

IN THE MATTER OF AN ARBITRATION UNDER THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA AND THE UNCITRAL ARBITRATION RULES

PCA Case No. 2018-55

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In the Matter of Arbitration Between: :

MASON CAPITAL L.P. and MASON MANAGEMENT LLC, :

Claimants, :

and :

THE REPUBLIC OF KOREA, :

Respondent. :

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HEARING ON PRELIMINARY OBJECTIONS, Volume 1

Wednesday, October 2, 2019

New York International Arbitration Center
150 East 42nd Street
17th Floor Conference Room
New York, New York

The hearing in the above-entitled matter came on
at 9:27 a.m. before:

PROFESSOR DR. KLAUS SACHS, President of the Tribunal
THE RT. HON. DAME ELIZABETH GLOSTER, Co-Arbitrator
PROFESSOR PIERRE MAYER, Co-Arbitrator

Also present:

Registry and Administrative Secretary to the Tribunal:

DR. LEVENT SABANOULLARI

Assistant to the Tribunal:

MR. MARCUS WEILER

Court Reporter:

MR. DAVID A. KASDAN

Registered Diplomate Reporter (RDR)

Certified Realtime Reporter (CRR)

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P R O C E E D I N G S

1
2 PRESIDENT SACHS: Good morning, ladies and
3 gentlemen.

4 Can you hear me? I hope so.

5 It's 9:27. If you don't mind, we'll start three
6 minutes ahead of our schedule.

7 So, welcome to New York, to this Hearing on
8 Preliminary Objections in PCA Case Number 2018-55, Mason
9 Capital L.P. and Mason Capital Management LLC versus the
10 Republic of Korea.

11 We understand it's the national holiday of Korea
12 today, so we will express our congratulations to the
13 State. I'd like to mention it's also our national holiday
14 in Germany today, so we share this situation that we sit
15 rather than to celebrate.

16 This being said, we've got your program that you
17 are proposing and that the Tribunal accepted, which would
18 start with the Opening Arguments this morning.

19 Are there any housekeeping matters that you would
20 like to address before we invite the Respondent to start
21 with its objections?

22 I start with the Respondent.

23 Sorry?

24 MR. FRIEDLAND: No.

25 PRESIDENT SACHS: Okay. Claimant?

1 MS. SALOMON: No.

2 PRESIDENT SACHS: Thank you very much.

3 Okay. Then we will invite the Respondent to
4 deliver its Opening Statement.

5 (Pause.)

6 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

7 MR. FRIEDLAND: We have three Preliminary
8 Objections, and they proceed from two core propositions.
9 I'm going to briefly introduce these two propositions and
10 then come back to them.

11 The first of our core propositions is that, under
12 the FTA and international law, a Claimant can bring a
13 claim only as to assets that the Claimant beneficially
14 owns. To state this in the converse: Under the FTA and
15 international law, a Claimant cannot bring a claim to the
16 extent that another entity beneficially owns the assets in
17 question. And it's our position that the FTA makes clear
18 in Article 11.16 the need for beneficial ownership, and
19 that's our first slide.

20 And this Article--and you know it--allows a
21 Claimant to submit a claim either on its own behalf or its
22 own loss or damage or on behalf of an enterprise
23 incorporated in Korea. Now, there's no claim on behalf of
24 a locally incorporated enterprise, so each Claimant here
25 has to be submitting, in our submission, its claim on its

1 own behalf for its own loss or damage. And if, as we say
2 is the case here, the GP's claim is for loss or damage
3 incurred by another entity, then the GP's claim is not
4 submitted on its own behalf for loss or damage incurred by
5 it.

6 Now, the FTA, in another Article, 11.22--it's our
7 second slide--says: "The Tribunal shall decide the issues
8 in dispute in accordance with this FTA and applicable
9 rules of international law." And it's our submission, as
10 you know, that the requirement that the Claimant hold a
11 beneficial interest is an applicable rule of international
12 law. And this is a rule recognized most prominently in
13 the Occidental Case, and there an ICSID annulment
14 committee comprised of Juan Armesto, Florentino Feliciano,
15 and Rodrigo Oreamuno annulled 40 percent of the damages
16 awarded because the Claimant lacked beneficial interest in
17 that 40 percent.

18 And the Committee ruled that the requirement of a
19 beneficial interest is a principle of international law so
20 uncontroversial and so well-established that it was an
21 annulable excess of power for the ICSID Tribunal there
22 not to apply it, and the next slide is the key passage:

23 "The position as regards beneficial ownership is
24 a reflection of a more general principle of International
25 Investment Law: Claimants are only permitted to submit

1 their own claims, held for their own benefit, not those
2 held (be it as nominees, agents or otherwise) on behalf of
3 third parties not protected by the relevant treaty." And
4 I'll return to this.

5 Now, if you decide both that the Occidental
6 Annulment Committee and the other cases that we've cited
7 with similar rulings are wrong and that "on its own behalf
8 then Claimant must have incurred its own loss or damage"
9 language that we saw in Article 11.16 doesn't mean what we
10 submit it means, then at least two of our three
11 Preliminary Objections fail. But if you decide the
12 beneficial ownership is required, then our second core
13 proposition becomes decisive, and it's a factual one. And
14 it concerns the evidence or lack of evidence of the GP's
15 beneficial interest in the Samsung Shares. And the key
16 point here, which I will develop, is that you could easily
17 learn what the GP's beneficial interest is in respect to
18 the Samsung Shares by looking at the Capital Accounts of
19 the Partnership. We explained this in our Reply. But
20 Mason has withheld the Capital Accounts, and this leads
21 to, as I will develop, the failure of proof as to the GP's
22 beneficial interest.

23 Now, we understand Mason now to be saying that
24 the GP's beneficial interest is its performance fee or
25 what's called the "Incentive Allocation." Now, as I will

1 discuss, it's our position that Mason hasn't proven the
2 GP's Incentive Allocation; but, even if it had, it's for
3 sure it's not disputed that the GP's beneficial interest
4 insofar as it consists of the Incentive Allocation could
5 be no more than 20 percent of the amount claimed by the
6 GP.

7 So, on Mason's own case, if you accept our
8 submission that a beneficial interest is required, the
9 GP's claim has to be reduced by 80 percent in your ruling
10 on these Preliminary Objections, but I hope to show you
11 that, under the record here, there's a failure of proof as
12 to the 20 percent, meaning the 20 percent comes out to
13 0 percent.

14 Now, it's a strange circumstance that you might
15 not know from reading the Rejoinder what our Preliminary
16 Objections are all about, from reading Mason's Rejoinder.
17 There's 35 pages about investment law and about Korean
18 law. There's very little about the FTA or on the
19 jurisprudence of beneficial interest, and there's
20 virtually nothing on the facts pertaining to the GP's
21 beneficial interest. So, I'm going to talk about the
22 facts in this opening. I'll do that first. I'll also
23 talk a bit about the Limited Partnership Agreement, the
24 "LPA," and about Cayman Partnership Law. I'll then
25 present our "no standing" and legal deficiency objections,

1 and my Partner Damian Nyer will then present our objection
2 on the GP status as an investor.

3 In its Counter-Memorial Mason argued that the GP
4 has an indivisible beneficial interest in the entirety of
5 the Samsung investment, and you see that here in Slide 4,
6 the "GP's legal and indivisible beneficial ownership
7 extended to all of the Samsung Shares."

8 Now, Mason seems to have amended this position in
9 its Rejoinder. That submission includes a second report
10 by Rolf Lindsay, Slide 5, and he says there: "Each
11 Partner has an indivisible beneficial interest in each of
12 the Partnership assets. That is not the same as saying
13 that any Partner is entitled to any specific asset. On
14 the contrary: Each of the Partners is interested in all
15 of the Partnership assets, and in each case to the extent
16 of its beneficial interest."

17 Now, I expect that the Experts can agree that the
18 indivisibility of a Partner's interest in the Partnership
19 assets means just that individual Partners don't have
20 rights to particular assets of the Partnership. When a
21 distribution or liquidation occurs, a Partner has a
22 divisible interest in those assets in proportion to the
23 size of its beneficial interest in the Partnership. And
24 you need to know what was in the Capital Account of each
25 Partner relative to what the other Partner's Capital

1 Account had as of the time of distribution or liquidation
2 to know what each Partner would get.

3 So, the Parties now seem to agree that the GP's
4 beneficial interest in the Samsung Shares wasn't and isn't
5 a hundred percent, and we need to determine the extent of
6 that beneficial interest in order to know whether GP can
7 claim on its own behalf. And it's unclear to me how the
8 indivisibility concept is at all relevant to this inquiry.

9 And I want to make sure we're clear here as to
10 what the issue is and isn't here. The issue here is not
11 whether under Cayman law the GP is empowered to bring a
12 claim on behalf of the entire Partnership; that's
13 undisputed. That's not the issue under the FTA and
14 international law. The issue under the FTA and
15 international law is what the GP can claim as its own loss
16 or damage in view of its beneficial interest in the
17 Samsung Shares, and the "beneficial interest" doctrine
18 makes a difference under the FTA and international law
19 even where it might not make such a difference to issues
20 of jurisdiction or standing under national laws such as
21 Cayman law; and this is because the FTA, or under the FTA,
22 as under all BITs, nationality is decisive: The FTA
23 protects U.S. companies; it doesn't protect Cayman
24 companies.

25 Now, the Parties agree about where we need to

1 look, at least initially, to identify the GP's beneficial
2 interest in the Samsung Shares, and it's the LPA. It's
3 right on Slide 6.

4 Now, if we pause preliminarily, just for a moment
5 on the first sentence, Rolf Lindsay has taken Issue with
6 Rachel Reynolds's use of the phrase "Partnership
7 Interests"--she uses it because it's used here--but I'm
8 going to leave that disagreement, such as it is, to the
9 Experts because I don't get the significance of the
10 disagreement. It seems to me a disagreement about labels,
11 not substance, and the rest of this provision is clear and
12 unambiguous: "The Partner's economic interest shall be
13 expressed as a percentage equal to the balance in the
14 Capital Account of such Partner divided by the aggregate
15 balance in the Capital Accounts of all the Partners at any
16 given time."

17 The phrase "economic interest" is exactly what
18 beneficial interests under international law connotes. It
19 might be an even better way of saying it. And we see that
20 to determine the interest--the extent of any Partner's
21 economic interest, we need to look at the relative
22 percentages of the amount in each Partner's Capital
23 Account. Now, we also see the words: "at any given time."
24 Each Partner's relative percentage naturally changes from
25 time to time in view of what each puts into or takes out

1 from its Capital Account, so the inquiry needs to be
2 temporally focused.

3 Now, the alleged wrong that gives rise to the
4 claims here was the SC&T-Cheil merger vote. That vote was
5 on July 17, 2015, so that date seems to us to be the date
6 that matters for any valuation of the GP's alleged lost
7 interest.

8 Now, I won't display it, but Article 4 of the LPA
9 describes the three ways that money can enter the GP's
10 Capital Account: First, the GP can make a capital
11 contribution, which would then be part of the
12 Partnership's investment capital. Second, Net Profits
13 that the Partnership makes from its investments could be
14 allocated to the GP's Capital Account, and this would be
15 done in proportion to the size of the GP's Capital Account
16 balance compared to the L.P.'s, Limited Partner's capital
17 balance. And third, the GP could receive a fee, the
18 Incentive Allocation, from the L.P. Whatever the source,
19 the money will go into the GP's Capital Account. And
20 that's not a fact that's unknown to the hedge fund people
21 that run Mason. The significance of the Capital Account
22 isn't the subtlety that they need explained to them by
23 lawyers or arbitrators. If outside this arbitration you
24 were to ask them what's their economic interest or
25 beneficial interest in the Partnership, they'd say in a

1 second, "Let's look at the Capital Accounts." They know
2 this better than anyone.

3 Now, in our Reply, we made a point of the fact
4 that under the LPA we need to see the Capital Accounts to
5 know the GP's economic or beneficial interest. This is
6 Slide 17--I'm not going to read the whole thing--Slide 7,
7 not 17--in Paragraph 17, you see we say here that the GP
8 had not shown, as of then--Mason had not shown as of then
9 to withhold from you and from us the Capital Accounts, and
10 Mason since then has decided that it remains in Mason's
11 best interests to continue to withhold the Capital
12 Accounts.

13 So, what might be in the GP's Capital Account?
14 Mason doesn't argue that the GP put capital contributions
15 into the Capital Account. It also doesn't argue that Net
16 Profits were allocated to its Capital Account. So, those
17 two potential sources for the GP's beneficial interest we
18 can set aside.

19 Mason does suggest that the GP at one point had
20 accumulated Incentive Allocations in its Capital
21 Account--I'll return to that in a moment--and Mason also
22 says, as we know, that it was deprived of an Incentive
23 Allocation and that this constitutes a loss or damage to
24 its beneficial interest to the extent you were to decide a
25 beneficial interest is required.

1 So, the question becomes what's the evidentiary
2 value of Mason's submissions on its allegedly lost
3 Incentive Allocation in light of its choice not to submit
4 the Capital Accounts or other documents such as Financial
5 Statements?

6 I've mentioned that Mason's case on the Incentive
7 Allocation, if proven, would establish, at most, a
8 20 percent interest on the part of the GP in the Samsung
9 Shares, and we get that 20 percent from LPA 4.06, which is
10 Slide 8, and you can see the GP's Incentive Allocation is
11 20 percent of the L.P.'s cumulative net return on the
12 whole portfolio, and the word "cumulative" tells us that
13 the Incentive Allocation isn't calculated or awarded on
14 the basis of a single investment. It's assessed on the
15 basis of the performance of the entire portfolio, and the
16 cumulative net profits in a given year have to be higher
17 than any cumulative past losses in order for the GP to get
18 an Incentive Allocation for that year. That's referred to
19 as "CUNL."

20 And to say it the way Mason says it, the
21 portfolio in a given year has to surpass the previous high
22 watermark of the portfolio as a whole in order for the GP
23 to get an Incentive Allocation that year, and that's what
24 Mason's CFO Satzinger says in his Witness Statement, and
25 he explains here, Slide 9, that the GP got no Incentive

1 Allocation in 2015.

2 Now, the evidentiary import of all of this is
3 that in order to show you the GP would get an Incentive
4 Allocation--that's what it says it lost--at all in a given
5 year, Mason would need to prove that the portfolio in its
6 entirety was making money and that the profits in that
7 year were higher than accumulated past losses. So, if the
8 non-Samsung parts of the portfolio had performed poorly
9 enough, either that year or in prior years, the GP
10 wouldn't get an Incentive Allocation in or for 2015
11 regardless of how the Samsung Shares should have allegedly
12 performed, and this means that it's not enough for Mason
13 to make allegations about how the Samsung Shares should
14 have performed. That, by itself, couldn't and doesn't
15 show you that the GP would have gotten an Incentive
16 Allocation in 2015 in relation to the Samsung Shares.

17 Incentive Allocations aren't rewarded in relation
18 to any single shareholding standing alone. Now, the
19 Capital Accounts plus the Partnership's Financial
20 Statements would tell us how the Partnership's portfolio
21 fared, as of 2015. Because Mason has chosen to withhold
22 the Capital Accounts and the Financial Statements, Mason
23 hasn't shown you that, as of July 2015, that the portfolio
24 as a whole was performing well enough that the GP would
25 have gotten any Incentive Allocation, regardless of how it

1 says the Samsung Shares should have performed.

2 And there's an interesting Concession in this
3 regard buried in the slide before you. It's buried in two
4 words here. Satzinger is saying here that the GP didn't
5 earn any Incentive Allocation in 2015 due, in part, to
6 losses associated with the Investments in the Samsung
7 Shares. Now, if the Samsung Shares had been the sole
8 cause of the absence of an Incentive Allocation, this
9 Witness Statement surely would have said that. So, what
10 this is acknowledging, then, is that the absence of an
11 Incentive Allocation in 2015 was due, in part, to losses
12 associated with investments other than the Samsung Shares.

13 So, what fairly are we to infer from a
14 withholding of the Capital Accounts and Financial
15 Statements? The reasonable inference, I would suggest,
16 has to be that, had these documents been produced, they
17 would show that the GP would have gotten far less than
18 20 percent, potentially 0 percent, in 2015, even if the
19 Samsung Shares had performed as Mason alleges they should
20 have. I'd also expect that, if the Capital Accounts and
21 Financials showed anything even near 20 percent, Mason
22 would have produced them.

23 Now, moving beyond the unproven Incentive
24 Allocation for 2015, there is a suggestion Rolf Lindsay's
25 Second Report that the alleged losses on the Samsung

1 Shares might have caused or might still cause the GP to
2 get a lower Incentive Allocation in future years after
3 2015. I follow the logic of that suggestion, but I don't
4 get the relevance. It's not a claim advanced or mentioned
5 in the Notice of Arbitration. It's not mentioned by
6 either of Mason's fact witnesses. And they had ample
7 opportunity to try to substantiate the suggestion made by
8 their expert because the results are in for a year since
9 2015, but they have chosen not even to try to prove the
10 Incentive Allocation--maybe loss, maybe not loss--for
11 later years just like they chose not to try to prove it
12 for 2015.

13 Now, another way that Incentive Allocations could
14 generate an arguable beneficial interest for the GP would
15 be by an accumulation of Incentive Allocations that the GP
16 chose to keep in its Capital Account. Now, as I
17 mentioned, Mason's CFO, in fact, says in his Witness
18 Statement, that the GP had as of May 2014, accumulated
19 Incentive Allocations of approximately \$350 million. Now,
20 if you compare that to what we know the L.P. had
21 contributed in capital as of May 2014, the GP's beneficial
22 interest would come out to about 5 percent as of May 2014,
23 so that's not surprisingly a calculation that we haven't
24 seen from Mason.

25 But the more important point is that the CFO

1 doesn't say whether this money was still in the GP's
2 Capital Account at the time of the merger vote in
3 July 2015. The hedge fund people running the GP might
4 have decided to cash in some of their chips after May 2014
5 or they might have lost some or all of what they kept in
6 their Capital Account because we know that 2014 was a bad
7 year for Mason. If we had the Capital Accounts, we
8 wouldn't have to guess about any of this.

9 And the repeated references in Mason's
10 submissions to May 2014 raises a question for us. What's
11 the legal relevance of that date? I don't know. Mason
12 says that it first invested in SEC by buying swaps in
13 May 2014. Mason continued to buy and sell Samsung Shares
14 over the following months until the merger vote in July
15 2015. How that makes May 2014 the relevant date for
16 valuation of alleged loss rising from the alleged harm
17 done when the merger was approved, I don't know.

18 Now, two final comments on beneficial interests
19 before I move on to our "no standing" and legal deficiency
20 preliminary objections:

21 First, it's uncontroversial that the GP holds the
22 Partnership assets as Trustee on behalf of the
23 Partnership, not on its own behalf. And we can see this
24 in the ELP Law itself. Next slide is 10, you can see is
25 ELP Section 16.1. And this isn't, to my knowledge, and

1 couldn't be contested.

2 So, given the GP status as Trustee of the
3 Partnership's assets, the question might arise to you:
4 Wouldn't it be okay for you to render an award for the
5 entirety of the Claim in favor of the GP and the GP as
6 Trustee would then just distribute to the L.P. the L.P.
7 share, and by doing that we could avoid all this fuss
8 about beneficial interest. And the answer is: The L.P.
9 is a Cayman entity. It's not protected under the FTA and
10 to allow the Cayman L.P. to benefit from this Claim would
11 violate the FTA and international law, and there are
12 arbitral decisions directly on point.

13 Come with me to Slide 11, on the top there's
14 Impregilo, that Impregilo may be obliged to account to its
15 Partners in respect of any damages obtained in these
16 proceedings is also an internal JV matter, which has no
17 bearing on Pakistan's agreed exposure under the BIT. And
18 then you have from Stern's dissent in the Occidental Case.
19 It's a principle that is affirmed: "Either OEPIC will not
20 transmit 40 percent of the amount received in damages to
21 Andes and it will then be unjustly enriched or OEPIC will
22 indeed transmit 40 percent of the amount received in
23 damages to Andes"--and Andes is the Party here--it's the
24 analogue or the homologue to the L.P. here--"and the
25 Tribunal will therefore have compensated Andes through

1 OEPCC, in violation of the principles of limited
2 jurisdiction *ratione personae*. This would be an improper
3 recovery on behalf of an entity not protected by the BIT.

4 And my final comment now in this introduction.
5 What we submit to be Mason's failure of proof on the GP's
6 beneficial interest is a failure to prove facts regarding
7 standing and jurisdiction. We have contested by our
8 Preliminary Objections that the GP has any beneficial
9 interest in the Samsung Shares. Mason's Reply can't be
10 that it will prove later the GP's beneficial interest.

11 I'm on Slide 12 now. This is from the Blue Bank
12 Case: "All facts that are dispositive for purposes of
13 jurisdiction must be proven at the jurisdictional stage."
14 And this isn't just a formality. The purpose of
15 bifurcation is to resolve, finally, the preliminary issues
16 presented. That purpose would obviously be undermined if
17 the preliminary factual issues bearing upon jurisdiction
18 or standing were left unresolved.

19 And this is what the Tribunal said in Khan
20 Resources: "Where the determination on jurisdiction
21 depends on facts, these facts must be proven at the
22 jurisdictional stage and cannot be taken *pro tem*, whether
23 or not they will remain relevant for the determination on
24 the merits. This logically follows from the purpose of
25 bifurcation between a jurisdictional and a merits phase,

1 which is to allow for the complete determination of
2 jurisdictional issues during a preliminary phase."

3 I'm now going to move on to our "no standing"
4 objection.

5 So, this objection arises, as you know, under the
6 language of Article 11.16. I have already shown you this,
7 it's now on Slide 14. Our position is that the ordinary
8 meaning of this Article is that a Claimant has standing to
9 bring only two types of claims: Either on its own behalf
10 in regard to a claim where the Claimant itself has
11 incurred loss or damage, or on behalf of an enterprise of
12 the Respondent. Mason doesn't invoke the second category.

13 Now, as to the first category, Mason argues that
14 legal ownership or control is all that's required under
15 the FTA. But even if legal ownership or control satisfies
16 other provisions of the FTA, Mason still needs to satisfy
17 the requirements of this provision in order to submit a
18 claim to arbitration under the FTA. This provision is
19 Mason's gateway to arbitration under the FTA. And Mason's
20 position, in our submission, doesn't account for the
21 ordinary meaning of "on its own behalf," and that ordinary
22 meaning is reinforced by the requirement that it's the
23 Claimant that must have incurred the loss or damage. If
24 another entity, not the Claimant, has the beneficial
25 interest, then that other entity is the one that incurs

1 the loss.

2 Mason's position also doesn't account in our
3 submission for the way that this Article is structured.
4 The Article identifies two categories of permissible
5 claims--there is no third category. There is no category
6 for a claim on behalf of the non-party that's not locally
7 incorporated. Korea has consented to arbitrate only the
8 two categories of claims that you see here. Mason attacks
9 our position for, as Mason says "fabricating a standing
10 requirement where none is expressed." I don't know if
11 Mason is saying that the word "standing" itself has to be
12 used or if the words "beneficial interest" themselves have
13 to be used. They don't have to be used. We call it a
14 "standing requirement," but it can be called just the
15 requirement for bringing a claim under the FTA. Doesn't
16 matter.

17 There is also no need for the FTA to use the
18 words "beneficial interest." It's enough in our
19 submission for the FTA to say that the Claimant must
20 submit a claim on its own behalf for its own loss or
21 damage.

22 Mason argues that the FTA is *lex specialis* with
23 respect to standing and that you can't consider extrinsic
24 international law principles such as the "beneficial
25 interest" doctrine, but we've seen that Article 11.22 of

1 the FTA says that: "You shall decide the issues in
2 dispute in accordance with this Agreement and applicable
3 rules of international law." In view of that language, I
4 don't see the basis to exclude application of
5 international law unless an FTA provision were clearly
6 inconsistent with the proffered principle of international
7 law. There are no instances cited to you or known in
8 which the "lex specialis" doctrine has been applied to
9 exclude consideration of international law consistent with
10 the language of a treaty. Of course, if you think it's
11 inconsistent with the language of the Treaty, then we lose
12 ab initio.

