *Bilcon* tribunal noted, the "sufficient degree of certainty"/"in all probability" standard stems from the full reparation standard set out by the PCIJ in *Chorzów Factory* and laid down in Article 31 of the ILC Articles. (RLA-090, ¶ 108) The full reparation standard provides that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." (CLA-097, p. 47) It follows that, in order to "wipe out all the consequences of the illegal act," the tribunal must first establish whether and to what extent the illegal act *caused* the claimant's loss, by considering the claimant's position in the but-for world ("the situation which would, in all probability, have existed if [the illegal] act had not been committed"); only then can the tribunal consider the *quantification* of any loss caused by the illegal act. (ROK Rejoinder, ¶ 28)

26. Claimant argued that "[i]t is insidious to suggest that evidential conclusions about a counterfactual require a greater degree of confidence than conclusions about actual facts." (D1 71:11–16) There is nothing "insidious" about such proposition. *First*, the proposition is well supported in international law. (*See* RLA-090, *Bilcon*, ¶ 110; RLA-126, *Nordzucker*, ¶ 51) *Second*, there are strong policy reasons for imposing a higher

threshold for establishing causation than for proving historical facts and the existence of breach. The full reparation obligation that the State "wipe out all the consequences of the illegal act" is a serious one, potentially exposing States to multi-billion-dollar damages orders. International law restricts its application by means of a stringent but-for causation test and applies a heightened standard of proof, lest States be ordered to pay compensation for injury they did not cause.[5] The ICJ's decision in *Bosnian Genocide* to deny compensation on the basis that it could not be concluded "with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations"—in circumstances as serious as Bosnia's failure to take steps to prevent genocide—illustrates that there is nothing "insidious" about imposing a heightened standard of proof to factual causation.

27. *Third*, the Tribunal itself applied the "in all probability" standard in respect of a question that is directly analogous to factual causation: establishing the financial position of Claimant in the but-for scenario (RLA-194, ¶ 931), while applying the lower "balance of probabilities" standard to findings of historical fact and evidence supporting a finding of breach (liability) (RLA-194, ¶¶ 266 and 581; *see* ROK Rejoinder, ¶¶ 42, 45) The ROK has already established this fact in its written pleadings and demonstrated the misleading nature of Claimant's arguments to the contrary, which Claimant repeated at the Hearing (D1 68:12–70:5). (ROK Submission, ¶¶ 47(b), 67, 77; ROK Rejoinder, ¶¶ 42–45) Moreover, as noted above, and in answer to Mr. Garibaldi's question at the Hearing (D2 60:2–12), former ICJ Judge Simma in the *Bilcon* award correctly noted that the *Chorzów Factory* "in all probability" standard is precisely the standard that applies in international law "to prove a causal link between breach and injury." (RLA-090, ¶ 110)

## IV. THE FIRST MHW INTERVENTION AND THE NPS'S PRE-EXISTING "POSITION" (ANSWER TO TRIBUNAL QUESTION 3)

28. It is common ground between the Parties that the first interaction between the MHW and the NPS concerning the Merger vote took place on 30 June 2015. (*See, e.g.*, R-153,

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[5] As the ROK noted in its opening submission (D2 5:3–14), where application of a rigorous causation test defeats a claim for full reparation, other remedies remain available, including declarations of breach and awards on a loss-of-chance basis.

p. 14; CL Reply (Original Proceedings), ¶ 108(c); ROK Rejoinder (Original Proceedings), ¶ 184(a), fn. 427) The record also shows that the Blue House did not directly engage with the NPS to influence the outcome of the NPS's vote. (*See, e.g.*, R-391, p. 748; *cf*. evidence cited in CL Reply (Original Proceedings), ¶ 115 (showing that Blue House officials nevertheless were regularly updated on status of Merger through MHW))

29. Despite Claimant's contentions to the contrary, the evidence does not support—on any standard of proof—a finding that the NPS had formed a position against the Merger at the time of the MHW's first intervention.

30. *As an initial matter*, the NPS could not have had an institutional "position" on the Merger before the relevant decision-making body (the IC, and possibly also the EVC) had commenced its deliberations on the matter. Importantly, as of 30 June 2015, the NPS had not yet completed its process of gathering and analyzing the information necessary for the IC/EVC to decide the matter. (*See, e.g.*, C-394, p. 8025 (categorizing the NPS's position regarding the vote as "not decided" as of 30 June 2015)) That process remained ongoing as of 30 June 2015 and continued straight through the eve of the IC meeting on 10 July 2015: throughout that period, the NPS was actively seeking and assessing valuation materials, reference materials provided to the SC&T board, and other information relevant to its assessment of the Merger. (*See, e.g.*, R-391, pp. 85, 724–729, 732–733; R-392, pp. 407–408) The NPS also continued to receive and analyze external valuation and other materials as late as 9 July 2015 (revised ISS valuation) and 10 July 2015 (opinion letter from Elliott). (R-127, p. 48; R-128, p. 4) Moreover, the Merger Injunction Decision—which rejected Elliott's application to enjoin the Merger and which the NPS decision-makers regarded as an important consideration in evaluating the Merger (*see* ROK Demonstrative D (ROK's supplemental version), Table 1, Factor [6]; ROK Submission, ¶¶ 107–109, 124–128, 137)—had not yet been issued as of 30 June 2015. (*See* R-009) Notably, Claimant itself also acknowledged in writing on 23 June 2015 that "NPS is still considering its position with regard to the proposed merger." (*See* C-202, p. 1) In these circumstances, the NPS cannot be said to have formed any "position" as of 30 June 2015.