13 Here's what was said relevantly in the Loewen
14 case: "An important principle of international law should
15 not be held to have been tacitly dispensed with by an
16 international agreement, in the absence of words making
17 clear an intention to do so." Under the FTA here, the
18 drafters weren't trying tacitly to dispense with
19 international law, they were explicitly bringing it in.

20 Now, Mason says that Occidental is
21 distinguishable because Mason turned--Occidental turned on
22 what Mason calls the use by the Claimants there of, and
23 I'm quoting, "an idiosyncratic temporary contractual
24 arrangement."

25 Two points in response.

1 First, the Occidental ruling on beneficial
2 interest did not turn on the particularities of the case.
3 I've already displayed to you the passage. Here it is
4 again. I'm not going to read it again. You can see we're
5 on Slide 16. The Committee states the principle. It's a
6 general principle of international law. Its expression of
7 the principle is in no way contingent on the facts of the
8 case, whether idiosyncratic or not.

9 And this isn't changed. The generality of the
10 principle isn't changed by the fact that the Committee
11 endorsed the Dissenting Opinion of Professor Stern. The
12 disagreement between Stern and the majority wasn't about
13 whether beneficial interest is required under
14 international law. It wasn't about whether the doctrine
15 is an established rule of international law. The
16 disagreement was entirely about whether under the facts of
17 the case legal ownership and beneficial ownership were
18 split.

19 And second response: The facts in Occidental
20 were comparable to ours. The Claimant in Occidental
21 legally owned the Investment, just like Mason says that
22 the GP owned the Shares here; and, like our FTA, the BIT
23 in Occidental defined "investment" as, and I'm quoting,
24 "every kind of investment owned or controlled, directly or
25 indirectly, by investors of the other Party." So, if

1 Mason's theory were right, the Claimant's legal ownership
2 in Occidental would have been enough to establish
3 jurisdiction and standing, but it wasn't. Beneficial
4 ownership was required.

5 Now, Mason says that Occidental is our sole
6 source for the "beneficial interest" doctrine, and Mason
7 argues on that basis that a single case can't establish a
8 general principle of investment law. Well, first, even if
9 it were the sole case, it's a significant one. The
10 committee was comprised of eminent jurists, and ICSID
11 annulment committees have jurisdiction to annul only for
12 manifest excess of power; and, second, Occidental isn't
13 the only support for the principle. We've given you in
14 our briefs other cases that support the beneficial
15 interest doctrine, none discusses beneficial interest to
16 the same extent as does Occidental, but they're consistent
17 with the key passage in Occidental.

18 I don't have time to go through that case law and
19 you probably don't want me to go through that now anyway.

20 So, now I'm going to go on to our legal
21 deficiency objection. This objection has the same basis
22 in principle as the "no standing" objection, but is
23 derived from a different provision of the FTA. It's not
24 Article 11.16. It's Article 11.20. I'm not going to read
25 it aloud. It refers to Article 11.26, which I'm also not

1 going to display. It concerns the Tribunal's power to
2 issue an award.

3 Now, it's our position, as you've now heard me
4 say a few different ways, that the GP can't recover the
5 amounts claimed because the loss is that of another
6 entity, and this is a principle that dates back at least
7 to the Chorzów Factory case.

8 I'm now on Slide 18.

9 This principle, recognized by the Chorzów Factory
10 case, has the effect of excluding from the damage to the
11 estimated injury resulting for third parties, and as
12 Chorzów dictum was, in fact, expressly confirmed and
13 endorsed by the Occidental Committee.

14 I'm now on Slide 19.

15 The dictum in Chorzów Factory confirms the
16 Committee's conclusion: "As a matter of international
17 law, the Occidental Tribunal was precluded from awarding
18 Claimants damages reflecting 100 percent of the investment
19 because it was required to exclude from the compensation
20 the injury caused to a third party, who was the beneficial
21 owner of a 40 percent interest in the expropriated
22 investment."

23 Now, under Article 11.26(c) for the purposes of
24 this Preliminary Objection, the Tribunal shall assume to
25 be true Claimants' factual allegations in support of any

1 claim in the Notice of Arbitration, so it's the Notice of
2 Arbitration that matters for the purpose of assuming the
3 facts as alleged.

4 The specification of the Notice of Arbitration
5 also means that facts advanced in subsequent submissions
6 by Mason are not to be presumed true. They can be proven
7 true, but they've got to be proven, and proven at this
8 Preliminary Objections stage.

9 So, let's look at what Mason said in its Notice
10 of Arbitration about Claimants' interests in the Samsung
11 Shares.

12 It's the next slide. I'm on 20 now.

13 First, in describing in Paragraph 57, the other
14 Claimant's, not the GP's, interest in the Samsung Shares,
15 Mason writes that the "Domestic Fund owned the Shares."
16 Very simple.

17 And then when Mason describes the GP's ownership
18 interest, Mason says that the GP legally owned and
19 controlled the Shares. At the end of the sentence there's
20 a footnote, and the footnote says that the GP holds the
21 Shares on trust, and the footnote cites Section 16.1 of
22 the ELP law, and we have already seen this, it's the next
23 slide. The GP holds all Partnership Assets on trust.

24 So, under the Notice of Arbitration, the GP's
25 interest was that of a Trustee, and as a Trustee, its

1 interest wasn't a beneficial one because a Trustee
2 obviously isn't the beneficial owner of assets held on
3 trust. To the extent that Mason now wants to argue that
4 the GP has a beneficial interest, Mason is entitled to try
5 to do that, but it has to prove it and it hasn't.

6 So, I've come to the end of my portion of our
7 presentation. Our submission so far is this: First,
8 beneficial interest is a requirement of both the FTA
9 Article 11.16 and international law.

10 Second, we've contested that the GP has a
11 beneficial interest needed to establish standing and
12 jurisdiction and a legal right to recover, and because
13 we've contested that, Mason's burden is to establish that
14 what the GP's beneficial interest is at this preliminary
15 objections phase, Mason can't say that it will prove the
16 GP's beneficial interest at a later stage, and Mason, in
17 fact, hasn't said that.

18 And third, even if Mason had chosen to prove and
19 had proven that the GP was entitled to an Incentive
20 Allocation in 2015, the GP's claim would still need to be
21 reduced by at least 80 percent, even under Mason's own
22 case on the facts.

23 And, fourth, by withholding the Capital Accounts
24 and Financials, Mason has failed to prove any beneficial
25 interest held by the GP. Mason has made allegations about

1 the Incentive Allocation, but the allegations aren't
2 supported by the obvious proof held by Mason. You need to
3 see the Capital Accounts and perhaps Financial Statements
4 in order to know whether the conditions for the GP to
5 receive an Incentive Allocation in respect of the Samsung
6 Shares were satisfied.

7 So, on this record, the GP's beneficial interest
8 isn't 20 percent, it's 0 percent.

9 My Partner, Damien Nyer will continue the
10 presentation.

11 PRESIDENT SACHS: Thank you, Mr. Friedland.

12 MR. NYER: Good morning.

13 PRESIDENT SACHS: Mr. Nyer, the floor is yours.

14 MR. NYER: Our last objection is that the GP, the
15 General Partner, does not qualify as an investor under the
16 FTA, and this is for two reasons:

17 First, the General Partner, the GP, did not make
18 an investment within the meaning of the FTA.

19 Second, under Korean law, the GP did not have
20 ownership or control of the Samsung Shares.

21 And I will start with the first prong of our
22 argument.

23 We start, as we should, with the language of the
24 Treaty, and I'm on Slide 23 of our deck. We've set out on
25 the slide Article 11.28 of the FTA which defines

1 "investment." It defines "investments" as every asset
2 that an Investor owns or controls, directly or indirectly,
3 that has the characteristics of an "investment," including
4 such characteristics as commitment of capital or other
5 resources, the expectation of gain of profit, or the
6 assumption of risk."

7 The reference to the characteristics of an
8 "investment," we say, tells us something. It tells us
9 that an investment, has an inherent meaning. And the
10 cases, as you well know, have identified four such
11 characteristics. You are no doubt familiar with them, and
12 they are largely uncontroversial.

13 The first characteristic of an "investment" is
14 that the Investment involves a contribution of capital and
15 resources by the investor.

16 The second characteristic, an investment involves
17 risks, and specifically the risk of losing one's
18 contribution to the investment.

19 The third characteristic is that an investment
20 involves an expectation of gain and profit.

21 And the fourth characteristic that the cases have
22 upheld is that an investment plays out over time. An
23 investment is not short-term speculation in the market.

24 Now, Mason tells you that this last requirement
25 does not appear--is not listed in this definition of

1 "investment" in Article 11.28. It is not explicitly
2 listed and, therefore, it would be inappropriate to
3 consider the "duration" requirement in this case.

4 We have two responses. First, we disagree that
5 the "duration" requirement is atextual. The notion of
6 "duration" can be found right here in the text in front of
7 you on Slide 23. Duration can be found in the concept of
8 commitment of capital and resources, we say.

9 Second response is that, in any event, the
10 characteristics of investments that are listed in Article
11 11.28 of the BIT--of the FTA, this list is not exhaustive,
12 and does not purport to be exhaustive. That's what the
13 use of the term "including" tells us.

14 Now, the cases, as I've mentioned, have
15 demonstrated that the duration requirements--that duration
16 is a requirement of an investment and is implied in the
17 plain meaning of the term "investment." Mason told us in
18 Rejoinder that we are relying on ICSID, inapplicable ICSID
19 jurisprudence, but it is not true. I'm on Slide 24, and
20 we've listed three cases that are non-ICSID cases that
21 have endorsed the duration requirements as being part of
22 the plain meaning of an "investment."

23 And this requirement, the "duration" requirement,
24 accords with the common understanding of an "investment,"
25 and I would like to stop to maybe consider a hypothetical:

1 If I were to go in a casino in Korea and bet \$100 in a
2 slot machine or at the poker table, I would certainly have
3 committed capital, contributed capital. I would certainly
4 have an expectation of gain or profit, and I would
5 certainly face the risk of losing my contribution. But no
6 one would say that, by doing so, I would have made an
7 investment. And what is missing in my gamble in the
8 casino in Korea is this concept of "commitment and
9 duration."

10 So, we have four characteristics of an
11 investment, we say.

12 ARBITRATOR GLOSTER: Can I just interrupt? I'm
13 sorry. Might I interrupt?

14 MR. NYER: Sure.

15 ARBITRATOR GLOSTER: There are a lot of cases in
16 the reports that try and differentiate between what is a
17 "speculation" and what is an "investment." It's very
18 fact-sensitive, very difficult, and incredibly
19 controversial.

20 Did you need this fourth requirement to make good
21 your case? I don't think so.

22 MR. NYER: I think you would need it as the
23 casino example shows.

24 ARBITRATOR GLOSTER: Well, the casino is one
25 extreme end of the spectrum, but as you go along the

1 spectrum, it can be very difficult, in my experience, to
2 differentiate between what is speculation and what is
3 "investment."

4 MR. NYER: And I will not dispute the fact that
5 it is a difficult factual inquiry, but it is an inquiry
6 that you have to conduct.

7 ARBITRATOR GLOSTER: And you say it's an inquiry
8 that can be done here?

9 MR. NYER: I'm saying it's an inquiry that can be
10 done here and it is an inquiry that tribunals routinely
11 conduct.

12 ARBITRATOR GLOSTER: I know that. And come to
13 very different conclusions.

14 Anyway, thank you.

15 MR. NYER: So, we say that there are about four
16 characteristics of investments that you would have to find
17 in this case to conclude that there is an "investment."
18 There is no dispute that the acquisition of the Samsung
19 Shares by the General Partner on behalf of the Partnership
20 involved an expectation of profit and gain by the General
21 Partner, that's the Incentive Allocations that
22 Mr. Friedland referred to. Our position, though, is that
23 the acquisition by the GP--the acquisition of the Samsung
24 Shares by the GP cannot meet the other three requirements
25 and, therefore, the GP can't be an investor under the FTA,

1 and this is so because the acquisition of shares was made
2 using someone else's capital, the L.P.'s capital, on
3 behalf and at the risk of someone else, the L.P.'s or the
4 Partnership, and for the purpose of short-term
5 speculation, Arbitrator Gloster, and we hope to show that
6 during the testimonies--during the course of this Hearing.

7 So, we'll start with the notion of
8 "contribution."

9 For an investment to exist, we say that the GP
10 must have contributed capital or other resources. The key
11 issue for you to decide is whether the GP itself must have
12 contributed capital and resources. Mr. Friedland has
13 explained at some length that there is no evidence that
14 the GP used its own capital to purchase the Samsung
15 Shares. It used the L.P.'s, the Limited Partner's,
16 capital. And we say that the GP cannot achieve investor
17 status based on someone else's contributions and capital.
18 The GP itself must have made the contributions.

19 Now, we're not just saying this but the FTA
20 explicitly requires it, in our submission. And if you
21 would follow me to Slide 25, we've set out the FTA's
22 definition of "investor". To be an investor of a party
23 means: "A party or state enterprise thereof, or a
24 national or an enterprise of a party, that attempts to
25 make, is making or has made an investment in the territory

1 of the other Party." And we're saying that this language,
2 explicit language, in the FTA makes clear that the GP
3 itself must establish that it has made an investment, and
4 that it has committed its resources and capital.

5 Now, Mason, in its Rejoinder says that we're
6 applying the FTA's characteristic of investments and in
7 particular the requirement of the commitment of capital
8 and resources to the definition of an investor. According
9 to Mason, it is enough that the GP holds shares and that
10 shares as a general matter reflect contribution of capital
11 by someone at some point.

12 Now, I don't really see the arguments, given the
13 plain language of the FTA that is displayed in front of
14 you on Slide 25, and the requirement that the investor
15 makes or has made or is attempting to make an investment.
16 But even if the FTA were not explicit, we have support in
17 multiple cases that we've briefed in our submissions. And
18 those cases have found that an investor must itself have
19 contributed to the Investment. And for ease of reference,
20 we've set them out on Slides 26 and 27, but looking at the
21 first one, on Slide 26, the KT Asia Tribunal was
22 considering in that case that the question before it was
23 whether the Claimant must itself have made a contribution
24 or whether it can benefit from a contribution made by
25 someone else; here, it's ultimate beneficial owner. And

1 the Tribunal in that case found that indeed the Claimants
2 to be an investor and to have made an investment needed to
3 have made the contribution itself. And there are several
4 other cases that we've listed but held similarly.

5 Now, Mason in its Rejoinder dismisses those cases
6 or this line of cases as being somehow the brainchild of
7 Professor Rusty Park. That's not true. Park chaired the
8 Alapli Case, but Quiborax and the KT Asia Case from which
9 I just quoted were chaired by Gabrielle Kaufmann-Kohler.
10 The Blue Bank Case was chaired by Söderlund, and Clorox
11 was chaired by Yves Derains, so it is a fairly
12 representative cross-section of prominent arbitrators that
13 have come to this conclusion that one must make itself an
14 investment, a contribution.

15 Now, Mason says in its Rejoinder as well that our
16 position runs counter to the well-established principle
17 that the origin of capital used to make an investment
18 should be irrelevant to jurisdiction. It's a nice sound
19 bite, but it's not responsive, in our submission. It is
20 true that arbitral tribunals will ordinarily not lift the
21 corporate veil to conduct an inquiry into the
22 nationality--that is the origin--of the invested capital.
23 That is, as you well know, the Tokios Tokelés and Ukraine
24 Case and the issue of the round-trip investment routed
25 through a third country with--a treaty with your State.

1 So, in that sense, the origin of the invested capital is
2 irrelevant.

3 But that principle says nothing about whether to
4 qualify as an investor, it is enough for a person to use
5 someone else's capital on someone else's behalf and at
6 someone else's risk. That's not what this principle says.

7 And as a matter of fact, several tribunals have
8 directly addressed this "origin of capital" argument made
9 by Mason and found that it was no response to the
10 principle that the purported investor must itself have
11 made contributions. And if you follow me to Slide 28,
12 we've set out quotes from two cases. One is Gaëta and
13 Guinea and Caratube-Kazakhstan. And you will see that the
14 Gaëta, the Tribunal chaired by Professor Pierre Tercier,
15 noted that even if the origin of--or sort of the source of
16 the Investment is not relevant to Article 25 of the ICSID
17 Convention, one must still demonstrate that the Investor
18 made a contribution of some kind. The Investor must in
19 particular show that it made the Investment payment on its
20 own behalf, and that the payment was in fact made. In
21 other words, even if the Investor received funds from
22 third parties, it must actually assume the risk and
23 demonstrate that it has done so.

24 And I will invite you to read for yourself the
25 Gaëta Case. It is a brave attempt by Professor Tercier to

1 reconcile the fairly confusing case law in this area.

2 Now, in fairness, Mason, in its Rejoinder, has
3 found and cited a case that does support its argument,
4 Eiser versus Spain, and I'm sure we'll hear a lot about
5 Eiser and Spain today and for the rest of the week. Our
6 position is that Eiser just cannot be reconciled with
7 those two cases that we just looked at, but it also cannot
8 reconcile with a series of cases that we've discussed that
9 have held that an Investor must make its own
10 contributions. Our submission is that the Eiser Tribunal
11 chaired by John Crook read too much in the "origin of
12 capital" debate.

13 Now, if we are right--

14 ARBITRATOR GLOSTER: So, you're saying it's
15 wrong?

16 MR. NYER: We're saying it's wrong, yes.

17 If we are right and if Eiser is wrong, Mason's
18 decision to withhold the Capital Accounts is a big problem
19 for its position, not only as to the beneficial ownership
20 status interest that Mr. Friedland discussed, but also as
21 to its status as an investor.

22 Now, to get around this problem, Mason says in
23 its Rejoinder that the GP made contributions in kind, if
24 not in capital, and we will hear Mr. Garschina's, Mason's
25 principal evidence, this afternoon on this topic. But the

1 gist of that evidence so far has been that Mason or some
2 Mason affiliates spent a lot of time considering whether
3 and when to deploy--to acquire and sell the Samsung Shares
4 on behalf of the Cayman Fund, on behalf of the
5 Partnership.

6 Now, our position is that if the General Partner
7 does not make an investment and does not become an
8 investor by using someone else's capital on someone else's
9 behalf, a fortiori, time spent considering whether and
10 when to use that capital cannot itself be an investment.

11 I will now turn to the second characteristic of
12 an "investment" that we say Mason cannot show in this
13 case, and this is the assumption of risk by the Investor.
14 And our argument here mirrors the "no contribution"
15 argument, and the point is that not having contributed to
16 its own capital to the acquisition of the Shares, the
17 General Partner did not run the risk of losing that
18 capital, did not run the risk of losing its contribution
19 and, thus, did not assume any investment risk. The
20 Partnership, and in particular the Limited Partner as the
21 entity that put up the money, bore the risk.

22 Now, we have support in the cases for the
23 proposition that the relevant investment risk is the risk
24 of losing one's contribution to the purported investments.
25 And if you follow us to Slide 29, we have set out quotes

1 from, again, the KT Asia case and the Blue Bank case. KT
2 Asia, noting in particular that the Claimant, that they
3 made no contribution to the investments and, having made
4 no contribution, incurred no risk of losing such
5 inexistent contribution. Not only did the Claimant not
6 make any contribution, nor was it meant to absorb any
7 financial losses.

8 And once again, we say that this approach, this
9 principle that the relevant investment risk is the risk of
10 losing your contribution to the Investment, this approach
11 accords with the common understanding of what an
12 "investment" is: An investor puts its capital at risk in
13 the hope of making a profit.

14 So, if the GP, the General Partner, did not run
15 the risk of losing its own capital and resources, the
16 question for you becomes whether the GP assumed any other
17 risk with respect to the acquisition of the Samsung Shares
18 that can fairly be regarded as an investment risk
19 characteristic of an investment.

20 And we say that it is highly relevant to this
21 inquiry that you will have to make that for all practical
22 purposes, the General Partner was and is insulated from
23 any trading and other losses that the Partnership could
24 have suffered.

25 If you follow me to Slide 30, we've set out an

1 excerpt from the LPA, the Limited Partnership Agreement.
2 We've quoted from the "Object and Purposes" of the Limited
3 Partnership: "The primary purpose of the Partnership
4 shall be to purchase, sell or hold, for investment or
5 speculation, securities on margin or otherwise, for the
6 account and risk of the Partnership," not for the account
7 and risk of the General Partner.

8 And as a matter of fact, if we read through the
9 LPA, we will find a very broad exemption of liability
10 clause, and you will find that on Slide 31, the
11 "exculpation" clause tells us that: "The General Partner
12 shall not be liable to any other Partner or the
13 Partnership for any losses suffered by the Partnership
14 unless such loss is caused by such covered person's gross
15 negligence, wilful misconduct, or breach of fiduciary
16 duty."

17 And if that were not clear enough, the
18 Partnership agreements and the exculpation clause go on to
19 state that: "The General Partner shall not be liable for
20 errors in judgment or for any acts or omissions that do
21 not constitute gross negligence, wilful misconduct or
22 breach of fiduciary duty."

23 Now, Mason tells you that the General Partner
24 still bore the risk of its own wilful negligence or breach
25 of fiduciary duty, and the issue for you to decide here is

1 whether the risk of suffering the consequences of one's
2 own misconduct is a risk that can fairly be said to be a
3 characteristic of an "investment," and we say it is not.

4 Now, Mason also argues that the General Partner
5 assumed the risk that it would not earn its performance
6 fee, the Incentive Allocation, if the Samsung Shares, for
7 example, were to perform poorly.

8 Now, our position is that it makes little sense
9 to consider the possibility of not making a profit to be
10 an investment risk. From a basic economic perspective, a
11 transaction where your capital is safe and not committed
12 and where the worst that can happen to you is not to make
13 a profit is the opposite of a risky transaction.

14 That brings me to the third characteristic of an
15 investment that we say Mason cannot meet in this case. An
16 investment plays out over time, and an investment is not
17 short-term speculation. There must be some duration
18 associated with the Investment.

19 Now, the cases generally requires a commitment of
20 capital or resources over a period of years. Brief
21 periods of 16 months and five months were found to be
22 insufficient. And if you follow me to Slide 32, we have
23 quotes from the KT Asia case and the Romak case that
24 respectively found that 16 months' holding of shares in KT
25 Asia was insufficient and did not involve the kind of

1 duration envisaged by the meaning of "investment." And,
2 similarly, Romak was a five-month long purported
3 investment.

4 Now, the issue for you, and that's the one you
5 raised, Arbitrator Gloster, would be to discern what the
6 intended duration of Mason's holding of the Samsung Shares
7 was. And Mason claims in its Rejoinder that it intended
8 to hold the Samsung Shares for years. They bought them
9 early on, and there was a restructuring coming on--coming
10 in, and a generational shift at Samsung, and they were
11 hoping that holding those Shares through the years and
12 with those changing of management and structure at
13 Samsung, the Shares would appreciate and they would make
14 money out of that, and that plan was frustrated when the
15 SC&T and Cheil merger vote was approved. They had to sell
16 their Shares earlier than planned.

17 Now, typically, tribunals in your position would
18 be able to rely on business plans, internal business
19 plans, investment plans, contracts, to determine the
20 duration of a project or the intent of duration of a
21 project, but there is nothing of the sort here. You only
22 have the self-serving evidence of Mason's principal,
23 Mr. Garschina, and a curated selection of e-mails.

24 Now, we will hear Mr. Garschina's evidence this
25 afternoon, and his evidence will be tested on

1 cross-examination, tested against whatever limited
2 documentary record we have, shows Mason, indeed, intended
3 to do with the Shares.

4 But for the moment, I want to leave you with one
5 thought on this topic. The patient and cautious approach
6 described in the Rejoinder is hardly consistent with
7 Mason's typical investment approach. Mason is not in the
8 Mom-and-Pop buy-and-hold long-term strategy. They're not
9 a Warren Buffet of sort whose holding perspective or
10 holding horizon is forever. It's a hedge fund, and it is
11 a hedge fund of a very particular type. They focus and
12 specialize in something known as "event driven strategies"
13 and "merger arbitrage." They actively trade in and out of
14 securities around events known as "catalysts" that they
15 speculate may impact the value of the Shares, and
16 depending on their speculation as to how a given event is
17 going to impact the Shares will trade in and out.

18 And now even by the standard of
19 events--events-driven hedge fund, Mason is noted for its
20 short-termism, and it's not us saying it. If you go to
21 Slide 33, we have an excerpt from a Due-Diligence Report
22 on Mason that was obtained by the Rhode Island Office of
23 the General Treasurer and published by the Rhode Island
24 Office of the General Treasurer in connection with the
25 contemplated investments by the Rhode Island Pension Fund

1 in Mason.

2 And you will see here that the Due-Diligence
3 Reports reported Mason's investment horizon tends to be
4 shorter than most event-driven and distressed managers,
5 with an average holding period of three to nine months.
6 And what we hope to show by the end of the week is that
7 the little evidence that we have at this stage in the case
8 is consistent with his statement, and suggests that
9 Mason's holding of the Shares was speculative and
10 short-term.

11 And if that's the case, that holding of the
12 Shares is incapable of amounting to a commitment under the
13 text of the FTA, and to constitute an investment under the
14 FTA.

15 Now, that brings me to the second independent
16 reason why the GP, the General Partner, does not qualify
17 as an investor under the FTA, and that reason is that,
18 under Korean law, the General Partner never owned or
19 controlled the Samsung Shares, and we will hear from the
20 Korean law experts on this. For the purpose of this
21 opening, I will only make some brief observations:

22 Preliminary comments: It is largely undisputed
23 that Korean law is relevant to determining whether someone
24 owns or controls shares in the Korean company. And we
25 cited in our Reply commentaries by Professor Douglas,

1 explaining that those questions have to be considered by
2 reference to the lex situs, and the lex situs with respect
3 to shares is the municipal law where the company is
4 incorporated. It would be Respondent Legal Authority 39.

5 Now, we say as a matter of Korean law, the
6 General Partner did not own or control the Samsung Shares
7 because it was the Cayman Fund and not the General Partner
8 that was the registered Shareholder of the Samsung
9 entities at issue.

10 And if you follow me to Slide 35, we've set out
11 an excerpt from the Shareholder register of SC&T, which is
12 one of the Samsung entities in which Mason invested, and
13 you will see that the entity that is identified as owning
14 the Shares is Mason Capital Master Fund L.P., identified
15 with a country code of KY, that's Cayman, and Mason
16 Capital Master Fund L.P. is the Cayman Fund, is not the
17 Claimant in this arbitration.

18 Now, we also see that another entity that owns
19 shares in SC&T is Mason Capital L.P., and that is the
20 Domestic Fund, and the Domestic Fund is one of the
21 Claimants in this arbitration.

22 Now, we've set out on Slide 36 excerpts from the
23 Samsung Electronics, "SEC," Shareholder register. And
24 once again, Mason Capital Master Fund, L.P., the Cayman
25 Fund, not the General Partner, is identified as the

1 registered Shareholder.

2 Now, I'm not the corporate law expert here, and
3 we will hear from the Korean law experts, but what I know
4 is that if you want to know who owns shares and who is
5 entitled to vote shares and who is entitled to exercise
6 Shareholders' rights with respect to those shares, the
7 first place we look at are the Shareholder registers of
8 the Company.

9 Now, Mason says it's just a fiction, that because
10 the Cayman Fund does not have legal personality as a
11 matter of Cayman law, it did not have capacity to acquire
12 the Shares--to acquire the Shares and Shareholder rights
13 under Korean law, and that, therefore, the Shareholder
14 registers should be disregarded.

15 Now, Mason bears a huge burden of persuasion on
16 this argument, that this is a fiction and that you should
17 disregard those entries in the Shareholder's register.
18 And as you know, the issue is--the question is hotly
19 debated by the Korean law professors who will be appearing
20 before you.

21 Suffice to say here that Respondent's expert,
22 Professor Rho, has cited to several decisions of the
23 Korean supreme courts that can be read as suggesting that
24 an exempted Limited Partnership, a Cayman law-exempted
25 Limited Partnership, the exact same entity that is at

1 issue here, may have capacity to acquire shares.

2 Now, Mason's expert on Korean law, Professor
3 Kwon, sought to distinguish these authorities and
4 disagreed with Professor Rho, and the three new Korean law
5 authorities that were submitted last week, or earlier this
6 week, go to that debate. They will be discussed by the
7 Experts.

8 The point is if our reading of Korean law is
9 right, and if you're bound by the accounting of the
10 Shareholders' registers, that means that the Cayman Fund,
11 not the General Partner, was the Party that owned and
12 controlled the Shares as a matter of Korean law.

13 Now, Mason says in its Rejoinder, well, that
14 doesn't really matter. That doesn't matter because the
15 General Partner, in any event, owned and controlled those
16 Shares indirectly as the text of the FTA permits, and it
17 owned and controlled those Shares indirectly because the
18 General Partner owns and controls the Cayman Fund.

19 And we have two responses to this argument: The
20 first response, and our position, is that the argument
21 isn't sound as a matter of law and logic. The General
22 Partner does not own the Cayman Fund. It holds the Cayman
23 Fund's assets on trust for the Fund. It's not an
24 ownership relationship. And the General Partner does not
25 control the Cayman Fund. It is a fiduciary that acts on

1 behalf and in the name of the Cayman Fund and in its best
2 interest.

3 Now, in other words, the General Partner owns and
4 controls the Cayman Fund just as much as an agent would
5 own and control its principal. It doesn't.

6 Now, in any event--and that's our second response
7 to the indirect control argument--in any event, we say
8 that the arguments that the General Partner owned and
9 controlled the Cayman Fund and thus, indirectly, the
10 Samsung Shares that were purchased by the Cayman Fund, is
11 not an argument that the General Partner should be heard
12 to make in this arbitration, and this is so because of a
13 series of inconsistent representations that were made by
14 Masons at the time it applied for foreign investment
15 registration in Korea, at the time it applied to be
16 authorized to buy shares in the Korean company.

17 If you follow us to Slide 37, we have excerpts
18 from this foreign investment registration application.
19 And the first comment you will see that the--so that was
20 the investment registration application for the Cayman
21 Fund so the Cayman Fund could purchase the Shares, and
22 Mason was required to identify the first major shareholder
23 in the Cayman Fund. And you will see that the first major
24 shareholder in the Cayman Fund here is identified as Mason
25 Capital LTD, that's the Limited Partner, and you will see

1 that the share of equity of Mason Capital LTD is listed at
2 a hundred percent.

3 So the Limited Partner owns a hundred percent of
4 the Cayman Fund. That was the representation made to the
5 Korean authorities.

6 Now, the General Partner is mentioned on this
7 application, and that's the second red box, "Related
8 Entities." Management company is identified as being
9 Mason Capital Management LLC. That is the General Partner
10 and the second Claimant in this arbitration. But you will
11 see that this Mason Management LLC company is identified
12 not as a U.S. entity; it is identified as a Cayman Island
13 entity.

14 Now, we don't know why Mason chose to make these
15 representations in the application for foreign
16 registration. It might have been innocent, inadvertent,
17 or it might have been driven by some perceived tax benefit
18 or some desire for secrecy, but what we know is that those
19 representations fly in the face of the arguments made to
20 this Tribunal that the Cayman Fund was owned and
21 controlled by U.S. person entitled to protection under the
22 U.S.-Korea FTA, the GP.

23 Now, this concludes my presentation on this
24 aspect of our last objection. And to conclude, a final
25 recap on this last objection, we say that the GP has

1 failed to prove to you that it has made an investment in
2 Korea, and, therefore, it cannot be an investor under the
3 FTA.

4 And that is because, first, the--first, a
5 short-term bet on the Stock Market made with someone
6 else's money and at someone else's risk does not meet the
7 criteria international tribunals have recognized for an
8 investment.

9 And, second, and in any event, the General
10 Partner never owned and controlled the Investment in the
11 Samsung Shares under the applicable law here, Korean law,
12 the Cayman Fund did.

13 Thank you.

14 PRESIDENT SACHS: Thank you, Mr. Nyer.

15 This concludes your opening?

16 MR. NYER: It does.

17 PRESIDENT SACHS: Okay. Fine. So, we will have
18 a break a little bit earlier than I think provided of 15
19 minutes, and we resume at 11:00, please.

20 (Brief recess.)

21 PRESIDENT SACHS: So, may we then invite the
22 Claimants to deliver their opening, please.

23 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

24 MS. SALOMON: Good morning. I'm Claudia Salomon,
25 Partner at Latham & Watkins and counsel for the Claimants.

1 Also here is Jim McGovern, General Counsel and Chief
2 Compliance Officer of Mason Capital.

3 We submit that the Tribunal's competence over the
4 General Partner's claim under the Treaty is clear: The
5 General Partner has established that it satisfies the
6 Treaty's definition of "investor," and the Samsung Shares
7 satisfy the Treaty's definition of "investment."

8 This morning I will go through each of the
9 jurisdictional requirements defined by the Treaty and how
10 the General Partner's investment in the Samsung Shares
11 meets these requirements, and I'll also explain how Korea
12 has attempted to redefine or add other requirements, but
13 in any event, the General Partner meets even those
14 stricter definitions.

15 And then I'll turn to Korea's objection to the
16 General Partner's so-called "standing" premised on a
17 general principle related to beneficial ownership of an
18 investment and explain how the Treaty does not impose a
19 requirement of beneficial ownership, but nonetheless the
20 General Partner beneficially owns the Shares.

21 Now, fundamentally this morning we heard from
22 Respondent's counsel that they are responding to a case
23 that we are simply not making. We are not asserting the
24 General Partner's claim is on behalf of anyone. The
25 General Partner is asserting its own claim. They, we

1 submit, are making jurisdictional arguments as they go
2 along, and their argument is littered with mistakes
3 regarding how a fund actually works.

4 Then my co-counsel, Mr. John Kim of KL Partners,
5 will address the "11th hour" argument under Korean law
6 that Korea has raised, which is actually inconsistent with
7 the position taken by their Cayman law experts.

8 And I'll conclude with an explanation regarding
9 why Korea has not established its objection to the General
10 Partner's damages claim. Their entire discussion of what
11 evidence is needed to prove damages is for a later phase
12 of this case. All that we need to prove at this time is
13 as a matter of law, we are capable of making a claim. It
14 is not a jurisdictional argument that they're actually
15 raising.

16 Now, later today, you will hear from Ken
17 Garschina. He is the co-Managing Member and co-founder of
18 Mason Management LLC, and you'll hear from Derek
19 Satzinger, the CFO. And tomorrow you will hear from
20 Mason's two expert witnesses, Rolf Lindsay and Professor
21 Kwon.

22 Now, Mr. Lindsay is a partner and head of the
23 investment funds group at Walker's. He's considered one
24 of the big figures in the Cayman Islands investment funds
25 community. And when trying to understand what the law

1 means, specifically the Exempt Limited Partnership Law in
2 the Cayman Islands means, it's not every day that you get
3 to hear from the person who actually wrote the law. But
4 in this case, Mr. Lindsay was the Chair of the committee
5 that drafted the Exempt Limited Partnership Law at issue
6 here. And Professor Kwon is currently the Dean at the
7 Kyung Hee University School of Law. He has LLM from
8 Berkeley, an SJD from Georgetown. He's published numerous
9 papers and books on Korean corporate law, including one
10 that got an award last year for the outstanding academic
11 book by the National Academy of Sciences.

12 So, before diving into Korea's Preliminary
13 Objection, it's important to note why we're here; and, as
14 the Tribunal will recall, this case arises out of Korea's
15 interference with Mason's investment in two publicly
16 traded companies that form part of the Samsung Group:
17 Samsung Electronics, referred to as "SEC," and SC&T.
18 Mason's case is that the former President of Korea,
19 conspiring with her confidante, took almost \$8 million in
20 bribes from the Lee Family, which controlled Samsung; and,
21 in exchange, President Park and other senior government
22 officials subverted the procedures at the National Pension
23 Service, a shareholder in companies in the Samsung Group,
24 so it would vote in favor of a merger between the two
25 Samsung companies.

1 And as was later revealed, this merger vote was a
2 key step in the transfer of power from the Head of the Lee
3 Family to his son JY Lee.

4 Now, this isn't just a series of assertions that
5 Mason has made in this arbitration. For her involvement
6 in this merger, President Park has since been impeached,
7 removed from office, and found guilty of bribery, abuse of
8 power, and coercion, and sentenced to 25 years of prison.
9 And the Seoul High Court, in hearing that case, expressly
10 found that part of Samsung's donations were, indeed, a
11 bribe, citing an implicit understanding between the
12 President and JY Lee for Government support of the merger,
13 and these findings have been upheld by the Korean Supreme
14 Court.

15 And the Minister of Health responsible for
16 supervising the National Pension Service and the Chief
17 Investment Officer have likewise been convicted and
18 sentenced to prison for their involvement in the scheme.

19 But before any of this corruption was publicly
20 known, in the view of Mason and many others at the time,
21 Samsung Electronics was thought to be fundamentally
22 undervalued. Samsung was thought to be undervalued due to
23 its poor corporate governance, overly complicated holding
24 structure, and general perception that Samsung was acting
25 for the benefit of the controlling family and not for the

1 benefit of the Shareholders. Mason believed that if the
2 merger vote failed, as it should because it wasn't in the
3 interest of the Shareholders, that failure would signal to
4 the market that Samsung was on the path to good governance
5 and structural reform; and, as a result, Samsung Shares
6 would increase in value.

7 And based on that analysis, the General Partner
8 made a substantial investment in Samsung amounting to
9 \$400 million at its peak and about \$144 million before the
10 merger announcement. The corruption, however, derailed
11 Mason's investment. The merger resulted in a loss and
12 damage to Mason in an amount currently estimated to be no
13 less than \$200 million.

14 Now, Korea cannot dispute any of the conduct I've
15 just described, all of which has been conclusively
16 established by the Korean courts. So, perhaps recognizing
17 that they will lack substantive defenses on the merits,
18 they have now raised a series of haphazard objections to
19 the Tribunal's jurisdiction, elevating form over
20 substance, and ignoring the plain text of the Treaty.

21 Now I want to provide a little background on
22 Mason. They are not day traders, they're not gamblers, as
23 Korea's counsel deliberately and pejoratively described
24 them. Mason Capital is an investment firm based in New
25 York. It was founded by two U.S. nationals, Mr. Garschina

1 and his co-founder Michael Martino, back in 2000. And, in
2 short, the reason Mason exists is to make and identify
3 investments. Mason has a team of analysts and traders who
4 carefully research and value potential investments in
5 companies based in the United States and abroad. And once
6 Mason's founders give the green light to make an
7 investment, the operations team executes the investment
8 with the assistance of brokers and the trading team.

9 And then the investment teams continue to
10 actively monitor, review and engage with the companies
11 that Mason invests in as well as with other market
12 participants to maximize Mason's potential profit from the
13 Investment.

14 Now, as an investment firm, Mason is financially
15 backed by a range of institutional investors, including
16 charitable foundations, universities, and pension funds
17 that recognize the value of Mason's investment expertise,
18 experience, and contacts. But to be clear--and I'll
19 discuss this further--when Mason makes an investment,
20 Mason owns the investment. It's not executing investments
21 for others like a broker or a trustee might do.

22 So, if you look at Slide 4, you can see that
23 Mason purchased the Samsung Shares two ways. On the
24 right, what's titled the "Delaware fund," you can see that
25 Claimant Mason Capital L.P. purchased about one-third of

1 the Shares, and that purchase and ownership of the Shares
2 is not at issue in this Preliminary Objection that has
3 been raised by Korea. And on the left what's titled the
4 "Cayman Fund," you see that Mason Management LLC, another
5 Claimant, which we refer to as the General Partner,
6 purchased about two-thirds of the Shares. And to
7 illustrate here, there is the General Partner; there is
8 also a Limited Partner in the exempt limited partnership
9 formed under the Cayman Islands, but as Mr. Lindsay will
10 explain, that is not an entity; it is a partnership that
11 exists under the law. And Mason Management LLC, the
12 General Partner, the straight line represents the legal
13 ownership of the Shares pursuant to Cayman law, and that
14 both the Delaware--both the General Partner and the
15 Limited Partner have beneficial ownership and indivisible
16 beneficial ownership of the Shares, and I'll explain that
17 further.

18 Now, to make its investment in Korea, Mason used
19 a common structure known as the "exempt limited
20 partnership," the "ELP," as it's sometimes referenced, and
21 I'm going to refer to that ELP as the Partnership.

22 ARBITRATOR GLOSTER: But it has no separate legal
23 personality? It's just a bundle of rights and
24 obligations?

25 MS. SALOMON: Exactly.

1 ARBITRATOR GLOSTER: And there are some
2 jurisdictions where a Partnership such as that will have a
3 separate legal identity, but not under Cayman law?

4 MS. SALOMON: That's exactly right.

5 It is, in fact, a structure that is unique to
6 Cayman law, but it's not unremarkable. It is used by most
7 U.S. hedge funds, private-equity funds, and Asia funds
8 involved in cross-border investment. And, indeed, more
9 than \$1.6 trillion in cross-border investment uses this
10 type of structure. These objections raised by Korea latch
11 on to the way in which the General Partner made its
12 investment in what Korea sees as a smoking gun, that the
13 Shares are recorded in the name of the Partnership, but
14 this is normal practice, and the consequences of which are
15 dealt with under Cayman law.

16 Now, it is entirely unremarkable that the
17 Partnership was named on the Registry for the General
18 Partner's investment in Samsung. It's, in fact, common
19 practice for entities using an exempt limited partnership
20 structure to list the name of the Partnership as opposed
21 to the name of the General Partner on the applicable
22 Shareholder Registry to distinguish the Shares that are
23 purchased in this way. It's so common, in fact, that the
24 Exempt Limited Partnership Law includes a provision, and
25 that is highlighted here on Slide 5; it's the Exempt

1 Limited Partnership Law Section 16(1), and that's
2 Claimants' Legal Authority 22, that specifically addresses
3 what happens in the very scenario that happened here.

4 In relevant part, Section 16(1) states that "any
5 rights or property or conveyed into or vested in the name
6 of the exempt Limited Partnership shall be held or deemed
7 to be held by the General Partner." So, in short, the
8 fact that the Samsung Shareholder Registry reflects shares
9 recorded in the name of the Partnership simply means those
10 shares are owned by the General Partner. Under Cayman
11 law, the Partnership cannot own shares. It cannot enter
12 into contracts. The Partnership, as Dame Gloster
13 correctly recognized, has no separate legal personality or
14 capability. And this is, in fact, not in dispute among
15 the Cayman law experts.

16 Korea's preliminary objection was so haphazard
17 that, in its Memorial, it asserted, as I show on Slide 6,
18 that the Statement of Holdings does not establish the
19 General Partner's alleged legal ownership of the Shares.
20 It established that the General Partner lacked legal
21 ownership. But once Korea finally engaged a Cayman law
22 expert, she contradicted the very argument that Korea
23 initially made, and confirmed that the General Partner was
24 the legal owner of the Samsung Shares.

25 Now, the position that Korea's Cayman law expert

1 is making is actually inconsistent with its own Korean law
2 expert asserting that the Partnership is the owner of the
3 Shares, but that would then mean that the Shares, as a
4 legal matter, were not owned by anyone, which would upend
5 a very significant amount of cross-border investment.

6 It is not that we are disregarding the Register.
7 It is for Korea and for anyone else who sees the Register
8 to understand what that means, and this is not anyone
9 hiding the ball. The name of the General Partner is
10 publicly known, and it is known that when the name of the
11 Partnership is listed as the owner, one then sees that the
12 General Partner is the owner and can identify easily who
13 the General Partner is.

14 Importantly, the General Partner is the sole
15 person with the authority to conduct the business of the
16 Partnership. In other words, the General Partner has sole
17 and complete control over the Partnership. And, indeed,
18 the Limited Partner is precluded from conducting the
19 business of the Partnership, and if it did, it loses its
20 limitation on liability. The General Partner makes all
21 decisions with respect to the business, the General
22 Partner enters into all contracts, the General Partner
23 engages in all legal proceedings with respect to the
24 business of the Partnership, and that is, indeed, this
25 case. The General Partner bears sole unlimited liability

1 in the event that the Limited Partnership is insolvent.

2 This complete control over the Partnership is
3 also affirmed by the Limited Partnership Agreement between
4 the General Partner and the Limited Partner. It states in
5 Section 3.02 that the management, control, and conduct of
6 the business of the Partnership is vested exclusively in
7 the General Partner. And that is exactly what happened
8 here: The General Partner made the decision to buy, and
9 subsequently sell the Samsung Shares. The General Partner
10 has the power to vote at shareholder meetings at Samsung,
11 the right to receive dividends, the right to engage in
12 shareholder advocacy.

13 And as detailed in Mr. Lindsay's reports--and
14 you'll hear from him tomorrow--the General Partner also
15 has an indivisible beneficial ownership interest in the
16 Samsung Shares. The General Partner's beneficial interest
17 in the assets doesn't turn on the definition of
18 "Partnership Interest" in the Limited Partnership
19 Agreement, as Korea's Cayman law expert asserts.

20 Latching on to that term, Korea contends the
21 General Partner's beneficial interest is equal to the
22 balance of its Capital Account divided by the total value
23 of the assets, and Korea is simply incorrect.

24 As Mr. Lindsay explains, the term "Partnership
25 Interest" only applies when a Limited Partner withdraws or

1 an additional General Partner joins the Limited
2 Partnership, neither of which occurred here. Instead, as
3 a matter of Cayman law, the General Partner has that
4 indivisible beneficial interest in all of the assets held
5 by--all of the assets, including the Cayman Shares.

6 And the General Partner also has a beneficial
7 interest in any gain or any loss in the value of the
8 assets. Korea is characterizing the General Partner's
9 interest as only one way, only if the Shares made profit,
10 but that is not how this works. If the Shares lose value,
11 that value is taken into account in the entire universe of
12 assets that then determine the Incentive Allocation of the
13 General Partner.

14 PRESIDENT SACHS: I'm not sure whether I follow
15 you on this point. Could you rephrase that?

16 MS. SALOMON: Certainly.

17 If--for example, there are three assets, two do
18 well and make profit, and the Samsung Shares are the one
19 asset loses money. That loss is calculated with the
20 profit to assess the total profit of the bundle of assets.
21 So, if there is a tremendous loss in one, it could mean
22 that there is no profitability in total, and then the
23 General Partner receives no asset allocation.

24 So, it is not--it carries over into consideration
25 of the entire set of assets.

1 PRESIDENT SACHS: Please proceed.

2 MS. SALOMON: And, as with any investment, the
3 General Partner's goal is to make investments, though,
4 that increase in value. If the investments increase, the
5 General Partner at the end of every fiscal period is
6 entitled to 20 percent of the profits for the entire set
7 of assets, and that's what's known as the "Incentive
8 Allocation." And I was describing, if the investments
9 lose money, the General Partner gets shouldered with what
10 is known as a Cumulative Unrecovered Net Loss, and while
11 the General Partner still has to keep actively managing
12 its investment, it does not get a cut for doing so. That
13 burden is shouldered until the loss is recouped in full.

14 So, when the investments made by the General
15 Partner perform well, the General Partner stands to earn a
16 considerable profit, but conversely, when those
17 investments suffer losses, the General Partner earns
18 nothing and, in fact, loses money unless and until the
19 investment losses are recouped in full.

20 So, the important take-away is that the General
21 Partner is the driving force behind the investment. It's
22 the sole entity that determines what investments to make.
23 It's the sole entity that owns the investment, and the
24 sole entity that actively manages the investment once it's
25 been acquired.

1 And contrary to what's been insinuated, there's
2 no concealment, there's no bad faith, the owner of the
3 Shares is readily discoverable. It's a matter of public
4 record, who is the General Partner of any Partnership.
5 And as Mr. Lindsay explains, it's understood that when an
6 asset is recorded in the name of the Partnership, the
7 owner is the General Partner.

8 And to be clear, the General Partner is not
9 bringing a claim on behalf of the Partnership. The
10 Partnership has no separate legal existence and,
11 therefore, has no claim. The General Partner is bringing
12 its own claim because it is the legal owner of the assets
13 and because it has exclusive control of those assets.