31. At most, certain individuals within the NPS may have developed preliminary views on issues relevant to the Merger, but such views cannot be equated with an institutional NPS position. In any event, the evidence shows that such preliminary views tended to

*favor* the Merger before any MHW intervention. (*See, e.g.*, C-421, p. 13231 (recording a Samsung Group employee's statement on 24 June 2015 that he had been informed by a "reliable source" that the "internal consensus" within the NPS was to "vote for the merger"); R-153, p. 66 (Moon/Hong High Court Judgment, holding: "It appears that Defendant [CIO Hong] had the preconceived will to approve the Merger even before he was instructed by the Ministry of Health and Welfare"); C-508, p. 66 (Court Testimony of [redacted], noting that, "even before it became a social issue, there was a report made by the Research Team as soon as the Merger was first announced. It had been positive since that time."))

32. Claimant in its Opening Submission pointed to two pieces of evidence that it claimed demonstrate that the NPS had already formed a position to vote against the Merger before any MHW intervention: (i) statements allegedly made by NPS officials, including NPS Research Team leader Mr. [redacted], during a March 2015 meeting with Claimant (D1 26:19–27:14); and (ii) the first iteration of the NPS Research Team's merger ratio analysis, produced on approximately 30 June 2015. (D1 42:12–43:4) Neither supports Claimant's case.

33. *First*, Claimant's reliance on statements allegedly made at the March 2015 meeting with Elliott is misplaced. As the ROK has demonstrated, the NPS officials who attended that meeting neither communicated, nor had authority to communicate, an institutional NPS position regarding the Merger. (*See* ROK Rejoinder, ¶¶ 60–62; C-201, p. 1) Notably, the two NPS officials were not members of the IC, the body responsible for making the ultimate decision. (*See* CWS-1, ¶ 28 (noting that the NPS officials who attended the meeting were Mr. [redacted] and Mr. [redacted])) Moreover, as demonstrated above, the NPS did not yet have any position on the Merger as of March 2015—a point in time at which the Merger had not yet been announced and the NPS had not yet obtained or analyzed the information that later informed its decision. (*See* ROK Rejoinder, ¶ 61) The March 2015 meeting therefore provides no reliable basis for inferring the position of the NPS as of 30 June 2015.

34. *Second*, the first iteration of the NPS Research Team's valuation analysis (C-393, p. 26), does not support any inference as to the NPS's position (tentative or otherwise). At the Hearing, Claimant contended that this analysis reflected the NPS's "own valuation of an appropriate merger ratio" and allegedly demonstrated that, before the MHW's first

intervention, the NPS had already concluded that the Merger Ratio was "destructive of value" for the NPS. (D1 42:9–43:4) That mischaracterizes both the document and the NPS's process: the analysis did not identify a single "appropriate" merger ratio; instead, it presented a range of benchmark merger ratios, from 1:0.46 to 1:0.89, reflecting various subjective assumptions, of which 1:0.64 was simply the midpoint. (*See* C-393, p. 26; *see also* D2 70:4–72:9; ROK Rejoinder, ¶ 70) Importantly, this iteration was merely a first draft, prepared hastily by persons who lacked valuation experience, at a time when the NPS was still gathering information for the valuation exercise. (*See, e.g.*, C-478, pp. 6–7; C-069, p. 69; *see also* R-391, pp. 85, 724–728; R-392, pp. 407–408) At the time, the NPS had "almost no materials" relevant to valuing Samsung Biologics, a critical component of the valuation exercise. (C-506, p. 8) The first draft therefore cannot be understood as reflecting a settled or considered NPS view on the Merger Ratio, much less a settled NPS position on *the Merger*. As the ROK has explained, the adequacy of the Merger Ratio was only one factor among several that had to be weighed. (*See, e.g.*, ROK Submission, ¶¶ 88–98, 136–139; ROK Rejoinder, ¶¶ 82–84; D2 30:9–15; D2 73:23–75:4; D2 113:5–9)

35. In answer to a related question posed by Mr. Garibaldi at the Hearing (D2 69:24–70:3), the subsequent evolution of the NPS's merger-ratio analysis is set out in the Moon/Hong High Court Judgment at pages 20 to 23. (R-153) In short, the NPS Research Team calculated three iterations of benchmark merger ratios: (1) 30 June 2015: 1:0.46–1:0.89 (midpoint 1:0.64); (2) 6 July 2015: 1:0.29–1:0.57 (midpoint 1:0.39); and (3) 10 July 2015 (final): 1:0.34–1:0.68 (midpoint 1:0.46). (*See* R-153, pp. 20–21; C-426, p. 2; D2 70:4–72:15) As the ROK noted at the Hearing, although the range declined in the second iteration, a substantial part of that decline was reversed in the third iteration after concerns were expressed within the NPS that Samsung Biologics had been overvalued. (*See* R-153, pp. 21–22; C-426, p. 2) This evolution therefore cannot be characterized as a settled, pre-intervention, "position" that was pushed downward by outside pressure; rather, it reflects an iterative process, in which conclusions evolved as new information and competing views were assessed.