14 And the Limited Partner is not the real investor.
15 The sole role of the Limited Partner is to provide capital
16 to the Partnership. That is, the Limited Partner added
17 cash to the bundle of assets the General Partner owned and
18 controlled. The Limited Partner is otherwise passive,
19 played no role in the General Partner's investment in
20 Samsung. All decision-making authority is with the
21 General Partner.

22 And, to be clear, the General Partner is not a
23 trustee in the way that Korea is describing. In a
24 trustee-beneficiary relationship, the beneficiary retains
25 decision-making control. And that's not the case here,

1 legally or practically with the Partnership. The General
2 Partner has full decision-making authority, controls all
3 actions of the Partnership without input from the Limited
4 Partner or for that matter, anyone else.

5 ARBITRATOR GLOSTER: Can I just pick you up on
6 the point you said a moment ago? You said that, in a
7 trustee-beneficiary relationship, the beneficiary
8 maintains, I think you said this control or this
9 decision-making control. That's not always the case. It
10 just depends on the terms of the trust, doesn't it?

11 MS. SALOMON: Yes, certainly.

12 ARBITRATOR GLOSTER: I mean, you may well have a
13 trustee who makes all the investment decisions?

14 MS. SALOMON: That's certainly the case.

15 ARBITRATOR GLOSTER: It depends whether it's a
16 Bare Trust or a trust with specific terms. So, I'm not
17 quite sure the point you're making there.

18 MS. SALOMON: Korea is putting forth that this is
19 akin to a Bare Trust. And we submit that that is not the
20 case. Now, of course, it would depend, as you describe,
21 on what is in the Trustee agreement.

22 But the additional key distinguishing feature is
23 that, under a Bare Trust, the trustee doesn't have
24 interest in the assets, and here, the General Partner has
25 the interest.

1 ARBITRATOR GLOSTER: Yes, thank you.

2 MS. SALOMON: Now, Korea has grabbed onto the
3 language in the law in section 16.1 that uses "upon trust
4 of," but that is a term of art used in the law and doesn't
5 in any way communicate that this is like a trustee
6 relationship where a trustee would not have interest in
7 the asset. That's very different than here.

8 Now, I want to turn to the language in the
9 Treaty. The Treaty is the fundamental basis for this
10 Tribunal's jurisdiction, so the critical question that the
11 Tribunal must decide is whether the General Partner is an
12 "investor" as defined in the Treaty and whether the
13 General Partner's purchase of the Samsung Shares is an
14 "investment" as defined in the Treaty.

15 Now, just to review briefly the definition of
16 "investor." It's important to note that the question
17 before the Tribunal is not as Korea has suggested, whether
18 the General Partner is the investor or the only investor.
19 The question is whether the General Partner is an
20 investor. It's well-established that a single investment
21 may have a range of different covered investors, including
22 entities in chains, shareholders or lenders.

23 So, here we have this point very clearly stated
24 in RREEF versus Spain highlighted on Slide 8, that there's
25 nothing in the Energy Charter Treaty, and we submit that

1 that's equally applicable in the Treaty here, that says
2 there can be only one single investor for each investment.
3 It cannot be the case as stated in RREEF versus Spain that
4 there can only be one single investor for each single
5 investment. The very concept of indirect investor and
6 indirect investment contained within those concepts are
7 that there may be a chain of ownership and control that
8 involves more than one entity.

9 ARBITRATOR MAYER: I'm sorry, do you mean by that
10 that the Limited Partnership, if it had a nationality
11 protected, could also have made the Claim?

12 MS. SALOMON: In this case, the legal owner is
13 the--the only legal owner is the General Partner, so
14 whether a beneficial ownership would be sufficient is not
15 something that we are addressing here. Only that the
16 General Partner is the only legal owner. In general,
17 there could be more than one investor.

18 ARBITRATOR MAYER: Thank you.

19 ARBITRATOR GLOSTER: But the Limited Partner, you
20 say--I'm sorry, the Limited Partnership has got no
21 separate identity, you say, so it couldn't make a claim as
22 the Partnership.

23 MS. SALOMON: Right, that's exactly right.

24 ARBITRATOR GLOSTER: So far as the Limited
25 Partner is concerned, are you saying that it could or

1 could not make a claim and be an investor?

2 MS. SALOMON: In this case, the Limited Partner,
3 as you described, is not entitled to make a claim and,
4 therefore, in this particular circumstance, the Limited
5 Partner would not be--

6 ARBITRATOR GLOSTER: But if this had the
7 protection of nationality--

8 MS. SALOMON: Even if it had the protection of
9 nationality in this circumstance, the only Party that can
10 bring the Claim is the General Partner.

11 ARBITRATOR GLOSTER: And that is because...?

12 MS. SALOMON: It is the Party under the
13 Partnership Agreement that has the control and under the
14 Exempt Limited Partnership Law of the Cayman Islands, the
15 General Partner is the only owner of the Shares, the legal
16 owner of the Shares.

17 ARBITRATOR GLOSTER: Yes, I see. Thank you.

18 MS. SALOMON: And, indeed, the Limited Partner is
19 precluded from taking any steps to pursue a claim or doing
20 anything with regard to the Partnership.

21 Now, I just want to go back to the language of
22 the Treaty that defines "investor." The Treaty's
23 definition of "investor" includes a national or enterprise
24 of a Party that attempts to make, is making or has made an
25 investment in the territory of the other Parties, and the

1 General Partner easily satisfies this definition because
2 it is a U.S. enterprise that made an investment. And you
3 can see on Slide 9 that the "enterprise of a Party" means
4 "an enterprise constituted or organized under the law of a
5 Party," and that certainly is the case, and Korea does not
6 dispute that the General Partner is a U.S. enterprise.

7 And nor does Korea dispute the purchasing of the
8 Samsung Shares is an "investment" in Korea. Instead of
9 conceding, as they should, that the General Partner is an
10 investor as defined by the Treaty, they argue that the
11 phrase "an investment" in the definition of "investor"
12 requires the General Partner to demonstrate it possesses
13 the characteristics of an "investment". This seems rather
14 circular, that the definition of "investor" would require
15 a Claimant to demonstrate that the Investor has the
16 characteristics of an "investment", namely the commitment
17 of capital, expectation of gain or profit, assumption of
18 risk. We submit that's nonsensical.

19 The characteristics of an "investment" identified
20 in the Treaty appear as one would logically expect. You
21 can see on Slide 10 the definition of "investment." The
22 characteristics are in the definition of investment in
23 order to identify the types of assets entitled to treaty
24 protection in contrast to assets that are not entitled to
25 protection, such as cross-border sale of goods.

1 So, in other words, to determine whether the
2 Shares are an "investment," the Treaty dictates that the
3 Tribunal consider whether the Shares required a commitment
4 of capital carried an expectation of gain or profit or
5 carried a risk. The Treaty does not require, as Korea
6 suggests, that the General Partner must satisfy those
7 conditions. And that would, under Korea's interpretation,
8 render much of the definition of investor meaningless.

9 And again, going back to the definition of
10 "investor," Korea concedes that the purpose of the phrase
11 "attempts to make, is making or has made an investment" is
12 to expand the scope of treaty protection and it protects
13 investors even before they have successfully made an
14 investment. Now, logically an investor's investment
15 thwarted before it is made has not committed capital,
16 cannot expect a gain, and has no risk because no capital
17 has been committed, so it simply cannot be the case that
18 an investor must demonstrate those characteristics in
19 order to bring a claim.

20 But, in any event, if that is the test, the
21 General Partner's investment certainly satisfies those
22 characteristics, and just to go through those.

23 It cannot be disputed that some entity committed
24 capital in order to acquire the Samsung Shares. Korea
25 argues that it's not the General Partner because the

1 ultimate source of money which was used to purchase the
2 Shares was not the General Partner, but there is no
3 support for Korea's contention that the Tribunal should
4 look at the original source of the money.

5 Consider a scenario where the General Partner
6 borrowed money from a bank, used the money to purchase the
7 Samsung Shares. It would defy logic to say that it was
8 really the bank who committed the capital for the share
9 purchase. And it would be equally illogical to say the
10 bank would be the rightful Claimant in this arbitration,
11 and that's precisely what Korea is arguing.

12 And Korea's argument ignores the fact that the
13 General Partner is the legal owner of the Shares and has
14 sole and complete control, so it is the General Partner
15 that committed the capital to make the investment.

16 And in addition to the contribution of capital,
17 the General Partner contributed additional financial
18 resources to the Samsung investment which Korea dismisses.
19 As Mr. Garschina has explained, the General Partner has
20 spent hundreds of hours investigating, analyzing, actively
21 managing its investment in the Samsung Shares. This
22 active management involves retaining local experts,
23 engaging with other investors, as well as engaging with
24 Samsung.

25 Now, on the category of expectation of gain or

1 profit, Korea does not dispute that the General Partner
2 expected to gain from its investment--indeed, an
3 expectation of profit via an Incentive Allocation is the
4 whole rationale for the General Partner's existence--and
5 that way the incentive of the General Partner are
6 perfectly aligned with the entities who invest their money
7 with the General Partner.

8 And, as for the category of "assumption of risk,"
9 Korea's contention that the General Partner assumed no
10 risk in connection with the Samsung's investment is simply
11 incorrect. First and foremost, the General Partner bore
12 risk in relation to the performance of the Samsung
13 investment. Were it not to perform, it would not only be
14 a waste of the General Partner's commitment of time and
15 resources, but it would also contaminate the General
16 Partner's entitlement to profit or gain from its other
17 investments, and that risk materialized here because the
18 General Partner received no Incentive Allocation in
19 respect of the Samsung Shares, and its losses continued to
20 burden the General Partner for subsequent years.

21 And the General Partner bears a range of
22 fiduciary, statutory, contract, and third-party risks. As
23 explained by Mr. Lindsay, the General Partner has a
24 fiduciary burden to act in the utmost good faith with
25 respect to its management and investment decisions, and

1 must act in the best interest of the Partnership. It's
2 not indemnified for breach of this duty, even if that
3 breach is unintended. And under Cayman law, the General
4 Partner bears personal responsibility for all of the
5 obligations of the Partner.

6 ARBITRATOR GLOSTER: Could I justify ask--I'm
7 sure it's in the evidence somewhere--the Third-Party
8 Investors in the Cayman Islands-exempted company, they put
9 in the money, in fact, into Mason Capital Limited Cayman
10 Islands, and do they have some sort of unit investment, or
11 is it an open-ended investment fund? I mean, they don't
12 maintain beneficial entitlement to their money, do they?

13 MS. SALOMON: It's an open-ended relationship,
14 but they--

15 ARBITRATOR GLOSTER: I mean, what do they have?
16 Do they have shares in Mason Capital Limited, or do they
17 have shares in a fund, or what's the position there?

18 MS. SALOMON: They don't have shares because they
19 are purchasing. They have an Investment Agreement with
20 Mason.

21 ARBITRATOR GLOSTER: Yes.

22 MS. SALOMON: And their rights then to withdraw
23 or their rights to subsequent profits is defined by that
24 Investment Agreement.

25 ARBITRATOR GLOSTER: Yes, so there is no question

1 of them maintaining ownership of the money or anything
2 that Mason Capital Limited buys with their money?

3 MS. SALOMON: That's right.

4 ARBITRATOR GLOSTER: Thank you.

5 MS. SALOMON: So, as I was mentioning, under
6 Cayman law, the General Partner bears personal
7 responsibility for all of the obligations of the
8 Partnership, and the General Partner is the Party
9 responsible for compliance with financial, tax, and
10 accounting regulations and personally accountable in the
11 event of any breaches.

12 And, as Korea has argued, these characteristics
13 often reinforce one another, and that's likewise the case
14 here. As Mr. Lindsay put it succinctly, there are very
15 few business activities that provide the financial
16 benefits of investment fund sponsorship without the
17 assumption of significant and material risk. The General
18 Partner's investment in Samsung is no exception.

19 The cases that Korea cites in support of this
20 proposition fail to provide any useful analogies or
21 reference points for the Tribunal. These cases are the
22 exceptions which prove the rule. The Investments in
23 question in KT Asia, which is RLA-17, and Caratube,
24 RLA-12, were made by an unprotected third party and
25 transferred for little or no consideration to a protected

1 Party in anticipation of a dispute.

2 Unsurprisingly, tribunals found that these
3 would-be claimants had not contributed to the investment
4 or taken risk given the way in which they received the
5 investment, and a similar situation occurred in Blue Bank:
6 Where an unprotected trustee had been replaced with a
7 protected trustee to obtain investment protection.

8 But more fundamentally for the Tribunal, the
9 trustee in Blue Bank was a trustee with no personal
10 interest in the investment, no ownership in the
11 investment, no control over what investments were made or
12 any exposure whatsoever to the performance of the
13 investments. None of these things are true here with
14 respect to the General Partner. The General Partner's
15 role in the investment is fundamentally different from a
16 trustee as we've described, particularly the trustee in
17 Blue Bank.

18 So, looking at the definition again of
19 "investment," the Treaty defines an "investment" as every
20 asset that an investor owns or controls. So, before
21 applying the facts of Mason's investment to the Treaty
22 definition, I want to note two important aspects of these
23 definitions. First, as Vandeveldel has observed, the
24 Treaty's broad and flexible definition of investment has
25 important implications for the General Partner's claim

1 here. The source of funds is irrelevant, and the ultimate
2 fruits of an investment, where they go, is equally
3 irrelevant.

4 And, second, the Treaty's definition of an
5 investment includes every asset that has the
6 characteristics of an "investment," and it also identifies
7 a variety of forms that an investment could take. And
8 it's important to note that shares and stock and other
9 forms of equity participation in an investment are the
10 principal forms of investment covered by treaties like the
11 one at issue here--that's described in Caplan and Sharpe,
12 Claimants' Legal Authority 48.

13 So, with those points in mind, I want to discuss
14 what the Treaty actually requires to qualify as an
15 "investor" and an "investment."

16 The General Partner is a Delaware Limited
17 Liability Company and, therefore, entitled to bring claims
18 for investments it owns or controls, and here there can be
19 no doubt that the General Partner both owned the Samsung
20 Shares and controlled the Shares.

21 Cayman law is clear that an exempt Limited
22 Partnership, like the Partnership, cannot own property.
23 All property is legally owned by the General Partner, and
24 that's even true if the property like the Samsung Shares
25 are recorded in the name of the Partnership.

1 So, the legal partner--the General Partner was
2 the legal owner. And, as detailed in Mr. Lindsay's Expert
3 Report, Cayman law dictates that the General Partner had
4 exclusive control over all property.

5 And the Samsung Shares have the requisite
6 characteristics of an "investment". While the fact that
7 the shares and stock appear in the Treaty's list is
8 illustrative and may not be dispositive, it must be given
9 considerable weight or the language of the Treaty would be
10 rendered meaningless. These characteristics are designed
11 to be illustrative, and the presence or absence of any one
12 characteristic is not determinative. But, as I've just
13 described in the context of an investor, the Shares
14 clearly have all three.

15 And more importantly, Korea does not dispute that
16 the Shares themselves possess all three of the
17 characteristics listed in the Treaty.

18 But they add this additional fourth
19 characteristic, "duration." That appears nowhere in the
20 text of the Treaty, and their effort to add a durational
21 requirement fails for two key reasons.

22 First, there is no basis to import a durational
23 requirement where none is actually here.

24 And second, if the requirement is there, the
25 General Partner's investment certainly satisfies it.

1 Korea is saying that somehow this durational
2 requirement is signaled silently, reflected in a body of
3 authorities under international investment law, but
4 importing a durational requirement would render
5 meaningless the portion of the Treaty's definition of
6 investor that includes entities attempting to make
7 investments because investors whose investments were
8 thwarted before they got off the ground could certainly
9 never satisfy Korea's purported durational requirement.

10 And anyway, Korea's purported body of authorities
11 doesn't withstand scrutiny even when looking at them
12 closely. Those cases concern the definition under--of
13 "investment" under Article 25 of the ICSID Convention, in
14 particular *Salini versus Morocco*, and the tribunals
15 analyzing those treaties, like one at issue here, have
16 consistently refused to apply this test. As the tribunal
17 in *Clorox-Spain* observed, there is no doubt that, in the
18 ordinary meaning, an investment comprises the use of money
19 or other assets with the expectation of gaining a profit.

20 In short, the General Partner's investment was
21 clearly not a short-term bet. The critical consideration,
22 as *KT Asia* suggests, is the intended duration of the
23 investment. This ensures the respondent state cannot take
24 advantage of their own wrongdoing committed early in an
25 investment's lifespan. Here, Korea cannot take advantage

1 of its wrongful interference with the Samsung Shares 14
2 months into the General Partner's investment when that
3 investment was clearly made for the longer term.

4 Mr. Garschina has explained that the investment
5 was driven by an assessment of Samsung's unrealized
6 underlying value, the opportunity for that value to be
7 unlocked through corporate restructuring and governance
8 changes. The correspondence at the time reflects that
9 view, and notes a range of factors that would influence
10 Samsung's corporate restructuring over the space of years.

11 And the General Partner's contemporaneous actions
12 provides even further support. Why go to the trouble and
13 expense of spending months or years researching an
14 investment, including sending a Mason employee to Korea
15 for further meetings and research for a short-term
16 investment? This is not day-trading. Korea's reliance on
17 a very select extract from a 2010 Due-Diligence Report is
18 fundamentally misplaced. As the report notes directly
19 before Korea's extract, the Fund may be invested in
20 situations that play out over extended periods of time and
21 thus exposed to market risk.

22 Now, while not specifically addressed in Korea's
23 Opening Statement, they have asserted that there is an
24 activity requirement that must be considered, and I want
25 to address that. They argue that the use of the phrase

1 "has made an investment" in the definition of "investor"
2 requires a showing that the General Partner made an active
3 contribution to the investment. Again, this purported
4 requirement is nowhere in the Treaty. Instead, they rely
5 on three decisions which I have identified on Slide 11.

6 ARBITRATOR GLOSTER: Could you give us the
7 reference, please, as to where the Respondents, you say,
8 impose or suggest this requirement should be imposed?

9 MS. SALOMON: Yes, I will give you the reference
10 in a moment.

11 ARBITRATOR GLOSTER: Oh later, if you like.

12 MS. SALOMON: And they rely on the three cases
13 included in Slide 11, and their Legal Authority Numbers
14 are included on the slide.

15 Now, we submit these decisions are clear outliers
16 both in their approach to treaty interpretation and their
17 unique facts. As an initial matter, subsequent tribunals
18 have steadfastly refused to interpret investment treaties
19 as requiring Claimants to have an ongoing active role in
20 the investment. Thus, these three cases relied upon by
21 Korea are of little persuasive value, and they are,
22 indeed, distinguishable on the facts.

23 As you can see from the slide, the structures
24 used by the prospective claimants in Korea bear little
25 resemblance to the structures--sorry, let me just start

1 again.

2 The structures used by the prospective claimants
3 in those cases bear little resemblance to the structure
4 used by Mason. In Alapli, the Claimant was a Dutch B.V.
5 established after the investment took place for the sole
6 purpose of claiming treaty protection. The Award--the
7 Tribunal in that case found that Dutch B.V. acted merely
8 as a passive conduit playing no meaningful role in the
9 investment.

10 In Clorox-Spain, the Claimant was a Spanish
11 entity established 10 years after the investment took
12 place, and which received the investment for zero
13 consideration.

14 And in Quiborax, the Tribunal declined
15 jurisdiction over one particular claimant because he had
16 been gifted a token share in the investment for no
17 consideration and played no role in making the investment.
18 Here, to the contrary, the General Partner was not a
19 post-investment creation used to obtain the Treaty's
20 protection. This fund structure was set up in 2000, years
21 before the Samsung Shares were purchased. The General
22 Partner pre-existed the investment by five years, actively
23 selected, paid for, and acquired the Shares, and was
24 actively involved in its investment until it decided to
25 dispose of the Shares.

1 And to address the question from Dame Gloster,
2 Korea makes this argument in its Reply Paragraphs 33 to
3 40, but we would ask you to note particularly
4 Paragraph 37, and we have addressed the arguments made
5 there.

6 ARBITRATOR GLOSTER: Thank you.

7 MS. SALOMON: I will turn now to Korea's argument
8 about beneficial ownership. They argue that Korea lacks
9 standing to bring its claim on the basis--sorry--it argues
10 that the General Partner lacks standing to bring its claim
11 on the basis that it lacks beneficial ownership in the
12 Samsung Shares, and this objection fails for two reasons:

13 First, as I have explained--and you'll hear more
14 from Mr. Lindsay tomorrow--as a matter of Cayman law, the
15 General Partner has an indivisible beneficial interest in
16 all Partnership assets, including the Samsung Shares.

17 Second, and more fundamentally, there is simply
18 no basis for such a "beneficial ownership" requirement in
19 the Treaty. Korea has attempted to create this
20 "beneficial ownership" requirement from two sources:
21 Article 11.16 of the Treaty, which is on Slide 12, and the
22 general principle of international investment law,
23 developed from decisions in a handful of cases.

24 So, turning to the first source, Article 11.16,
25 and I would ask you to look closely at the text of the

1 Treaty. This Article has nothing to do with "beneficial
2 ownership." As is clear on its face, it addresses an
3 entirely different issue. As commentators, tribunals and
4 contracting parties themselves have repeatedly noted, the
5 function of this Article 11.16 and similar provisions in
6 other treaties is to permit foreign investors to bring
7 derivative claims and set out a special regime for these
8 kinds of claims, and that is included in Article 11.16(b).
9 So, it's clarifying the Claimant can bring its own claim
10 on its own behalf, and the derivative claim on behalf of
11 an enterprise of the Respondent. We clearly satisfy the
12 first half because it is the General Partner bringing its
13 own claim, not on behalf of anyone else.

14 As Article 11.16 also prescribes that the
15 Claimant has suffered loss or damage by reason of or
16 arising out of a breach, and the authorities cited by
17 Korea explain that simply means that some loss has to
18 actually be suffered--some loss suffered--before a claim
19 can be brought and the loss is actually caused by a
20 breach. None of the commentators--and to be clear, none
21 of the commentators, decisions or non-disputing party
22 submissions cited by Korea support its interpretation of
23 Article 11.16.

24 And such an interpretation would contravene the
25 actual language of the Treaty, which expressly permits

1 claims for investments the Claimant owned directly or
2 indirectly without limiting the nature of ownership.

3 Given that the "beneficial ownership" principle
4 finds no support in the text, they've argued that such a
5 principle nonetheless exists as a general principle of
6 international investment law. On that basis, the
7 decisions in a handful of investment cases have somehow
8 overridden the international agreement of two sovereign
9 states because they did not expressly exclude a
10 "beneficial ownership" requirement. It is not on the
11 Contracting States to expressly exclude a requirement for
12 it to not be required.

13 First, the rights invoked by Mason in this case
14 have been created by the Treaty. The Contracting Parties
15 have clearly and consciously defined those rights,
16 including defining "investors" and "investments" which it
17 protects. Each and every treaty defines its own scope of
18 protection.

19 And, second, the very idea of a binding general
20 principle of international investment law which overrides
21 the express terms of a treaty is misguided. The decisions
22 like this one interpreting and applying the terms of a
23 specific treaty are not independent sources of
24 international law, which override the terms of other
25 treaties.

1 So, if you look at the cases cited by Korea in
2 our Chart 13, a general principle of international
3 investment law requiring beneficial ownership simply does
4 not exist. In reality, the only case which suggests such
5 a principle is Occidental versus Ecuador, which Professor
6 Mayer, who advanced these arguments on behalf of Ecuador,
7 will undoubtedly know. The facts of Occidental, however,
8 bear little resemblance to the facts here. First, that
9 case concerned a transfer of interests by the original
10 investor to a third party. It's of little relevance here
11 whether the General Partner is the original investor in
12 the Shares as part of an Exempt Limited Partnership
13 structure.

14 And second, the transfer in Occidental was
15 completed in violation of the applicable law, and there is
16 no such illegality alleged or could be alleged.

17 And, third, Occidental had transferred the
18 complete bundle of rights and obligations in the
19 investment and not simply certain rights derived
20 therefrom. Here, the General Partner has a material
21 interest in the success of the Samsung investment,
22 retained its statutory and fiduciary obligations to
23 maintain the Samsung Investment.

24 And finally, on Occidental, it transferred all
25 control of the Investments. It was AEC, the transferee,

1 whose instructions the nominees agreed to follow and who
2 thus controlled its share of the investment, and that is
3 not this case. The General Partner has complete control
4 and authority over the Shares.

5 And the other decisions cited by Korea do not
6 deal with the impact of beneficial ownership on a
7 Claimant's standing. These decisions address a variety of
8 other legal issues and come to a number of different
9 conclusions based on the terms of the treaties at issue
10 and the particular facts of the case. They simply do not
11 support Korea's contention that there exists a general
12 principle that investment treaties require beneficial
13 ownership.

14 Korea argues what matters in Impregilo was the
15 limited beneficial interest, and that's a reconstruction
16 of the Decision. The case stands for the proposition that
17 where legal ownership, beneficial ownership, liability and
18 control are all proportionally split between Shareholders,
19 one Shareholder cannot bring a claim for more than its
20 share.

21 Blue Bank, as I previously mentioned, is
22 inapposite. In that Decision, it was premised on the fact
23 that the claimant was a mere trustee in furtherance of
24 certain third party interests. Blue Bank had no skin in
25 the game in relation to the trust assets, and that's

1 completely different here.

2 Zhinvali, again, they do not evidence the
3 existence of a principle which denies standing on the
4 basis of beneficial ownership. It relates to the ability
5 of a company to bring claims for its shareholders which
6 did not consent to the arbitration.

7 In PSEG, the tribunal declined jurisdiction over
8 two third-party service providers. These cases provide no
9 relevance to the Tribunal's decision here.

10 Instead, we would ask you to look at the Legal
11 Authorities included on Slide 14, particularly Douglas,
12 which is Claimants' Legal Authority 49, "whereas control
13 is the touchstone for the quality of the relationship
14 between the Claimant and its investment, other possible
15 contenders must be excluded, among them is the suggested
16 requirement of beneficial ownership."

17 Not only are the facts of Korea's beneficial
18 ownership cases plainly different from the present case,
19 there's a clear line of authorities where tribunals have
20 rejected the same objections raised by Korea and exercised
21 jurisdiction over the claims of General Partners in
22 English Limited Partnerships.

23 As with Cayman ELPs, an English Limited
24 Partnership, has no separate capacity, legal personality,
25 or existence. And likewise, as with Cayman General

1 Partners, English General Partners have legal and
2 beneficial ownership, as well as control, over the assets.

3 So, in both Eiser and RREEF, the General Partner
4 brought a claim under an investment treaty for losses of a
5 Partnership asset. And just like Korea, the Respondent
6 State in those cases claimed that the General Partner
7 didn't contribute capital, and, instead, the capital had
8 been contributed by the Limited Partners.

9 The tribunals in these cases flatly rejected the
10 argument that Korea is making here. And as the Tribunal
11 in Eiser explained, the origin of capital invested by an
12 investor in an investment are not relevant for purposes of
13 jurisdiction.

14 There is no justifiable basis to depart from
15 these authorities here. Like the tribunals in Eiser and
16 RREEF, the Tribunal is obliged to exercise its
17 jurisdiction over the General Partner's claims.

18 I will pause here to allow my co-counsel,
19 Mr. Kim, to address the Korean law arguments, and then I
20 will address the damages issues.

21 PRESIDENT SACHS: Thank you, Ms. Salomon.

22 Mr. Kim, please.

23 MR. KIM: Thank you, Claudia.

24 Mr. President, Members of the Tribunal, my name
25 is John Kim. I'm an attorney at the Korean law firm of KL

1 Partners in Seoul, Korea.

2 As my colleague, Ms. Salomon, has explained, the
3 General Partner is clearly a U.S. investor under the KORUS
4 FTA. Contrary to Respondent's presentation on Korean law
5 this morning, the same is true regardless of whose name is
6 recorded in the relevant Shareholder's Registry or under
7 the foreign investment registration in Korea.

8 During this portion of our opening, I will
9 explain the irrelevance of Korean law to the issue of
10 ownership in these proceedings, and the real meaning and
11 the fact of the various Korean law arguments that have
12 belatedly been put forward by Respondent in these
13 proceedings.

14 At the time of its Memorial, Korea, too, was also
15 of the view that Korean law is not relevant. There is not
16 a single mention of matters relating to Korean law in its
17 Memorial. However, presumably now, recognizing that the
18 General Partner is both the legal and beneficial owner
19 under Cayman law, Korea has belatedly introduced Korean
20 law for the first time in its Reply, a last-resort attempt
21 to construct yet another baseless objection to the
22 Tribunal's jurisdiction.

23 Even now, days before these proceedings, Korea
24 continues to add last-minute Korean authorities in an
25 attempt to contrive some relevance to Korean law.

1 Korea's Korean law argument is premised on a
2 single assumption that the Cayman Fund, or "ELP," and not
3 the General Partner may have capacity to acquire shares
4 under Korean law; and I paraphrase from Respondent's
5 presentation earlier this morning. According to Korea, if
6 the ELP was the owner of the Samsung Shares, then the
7 General Partner cannot be an investor under the Treaty.

8 First, as I will explain later on in this
9 presentation, even if Korean law were to apply, Korea's
10 assumption is simply incorrect. There are no
11 circumstances under which a Cayman-exempted Limited
12 Partnership with no legal personality can be the owner of
13 shares under Korean law. This is simply impossible.

14 Second, it is a clear and basic principle under
15 private international law that matters related to
16 corporate legal capacity and having capacity to own
17 property are governed by the laws of the place of its
18 establishment. This is obvious and uncontroversial.
19 Therefore, in order to determine whether the Cayman Fund
20 is capable of being the owner of the Samsung Shares, one
21 must look to Cayman law. In other words, Korean law is
22 not relevant to the issues before this Tribunal in these
23 preliminary proceedings.

24 Although this is obvious in its own right,
25 Korea's own act on private international law confirms the

1 same. Article 16 of the Act on private international law,
2 which can be found at CLA-54, expressly states, and I
3 quote: "Corporations and other organizations shall be
4 governed by the applicable law of the establishment
5 thereof." This is simple and clear: Cayman law applies,
6 and this should be the beginning and end of it as it
7 relates to Korean law in these proceedings.

8 However, since Cayman law offers no support to
9 Korea's preliminary objection, Korea now argues that since
10 the Samsung Shares were recorded in the name of the Cayman
11 Fund in the Shareholder's Registry of Samsung SC&T and
12 Samsung Electronics, this means as a legal matter that the
13 Fund, rather than the General Partner, is the owner of the
14 Samsung Shares. However, this is incorrect even as a
15 matter of Korean law.

16 First, in Korea, a Shareholder's Registry is not
17 determinative of ownership. Companies utilize Shareholder
18 Registries in order to have a uniform means of handling
19 matters related to their shares, and to identify Parties
20 who can assert their status as a shareholder vis-à-vis the
21 Company. This protects companies in case of disputes
22 between Shareholders or those who claim to be Shareholders
23 over who is entitled to exercise Shareholder rights. The
24 Registry determines who can exercise Shareholder rights.
25 It does not resolve or decide questions of ownership.

1 Under Korean law, the ability to exercise
2 Shareholder rights, which are exercised vis-à-vis the
3 Company, is distinct and separate from ownership rights,
4 which is a fundamental economic interest that can be
5 exercised against the world. As Korea's Korean law
6 expert, Professor Rho, has stated in his Report, and I
7 quote: "The Supreme Court makes a distinction between the
8 ownership of shares, on the one hand, and the exercise of
9 Shareholder rights, on the other hand. Ownership of
10 shares is an issue of who holds title of the stocks, and
11 an entity lacking ownership of shares cannot claim to any
12 third party that it is a Shareholder of the Company.
13 Exercise of Shareholder rights is an issue of who can
14 exercise specific Shareholder rights such as voting rights
15 vis-à-vis the Company." And that can be found at RER-2,
16 Paragraph 26.

17 Let me give you a very simple example: If Party
18 A validly transfers its shares to Party B, and Party B
19 pays Party A for the shares--and there's no dispute among
20 the Parties--Party B would clearly be the legal owner of
21 the shares. This would be true even if the Parties didn't
22 get around--for whatever reason, lazy, mistake,
23 oversight--to notifying the Company and updating the
24 Shareholder's Registry. Simply put, the Shareholder's
25 Registry does not determine share ownership.

1 In addition, even if Korean law were to apply,
2 there are no circumstances under which the Cayman Fund can
3 be the owner of shares under Korean law. The Fund has no
4 legal personality at all and, therefore, lacks the
5 requisite legal capacity to own or hold property. It
6 cannot be the owner of the Samsung Shares.

7 As mentioned in the Korean Civil Law Commentaries
8 found at CLA-52, a legal capacity to have rights under
9 Korean law means the standing or eligibility to have
10 rights. This is derived from a similar principle under
11 German law--and please excuse me in advance for my
12 pronunciation--"Rechts-fähigkeit"--I could spell it for
13 the Reporter later--this is derived from a similar
14 principle under German law--and I'll skip the
15 pronunciation--as explained by Professor Kwon, a legal
16 capacity to have rights is a fundamental status that is
17 unaffected by legally imposed restrictions or limitations
18 and applies to both natural persons and organizations.

19 It is an undisputed principle under Korean law
20 that a person or organization that does not have a legal
21 capacity to have rights cannot hold any rights including
22 ownership rights.

23 In this regard, both Parties and their respective
24 Cayman law experts agree, that the Cayman ELP has no legal
25 personality, no separate existence from the General

1 Partner and Limited Partner, and no separate capacity to
2 contract, bring claims, or own or control assets.

3 Accordingly, since the Fund has no legal capacity
4 to own assets under Cayman law, it cannot be the owner of
5 the Samsung Shares under Korean law. This is a
6 fundamental status that remains unchanged and unaffected,
7 regardless of how a particular Korean statute may treat an
8 organization for the limited purpose of that statute.

9 In case of foreign organizations, it is true that
10 there are a number of Korean statutes that extend their
11 application to cover foreign organizations, even if they
12 are a type of organization that does not have a legal
13 capacity under Korean law or, as in the present case, does
14 not have a legal capacity under the laws of the place of
15 its establishment. This extended application helps to
16 minimize regulatory arbitrage and potential loopholes to
17 circumvent the statute.

18 However, those statutes do not have any
19 determinative effect on ownership or otherwise displace
20 the general principle that a legal capacity to have rights
21 is a fundamental status that remains unaffected by how a
22 particular statute may treat such foreign organization for
23 the purpose of that statute.

24 In his Expert Report, Korea's expert, Professor
25 Rho, relies on three such statutes, namely the Capital

1 Markets Act, the Corporate Tax Act, and the Civil
2 Procedure Act, to support his argument that the Cayman
3 Fund can, indeed, be the legal owner of the Samsung
4 Shares, even if it does not have a legal capacity to hold
5 rights or to own shares pursuant to Cayman law.

6 First, Professor Rho relies on the fact that the
7 term "foreign corporation, et cetera," is defined under
8 the Capital Markets Act to include foreign funds or
9 associations, and argues that the Cayman Exempted Limited
10 Partnership is therefore capable of acquiring listed
11 securities. Clearly, this is a stretch.

12 The relevant provisions of the Capital Markets
13 Act are simply permissive and state that foreign
14 corporations, et cetera, may acquire listed shares, which
15 is quite natural and quite obvious. The Act says nothing
16 about ownership or whether an organization without legal
17 personality or a legal capacity to have rights can even
18 acquire shares because, of course, it cannot.

19 The second statute that Professor Rho relies upon
20 is the Corporate Tax Act. In his Report, at Paragraph 20
21 of his Report, Professor Rho states that, and I quote--and
22 this is the entirety of his argument: "The Supreme Court
23 of Korea has ruled that a Limited Partnership established
24 pursuant to the laws of the Cayman Islands was a foreign
25 corporation within the meaning of the former Corporate Tax

1 Act."

2 While the conclusion that Professor Rho hopes to
3 be drawn from this statement is unclear, it is clear that
4 this has nothing to do with share ownership. This Supreme
5 Court case relates solely to tax treatment under the
6 Corporate Tax Act and does not have broader application.

7 Lastly, Professor Rho refers to Korea's Civil
8 Procedure Act which mentions that a foreigner without
9 litigation capacity in its home country may be deemed to
10 have litigation capacity in Korea. Based on that, and
11 while this may be true, this, again, clearly has nothing
12 to do with a legal capacity to have rights or ownership
13 rights.

14 If not already clear, as Professor Kwon has
15 explained in his Expert Report, Professor Rho's reliance
16 on these statutes is futile and misleading. None of the
17 statutes raised by Korea's Korean law expert relate to
18 ownership and are completely irrelevant.

19 The same is true for Korea's reliance on the
20 foreign investment registration regime in Korea. This is
21 for administrative purposes and to supervise compliance
22 where certain investment restrictions or limits placed on
23 foreign investment and to record affiliation. Again, this
24 has no bearing on the question of attribution of share
25 ownership.

1 In conclusion, based on Article 16 of Korea's Act
2 on Private International Law, the question of whether the
3 Cayman Fund itself is capable of being the owner of the
4 Samsung Shares must be determined based on Cayman law.
5 This is clear. But even if Korean law was relevant and
6 should be applied, the Cayman Fund cannot and is not
7 capable of being the owner of the Samsung Shares since it
8 does not have any legal personality or capacity to have
9 rights in the first place.

10 This conclusion cannot be changed or simply
11 altered based on the fact that a foreign investment
12 registration was filed in the name of the Cayman Fund or
13 that the Fund's name was recorded in the Shareholder's
14 Registry. As I have explained, neither document is
15 determinative of share ownership, nor can they change the
16 status of the Cayman Fund under applicable, namely Cayman,
17 law.

18 Contrary to Korea's arguments in these
19 proceedings, if the Fund has no legal capacity to have
20 rights, there are no circumstances under which Korean
21 law--under Korean law whereby the Fund can be attributed
22 with share ownership of the Shares in Samsung SC&T or
23 Samsung Electronics. Therefore, ownership of the Samsung
24 Shares should be determined according to Cayman law and
25 the Fund's internal legal relations.

1 Thank you.

2 PRESIDENT SACHS: Thank you, Mr. Kim.

3 MS. SALOMON: Members of the Tribunal, I want to
4 address Korea's objection to the Tribunal's jurisdiction
5 that the General Partner's claim should be dismissed on
6 the basis of Article 11.20.6 of the Treaty.

7 Now, that Article concerns objections that, as a
8 matter of law, the claim submitted is not a claim for
9 which an award in favor of the Claimant may be made.

10 So, before turning to the substance of the
11 argument, an important note about the procedure that Korea
12 has invoked under this Article. That procedure is truly
13 exceptional. Granting Korea's damages objection at the
14 very outset of the case would deprive the General Partner
15 of its right to have its claim heard following a full
16 presentation of the evidence.

17 The burden of proof Korea must meet here is high.
18 To establish this objection, Korea must prove that the
19 General Partner's claims are "demonstrably doomed to
20 failure" and "legally hopeless"; and that language may be
21 found in the Bridgestone case versus Panama at CLA-28, and
22 The Renco Group versus Peru at CLA-43.

23 As the Tribunal in Pac Rim observed, to grant
24 such an objection, a tribunal must have reached a position
25 both as to all relevant questions of law and all relevant

1 alleged or undisputed facts that an award should be made
2 finally dismissing the Claimant's claims at the very
3 outset. There are many reasons, says the Pac Rim
4 Tribunal, why a tribunal might reasonably decide not to
5 exercise such a power, even where it considered such a
6 claim appeared likely but not certain to fail if assessed
7 only at the time of the Preliminary Objection. That's
8 CLA-36.

9 So, in other words, the Tribunal must accept as
10 true the facts alleged in the Notice of Arbitration and
11 deny Korea's damages objection unless, as a matter of law,
12 the General Partner's claim cannot succeed.

13 So, this objection fails unless an award could
14 not possibly be made in the General Partner's favor
15 because the General Partner is legally precluded from
16 obtaining any damages whatsoever in connection with its
17 Samsung investment, and that is plainly not the case here.
18 Korea's arguments about what proof the General Partner has
19 submitted with regard to its damages, its focus on the
20 accounts ledger is simply irrelevant for this phase of the
21 case. It need not prove its full damages case at this
22 time.

23 Korea's arguing that the General Partner is not
24 capable of suffering damages, but they simply reiterate
25 the same erroneous arguments regarding the General

1 Partner's ownership and control, contending the General
2 Partner is not the real investor and that the General
3 Partner has no risk. But it's important to understand
4 what Korea is asking this Tribunal to do if it accepts
5 Korea's position. It's asking the Tribunal to eliminate
6 treaty protection for an entire sector of cross-border
7 investment, not just Mason, but more than \$1.6 trillion in
8 cross-border investment that uses the Cayman Master Fund
9 structure.

10 Now, Korea's complaints about Mason's structure,
11 we have explained, have no merit. The General Partner has
12 legal title including to the Shares. And once the General
13 Partner is permitted to present its case in full, the
14 record will establish that, absent Korea's illegal
15 interference in violation of the Treaty, the Shares would
16 have increased in value, and instead, due to Korea's
17 illegal interference, they declined in value, and the
18 General Partner suffered loss.

19 Because the General Partner has legal title, the
20 damages are the difference between the sale price and what
21 they would have been worth absent Korea's illegal
22 interference. But even ignoring that the General Partner
23 has legal title, the General Partner suffered additional
24 damages as a result of Korea's breach.

25 As explained by Mason's CFO, the losses

1 associated with the Samsung investment contributed to the
2 General Partner receiving zero Incentive Allocation in
3 2015. Absent Korea's interference, the Shares would have
4 increased in value. The General Partner would have
5 received 20 percent of that increase as its Incentive
6 Allocation.

7 The General Partner spent considerable resources
8 researching/managing the Samsung investment, including
9 hundreds of hours spent by analysts traveling to Korea
10 meeting with Samsung, but those costs were never recovered
11 because Korea caused the Shares to be sold at a loss.

12 Additionally, the poor performance of the Shares
13 resulted in reputational damage to the General Partner
14 which, in turn, results in lost profits.

15 The entire business model of the General Partner
16 is premised on delivering market-beating results to its
17 investors in sharing in those profits, but when
18 investments lose money, it hinders the General Partner's
19 ability to attract new investors and causes existing
20 investors to take their money elsewhere.

21 We, therefore, submit that Korea has failed to
22 carry its hefty burden of proving the General Partner is
23 legally precluded from obtaining any damages whatsoever,
24 even if its claim were to succeed.

25 The Tribunal's competence over the General

1 Partner's claim under the Treaty is clear. The General
2 Partner satisfies the definition of "Investor." The
3 Samsung Shares satisfy the Treaty's definition of
4 "investment." The Tribunal should reject Korea's attempts
5 to rewrite the terms of the Treaty.

6 We respectfully request that the Tribunal comply
7 with that mandate in which it's obliged to exercise
8 jurisdiction it has under the Treaty and here, the General
9 Partner's claim.

10 Thank you.

11 PRESIDENT SACHS: Thank you, Ms. Salomon.

12 This brings us to the end of the openings. We
13 will now have a lunch break and resume at 2:00. Thank you
14 very much.

15 (Whereupon, at 12:46 p.m., the Hearing was
16 adjourned until 2:00 p.m., the same day.)

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AFTERNOON SESSION

PRESIDENT SACHS: So, good afternoon,
Mr. Garschina.

THE WITNESS: Good afternoon.

KENNETH GARSCHINA, CLAIMANTS' WITNESS, CALLED

PRESIDENT SACHS: You're here as a fact witness
named by the Claimant. Could you please read the
statement which is in front of you.

THE WITNESS: I solemnly declare upon my honor
and conscience that I will speak the truth, the whole
truth, and nothing but the truth.

PRESIDENT SACHS: Thank you, Mr. Garschina.

You submitted two Witness Statements in these
proceedings, the first one dated 17th of April, and the
second one 4th of September, both of 2019. Is there
anything you would like to correct or amend in any of
these two Witness Statements?

THE WITNESS: No.

PRESIDENT SACHS: Thank you.

Will there be direct?

MR. WATSULA: A short direct, yeah.

PRESIDENT SACHS: A short direct, so please
proceed.

DIRECT EXAMINATION

BY MR. WATSULA:

1 Q. Good afternoon, could you state your full name
2 for the record, please?

3 A. Ken Garschina.

4 Q. And you are the Co-founder and Managing Member of
5 Mason Management LLC; is that right?

6 A. Yes.

7 Q. Can you speak a little bit about your educational
8 background for the Tribunal.

9 A. Sure.

10 I went to high school, public high school, on
11 Long Island, Garden City. I graduated from there in 1989.
12 I matriculated to the College of the Holy Cross in Western
13 Massachusetts, graduated from there in 1993 with a
14 Bachelor's in economics.

15 Q. What did you do before you co-founded Mason?

16 A. My previous employer was another hedge fund
17 called "KS Capital," where I was an analyst initially and
18 then a Portfolio Manager specializing in risk arbitrage
19 and distressed securities.

20 Q. And you left there to co-found Mason; is that
21 right?

22 A. Yes. On July 1st of 2000.

23 Q. And there is one other Co-founder and one other
24 Managing Member of Mason; correct?

25 A. Yes.

1 Q. And who is that?

2 A. Mr. Michael Martino.

3 Q. What are your duties and responsibilities as a
4 Managing Member of Mason?

5 A. Mike and myself have co-duties as managing the
6 firm, overseeing, effectively CEO of the firm, and most
7 importantly overseeing, managing and being responsible for
8 the research and decision-making process and the
9 investment process.

10 Q. And can you give the Tribunal a brief explanation
11 of what it is exactly that Mason does?

12 A. Sure.

13 Mason Capital is a venture hedge fund, and
14 "venture" broadly speaking encompasses many
15 subdisciplines, including bankruptcy investing, risk
16 arbitrage investing, litigation-driven investing, whether
17 a company is undergoing a legal predicament. Other forms
18 of venture of investing such as restructurings,
19 recapitalizations, liquidations, and generally speaking we
20 invest to provide alpha to our clients, meaning we're not
21 investing to get the returns or similar types of returns
22 that the Stock Market would give. We're looking for
23 uncorrelated returns, returns that are driven by the
24 events that take place around companies that are going to
25 drive the prices of the underlying securities.

1 Q. Thank you.

2 MR. WATSULA: No further questions from Claimants
3 at this time.

4 PRESIDENT SACHS: Thank you very much.

5 Who will do the cross?

6 MR. NYER: I will do the cross, Mr. President.

7 PRESIDENT SACHS: Mr. Nyer, thank you.

8 MR. NYER: We have a binder of documents that
9 we'll provide to the Tribunal, Mr. Garschina and counsel
10 for Claimants.

11 CROSS-EXAMINATION

12 BY MR. NYER:

13 Q. Mr. Garschina, good afternoon.

14 A. Hello.

15 (Pause.)

16 Q. Mr. Garschina, good afternoon again.

17 You are the Co-founder and Principal of Mason
18 Capital Management LLC; right?

19 A. That's correct.

20 Q. And you refer to this entity as the "Investment
21 Manager"; right?

22 A. Excuse me?

23 Q. Do you refer to this entity in your Witness
24 Statement as the "Investment Manager?" Are you familiar
25 with that?

1 A. Can you point that to me?

2 Q. Sure, sure.

3 Paragraph 2 of your First Witness Statement.

4 A. Yes, that's one of the entities, yes.

5 Q. Now, Mr. Satzinger explains that the Investment
6 Manager of Mason Capital Management LLC employs the staff
7 which works on Mason Capital's behalf; is that correct?

8 A. The General Partner, I believe, employs staff,
9 yes.

10 Q. The--and Mason Capital Management.

11 A. I'm not sure exactly which of the entities the
12 paychecks go out from, but in general, the Mason entities
13 employ staff, yes.

14 Q. But specifically the Investment Manager of Mason
15 Capital Management LLC, is that the entity that employs
16 staff, the Mason staff?