## V. THE POSSIBILITY OF CHANGING THE MERGER RATIO (ANSWER TO TRIBUNAL QUESTION 4)

### A. The statutory merger ratio is a matter of mandatory law

36. In Korea, the statutory merger ratio formula for mergers between two listed companies is a matter of mandatory law. (CER-2, ¶ 26) Article 165-4(1)1 of the Financial Investment Services and Capital Markets Act requires a listed corporation to comply with the requirements and methods prescribed by the Enforcement Decree (R-024, p. 1), and Article 176-5(1)1 of the Enforcement Decree prescribes the formula. (R-020, fn. 1) Under that formula, the merger price is calculated as at a reference date, being the day preceding the earlier of (i) the date of the board resolution approving the merger or (ii) the date of execution of the merger agreement. (C-222, PDF p. 171; R-020, pp. 3–4; C-016, PDF pp. 1–3) For the Merger between SC&T and Cheil, the board resolutions and execution of the Merger Agreement all occurred on 26 May 2015. The reference date for the Merger was accordingly 25 May 2015. (R-020, pp. 3, 17)

37. Once the reference date is fixed, the inputs to the statutory formula are closed and the merger ratio must be calculated based on the reference market price per share for each of the merging companies (R-020, fn. 1), which is determined by the arithmetic mean of: (i) the volume-weighted average closing price over the most recent one-month period; (ii) the volume-weighted average closing price over the most recent one-week period; and (iii) the most recent closing price.

38. Under the Enforcement Decree, a discretionary adjustment to the reference market price per share of each company is permitted in exceptional circumstances ("**discretionary adjustment**"). (R-020, fn. 1; R-391, pp. 883–884, 895–896) The permissible range of discretionary adjustment was limited by law to ±30% "due to concerns that it could harm the fairness of the Merger ratio" (R-391, p. 895) and "such scope was further limited"—to ±10%—"in case of mergers between affiliated companies," such as SC&T and Cheil. (R-391, p. 895; R-020, fn. 1) Application of a discretionary adjustment necessarily would benefit shareholders of one company to the detriment of shareholders of the other company. From the time of its introduction in 2013 through the date of the Merger announcement on 26 May 2015, there was not a single case of the discretionary adjustment mechanism having been used. (R-391, pp. 883, 895) The Korean courts have explained that market participants considered that application of the discretionary

adjustment in any circumstance other than where necessary to adjust for a sudden fluctuation in stock prices during the merger ratio calculation reference period (e.g., as a result of merger-related information having leaked) would risk lawsuits and could even be considered a breach of trust (a criminal offense). (R-391, pp. 883, 895; R-020, p. 21) In fixing the Merger Ratio on 26 May 2015, SC&T and Cheil did not apply a discretionary adjustment to the reference market price of either company. (C-016, pp. 1–2 (reference price applied "without discount or premium"))

**B. Circumstances under which the Merger Ratio could be changed**

39. Under Article 523 of the Commercial Act, the merger ratio is required to be stipulated in the merger agreement. (C-127, PDF p. 131) Neither SC&T nor Cheil could therefore have changed the Merger Ratio acting unilaterally, the Merger Ratio being a term of the Merger Agreement. Nor could SC&T and Cheil have jointly changed the Merger Ratio stipulated in the existing Merger Agreement once it was executed on 26 May 2015, given that the statutory reference date had already been fixed, and required disclosures to shareholders and to the market had already been made.

40. It follows that, if SC&T and Cheil had wished to change the Merger Ratio between the date of the Merger announcement (26 May 2015) and the date of the scheduled general meetings (17 July 2015), they would have needed to replace their existing merger agreement with a new or amended agreement. Pursuant to mandatory law (C-127, PDF pp. 82, 92, and 130), this would have required new board resolutions, the execution of the new or amended agreement, and a fresh notice convening the general meetings upon two weeks' notice. The new merger ratio would have to be calculated by reference to a new reference date, and, in accordance with the mandatory formula, by the arithmetic mean of share prices within a one-month window that would have reflected extreme volatility in connection with the announcement and abandonment of the first merger. (*See* C-511, pp. 79, 110 (failed merger between Samsung Heavy Industries and Samsung Engineering caused sharp fall in both companies' share prices)) An attempt to change the Merger Ratio could therefore equally have resulted in a merger ratio *less* favorable to SC&T. (C-502, p. 33)

41. In principle, the companies could have decided to apply a discretionary premium or discount within the permissible ±10% range to the newly-calculated reference market

prices. However, it seems doubtful that the directors of SC&T and Cheil would have been willing or able to abandon one merger agreement in favor of another within a short time period without risking exposure to civil or even criminal liability for breach of trust or market manipulation.[6] (C-502, pp. 28–30)

42. For completeness, the ROK notes that, on 7 July 2015, CIO Hong met in person with JY Lee and others and discussed, among other issues, the question of a discretionary adjustment to the Merger Ratio (±10%). (R-391, pp. 743–744; C-413, p. 19671; C-511, pp. 31–33; C-516, pp. 35–37, 39) The record reflects that Mr. Lee explained to CIO Hong that the Samsung Group had considered applying a discretionary adjustment but had concluded, following a legal review, that no exceptional circumstances existed that would permit application of such an adjustment. (R-391, pp. 605, 632; C-413, p. 19671) In the JY Lee Unlawful Merger case, the court reviewed the legal advice that Samsung had received and concluded that Mr. Lee's statements at the meeting were not deceptive. (R-391, pp. 743–744)

## VI. REBUTTALS TO CLAIMANT'S KEY ASSERTIONS ON THE EVIDENCE

### A. Claimant has not proven that the IC would have voted differently absent the Blue House Measures

43. At the Hearing, Claimant's argument on how the IC would have voted in the but-for world rested on one principal proposition—that the IC members themselves stated that they would not have voted for the Merger absent the tainted synergy projections. (D1 97:25–99:15; Claimant's Opening Presentation, 28 July 2026 ("**Claimant Opening**"), pp. 73–75) As the ROK has demonstrated in its written submissions and at the Hearing, that contention is without merit.