17 A. I'm not sure.

18 Q. You're not sure.

19 Is that the entity that rents your offices in New
20 York?

21 A. Again, there are many boxes for legal reasons,
22 different kind of legal reasons, and I'm not the expert on
23 that.

24 Q. Okay. Fair enough.

25 How many employees does the Mason Group employ

1 overall?

2 A. It varies. When we started, we had no employees,
3 just myself and my partner. Currently, we have I
4 approximate around 20.

5 Q. Now, as far as you know, the Investment Manager
6 is not a Claimant in this arbitration; do you know that?

7 A. I don't know.

8 Q. Mason manages two funds?

9 A. We have one pool of capital that is divided into
10 two entities for legal--for tax reasons.

11 Q. And one of these entities is the Domestic Fund or
12 has been referred to as the "Domestic Fund"; right?

13 A. Yes.

14 Q. And the second one is the offshore/Cayman Fund?

15 A. That's a tax entity. All the decision-making on
16 investments is done at the top Mason entities; that's
17 where all the decision-making ability rests in myself and
18 my partner and I think where the staff was employed, but
19 I'm not positive, but all the intellectual capital which
20 is what we provide to our investors is done at the
21 Mason--the top level of the Partnership.

22 Q. Understood, understood, but they are two
23 entities, one offshore and one domestic?

24 A. There are two entities, I believe, for tax
25 reasons.

1 Q. Understood.

2 A. But the one investment strategy and the
3 investments are run completely pari passu, meaning the
4 exact same investments.

5 Q. The Cayman tax entity that you mentioned, do you
6 understand that it is incorporated as a Cayman-exempted
7 Limited Partnership?

8 A. You mean that's what it says.

9 Q. And do you understand that these entities are
10 called Mason Capital Master Fund LLP?

11 A. Yes.

12 Q. And that entity is not a Party to this
13 arbitration; you understand that?

14 A. No, I don't.

15 Q. Maybe you learned that, but the Second Claimant
16 in this arbitration is an entity called "Mason Management
17 LLC"; are you aware of that?

18 A. Yes. I believe that's one of the General Partner
19 entities.

20 Q. That is a General Partner. And it is a Delaware
21 LLC that you co-founded with Mr. Martino, I understand?

22 A. I'll take your word for it.

23 Q. Well, you don't have to take my, sir. It's in
24 this paragraph, the first paragraph of your First Witness
25 Statement.

1 A. Then you know it already.

2 Q. So, Mason Management LLC serves as the General
3 Partner in both the Domestic Fund and the Cayman Fund? Do
4 you know that?

5 A. Functionally, which again I am not a legal expert
6 on organizational charts that are done for various legal
7 and tax reasons. The Mason General Partnership has the
8 investment authority to make investment decisions for all
9 the capital that we manage.

10 Q. The General Partner Mason Management LLC is a
11 special-purpose vehicle, isn't it?

12 A. I don't know.

13 Q. And you don't know whether it has any employees,
14 do you?

15 A. Again, I'm not the human resources department. I
16 do know how to manage money. There are many, many
17 entities, which I'm sure you know, where the--where the
18 pay stubs are sent out from is not of my purview.

19 Q. Understood.

20 Now, the Cayman Fund, the offshore fund, also has
21 a Limited Partner; right?

22 A. Has a Limited Partner?

23 Q. Yes.

24 A. I believe there are Limited Partners, not a
25 Limited Partner.

1 Q. There might be several investors in your Limited
2 Partner in the Cayman offshore entity, but as far as we
3 have been told so far, there is only one Limited Partner?
4 I appreciate that--

5 A. That's not my area of expertise.

6 Q. I appreciate that.

7 That Limited Partner has been referred to as the
8 "feeder fund." Are you familiar with that terminology?

9 A. No.

10 Q. And do you understand whether the Limited Partner
11 receives money from third-party investors?

12 A. I'm not sure where the money comes in of all the
13 different boxes, but I know where all the investment
14 decisions are made.

15 Q. Now, you spoke earlier on direct examination, you
16 explained the--that Mason was investing to produce alpha.
17 That's what you said, for its client?

18 A. Yes.

19 Q. For its clients? Sorry.

20 A. We have produced alpha for our clients, yes.

21 Q. And your clients would be third-party investors?

22 A. Well, the biggest client of the firm is
23 ourselves.

24 Q. Meaning you, yourself, Mr. Garschina, and
25 Mr. Martino?

1 A. Mr. Martino, yes.

2 Q. All right. And do you know--

3 A. As well as third-party investors.

4 Q. And are you Shareholders in the Limited Partner?

5 A. I don't know. I know that we are--we are the
6 General Partnership, and that's where the decision-making
7 authority is and where all our intellectual capital is.

8 Q. I understand.

9 And the purpose of your decision-making authority
10 is to produce alpha, which is returns for your clients;
11 right?

12 A. That's one of the purposes.

13 Q. If you're successful in producing alpha, you will
14 get a performance fee; right?

15 A. No, that's not correct.

16 Q. The Cayman Fund, the offshore structure--

17 A. Would you like me to say what we do get?

18 Q. I'm sure your lawyers will come back to this.

19 A. I see.

20 Q. We're under the clock here.

21 A. I have plenty of time.

22 Q. The Cayman Fund was established in 2009?

23 A. I'll take your word for it. I'm not sure.

24 Q. Once again, Paragraph 7 of your First Witness
25 Statement.

1 A. So you know already.

2 Q. And it was established first into a Limited
3 Partnership Agreement; is that right?

4 A. I'm not sure.

5 Q. You're not familiar with the Limited Partnership
6 Agreements?

7 A. The "Limited Partnership Agreement"? I mean, in
8 broad strokes I'm familiar with it. I haven't read it in
9 quite some time.

10 Q. But you've seen the document?

11 A. It's possible.

12 Q. Well, if you haven't read it in quite some time,
13 it means you read it at some point; right?

14 A. I mean, I don't remember, but I'm sure that I
15 read them, yes.

16 Q. Let's look at it. You'll find it under Tab 6 of
17 your binder.

18 A. Um-hmm.

19 MR. NYER: And for the record, we're looking at
20 Exhibit C-30, three-zero.

21 THE WITNESS: C?

22 BY MR. NYER:

23 Q. Tab 6. Tab 6.

24 A. Okay. I'm on it.

25 Q. And I will start only looking at the cover page.

1 You will see the document is entitled "Second Amended and
2 Restated Limited Partnership Agreement" dated January 1st,
3 2013.

4 Do you see that?

5 A. I see it.

6 Q. Do you have any recollection as to the reasons
7 for the restatements and the amendments of the Limited
8 Partnership Agreement in 2013?

9 A. No.

10 Q. If you could turn to Article 1.05. It's on
11 Page 2 of the Limited Partnership Agreement.

12 A. Um-hmm.

13 Q. And you should see here a provision entitled
14 "Objects and Purposes."

15 Do you see that?

16 A. Yes.

17 Q. And that provision reads: "The primary purpose
18 of the Partnership shall be to purchase, sell or hold, for
19 investment or speculation, securities, on margin or
20 otherwise, for the account and the risk of the
21 Partnership."

22 Do you see that?

23 A. I see it.

24 Q. So, it does happen from time to time for the
25 Partnership to purchase securities for the purpose of

1 speculation; right?

2 A. I don't know what you mean by "purchase."

3 Q. Acquire securities.

4 A. I'm not sure what entity acquires the securities
5 for legal reasons. I'm not an expert on that, again.

6 Q. And, Mr. Garschina, that's a fair point. I won't
7 hold you to any of the legal technicalities.

8 A. But you're asking me a legal technicality.

9 Q. I'm asking you: Does it happen that the Cayman
10 Fund purchased securities for the purpose of speculation?

11 A. I don't know which Cayman entities is, in my
12 layman's understanding, a pass-through entity for tax
13 purposes. It has no function other than for tax purposes.
14 There are certain investors, both onshore and offshore
15 investors. Domestically--in fact, in our funds most of
16 the offshore investors are U.S. non-taxpaying endowments
17 and foundations, and those investors would like to invest
18 in a Cayman entity for their own tax-planning purposes.
19 Again, they're non-taxpaying entities, so it's not for tax
20 avoidance. It's for tax-planning.

21 The offshore investors would like to invest in a
22 Cayman entity for their own tax-planning purposes; I
23 believe one of the reasons is to avoid dividend tax
24 withholding. That entity is--has no investment authority.
25 It has no power to make investment decisions. All those

1 decisions are done at the Mason Management General Partner
2 level.

3 Q. I have to apologize. I wasn't clear. I meant to
4 ask, does it happen that the Cayman Fund purchased
5 securities for the purpose of speculations? Could you
6 answer that question?

7 A. I don't know what entity actually makes the
8 purchases.

9 Q. On the basis of this provision 1.05, does the
10 Cayman Fund appear to have the authority to purchase
11 securities for the purpose of speculation?

12 A. Yes, that's what it says.

13 Q. Now, Mr. Garschina, one of Mason's core
14 strategies is to make event-driven trades and investments;
15 right?

16 A. That is our strategy.

17 Q. And if you could please turn to Tab 16 in your
18 binder, and we're looking at Exhibit R-3?

19 A. Yes.

20 Q. And you should see in front of you a report by
21 Cliffwater.

22 Do you see that?

23 A. I see it.

24 Q. And it appears to be a hedge fund investment
25 Due-Diligence Report.

1 Do you see that?

2 A. That's what it says.

3 Q. Dated as of December 2010?

4 A. That's what it says.

5 Q. Are you familiar with Cliffwater?

6 A. I wasn't until my lawyers showed me this
7 document.

8 Q. And having reviewed the document, do you
9 understand Cliffwater to be an investment advisory firm
10 that provides research and due diligence on hedge funds?

11 A. It's a report that purports to know about my
12 firm.

13 Q. And do you have any understanding of the purpose
14 of such a report?

15 A. They want to sell their knowledge to clients, I'd
16 imagine.

17 Q. Could you please turn to Page 5 of that document.
18 And you should see at the bottom of the page there is a
19 section starting: "Investment Strategy and Processes
20 (sic)"--"and Process."

21 A. Yes.

22 Q. And I read part of this paragraph and ask you a
23 few questions about it.

24 "Mason engages in event-driven investing that
25 combines deep fundamental analysis with a hard catalyst

1 and a global perspective. The fund seeks to invest in
2 opportunities where the impact of the event is not yet
3 reflected in the price of the Company's securities.
4 Event-driven positions in a security are driven by both
5 fundamental value and by unusual or extraordinary
6 corporate events that will drive the value of the security
7 in the near-to-medium term."

8 Do you see that?

9 A. I do.

10 Q. Is that a fair description of Mason's investment
11 approach?

12 A. No.

13 Q. What specifically in this description would you
14 take issue with?

15 A. Would you like me to go word by word?

16 Q. Generally.

17 A. I'm going to have to take my glasses off.

18 I don't know what "global perspective" means.

19 "Seek to invest in opportunities where the impact
20 of the event is not yet reflected." Sometimes yes,
21 sometimes no.

22 In "near-to-medium term," I don't agree with
23 that.

24 "Uses skills developed in risk arbitrage and
25 distressed investing, and applies them to interesting long

1 and short corporate events," I don't know what that means.

2 We have "partners and senior analysts have
3 expertise in complicated transaction-oriented investments
4 and are therefore, able to invest in complex situations,"
5 I agree with that.

6 So, strikes and gutters.

7 Q. So, you agree with part of it, and you disagree
8 with part of it?

9 A. It's a very high level description from someone
10 who really has no knowledge of my firm, as far as I know.

11 Q. Isn't it true that you saw an event-driven
12 opportunity in the Samsung restructuring?

13 A. Yes.

14 Q. And that opportunity was related to the prospect
15 of a leadership's change at Samsung?

16 A. A leadership change? Can you define that for me.

17 Q. The transition from the one generation to a
18 second generation?

19 A. That was a part of it. That's not why--it would
20 be leaving out 80 percent to describe that as the reason.

21 Q. If I could direct you to Paragraph 8 of your
22 Witness Statement.

23 A. Which one?

24 Q. The Second Witness Statement. And you state
25 here: "What prompted us to invest at the time was the

1 prospect that the transition to the next generation of
2 leadership would require significant restructuring of the
3 Samsung Group."

4 Do you see that?

5 A. Um-hmm.

6 Q. Was that your testimony at the time when you
7 signed this Witness Statement?

8 A. That's one of the reasons, yeah.

9 Q. And the transition in leadership--

10 A. It's not untrue, I guess is what you're getting
11 at.

12 Q. Understood.

13 The transition in leadership from in the Lee
14 Family was--would require significant restructuring
15 because the group was complex with many affiliates?

16 A. Well, the family dynamic was a part of it. Also
17 a part of it was the corporate environment in Korea and
18 the fact that laws had been passed that would require
19 certain structures to be unwound. Those structures,
20 commonly referred to as the "chaebol" system, are a group
21 of circularity-driven--I mean, if you looked at the Mason
22 capital structure, and I'm confused by it, if you looked
23 at the Samsung structure, your brain would explode, so the
24 Government of Korea said this is not hospitable to
25 investment capital. Our securities trade at four times

1 earnings. It's not good for capital coming into the
2 country for investment, ultimately it's not good for
3 growth. We need to have--we need to be more friendly to
4 capital if it's mobile, globally.

5 And I think they took steps to redress that by
6 having this law passed that required within a certain
7 amount of time a simplification of these structures.
8 That, combined with the fact that there was a leadership
9 change coming and the perception on our part was that the
10 younger generation would be less wed to the old way of
11 inefficiency, poor capital allocation, self-dealing,
12 run-ins with the law for bribery.

13 I mean, Samsung was--as far as when I came into
14 the industry, it's fairly been uninvestable for that
15 reason, and there were real signs and legal milestones
16 that change was afoot, so I think--I can go on, but...

17 Q. I think it's consistent with what you've stated
18 in your Witness Statement, but would you agree, would you
19 not, that there were multiple Samsung entities and there
20 were a number of cross-shareholders as between those
21 various Samsung entities?

22 A. I mean, it's like an octopus. You can look at
23 it, I'm sure you have. There are many, many, many
24 entities.

25 Q. And they were trying to unwind those

1 cross-shareholdings to an extent?

2 A. It think they were trying to simplify it.

3 Q. Now, Mason first started looking into Samsung in
4 or about February 2014; right?

5 A. I believe that's right.

6 Q. And as an aside, we have some privacy concern, as
7 you may have heard since the Hearing is being broadcast,
8 so I will have some difficulties mentioning the names of
9 the members of your team, and I will refer to them as
10 Mr. L or Mr. G, and we will--or maybe by their first name?

11 A. Okay.

12 Q. So, we will try to discern who they are.

13 A. All right.

14 Q. If you can turn to Paragraph 4 of your Second
15 Witness Statement.

16 And in the middle of the paragraph: "For the
17 Investment in Samsung, the core team included Mr. L,
18 Mr. GV, Mr. K, and Mr. R."

19 Do you see that?

20 A. Yes.

21 Q. And those were the team--that was the team
22 working on the Mason project; right?

23 A. Yes.

24 Q. And you told us, you have no idea who of those
25 four individuals are employed by Mason Capital or by Mason

1 Management or by any other entities; right?

2 A. They're employed by one of them, I'm sure of
3 that.

4 Q. Okay.

5 A. Or else they were working for free, which is
6 fine.

7 Q. Right. And they wouldn't be employed by several
8 of them; right?

9 A. I wouldn't know about that either, but I'm sure
10 someone does.

11 Q. Presumably you wouldn't pay twice their salaries;
12 right?

13 A. If we're feeling extra generous. If the Samsung
14 investment had gone unimpeded by certain things, perhaps.

15 Q. Fair enough.

16 If you can turn to Paragraph 18 of your Second
17 Witness Statement.

18 A. Second one?

19 Q. Yes.

20 And you say here that: "The team under my
21 supervision spent hundreds of hours investigating and
22 analyzing Samsung Electronics and the Samsung Group."

23 Do you see that?

24 A. Yes, I do.

25 Q. Now, the purpose of these investigations was not

1 to provide advice to the management of Samsung on their
2 restructuring; right?

3 A. No, that's wrong.

4 Q. It was the purpose, to provide--

5 A. It's one of the purposes, yeah.

6 Q. You're a management consulting firm, sir?

7 A. No.

8 Q. Now, wasn't the purpose of those investigations
9 to get insight into how the restructuring would play out?

10 A. Well, there are many purposes of it. One is
11 to--when you--when I think of an investment, the
12 investment doesn't start the day that we commit capital.
13 The investment starts when we begin our research process.
14 By the time we were able to commit capital, we have done
15 our homework, hopefully correctly, not always correctly.
16 And so the investment process, to me, is when we start
17 what you're describing here. The investment starts then.
18 The actual buying and selling you referred to earlier is a
19 mechanism to put that investment research to work. It's
20 like a switch.

21 So, our investment process is oftentimes long and
22 deliberative, and there is a reason for us to benefit from
23 the investment process, meaning to get to that point where
24 we do turn a switch.

25 And importantly, you mentioned a management

1 consultant. We invest in maybe, depends on the year, but
2 five or six new things a year. We look at hundreds of
3 things, so you can think of us as a research organization
4 inside a money management firm.

5 In fact, often when I come home from work, my
6 wife asks me what did you buy and sell today? And I say
7 nothing. That doesn't mean I'm not investing.

8 So, part of that investment is to educate myself
9 on what we're looking at, but part of it is also to
10 educate myself so the firm can have a dialogue, hopefully
11 a constructive one, with the firm that we're analyzing or
12 firms that we're analyzing, and we are an active
13 participant in restructuring processes, whether it's the
14 Lehman bankruptcy--I can list scores of things over the
15 years. We have a very iterative dialogue with management
16 teams and sometimes Boards.

17 In this case, as you rightly point out, we
18 committed a lot of resources, and part of those resources
19 were--we have--we were fortunate to have more than a
20 couple Korean-Americans working at the firm, and part of
21 the reasons they were assigned to look at this particular
22 investment was their ability to interface with Samsung
23 culturally and language-wise, and to go there because they
24 were on vacation and other reasons to go, it's a long
25 trip.

1 And we had very, very good dialogue with Samsung.
2 They assured us that our analysis and comments were being
3 translated or communicated to the very highest levels and
4 taken into consideration, and that was encouraging to us
5 because they were looking for feedback. It's a company
6 that had been on the outskirts of the capital markets for
7 so long, given their bad corporate governance practices.
8 They were looking for engagement on what to do, how to do
9 it, how to surface value, how are investors going to react
10 to it.

11 So, in that sense, you mentioned "management
12 consulting," I think not in a legal definition but in a
13 functional back and forth between companies we were
14 analyzing, yes.

15 Q. I'm sorry, my question must have been quite
16 unclear. I meant to ask: Was a purpose of your
17 investigations to gain insight into how and when the
18 restructuring might play out?

19 A. How and when, yes.

20 Q. So, if you could please turn to Paragraph 11 of
21 your Second Witness Statement, and I would like to direct
22 your attention to the last sentence in that paragraph,
23 where you explain that Mr. J noted: "No one really knew
24 what Samsung's plans were except for the family," and
25 Samsung had many potential restructuring scenarios

1 pre-planned."

2 Do you see that?

3 A. Yeah.

4 Q. Isn't it true that the multiple scenarios that
5 were pre-planned by Samsung were because of the multiple
6 affiliates and cross-shareholdings that we discussed
7 earlier?

8 A. I don't know why it's true, but it was true.

9 Q. Now, Samsung could use various affiliates or the
10 family could use various affiliates and structure to pass
11 control from one generation to the other.

12 Do you understand that?

13 A. Not really.

14 Q. They had several options?

15 A. As it said, we didn't know what the options were.
16 They said that they were deliberating many things. They
17 announced some restructuring plans.

18 I would not like to speculate, but I can imagine
19 that they looked at hundreds of different restructuring
20 alternatives.

21 Q. And would it be valuable from your perspective to
22 understand which scenario the family would privilege?

23 A. It could be atmospherically valuable. I mean, I
24 think different members of the family may want different
25 things. It kind of depends on who you're talking to. Big

1 family, dynastic change. It's an atmospheric datapoint.

2 Q. Let's look at the e-mail that you footnote in
3 this paragraph. We're looking at--we will be looking at
4 Tab 10 in your binder, please, and that's an e-mail from
5 Mr. L.

6 A. Mr. JL?

7 Q. JL.

8 A. Okay.

9 MR. NYER: And, for the record, we're looking at
10 Exhibit C-45.

11 THE WITNESS: Tab 10; right?

12 Okay.

13 BY MR. NYER:

14 Q. And it's an e-mail from JL sent to the Amagansett
15 at Bloomberg. That's your personal e-mail address?

16 A. It's not my personal e-mail, but it is one of my
17 work e-mail addresses.

18 Q. Right. And JL at the time spent a week or so in
19 Korea speaking with various people?

20 A. Yes. I believe he was on a family vacation which
21 he found some time for work on.

22 Q. And he produced a 22-page note that he attached
23 to this e-mail on his family vacation; right?

24 A. This is--a lot of this, I think, is cut and
25 pasted from analyst report, so...

1 Q. Okay.

2 A. So, I don't think he produced it. I think it's
3 an amalgamation of different third-party research reports,
4 if I'm looking at it correctly.

5 Q. Right. And he seems to be speaking about--

6 A. But he didn't produce it.

7 Q. He compiled it?

8 A. He is forwarding to me, I would say.

9 Q. You did not look to it? Is that what you said?

10 A. I'm sorry, I think he forwarded me other people's
11 research, that is what he did.

12 Q. Okay. If you look at the first bullet point in
13 the document Mr. JL attaches to your e-mail to you?

14 A. We're not referring to the JL firm; am I?

15 Q. Right. The JL who works for you.

16 A. Right.

17 Q. The first bullet point, I'm reading: "The main
18 link to focus on is Samsung life's stake 7.6 percent in
19 Samsung Electronics due to a variety of existing and
20 potential regulations discussed later. This part of the
21 structure could largely dictate how the rest of the chips
22 fall into place."

23 Do you see that?

24 A. Maybe I'm looking at the wrong page. It's
25 Tab 10?

1 Q. Tab 10, and I'm looking at the attachment to the
2 e-mail from JL.

3 A. The attachment?

4 Q. Yeah.

5 A. Which page of the attachment?

6 Q. First page of the attachment?

7 A. The main link. Okay, yeah, I see that.

8 Q. "Due to a variety of potential existing
9 regulations discussed later, this part of the structure
10 would largely dictate how the rest of the chips fall into
11 place."

12 Do you see that?

13 A. I do.

14 Q. Isn't it true that Mason was trying to figure out
15 how the chips would fall in the restructuring?

16 A. The opportunity was so big, given, as I
17 mentioned, that hundreds of different ways it could be
18 restructured, that we weren't so--we knew we never were
19 going to be able to figure out, given the octopus, what
20 was going to happen, but we thought that, if they did, if
21 they moved towards simplifying it, we would make money, so
22 no one could figure out what they were going to do
23 exactly, but the bigger question we were trying to figure
24 out is are they moving in the right direction.

25 Q. Depending on how the chips would fall into place,

1 there would be winners and losers within the Samsung
2 Group, sir; would you agree with that?

3 A. Not necessarily.

4 In fact, I think that it's safe to say that the
5 entire structure was so undervalued given the poor record
6 of corporate governance that, as I said, moving in the
7 right direction towards any kind of Western duty-toward-
8 shareholders attitude would have been beneficial to just
9 about the entire group.

10 Q. If you could please turn to Tab 15 in your
11 binder. And you should be looking at what has been
12 produced as Exhibit C-55, and it's an e-mail from the same
13 JL to you and others at Mason.

14 Do you see that?

15 A. I do.

16 Q. And JL was reporting on conversation with various
17 people in Korea at the time?

18 A. I'm not sure, but it looks like it.

19 Q. If you could turn to the second page of that
20 e-mail--

21 A. Um-hmm.

22 Q. --there is an entry called "Samsung I R."

23 Do you see that?

24 A. I do.

25 Q. And "Samsung I R" is presumably "investor

1 relation"?

2 A. Probably.

3 Q. Now, if you look at the third paragraph from the
4 bottom on this page, JL writes: "What have investors been
5 asking? Domestic guys been asking on restructuring and
6 trying to figure out which affiliates to own."