#### *1. The primary evidence demonstrates that the IC voted for the Merger based on a range of untainted factors and did not rely decisively on the tainted synergy projections*

44. In deciding whether to approve the Merger, the IC prioritized a range of material factors independent of the tainted synergy projections. (ROK Rejoinder, ¶¶ 82–84; ROK

[6] In the Moon/Hong case, the courts held that, if the Merger Vote had failed as a result of opposition by the NPS, SC&T and Cheil likely would have re-attempted the merger at some unspecified future time. (R-153, p. 62) In the JY Lee Unlawful Merger case, the courts held that, in light of SC&T's accumulating losses in the construction sector, if the Merger had proceeded at a later point in time, "the merger ratio would have been even more unfavorable to [SC&T's] shareholders." (R-391, p. 396)

Submission, ¶¶ 88–98, 136–139; D2 30:9–15) As catalogued in Demonstrative D, these included, among others: (i) the Merger's anticipated benefits for the Fund's USD 20 billion portfolio of the Samsung Group holdings and for the stock market and national economy; and (ii) anticipated adverse consequences to that portfolio and to the stock market and national economy if the Merger failed. (*See, e.g.*, ROK Demonstrative D (ROK's supplemental version), Table 1, Factors [7]–[11]; D2 82:18–86:21; D2 87:15–91:5)

45. At the Hearing, Claimant asserted that "valuation and synergy" outweigh any other consideration because the NPS was required to invest in accordance with the "principle of profitability." (D1 51:13–18) Claimant's assertion is misplaced. The relevant inquiry under the NPS Voting Guidelines was not whether the Merger maximized short-term profitability, but whether it served long-term profitability, alongside other core principles such as stability and the public interest. (ROK Submission, ¶¶ 82–87, 111; R-057, Arts. 4, 4–2, 6) Accordingly, even absent the tainted synergy projections, any alleged "loss" to the Fund arising from a gap between the statutory Merger Ratio and any purported "fair" merger ratio ("**value gap**") would not, by itself, have dictated a vote against the Merger. Rather, the IC was required to weigh any such value gap against the Merger's anticipated long-term benefits and the risks associated with a failure of the Merger. The IC undertook precisely that exercise in the actual world, and concluded that those other factors outweighed the subjective value gap calculated by the NPS Research Team—without relying exclusively, or even primarily, on the tainted synergy projections, which the Committee understood to be uncertain. (*See* ROK Demonstrative D (ROK's supplemental version))

46. Against the weight of that evidence (and the Korean courts' factual findings discussed below in **Section VI.C**), Claimant emphasizes criminal investigation reports (and some court testimony) in which IC members reportedly stated that they may not have voted for the Merger had they known the synergy projections were fabricated. Putting aside the unreliability of those reports (addressed below in **Section VI.A.3**), such statements are not probative of how such members would have voted in a counterfactual scenario in which no fabrication would have occurred. (*See* ROK Submission, ¶¶ 136–137 (noting that the questions posed by the prosecutors are entirely different than the relevant question for but-for causation); D2 112:21–113:9) In that but-for scenario, as in the actual scenario, the IC would still have weighed any subjective value gap against a range of

expected synergy effects, including improved stock price performance and dividends from the Samsung Group's new corporate structure; lower borrowing costs from New SC&T's improved credit rating; royalty revenues arising from New SC&T's status as de facto holding company; and potential revenue synergies (whether quantified or not). (ROK Opening, pp. 93–95, 112, 130, 149; ROK Submission, ¶¶ 88–92, 95–99, 111–113; ROK Rejoinder, ¶¶ 69, 83(e); ROK Demonstrative D (ROK's supplemental version), Table 1, Factors [4], [5], [7]) The in-court testimony excerpted in Demonstrative D confirms that those diverse synergy effects, coupled with the need to protect the Fund's Samsung Group holdings from the Merger's failure, were sufficient to outweigh the value gap in the actual world, even accepting that the synergy projections were uncertain, subjective, and imprecise. (*See* ROK Demonstrative D (ROK's supplemental version)) It follows that the IC not only *reasonably could have* reached the same result in the but-for scenario—it very likely *would have* done so.[7]

2. *The findings of the Korean courts support the same conclusion*

47. The Korean courts have carefully examined the primary evidence concerning the IC's decision-making process and, in two separate cases, concluded that the unlawful acts of Minister Moon and CIO Hong (including the tainted synergy projections) did not change the outcome. (*See* ROK Submission, ¶ 138; ROK Rejoinder, ¶¶ 54, 83(c)) In the Merger Annulment Judgment (2017), the court reviewed the IC members' testimony in the Moon/Hong case together with the wider evidentiary record and held that the Committee's decision had not been tainted by Moon and Hong's unlawful conduct, relying on six factual findings detailed at paragraph 138(a) of the ROK's Submission. (R-020, pp. 36–40) In the Shareholder Claims District Court Judgment (2022), the court again reviewed the Moon/Hong record together with other Korean court judgments and a mass of primary evidence and again concluded that the misconduct had not "actually affected" the outcome of the Committee's deliberations, relying on three factual findings detailed at paragraphs 54(a) and 83(c) of the ROK's Rejoinder. (R-389, pp. 12–13) Those

[7] At the Hearing, Claimant also contended that the ROK "ignored the evidence" that CIO Hong allegedly (i) insisted on selecting the IC members himself and (ii) "pressure[d]" them to vote for the Merger. (D1 99:16–100:1) That contention is baseless. The Korean courts in the Moon/Hong proceedings already examined and rejected challenges to the process by which the IC members were selected. (C-069, p. 63; R-153, pp. 68–69) Further, IC members testified that they did not feel pressured by CIO Hong in connection with their decision on the Merger. (*See, e.g.*, C-499, p. 17; C-500, p. 12; C-501, p. 56; C-502, p. 9; R-291, p. 51; R-290, p. 33)

findings were upheld on appeal (2026). (R-390, p. 8) The JY Lee Unlawful Merger District Court Judgment (2024) likewise referred approvingly to the Shareholder Claims District Court Judgment's findings on this issue. (R-391, p. 748)