7 Do you see that?

8 A. I do.

9 Q. And the domestic guys would be the domestic
10 investors in Korea?

11 A. Probably.

12 Q. And why do you think the domestic guys are trying
13 to figure out which affiliates to own?

14 A. I don't know. I'm not a domestic guy. Well, I
15 am here.

16 Q. Fair enough.

17 If you could turn back to Exhibit R-3, that's Tab
18 16 in the binder--we looked it--it's the Cliffwater
19 Report. And if you could flick through Page 6, I'm sure
20 you've reviewed that paragraph.

21 A. Um-hmm.

22 Q. I'm looking at the end of the first full
23 paragraph, starting with "while." "While the Fund may be
24 invested."

25 Do you see that?

1 A. Yes.

2 Q. Last sentence of that paragraph: "Mason's
3 investment horizon tends to be shorter than most
4 event-driven and distressed Managers, with an average
5 holding period of three to nine months."

6 Do you see that?

7 A. I do.

8 Q. And do I understand your testimony to be that the
9 time horizon on your Samsung holdings was longer than
10 three to nine months?

11 A. It was impossible to tell because of the
12 complexity of it. Typically--I don't want to deviate from
13 your question. What was your question? I'm conscious of
14 your time, would you like me to answer a specific?

15 Q. I was checking the time as well.

16 A. Okay.

17 Q. It was impossible to tell, I think that's good
18 enough.

19 A. You know, some investments you make, there's a
20 merger agreement, and you're going to get paid a certain
21 amount of money, and it's feasible to bracket a time
22 period where you're going to receive your money. Other
23 investments--and--and having a shorter time, your money
24 invested for a shorter period of time is not a bad thing,
25 it's a good thing, because your Internal Rate of Return

1 will be higher and your investor's capital will be at risk
2 for a shorter period of time and for less market risk, a
3 lot of other factors that we were not interested in
4 imposing on our investors unnecessarily.

5 But this investment is more of an open-ended,
6 long-term investment because the gestation period for
7 change in Korea was going to be long. I would compare it
8 to like a long bankruptcy investment where you have the
9 process moves along quite slowly as evidenced by the fact
10 that we're still sitting here in 2019, and they're still
11 restructuring.

12 Q. Understood.

13 Let's speak about the specific investment in
14 Samsung Electronics.

15 A. Okay.

16 Q. If you could turn to Tab 9 in your binder. And
17 we're looking at what has been labeled as Exhibit C-40.

18 A. Um-hmm.

19 Q. You should see--

20 A. I don't have labels.

21 Q. Yes, the C exhibits have no branded--the
22 documents are not branded.

23 A. Okay.

24 Q. And you should be looking at an e-mail from you
25 from the Amagansett address--

1 A. Yes.

2 Q. --to your Partner, Mr. Martino, and some other
3 people at Mason.

4 A. Yes.

5 Q. And you sent that e-mail on May 12, 2014; right?

6 A. That's what it says.

7 Q. And at the time, I don't think you had any
8 holding in Samsung; right?

9 A. I believe we were in the investment research
10 process part of the investment.

11 Q. Now, if you follow me running through this
12 e-mail, it's the third sentence: "The Patriarch has heart
13 attack this weekend."

14 Do you see that?

15 A. I do.

16 Q. And the "patriarch" you are referring to is the
17 Chairman of the Samsung Group?

18 A. Yes, I believe so.

19 Q. And then reading on, you explain that the stock
20 has never been cheaper on the nav basis, and that's "Net
21 Asset Value" basis; right?

22 A. Um-hmm.

23 COURT REPORTER: Is that a yes?

24 THE WITNESS: I'm looking for it.

25 MR. FRIEDLAND: You have to say "yes," instead of

1 "um-hmm."

2 THE WITNESS: I haven't made that decision yet,
3 but when I do, I will tell you guys. I promise you.

4 (Witness reviews document).

5 THE WITNESS: Can you point out again where that
6 is?

7 BY MR. NYER:

8 Q. Sure.

9 It's the fourth line from the bottom of the first
10 paragraph. "Never been shared on that basis."

11 A. Okay, yes, I see that.

12 Q. And then continuing--

13 A. Yes, I see that.

14 Q. "There is pressure from Shareholders 70 percent
15 foreign to do something for Shareholders."

16 Do you see that? "I'm told a lot of pressure."

17 A. Yes, I see that.

18 Q. And then we'll get to the sentence I would like
19 to pause with you: "Feels like getting in front of a wave
20 of buying as idea of restructuring one of the two
21 remaining chaebols in Korea gets priced in."

22 Do you see that?

23 A. I do.

24 Q. Now, looking at this sentence today, is it fair
25 to say that you were anticipating that other people may

1 buy into or other people would realize that the
2 restructuring was coming--

3 A. Our entire business relies upon other people
4 buying securities from us at higher prices than we
5 ourselves purchase them at, so that would apply to every
6 investment that we make on the long side.

7 Q. Right, so you wanted to be invested in the
8 securities before the wave of buying-in comes in; right?

9 A. In order to make money you need to have someone
10 to sell to. I don't know about a "wave," but in Korea,
11 the thesis was always you have horrible corporate
12 governance, you have bad corporate behavior, capital does
13 not want to be there because it doesn't feel protected
14 either by the courts or by the companies' interests, the
15 family's interests is always put first.

16 And the thesis--and it's not the first time I've
17 looked at Korea as an investment. The thesis was always
18 if you invest at the right time and change is happening,
19 at some point other investors may be investors who aren't
20 as sophisticated in analyzing restructurings, who aren't
21 as--who don't have a JL to go do the work for them and
22 speaking in Korean, will realize that the capital really
23 is being treated better and will come in and buy the
24 securities from you at a higher price. How long that
25 takes, again, this investment was not one that we could

1 bracket in time very quickly.

2 Q. Now, you needed to get in front of that wave;
3 right? That's what you say here. As a wave of buying-in
4 coming?

5 A. I said it feels like--it's a feeling, it's not
6 doing something. I'm feeling.

7 Q. As a matter of fact, that's what you did; right?
8 You immediately bought some Samsung--

9 A. When--I don't know when the date of our purchase
10 was.

11 Q. I believe about a week later, after that e-mail,
12 Mason first entered into swaps over Samsung?

13 A. I don't know.

14 Q. I think you say in your First Witness Statement
15 in or around May 2014. We will look at the trading
16 records and see if that happened.

17 A. Okay. I don't know swap versus cash. There is a
18 difference.

19 Q. You do use "swaps" in your Witness Statement, so
20 I don't want to be misleading you here.

21 A. Okay. But I don't know. Sometimes we use swaps,
22 sometimes we use cash. So I'm not evading. I'm just
23 saying I don't know.

24 Q. The swaps used in that case were total return
25 swaps; right?

1 A. Swaps, to us, are a financing mechanism.

2 Q. They're a contractual agreement that you entered
3 into with Goldman Sachs in that case; right?

4 A. Yes. They're a financing mechanism.

5 Q. They are a derivative contract entered into with
6 Goldman Sachs in tracking the variation in the price of an
7 underlying security; right?

8 A. It's a financing mechanism.

9 Q. And--

10 A. If you would like me to explain, I'm happy to.

11 Q. Now, you held those swaps for--you closed them
12 out, you say in your Witness Statement, at Paragraph 16 of
13 your First Witness Statement, you closed the swaps in
14 August 2014.

15 Do you remember that?

16 A. I don't.

17 Q. You can look at your First Witness Statement at
18 Paragraph 15--16, sorry.

19 A. Yes, I see it.

20 Q. Now, you had held those swaps for about three
21 months; right? I think--

22 A. I mean, that's what it says, so, you know--

23 Q. Is that a "yes"?

24 A. That's what it says, yeah, and I signed it.

25 Q. Now, did you make a profit on that trade?

1 A. I'm not sure about that.

2 As I spoke to before, our investment process, the
3 investment begins when we start our research process. The
4 switch I referred to before, the buying and the selling,
5 is the mechanism by which we enter into either through
6 cash or swaps, ownership or beneficial ownership of
7 securities. That process of buying and selling is done by
8 the traders of which JL is one. And that process, they're
9 instructed by us, the General Partner, to execute in the
10 best available fashion for them. That requires a lot of
11 things--you probably don't understand but it's essentially
12 computer games at this point, but it's not a process where
13 you buy and you sell all in one, we decide to buy here, we
14 will sell it a year later. It's where they enter into
15 trades, they may sell some, buy it back lower. If they
16 think a large seller is coming, they may get completely
17 out in anticipation of buying it back lower, if a large
18 buyer comes in and they think the price is out of the
19 zone, they will sell it, and it's all a part of optimizing
20 our--and lowering our execution costs for our investors.

21 Q. You explain in your Witness Statement at the same
22 Paragraph 16 that after closing out those swaps, you
23 purchased directly some Samsung Shares; right?

24 A. Yes.

25 Q. And your testimony, as I understand, is that you

1 intended to hold these Shares until after the
2 restructuring was completed?

3 A. We intended to hold the Shares--where does it say
4 that in the Witness Statement?

5 Q. I'm asking you whether that is your testimony,
6 that you intended to hold the Shares until after the
7 restructuring?

8 A. I think--I think we were going to hold the Shares
9 until not only in the restructuring happened but at a
10 price--inherent in investing is being happy where the
11 price is. You can't just--it's not untrue--

12 Q. Right.

13 A. --but there are many reasons.

14 Q. Right. So, you were intending to hold the Shares
15 until you could make money selling them in the market;
16 right?

17 A. Or until there was a reason that we had to get
18 out, which happened in this case.

19 Q. And--

20 A. Sometimes you have to realize you're wrong and
21 move on.

22 Q. Understood.

23 Isn't it true, Mr. Garschina, that shortly after
24 purchasing the Shares in August 2014, Mason then proceeded
25 to sell its entire Samsung Electronics shareholding?

1 A. Yes. I looked at that record in preparation for
2 this testimony.

3 Q. Yes, it's true?

4 A. Yes, it is.

5 Q. Let's look at the record, and it's great that you
6 have been prepped on that record as well.

7 A. Well, I didn't want to come in here and not be
8 able to answer questions.

9 Q. And we all appreciate that.

10 If you could turn to Tab 7 in your binder.

11 MR. NYER: And we will be looking at what has
12 been labeled Exhibit C-31, three-one.

13 THE WITNESS: I don't have labels but the
14 spreadsheet?

15 BY MR. NYER:

16 Q. Once again, the Claimants' exhibits have not been
17 branded.

18 A. I see it.

19 Q. But is that the trading record that you reviewed
20 in preparation for your testimony today, sir?

21 A. Yes.

22 And importantly the reason for me to review it is
23 that I'm not involved in the execution of trades.

24 Q. Now, if we look at the first three lines in that
25 spreadsheet, on the left we have "buy" "buy" "sell"

1 "sell," so that tells us what the operation is, if it's a
2 buy or a sell; right?

3 A. Yes.

4 Q. Sorry, in the last column?

5 A. Yeah.

6 Q. So, the first three lines seem to be the purchase
7 of the swaps--right?--if you look at the Investment Code?

8 A. That's what it says.

9 Q. And then we see that on August 1st and
10 August 8th, you sold those swaps.

11 Do you see that?

12 A. Yes.

13 Q. Now, apparently from August 11th to
14 September 12th, so over a period of one month, there is a
15 series of buy orders.

16 Do you see that?

17 A. Buy executions, not orders.

18 Q. Buy executions, yes.

19 And I will represent to you, and I'm sure you
20 have done the calculations in preparing for your testimony
21 today, but Mason overall bought 141,650 Samsung Shares
22 during that period. I have a calculator--

23 A. I'll take your word for it. I just have trouble
24 seeing small type, that's all.

25 Q. I will give you the calculator just in case.

1 A. No need.

2 Q. You know it's here.

3 And then starting on September 23rd through
4 October 10th, 2014, there is a series of sell executions.

5 Do you see that?

6 A. October 3rd?

7 Q. Starting from September 23rd all the way
8 through--

9 A. These are done in the European--we have the
10 months and the days different.

11 Q. Right.

12 A. Yes, I see that. I see that.

13 Q. And isn't it true that you sold your entire
14 holding of Samsung Electronics--by the 10th of October,
15 you had sold your entire holding of Samsung Electronics?

16 A. That's what it says. What I would say to you is
17 that part of the execution process often is--it's like
18 when you're going into an ocean, you don't jump in right
19 away, at least I don't, sometimes you put a leg in,
20 sometimes you put an arm in, and you splash water on
21 yourself, and if you don't like it you may go out, but you
22 ultimately go in, and that's part of the execution process
23 for investing. And I think that's what you're seeing
24 here. It's maximizing, getting the lowest price for our
25 investors for which--who we're fiduciaries.

1 Q. I understand the reasons. But what I'm asking
2 you is that by the 10th of October 2014, isn't it true
3 that Mason had liquidated its entire holding in Samsung
4 Electronics?

5 A. It looks like that, but again, I would say that
6 that's not the end of the investment. That's part of the
7 execution process.

8 Q. Now, starting on the 30th of October 2014, then
9 we have a series of buy orders.

10 Do you see that?

11 A. Yes.

12 Q. And they go all the way to the 2nd of April,
13 2015. That's the penultimate entry on the first page.

14 Do you see that?

15 A. Yes.

16 Q. Now, starting on the 2nd of April through the 3rd
17 of June, Mason sells its holding in Samsung Electronics.

18 Do you see that?

19 A. I do.

20 Q. Now, April 2015, Mr. Garschina, that's four
21 months before the merger votes on the Cheil-SC&T merger;
22 right?

23 A. I don't know when the vote was.

24 Q. The Cheil-SC&T merger was announced in May 2015.
25 Does that sound right?

1 A. You know, it was a long time ago. I will take
2 your word for it, if you--

3 (Overlapping speakers.)

4 Q. Assuming the Mason-Cheil merger was announced on
5 the 25th of May 2015, it looks like on the face of this
6 record, Mason started selling its shareholding in Samsung
7 four months earlier; right?

8 A. I mean, I would have to look at what the net
9 running position was.

10 Q. But you did sell some positions or part of your
11 position?

12 A. Where is the net positions after each buy and
13 sell? I can't really evaluate that without looking at
14 that.

15 Q. I don't know that it is provided on this
16 spreadsheet.

17 A. Then I would have to--I mean, we buy and sell
18 securities to optimize prices all the time. Clearly,
19 we're not walking away from our investment.

20 Q. Could you please turn to or turn back to
21 Paragraph 16 in your First Report--in your First
22 Statement. And we looked at this paragraph. It's where
23 you explain--

24 A. C&T, that one?

25 Q. No, 16, where you explain the General Partner

1 first invested in Samsung Electronics in May 2014.

2 Do you see that?

3 A. I do.

4 Q. And then you explain in the same paragraph that
5 you closed out the swaps, and you bought directly some
6 Samsung Shares.

7 Do you see that?

8 A. Yes.

9 Q. Now, if you go to the next paragraph, 17, you
10 explain that by June 2015, Mason's direct investment in
11 Samsung Electronics had grown to about KRW 133 billion.

12 A. Which paragraph was this?

13 Q. First sentence of the next paragraph,
14 Paragraph 17.

15 A. Yes, I see that.

16 Q. Now, you used the word "grown."

17 Do you see that?

18 A. Yes.

19 Q. You don't say anywhere in your Witness
20 Statements, in your two Witness Statements, Mr. Garschina,
21 that after the period from May 2014 to June 2015 Mason had
22 been trading in and out of Samsung Electronics. You don't
23 say that in your Witness Statements?

24 A. To me, it's not relevant. Optimizing our price
25 is something completely different from my investment

1 thesis and my investment research and the ideas I have in
2 my mind.

3 Q. Now, you don't say anywhere in your Witness
4 Statements, your two Witness Statements, sir, that, by
5 June 2015, Mason had been selling Samsung Electronics
6 shares continuously since April 2015. You don't say that
7 in your Witness Statement.

8 A. Is that bad?

9 Q. I'm not suggesting it's bad. I'm just pointing a
10 fact.

11 A. Okay.

12 Q. Okay.

13 A. There are lots of things that are facts that are
14 not in my Witness Statement.

15 Q. I would like to speak briefly about the--your
16 purchase of the SC&T shares.

17 A. Yes.

18 Q. So, that's the second Samsung entity in which
19 Mason purchased shares; right?

20 A. Yes.

21 Q. Did it you purchase shares in any other Samsung
22 entities during that period?

23 A. I don't remember.

24 Q. Now, you first acquired shares in SC&T in early
25 June 2015?

1 A. If that's what it says on the document, yes.

2 Q. Well, as a matter of fact, I don't want to
3 mislead you, and I think we should look at the trading
4 record because I may not have been entirely accurate in my
5 question.

6 So, if we could look at Tab 8. And we're looking
7 at Exhibit C-32; right?

8 Do you see that?

9 A. I don't have the C's, but...

10 Q. Oh, apologies.

11 A. Page 1?

12 Q. First page--

13 A. Page 1?

14 Q. --yes.

15 And are you familiar with this document, sir?

16 A. I have looked at it.

17 Q. And do you understand that it is the--or at least
18 it had been represented as being the trading record,
19 Mason's trading record in the SC&T shares?

20 A. Yes.

21 Q. Now, we see the first purchase, and that's where
22 I didn't want to be misleading with you. We have a first
23 purchase on April 15th, 2015.

24 Do you see that?

25 A. I do.

1 Q. For 334,000 shares.

2 Do you see that?

3 A. Yes.

4 Q. And then about a week later, you sold those
5 Shares, the entire holding.

6 A. Yes.

7 Q. Okay. Now, you then proceeded--oh, sorry.

8 Mason then proceeded to buy--to buy additional
9 shares in the SC&T, starting in--sorry, I'm getting
10 confused by the European and American dates, the format--I
11 think it's starting 4th of June 2015.

12 Do you see that? That's the third entry in the
13 log.

14 A. Yes, I see that.

15 Q. All right. And so that was then after the
16 announcement of the proposed merger between Cheil and SC&T
17 on the 26th of May 2015; right?

18 A. I believe so, yes.

19 Q. Now, by mid-August, you had liquidated your
20 position in SC&T.

21 A. Yes.

22 Q. In other words, after the merger votes on the
23 17th of July 2015; right?

24 A. Yes. We didn't think the vote would go the way
25 that it did, for various reasons.

1 Q. So, Mason held the Shares in SC&T for about two
2 months; right? Correct?

3 A. Well, we started in April and we ended in
4 August--August? Yeah, August.

5 Q. Sorry, Mason--you started in April, you bought
6 334,000, you sold them in April, and then you bought in
7 May, in June, early June, and you held them until August.
8 That's about two months.

9 A. That's the trading record, although I would
10 emphasize that C&T was a proxy for Samsung Electronics.
11 It essentially is a company--maybe still today; I haven't
12 followed it--its primary asset was shares in Samsung
13 Electronics. They had some other peripheral assets. But
14 the reason to buy C&T--there were several reasons, but one
15 of the main reasons to buy it was that it was a cheaper
16 proxy of Samsung Electronics.

17 So I don't--you haven't pointed me to how much
18 Samsung Electronics we owned at this point.

19 Q. Right.

20 A. But what I would say is that it's a--my
21 recollection is that we swapped, not in a financial
22 funding instrument, but we sold some Samsung or just
23 bought Samsung C&T as a cheaper way to buy Samsung
24 Electronics.

25 So, when I look at our investment at Samsung,

1 it's in--for restructuring of Samsung, it says as a whole.
2 It's not C&T or Samsung.

3 And importantly, I think that C&T effectively,
4 its main asset was Samsung Electronics in the cross
5 holdings. So, if you added up the Shares in Samsung
6 Electronics and then added up the other, I believe there
7 was some real estate and a few other operating
8 businesses--I believe there was a blood--some sort of
9 generic biotech business--if you added that up, you are
10 "creating," my word, Samsung Electronics at a cheaper
11 price.

12 So, when you say we entered C&T and we exited
13 at--and during a short period of time, I would say two
14 things: One, our investment, as I said before, begins the
15 day we start research. Executing in the market is a
16 switch that we turn on when we want to have economic
17 exposure to that investment process.

18 And two, Samsung and Samsung C&T were not
19 completely disconnected investments since they were
20 overlapping in the sense that they were both inherently
21 exposed to Samsung Electronics and that Samsung C&T was
22 also undergoing a merger vote that we anticipated would
23 have to be--the exchange ratio would have to be increased
24 if the vote was turned out.

25 As it turned out, fraud was committed, and the

1 horse was bought, and they ended up buying the vote, in my
2 opinion, and so we exited.

3 Q. If the exchange ratio on the--for the merger had
4 increased or been more favorable, the SC&T shares would
5 have appreciated on the market; right?

6 A. I believe had fraud not been committed, they
7 would have had to raise the offer for the Shares, yes.

8 Q. Let's look at Paragraph 16 in your Witness
9 Statement--in the Second Witness Statement, sorry, and I
10 think it's the paragraph in your Second Witness Statement
11 where you explain essentially what you stated a moment
12 ago.

13 A. So you already know. I could have saved myself a
14 lot of time. I'm running out of water.

15 Q. You explained that the main attraction of SC&T
16 was its ownership of Samsung Electronics, and then you
17 quote from one of your colleagues, EGV, who seems to be
18 explaining essentially that Samsung SC&T was worth more
19 than the sum of its parts; right?

20 A. That's what I just said before.

21 Q. Right.

22 And then you conclude this paragraph by saying:
23 "An opportunity to buy a large, indirect stake in Samsung
24 Electronics through SC&T came when the merger with Cheil
25 was announced."

1 Do you see that?

2 A. Yes.

3 Q. Now, I mean, if SC&T was trading at less than the
4 sum of its parts, the opportunity to buy a
5 large--indirectly a large position in Samsung Electronics
6 existed irrespective of the merger, sir. You could have
7 bought before the merger was even announced.

8 A. I mean, opportunities exist everywhere. It
9 doesn't mean that it's an opportunity that I would like to
10 expose my investors and my own capital to.

11 Q. Let's have a quick look at the e-mail from your
12 colleague EGV that you quote here. It's Tab 14, one-four,
13 in your binder, and it is Exhibit C-53.

14 A. Okay. "Looks like a buy." That one?

15 Q. That's the conclusion, it looks like a buy;
16 right? I'd like to start--

17 A. No, I'm not saying that's a conclusion. I'm
18 saying that's what it says.

19 Q. I would like to start from the bottom of the
20 e-mail, and the bottom e-mail from Mr. E to a number of
21 people at Mason you included dated April 12th.

22 Do you see that?

23 A. Yes.

24 Q. And he explains: "I think we should discuss soon
25 and move fast. Why I like it." And then the second

1 bullet point is the one you quote in your Witness
2 Statement; right?

3 A. I don't know.

4 Q. That's the sum of its part, more on the sum of
5 its parts point.

6 A. Okay.

7 Q. Less than the sum of its parts.

8 Now, the next bullet point, and it's on the other
9 side of the page, Mr. E explains: "Fear of C&T merging
10 with Cheil at unfavorable ratio. I think a merger with
11 Cheil would in fact unlock the value because it cannot be
12 done at the value below that of the listed securities at a
13 minimum."

14 Do you see that?

15 A. I see that.

16 Q. And then EVG, Mr. E goes on to explain why Cheil
17 would have to pay more than the current and favorable
18 ratio.

19 Do you see that?

20 A. That's his opinion, yes.

21 Q. And he explains in particular that there is a
22 very large foreign ownership, and that the foreign
23 ownership would oppose any unfavorable deal.

24 Do you see that?

25 A. I see that he wrote that, yes.

1 Q. Right.

2 Now, I want you to read up the e-mail chain.
3 There was then a response from your partner, Mr. Martino,
4 to Mr. E, and then Mr. E tried to clarify his thinking in
5 this e-mail. And I'm looking at the top e-mail from
6 Mr. EGV sent at 23--or starting with, one, "MKT assumes."
7 Right?

8 A. Okay.

9 Q. "MKT assumes"--MKT would stand for market?

10 A. Market, yes.

11 Q. --"the risk of merger with Cheil is in the
12 short-term and that is one of the reasons C&T trades low."

13 Do you see that?

14 A. Yes.

15 Q. And then he explains: "My point is that Cheil
16 will have to offer significantly more than current MKT
17 cap"--market cap--"given that C&T trades well below the
18 value of its stakes in the listed company."