48. At the Hearing, Claimant argued that the Tribunal should disregard these findings for two reasons, neither of which has merit. *First*, Claimant asserted that the Tribunal already distinguished the Merger Annulment Judgment in paragraph 614 of its Award, and that the same points of distinction "could be said about the [Additional Judgments]." (D1 102:1–17; *see also* CL Reply, ¶¶ 94–95) But paragraph 614 of the Award does not address, let alone distinguish, the Merger Annulment Judgment's factual findings on the issue discussed above. (RLA-194, ¶ 614) Moreover, as the ROK has explained, none of the three grounds on which the Tribunal distinguished the Merger Annulment Judgment applies to the Additional Judgments. (ROK Rejoinder, ¶ 117)

49. *Second*, Claimant asserted that certain of the findings of the Shareholder Claims Judgment are "difficult . . . to reconcile" with the primary evidential record. (D1 104:5–15) To the extent that Claimant suggests that criminal investigation reports should be preferred to judicial findings of fact, that is an invitation to error, for the reasons discussed in **Section VI.A.3** below. Moreover, as discussed in **Section VI.C** below, the same categories of primary evidence were available to, and considered by, the Korean courts when they made their findings. At bottom, Claimant has failed to identify any compelling reason for the Tribunal to reach a different conclusion than the Korean courts on whether the tainted synergy projections had a decisive impact on the IC's decision to support the Merger.

*3. Claimant's reliance on criminal investigation reports does not assist*

50. At the Hearing, Claimant again relied heavily on criminal investigation reports, including to argue that IC members had told prosecutors that they would not have supported the Merger absent the fabricated synergy-effect calculations. (*See, e.g.*, D1 97:25–99:15; Claimant Opening, pp. 73, 75) That reliance is misplaced.

51. As the ROK explained at the Hearing (D2 78:3–79:14), prosecutorial interview summaries are of limited evidentiary reliability. *First*, they are not verbatim or even near-verbatim transcripts, but condensed summaries reflecting only the points the prosecutor chose to include, written in the prosecutor's own language (*see, e.g.*, Merits

Hearing D3 179:9–180:3 (Mr. Cho); Merits Hearing D4 22:4–24:6 (Mr. Cho) (stating that "the prosecutor used just the one line to describe the whole six-hour meeting")). *Second*, the interviews take place in an environment controlled by the prosecution, frequently involving lengthy and repeated questioning, and, in some instances, examinations extending late into—or even throughout—the night (*see, e.g.*, C-468, pp. 3, 27 (showing that examination began at 7:40 pm and concluded at 8:12 am the following day); C-456, pp. 1, 16–17, 21; C-473, PDF p. 1; C-474, PDF p. 1; Merits Hearing D3 179:18–179:20 (Mr. Cho)). *Third*, they are conducted behind closed doors, and, in the case of interviews of non-defendant witnesses, counsel for the criminal defendant has no right to attend, participate in, or challenge the prosecutor's examination. (*See, e.g.*, C-459, pp. 15–16) As the ROK further explained (D2 79:15–80:15), this stands in stark contrast to Korean court proceedings, where witnesses testify under oath, are expressly warned of the penalties for perjury, are afforded procedural safeguards, and are subject to the parties' rights of examination and challenge.

52. For these reasons, criminal investigation reports must be approached with caution as a record of a witness's out-of-court statements. Where in-court testimony has been taken, it has far greater reliability than the investigation reports that preceded it. Indeed, witnesses frequently use their court testimony to correct, clarify, or otherwise contextualize statements attributed to them in investigation reports. And where a court has made findings of fact after reviewing the full evidentiary record, those findings necessarily carry greater probative value than reports that (again) are merely summary materials prepared by one party in the criminal action.

53. In relation to the statements attributed to IC members concerning how their vote may have changed had they learned that the synergy projections had been reverse-engineered, several members later clarified in court that the reports were incomplete or inaccurate in material respects and that they had considered and given priority to a range of factors beyond the tainted synergy projections. (*See, e.g.*, R-292, pp. 44–45; C-502, p. 24; R-291, p. 55) As discussed above, the Korean courts considered the full testimony and evidentiary record and rejected the proposition that the tainted projections were decisive to the IC's decision. (*See* **Section VI.A.2** above)

54. At the end of the Hearing, Claimant raised a "point of order" in which it argued that, by questioning the reliability of the criminal investigation reports, the ROK was "recanting"

factual stipulations it allegedly made in the Original Proceedings. (D2 119:7–24) It further contended that accepting the ROK's position would give rise to a "due process concern." (D2 119:25–120:6) Claimant's objection is unfounded. As the ROK explained at the Hearing (D2 120:12–24), and as the record confirms, its position is entirely consistent with that taken in the Original Proceedings.

55. As paragraph 266 of the Award records, the ROK accepted in the Original Proceedings that the Tribunal may rely on the "factual findings of the Korean courts" absent contrary evidence, in which case it should "weigh the evidence to reach its own factual conclusions." (RLA-194, ¶ 266) Contrary to Claimant's point of order, the ROK never stipulated to the reliability or accuracy of criminal investigation reports. (*See, e.g.*, ROK PHB, ¶ 45 (expressly limiting its stipulation to "affirmative factual findings" of the Korean courts); Merits Hearing D2 16:17–17:12) To the contrary, in the Original Proceedings the ROK expressly contested the reliability of such reports. (*See, e.g.*, ROK PHB, ¶ 9 (investigation reports reflected "closed-door interviews" as opposed to testimony given and tested in open court); ROK Rejoinder (Original Proceedings), ¶ 162 ("The so-called testimony on which the Claimant relies is often not testimony at all, but merely statements from interviews that prosecutors conducted for investigations they were pursuing, and many of these interview statements were contradicted or clarified later in actual court testimony that the Claimant ignores.")) Indeed, in the Award, the Tribunal expressly noted (without deciding) the Parties' dispute concerning the evidentiary value of "statements given to the prosecutors in connection with criminal investigations." (RLA-194, ¶ 621)

56. Claimant's purported due process concern thus rests on a false premise and can be disregarded.

### B. Claimant has not proven that the EVC would have voted against the Merger absent the Blue House Measures

57. As the ROK has noted, the EVC in the but-for scenario would have been presented with the same information and data as was presented to the IC in the actual world (absent the tainted synergy projections), and would have been applying the same principles and considerations as those that governed the IC's decision. (ROK Submission, ¶ 146) It follows that the same untainted affirmative factors that led the IC to vote for the Merger

in the actual world, as detailed in Demonstrative D, would likely have guided the EVC to the same decision.

58. At the Hearing, Claimant reiterated its assertion that the Blue House Measures were intended to prevent the voting decision from reaching the EVC because the MHW believed the EVC was likely to vote against the Merger. (D1 36:1–37:4; D1 39:17–40:19) But the evidence demonstrates, to the contrary, that the MHW intervened *not* because it expected the EVC to reject the Merger, but because it assessed the outcome before the EVC as unpredictable and "not enough to 100% guarantee the approval of the Merger." (C-069, p. 8) The chronology of relevant events with citations to the record is set out in the ROK's submissions (ROK Submission, ¶¶ 119–125; ROK Rejoinder, ¶¶ 63–65), and Claimant has not meaningfully engaged with it. Indeed, Claimant's own Reply on the Remitted Issue described the MHW's concern as being that "it would be difficult to *ensure* the approval of the Merger via the EVC." (CL Reply, ¶ 50 (emphasis added))

59. Moreover, as the ROK has demonstrated, the EVC's decision to vote against the SK Merger is not probative of its likely decision on the Merger, given material differences between the two transactions. Most notably: (i) because of the size of the Fund's holdings in Samsung Group companies, a failed Merger posed a risk of volatility and loss to the Fund that was not present in the SK Merger; and (ii) unlike with the Merger, the EVC deliberated on the SK Merger's fairness without a Korean court decision rejecting challenges to that transaction's fairness (the Merger Injunction Decision, which Mr. Cho testified was very significant and would have made it difficult for the EVC to make a decision departing from that of the court). (ROK Submission, ¶¶ 126–132, 152–154; ROK Rejoinder, ¶¶ 63–65) Claimant made no effort at the Hearing, or in its written submissions, to rebut these and other relevant points.

60. Finally, the additional translations Claimant introduced immediately before the Hearing do not advance its case. One was of a criminal investigation report of an interview with EVC member [redacted], purportedly recording his statement that four professor-members of the EVC would have voted against the Merger. (C-456, p. 21) That purported statement fell apart at trial, when Mr. [redacted] testified that at the relevant time he had not confirmed with *any* of the four professors their position, and that after the fact he had merely had "casual" conversations with *two* of them, in which a view was expressed that the Merger Ratio "seems to have been somewhat unreasonable." (ROK

Opening, pp. 139, 141) Such testimony tells us precisely nothing as to the likely outcome of a vote of the EVC. Even if two or three members of the EVC felt that the Merger Ratio was "somewhat unreasonable," that view would not itself have dictated a vote (even by those minority members) against the Merger, as any value gap would need to be weighed against the Merger's expected benefits and the risks of its failure, as discussed above.

### C. Claimant's attempts to undermine the Additional Judgments fail

61. As the ROK explained at the Hearing (D2 35:2–36:2), the Additional Judgments are an important addition to the corpus of Korean judgments that the Tribunal considered in the Award, and their fact findings are of particular value in relation to contested causation issues in these Remitted Proceedings. Claimant's attempts to undermine and distinguish the Additional Judgments—including by reference to differences in governing law and causes of action—do nothing to diminish the persuasive value of the factual findings in those Judgments, which reflect the Korean courts' careful examination of an extensive record that included much of the primary evidence on which Claimant relies here.

62. The Shareholder Claims Judgments were rendered on the same factual matrix, with the same category of plaintiff (former SC&T shareholders), the same category of loss (diminution in share value resulting from the Merger Ratio), and the same defendant (the ROK) as this Arbitration. Adjudicating questions of causation on the same underlying facts, the courts found that the misconduct of Minister Moon and CIO Hong did not "actually affect[]" the outcome of the IC's decision on the Merger in the actual world. (R-389, p. 13; affirmed in R-390, pp. 5, 6, 8) As discussed in **Section VI.A.2** above, those detailed findings support the conclusion that stripping the tainted elements from the deliberation process (as would be the case in a Treaty-compliant but-for scenario) would not change the outcome of the NPS's vote.

63. The JY Lee Unlawful Merger Judgments are a complete answer to Claimant's long-pressed narrative that the Merger was the product of unlawful manipulation and scheming by Samsung: the courts found that the Merger's purpose, ratio, timing and procedure were lawful and consistent with the interests of SC&T and its shareholders. (ROK Opening, pp. 46–54)

64. To discount the relevance of the Additional Judgments, Claimant's opening relied on two legs: (i) the outcome of the Moon/Hong criminal case (D1 102:18–103:2), and (ii) what Claimant calls "primary evidence," largely composed of criminal investigation reports. (*See, e.g.,* D1 17:7–18:1) However, neither leg supports what Claimant must prove: causation between the Blue House Measures and its alleged loss.

65. *First*, as to the Moon/Hong convictions, as the ROK demonstrated in its opening (D2 32:14–33:24), the Seoul High Court examined the same type of loss Claimant advances here (i.e., diminution in the value of the NPS's SC&T shareholding from the Merger Ratio) and refused to find it. (R-153, pp. 64–66) Those convictions were thus entered on a footing that *excluded* the very loss Claimant now claims. Equally, the Moon/Hong findings Claimant emphasized (Claimant Opening, p. 81, *see* bullet points 3 to 5) do not address whether the Blue House Measures *in fact* affected the IC members' votes in the actual world, much less how the NPS would have voted but for the MHW's intervention.

66. *Second,* Claimant's suggestion that the Additional Judgments failed to engage with primary evidence is wrong. Notably, for the first time at the Hearing, Claimant referred to the prosecutor statement of Mr. [redacted] (Deloitte Anjin accountant), purportedly admitting that the valuation exercise underlying the Deloitte Anjin Report (which concluded that the Merger Ratio was within a fair range) had been influenced by Samsung; described the JY Lee Unlawful Merger Judgment's contrary conclusion as "surprising"; and asked the Tribunal to "prefer the primary evidence." (D1 94:20–95:17; *see* Claimant Opening, p. 66)

67. Claimant's suggestion that the Tribunal should prefer a criminal investigation report summarizing alleged statements by Mr. [redacted] to the findings of the Korean courts is misplaced. In the JY Lee Unlawful Merger proceedings, the court scrutinized the investigation report on which Claimant relies and, after hearing Mr. [redacted]'s court testimony and examining the surrounding evidence, concluded that the report was "difficult to believe." (R-391, p. 431)

68. Specifically, Mr. [redacted] testified to the court under oath that his statements to the prosecutor had been confused and inaccurate, including because he had been "making assumptions based solely on emails" presented to him in the interview. (R-391, p. 431) He further

clarified that, although an SC&T manager had reprimanded him, the reprimand was *not* a demand that he make the merger ratio report "match up with the stock price level," as the criminal investigation report incorrectly recorded. (R-391, p. 431) (Rather, as the court concluded, it related to Mr. [redacted]'s failure to "match" with the schedule for preparing that report. (R-391, pp. 433–434)) The court's assessment rested not only on Mr. [redacted]'s court testimony, but also on broader evidentiary considerations, including that (i) the Prosecutor's questioning of Deloitte Anjin accountants "occurred more than three years after the Merger"; (ii) "it remains unclear whether the accountants were provided with sufficient materials by the Prosecutor and were able to accurately recall their memories to make proper statements"; and (iii) other Deloitte Anjin accountants and the SC&T manager consistently testified that the SC&T manager was pressing Deloitte Anjin to meet the report's preparation schedule, rather than directing the substance of the analysis. (R-391, pp. 433–434) The court expressly *rejected* the Prosecution's allegation that the accountants' statements to prosecutors "are likely to be more accurate than their recollections at the time of their court testimony." (R-391, pp. 433–434; *see also* discussion in **Section VI.A.3** above)

69. Having weighed the criminal investigation reports against the court testimony, the court also considered a range of further facts, for instance: the review of the Merger Ratio had been commenced on Deloitte's own suggestion; and Deloitte applied valuation approaches consistent with the applicable accounting standards. Only after this analysis did the court reach the conclusion Claimant inaptly described as "surprising," namely that the evidence did not support the allegation that the Deloitte Anjin Report was the product of manipulation by Samsung. (R-391, p. 602)

70. More generally, Claimant's suggestion that the Additional Judgments may not have rested on the "same evidential showing" as that available to this Tribunal (D1 103:21–104:15) is unsupported. The ROK has confirmed that the evidence before the Shareholder Claims courts overlapped substantially with the materials Claimant calls "primary evidence": including statement reports and court-testimony transcripts of the same key individuals from the Blue House, MHW, NPS and the IC members, as well as MHW internal reports and Blue House handwritten notes. The underlying materials can be made available to the Tribunal should any question arise in that regard. The courts in the JY Lee Unlawful Merger case conducted extensive factual scrutiny involving "more

than 100 hearings and reviewed over 20,000 items of evidence presented by the Prosecutor" (R-392 p. 4), and expressly engaged with numerous earlier judgments and arbitration awards. (*See* ROK Opening, p. 42)

71. Finally, as a response to the President's question on the standard of proof (D1 105:3–7), the ROK notes that the standard underlying the Shareholder Claims Judgments is a proximate causal relationship, assessed on "the probability of a typical outcome" (R-389, p. 10), and on the civil standard of a "high degree of probability." (ROK Rejoinder, Additional Judgments Annex, ¶ 14(c) (citing RLA-184)) This standard is not expressly stated in the Shareholder Claims Judgments as it is established jurisprudence. In applying it, Korean courts employ an element of a but-for inquiry into factual causation, as Claimant accepts. (D1 105:8–9) Meanwhile, the JY Lee Unlawful Merger Judgments applied the criminal standard for conviction of proof beyond reasonable doubt.

72. Critically, however, while the statutory elements of an offense or claim must be proved to the respective standard, that does not mean that every evidential matter must meet that standard. The court's findings on the underlying facts rest on the judges' free evaluation of the evidence, a principle that applies in both civil and criminal proceedings. (*See e.g.,* R-021, Art. 308) So long as that discretion is exercised in accordance with logical reasoning and empirical rules (*see* R-001, p. 1), affirmative factual findings remain valid and established, irrespective of the standard of proof applicable to the ultimate legal determination.

73. The factual findings on which the ROK relies in the Additional Judgments are affirmative findings as to what did and did not occur, made after extensive review of the underlying evidence, rather than statements that a party failed to discharge its burden. The Tribunal may therefore give full effect to those findings, regardless of the standard of proof it applies.

## VII. REBUTTALS TO CLAIMANT'S KEY ASSERTIONS ON LEGAL CAUSATION

74. The legal causation inquiry asks whether the Blue House Measures were a direct and proximate cause of Claimant's loss. (RLA-194, ¶ 815; ROK Submission, § IV; ROK Rejoinder, § IV) As the Tribunal recognized in the Award, causation must be established in relation to a specific breach. (RLA-194, ¶ 813) The ROK illustrated at the Hearing that the causal chain in respect of the Blue House Measures involves multiple links, including

three events of considerable complexity — (i) the deliberative decision of the 12-member Investment Committee; (ii) the vote of thousands of SC&T shareholders in favor of the Merger; and (iii) the stock transactions of thousands of buyers and sellers of SC&T stock — and is therefore too attenuated to satisfy legal causation (ROK Opening, p. 7; D2 8:21–9:14).

75. Claimant's discussion of legal causation at the Hearing focused on attacking two different arguments that the ROK has never actually made. *First*, Claimant asserted that the ROK "conten[ds] that the Tribunal failed to address a requirement of foreseeability of harm" and "suggest[s] that the Tribunal ought to have set out a test of foreseeability and then applied that test." (D1 77:25–78:2; D1 80:6–8) This is a mischaracterization of the ROK's position. It is Claimant, not the ROK, which has argued in favor of foreseeability as supposedly sufficient to establish legal causation. (CL Submission, ¶¶ 12, 67, 72; CL Reply, ¶¶ 9(b), 107) In response, the ROK observed that, while the Tribunal referred to foreseeability in *other* sections of the Award, it "indisputably did not mention foreseeability in discussing legal causation" despite Claimant's arguments in the Original Proceedings that foreseeability was relevant to legal causation (ROK Rejoinder, ¶ 94). Therefore, the ROK's position is clearly *not* that the Tribunal "failed to address" foreseeability — but, rather, that it chose not to refer to foreseeability in defining or applying the test for legal causation, focusing instead on the requirements of directness and proximity. Claimant itself conceded at the Hearing that "foreseeability . . . is not a necessary part of the legal causation analysis." (D1 81:6–15)

76. *Second*, Claimant engaged in another red herring by asserting that the ROK's "causa interveniens defence" must fail in light of the Tribunal's holding at paragraph 822 of the Award (set aside), in the context of legal causation, that "[a] chain of causation is not interrupted by a potential event." But the ROK has not pursued a "causa interveniens defence" in these Remitted Proceedings. Instead, it has argued that the causal chain is too indirect, and the claimed loss too remote from the Blue House Measures, for legal causation to be established.

77. Claimant argued at the Hearing that the Blue House Measures involved a specific "targeting" of Claimant, though it is unclear whether it maintained its earlier allegation of an international breach or intention to cause the loss awarded by the Tribunal (e.g., D1 8:7–10; D1 10:22–24; D1 18:21–23; *cf.* CL Submission, ¶ 75; CL Reply, ¶ 114). In any

case, such allegations find no support in the record. The Tribunal made no finding that the Blue House Measures "target[ed]" Claimant or were undertaken with intent to harm Claimant. (ROK Rejoinder, ¶ 101(b)) The fact that the Blue House was aware of Claimant's opposition to the Merger and foresaw that the Merger's approval would be adverse to Claimant's position in opposition to the Merger does not mean that the Blue House intended to cause economic loss to Claimant. The Blue House considered the Merger necessary for the Samsung Group and thus important for the Korean economy; but there is no evidence that the Government agreed with Elliott that the Merger would negatively impact SC&T's shareholders.

## VIII. REBUTTALS TO CLAIMANT'S KEY ASSERTIONS ON LOSS OF CHANCE

78. As the ROK explained at the Hearing, the loss of chance framework fits the circumstances of this case, as it allows the Tribunal to quantify the value to Claimant of the opportunity to have its anti-Merger campaign decided by the shareholders of SC&T without government interference (ROK Opening, p. 8; *id*, pp. 167–172). Yet Claimant has not invoked the framework, choosing instead to pursue an all-or-nothing approach.

79. Claimant argued at the Hearing, for the first time, that, "in finding that the NPS was a de facto State organ, you [the Tribunal] found that its function required its decision-making to be independent of Government, and so your prior finding proceeded on the basis that Elliott's entitlement was not to a particular outcome, but to a fair opportunity to achieve that outcome." (D1 107:16–22). But such argument finds no support in the Award. The Tribunal established causation by reference to the NPS's own vote in favor of the Merger (RLA-194, ¶¶ 819, 821). It then noted: "The counterfactual must be the scenario where the Respondent did not breach the Treaty, i.e. where the NPS did not vote in favor of the Merger and thereby cause the approval of the Merger" (RLA-194, ¶ 929). Since the NPS's conduct was considered attributable to the ROK, and causation was established in relation to the NPS Vote itself, the causal chain did not involve any difficult-to-prove exogenous conduct of third parties such that the Tribunal would need to consider the applicability of the loss-of-chance framework. Such framework therefore remains available to the Tribunal, in the event that it determines (against the ROK's case) that Claimant should receive *some* compensation for loss caused by the Blue House Measures. (*See* RLA-090; *see also* CLA-222, Judgment, ¶ 263(v) (accepting that loss of chance was an argument raised but not yet decided))

## IX. REQUEST FOR RELIEF

80. The ROK reiterates the Request for Relief at paragraph 213 of its Submission.

Respectfully submitted,

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