19 Do you see that?

20 A. I do.

21 Q. When Mr. EGV speaks of "Cheil will have to offer
22 significantly more," that's the acquisition offer that
23 they would have to make to purchase these Shares in--to
24 purchase C&T? Is that the way you understood it at the
25 time?

1 A. I mean, I don't remember reading this at the
2 time, so it's hard for me to say.

3 Q. Well, I mean, if you look at the first sentence
4 of this e-mail, sir, on top of it, that's from you, and it
5 says, "Looks like a buy." So you probably read that
6 e-mail before telling your colleagues that you intended to
7 buy the SC&T shares; fair?

8 A. It's possible that I read the e-mail prior to
9 writing that. Sometimes I reply to e-mails on my own
10 person rather than in response to content.

11 Q. On trust.

12 A. No. It's--sometimes I get 500 e-mails a day, and
13 sometimes I see an e-mail from a person, and I just
14 respond without reading it with something I want to say on
15 my own.

16 So I can't tell you what that's responding to.

17 Q. Well, the Korean government is facing a claim for
18 \$200 million in this arbitration essentially based on a
19 trade that was approved in this e-mail, sir, so--but--

20 A. There was--no, the trade was not approved in the
21 e-mail.

22 Q. But coming back to the--

23 A. I disagree with that strongly.

24 Q. Coming back to the paragraph in Mr. E--

25 A. And importantly, it's \$200 million that we lost,

1 so it's not just someone is handing us \$200 million that
2 were not deserved, in our opinion.

3 Q. Mr. EGV--it's really tedious to have to use the
4 initials, but--

5 A. That's okay.

6 Q. --but I apologize for that.

7 Reading on the paragraph we were looking at, it
8 says: "If timing is uncertain, it could also happen that
9 Cheil doesn't merge with C&T, in which case C&T would
10 trade up."

11 Do you see that?

12 A. I see that, and what I would say is that Mr. EGV
13 is an analyst. He has no decision-making authority. His
14 opinions are his own. They're advisory as to Mike and I's
15 decision-making capability.

16 It's an e-mail about what he thinks. I grant you
17 that.

18 Q. And you do have--you're the one with
19 decision-making authority; right?

20 A. Yes.

21 Q. Right.

22 And you do respond to this e-mail saying, "Looks
23 like a buy. Ask Mike." Mike is Mr. Martino?

24 A. I write, "Looks like a buy. Ask Mike." I'm not
25 sure that it was a response to this e-mail. It could have

1 been a response to the entire situation in my head, which
2 is more important at all times than one e-mail in probably
3 500 e-mails I've read about this from my analysts.

4 So I can't tell you--in fact, I'm telling you
5 it's not true that my decision-making was driven by this
6 e-mail. My decision-making was driven by all the research
7 that was done starting over a year prior to this e-mail.

8 Q. Isn't it true, sir--

9 A. If it were as simple as you're implying, that
10 would be great.

11 Q. Isn't it true, sir, that you took a view on the
12 likely outcome of the merger vote? You did.

13 A. I thought that they would have difficulty getting
14 the vote because I felt that the National Pension System
15 would act like they cared about the money that they
16 managed. I didn't anticipate external factors, like
17 fraud.

18 Q. You gambled that the merger would be blocked and
19 that Cheil would have--

20 A. Gambled, no. Gambled, no. If I want to gamble,
21 I can go to Atlantic City.

22 Q. And I apologize for this. I shouldn't have used
23 a loaded term.

24 You anticipated that the merger would be blocked
25 and that Cheil would have to increase its offer; right?

1 A. I thought it would be difficult for them to get
2 the vote.

3 Q. And to get the vote, they would have to increase
4 their offer; right?

5 A. No. They could have just lost the vote and not
6 increased their offer.

7 Q. But one way or the other--

8 A. But I felt that the price of all the securities
9 in the Samsung structure would go up if they lost the
10 vote, yes.

11 Q. And that's exactly what Mr. EVG is saying in his
12 e-mail; right? He's saying, well, either we're going to
13 have increase our votes or if they don't win on the votes,
14 then the merger doesn't happen, and then all the--

15 A. I don't--you know, what he thinks is advisory on
16 my opinion. I don't remember this e-mail, but I remember
17 what I was thinking which I just relayed to you.

18 Q. Now, there was a number of U.S. hedge fund that
19 was invested in SC&T at the time and that opposed the
20 merger; right?

21 A. There were many.

22 Q. Elliott Management was at a--had a fairly large
23 position in SC&T at the time; right?

24 A. I don't recall what their position was. You
25 would know better than I.

1 Q. But they did have a position; right?

2 A. I believe they had a position in the Samsung
3 structure. I don't know what entity it was in. I don't
4 remember what entity it was in.

5 Q. We can look at the representations that have been
6 made by your lawyers, then, on this topic.

7 A. Okay.

8 Q. You should have a copy under Tab 3. You should
9 have a copy of the Notice of Arbitration.

10 A. Yes.

11 Q. And I'll direct your attention to Paragraph 30.

12 A. Yes, I see that. I see that.

13 Q. And you see here that it is stated that:
14 "Elliott first announced its opposition to the Transaction
15 the next day, on June 4th, 2015, and spent the next
16 several weeks campaigning against the merger." Right?

17 Do you see that?

18 A. I see it.

19 Q. Is it purely coincidental, sir, that Mason
20 started rebuilding its position in SC&T on the day Elliott
21 Management announced its opposition to the merger?

22 A. I can't tell you.

23 Q. Do you recall that you started buying SC&T shares
24 on the 4th of June?

25 A. I don't.

1 (Comment off microphone.)

2 MR. NYER: Thank you very much, sir.

3 PRESIDENT SACHS: That's it?

4 MR. NYER: That's it.

5 THE WITNESS: I'm surprised you didn't take much
6 more time.

7 PRESIDENT SACHS: Would there be--

8 MR. WATSULA: No further questions from
9 Claimants.

10 ARBITRATOR GLOSTER: Can I ask a question?

11 PRESIDENT SACHS: Yes, certainly.

12 QUESTIONS FROM THE TRIBUNAL

13 ARBITRATOR GLOSTER: I have one question for you,
14 please, maybe two.

15 You said a number of times that you'd be
16 optimizing your price when you were dipping in and out.

17 Can you just explain to me what you mean by that?

18 THE WITNESS: Sure.

19 ARBITRATOR GLOSTER: What that strategy was?

20 THE WITNESS: It's--effectively, the markets have
21 become so electronicized that we used to have a system
22 where all the buyers and sellers would be in one place
23 called the "specialist system" here or the "floor trading"
24 system in London or the "DAX floor," and all the buyers
25 and sellers used to be in one place. And you would think

1 that was a very efficient market, which it is. If you
2 want to buy a car, you go to the place where all the
3 buyers and sellers are, the most centralized market,
4 you're going to get the best price.

5 One of the things that have happened when
6 electronicization took over the markets is that you have
7 many markets all over the place, so you have dark pools
8 where you buy and sell. A very small amount of the
9 trading is actually done on the floor of the Stock
10 Exchange. If you go down there, there's almost no one
11 there. Different pools of capital everywhere. So it's
12 very difficult to find people to, if you're a buyer, to
13 sell to you, or if you're seller, to buy from you.

14 So what often happens is you employ a computer
15 program to, it sounds strange, but fight against the
16 people that are trying to game the system against you in
17 executing. And I think it's a horrible fact for the
18 financial markets globally, and is really destabilizing
19 that you have to optimize your trading by looking around
20 all these different entities rather than--you know, it's
21 like buying a used car in the town where there's only one
22 used car for sale and you need one. It requires moving
23 around the system and buying and selling to get the best
24 price over time.

25 ARBITRATOR GLOSTER: So, what were you doing in

1 terms of optimizing your price when you bought and sold
2 these tranches we've been looking at? What were you
3 optimizing--were you trying to increase the price, find
4 the buyer, affect the price and buy more cheaply?

5 THE WITNESS: I don't know specifically because
6 I'm not involved in the execution. I give the order: I
7 want to own this amount over time. The traders make the
8 decision.

9 It could be that they saw a big seller was out
10 there, a broker called and said, "We have a large seller
11 and they want to get out of the way and buy back at a
12 lower price."

13 It could be that there was a tumult in the
14 markets for some reason that they wanted to get out of the
15 way. It's--you know, or the research process could have
16 been, as I described, getting in the water, getting out of
17 the water, making our decisions. It's not a (witness
18 snaps fingers) we want to own this right now.

19 It's like baking a cake. I mean, it's a process
20 on how much you want to own, what's going on in the
21 markets. Every situation is different, really.

22 ARBITRATOR GLOSTER: Yes, I see. Thank you.

23 The other point I wanted to ask you about was you
24 said a moment ago that you denied that you'd made the
25 decision by e-mail. I think it was at 15:22:22 on the

1 Transcript. I just wondered where you did make that
2 decision.

3 THE WITNESS: Is that the one that says "Looks
4 like a buy"?

5 ARBITRATOR GLOSTER: Yeah.

6 You say: "The trade was not approved in the
7 e-mail. I disagree with that strongly."

8 THE WITNESS: Yeah. Well, for a couple--

9 ARBITRATOR GLOSTER: I just wondered where you
10 would have made the decision, if not in the e-mail.

11 THE WITNESS: Okay. That's a good question.

12 "Looks like a buy," meaning I'm thinking about
13 it. So I'm not saying "buy it." I'm not sending an order
14 to the traders or picking up the phone to the traders and
15 saying "Execute." It's ruminating. "Looks like a buy" is
16 like, "okay, ask Mike," meaning ask my partner who has--we
17 have joint decision-making authority with, looks like Mike
18 talked to him, see what he thinks, maybe we will talk
19 about it tomorrow.

20 It's not an order. It's a, yeah, it looks
21 interesting.

22 ARBITRATOR GLOSTER: I see.

23 But before you made that sort of decision,
24 whether to buy or sell, what would you and Mike--

25 THE WITNESS: Typically we would confer, yes. I

1 don't know in this instance whether we did, but typically
2 we would confer, and a direct order to buy and sell would
3 be given to the traders by one of us. That would be the
4 decision to buy it, so...

5 ARBITRATOR GLOSTER: Thank you.

6 ARBITRATOR MAYER: One question which is, of
7 course, linked to the questions you've been asked by
8 Respondents for a long time, but I will start at
9 Paragraph 19 of your First Witness Statement so that maybe
10 you can explain better what was exactly the reason why you
11 thought there was an opportunity.

12 So: "In May 2015, when SC&T and Cheil announced
13 plans to merge (at a ratio that was plainly and obviously
14 unfavorable to SC&T Shareholders) we saw the opportunity
15 to purchase shares in SC&T."

16 So if you just take the sentence as it is
17 written--

18 THE WITNESS: The first one?

19 ARBITRATOR MAYER: That sentence, that only one,
20 the first one.

21 THE WITNESS: Okay.

22 ARBITRATOR MAYER: It's even contradictory--

23 THE WITNESS: The "unfavorable" part? Is that
24 what you want explained, "At a ratio that was plainly"--

25 ARBITRATOR MAYER: Yes.

1 THE WITNESS: --"and obviously unfavorable"?

2 ARBITRATOR MAYER: Yes.

3 THE WITNESS: Why that is? Yeah.

4 ARBITRATOR MAYER: Plainly and obviously
5 unfavorable, and we know it was criticized at the time--

6 THE WITNESS: Yeah. Yeah. Because--

7 ARBITRATOR MAYER: Wait, no.

8 My question exactly is: Why was it a good
9 opportunity? Where did you see the possibility of later
10 making a profit?

11 THE WITNESS: Okay. Well, from a value
12 perspective, if you looked at the assets of C&T, meaning
13 it was largely just Samsung Shares, and you looked at--say
14 the value of C&T was a hundred. 80 of it was Samsung
15 Shares, they were publicly traded, easy to value, another
16 20 was things that we valued, maybe stakes in other
17 entities in the Samsung Group or private entities or cash,
18 and we come up with an NAV, Net Asset Value, of a hundred
19 of what it's worth.

20 My recollection is that they were bidding
21 substantially less than that easy math would tell you.
22 Again, the bulk of that easy math is a publicly traded
23 security. It's not hard to figure out what it's worth.

24 And the reason I thought it was a good
25 opportunity is because I couldn't imagine a fiduciary for

1 pension assets would vote for that.

2 ARBITRATOR MAYER: No, that I understand.

3 But why would it be a good opportunity because
4 the ratio was unfavorable?

5 THE WITNESS: Because the Samsung Group was
6 embarked on a journey to simplify itself, and as continues
7 today. And, you know, there's been ebbs and flows, but
8 it's grunted along. And this--it's my memory that this
9 particular merger was necessary--a necessary piece of that
10 restructuring and that in our dialogues with them, it's
11 one of the many things that they talked about. And, in
12 fact, there are some analyst reports in here to that--to
13 that end that talk about the Cheil entity being one that
14 needs to be restructured.

15 And we thought that, like most attempts to
16 restructure, your first offer sometimes is not your best,
17 and that this offer was so demonstrably bad or inferior to
18 the Net Asset Value that the shareholders would say "No."
19 And that's not what happened, so we were wrong.

20 ARBITRATOR GLOSTER: Just following up from that
21 because I'm not sure that you've answered Professor
22 Mayer's question: What did you think was going to be the
23 outcome of an offer, a merger offer, as a poor ratio? You
24 thought, you just told us, that shareholders were going to
25 vote against it. What did you think was going to happen

1 next?

2 THE WITNESS: Well, I didn't know, but there are
3 a couple of possibilities. One was I thought in either
4 scenario the price would trade up because it would have
5 been a very strong statement by the National Pension
6 System, which really had the cusp vote, that things have
7 changed in Korea, which would have been affirming of our
8 original thesis. So I thought the entire shareholder
9 structure would lift. I thought the entire Korean market
10 would lift because it would be a clearly non-disinterested
11 party, the National Pension System, and the local
12 investors, for that matter, who usually would just vote
13 for something that was against a shareholder's interest
14 for some other reason, it would be against--it would be
15 them picking themselves up and saying, "We're getting
16 involved in the norms of the rest of the world as far as
17 how we treat shareholders."

18 And that if that happened, regardless of whether
19 they increased the offer price or not, it would trade more
20 in line with what clearly was the value in the structure
21 of a hundred, in my analysis. So it would trade up from
22 65 to a hundred just because the rule of law and
23 shareholder rights had been stood up for by the
24 shareholders themselves.

25 PRESIDENT SACHS: And to the other scenario?

1 THE WITNESS: That it was voted through?

2 I think it depended on how. If it was voted
3 through in a way--look, when something is worth a hundred,
4 clearly on paper it's not illiquid assets. They're liquid
5 assets and someone is bidding 65 for them. And if the
6 shareholders vote for it, I think there's something wrong.
7 So I thought it highly unlikely that that would happen. I
8 wouldn't have risked.

9 But in that event, I mean, it's hypothetical.
10 They could have come back--yeah, you were going to lose
11 money because the deal was going to go through at a price
12 that was much less than what they're offering.

13 ARBITRATOR GLOSTER: I've got one more question.

14 And did you consider what the chances were of
15 Cheil raising its offer if its original offer were
16 refused? I mean, was that in your equation then?

17 I'm just not quite understanding.

18 THE WITNESS: It was a--my thinking was firmly of
19 the view that if the deal was voted down, either the
20 security would trade up on its own because shareholder
21 rights have been affirmed, or they would come back with a
22 higher offer.

23 In either case, I thought the lynchpin for value
24 creation or destruction was the shareholder vote.

25 ARBITRATOR GLOSTER: Thank you.

1 PRESIDENT SACHS: Thank you very much. You're
2 now released as a witness.

3 THE WITNESS: Thank you.

4 PRESIDENT SACHS: And we will have a 15-minute
5 break.

6 (Witness steps down.)

7 PRESIDENT SACHS: Let's say we resume at 4:00 as
8 scheduled.

9 (Brief recess.)

10 DEREK SATZINGER, CLAIMANTS' WITNESS, CALLED

11 PRESIDENT SACHS: Mr. Satzinger, good afternoon.

12 THE WITNESS: Good afternoon.

13 PRESIDENT SACHS: In front of you is a
14 Declaration that we would ask you to read aloud.

15 THE WITNESS: I solemnly declare upon my honor
16 and conscience that I will speak the truth, the whole
17 truth, and nothing but the truth.

18 PRESIDENT SACHS: Thank you, Mr. Satzinger.

19 You submitted two Witness Statements in these
20 proceedings, the first one dated April 18, the second
21 one September 5, 2019.

22 Is there anything that you would like at this
23 point of time to correct?

24 THE WITNESS: No.

25 PRESIDENT SACHS: In other statements?

1 THE WITNESS: No.

2 PRESIDENT SACHS: Thank you.

3 There will be a short direct examination, so
4 please proceed.

5 DIRECT EXAMINATION

6 BY MR. WATSULA:

7 Q. Good afternoon, Mr. Satzinger. Could you state
8 your name for the record, please.

9 A. Derek Satzinger.

10 Q. And you are the CFO of Mason Capital Management
11 LLC; correct?

12 A. Correct.

13 Q. And could you take a minute to explain your
14 education background to the Tribunal?

15 A. Yeah. I went to Hofstra University on Long
16 Island. I graduated in 2000 with a Bachelor's in
17 accounting.

18 Q. And when did you become the CFO at Mason?

19 A. The CFO in January of 2013.

20 Q. Okay. So, you had some jobs in between
21 graduating from Hofstra and joining Mason?

22 A. Yeah. I was at a small accounting firm on Long
23 Island for a year or so, and then I moved over to a large
24 accounting firm in New York City, BDO Seidman, and I was
25 there until 2006, when I joined Mason.

1 Q. And what was your first role at Mason?

2 A. Controller.

3 Q. And you were a controller at Mason up until the
4 time when you became CFO?

5 A. Correct.

6 Q. What are your duties and responsibilities as CFO?

7 A. As CFO, I'm responsible for a staff of three fund
8 accountants and a controller. Their responsibilities are
9 daily position and cash reconciliations. Essentially,
10 everything we do rolls out to reporting to the Portfolio
11 Managers, daily positions and P&Ls, and the reports they
12 need to run the Fund.

13 Q. And you manage those activities?

14 A. I manage those activities, yes.

15 Q. Is it your understanding that this arbitration,
16 the reason why we're here today, concerns shares of two
17 Samsung entities that Mason purchased in 2014 and 2015?

18 A. Yes.

19 Q. And you were the CFO of Mason during that time;
20 is that right?

21 A. Yes.

22 MR. WATSULA: No further questions at this time.

23 PRESIDENT SACHS: Okay. Thank you.

24 We will then proceed with cross-examination,
25 Mr. Satzinger.

1 THE WITNESS: Sure.

2 PRESIDENT SACHS: Mr. Nyer, you have the floor.

3 CROSS-EXAMINATION

4 BY MR. NYER:

5 Q. Good afternoon, Mr. Satzinger.

6 A. Good afternoon.

7 Q. I'm Damien Nyer, an American here in French, and
8 I'll be asking you a few questions this afternoon.

9 A. Fine.

10 Q. You should have in front of you a binder with a
11 few documents that we'll be looking at.

12 You are the CFO--I want to get the entities
13 right. You're the CFO of Mason Capital Management LLC;
14 right?

15 A. I would be the CFO of any Mason entity.

16 Q. But the one you list in your Witness Statement is
17 Mason Capital Management--

18 A. Mason Capital Management is the entity--that
19 employs the employees, so...

20 Q. LLG Investment Manager?

21 A. The Investment Manager.

22 Q. And the Investment Manager employs all the
23 employees in the group?

24 A. Yes.

25 Q. And I'm going to show you a paragraph from

1 Mr. Garschina's statement. It's not in the binder, but
2 just to clear up. Mr. Garschina didn't have the technical
3 knowledge on those issues. It's Paragraph 4 of the Second
4 Statement of Mr. Garschina, and he lists a core team of
5 four people that worked on the Samsung trade. If you
6 could look at this, please.

7 A. Sure.

8 Q. And we have some privacy concerns, so we won't be
9 able to turn the name those people, and we may use
10 initials?

11 A. Okay.

12 Q. But are you--did you know all those four people
13 listed?

14 A. I do.

15 Q. And they're employed by the Investment Manager?

16 A. At the time they were, yes.

17 Q. And they were paid by the Investment Manager?

18 A. Yes.

19 Q. Thank you. In your role as CFO of Mason
20 generally, you have access to the books and records of the
21 group?

22 A. I'm responsible for the books and records of the
23 Mason trading entities. The Chief Operating Officer, John
24 Grizzetti, is responsible for the books and records of the
25 management company and the General Partner.

1 Q. And the trading entities would include what has
2 been referred to as the Cayman Fund, the offshore fund?

3 A. Yes.

4 Q. And you're responsible for the books and records
5 of that entity?

6 A. Yes, among others, yes.

7 Q. Are you familiar with the Limited Partnership
8 Agreement of the Cayman Fund?

9 A. Not--I don't have it memorized, but I'm familiar
10 with its existence, yeah.

11 Q. You do refer to it in your Witness Statement.

12 A. Yeah. I'm generally familiar with it.

13 Q. Could you maybe turn to Tab 5 in your binder
14 where you'll find a copy of the Limited Partnership
15 Agreement. Exhibit C-30. And if you look at the cover
16 page of this document, it is entitled "The Second Amended
17 and Restated Limited Partnership Agreement" of Mason
18 Capital Master Fund, and the date is January 1st 2013.

19 Do you see that?

20 A. Yes.

21 Q. Now, I understand that the Cayman Fund had been
22 established in 2009-2010; right?

23 A. Cayman Master Fund was established in 2008, yeah.

24 Q. Do you have a recollection of why the Limited
25 Partnership Agreement was amended and restated in 2013?

1 A. I don't.

2 Q. If you please turn to Article 9.03 of the
3 Partnership Agreement, and it would be on Page 20, do you
4 see a provision entitled "Retention and Inspection"?

5 Do you see that?

6 A. Yes.

7 Q. And reading this provision, it states: "At all
8 times during the continuance of the Partnership, the
9 General Partner shall keep or cause to be kept full and
10 true books of accounts of the business and investments of
11 the Partnership, in which shall be entered fully and
12 accurately each transaction of the Partnership."

13 Do you see that?

14 A. Yes.

15 Q. And those are the books and records that you are
16 responsible for maintaining?

17 A. Yeah, yeah.

18 Q. Now, it is also stated that all such books of
19 accounts shall at all times be maintained at an Office of
20 the Partnership and shall be open for inspection by the
21 Limited Partner.

22 Do you see that?

23 A. Yes.

24 Q. And those books are maintained in the New York
25 Office of the Masons?

1 A. Yes. Our official books and records lie with our
2 administrator SS&C, which is in New York, but essentially
3 parallel books and records are kept in our New York office
4 as well.

5 Q. In what format are those books and records
6 maintained?

7 A. If it's a trading system, they're in Advent
8 Geneva, which is the system we use for trading. We have
9 live Excel files. If it's investor information, papers
10 and folders in locked file cabinets. A lot of that
11 stuff's been moved to electronic.

12 Q. How often are those books and records updated?

13 A. I'm sorry?

14 Q. How often are they updated?

15 A. Oh, every day.

16 Q. Every day. And does the public have access to
17 those books and records?

18 A. No.

19 Q. But you have access to them; right?

20 A. Yes.

21 Q. If you could turn to Article 4.03 in the
22 Partnership Agreement, and you should see a provision
23 entitled "Capital Account."

24 Do you see that?

25 A. Yes.

1 Q. And reading the beginning of this provision, it
2 states: "A Capital Account shall be established for each
3 Partner on the books of the Partnership, for the General
4 Partner and for each series or subseries of shares issued
5 by a Limited Partner."

6 Do you see that?

7 A. Yes.

8 Q. And to your knowledge, did the General Partner
9 comply with its obligation to establish the Capital
10 Account for each Partners in the books and records of the
11 Partnership?

12 A. If you're asking if all the capital activity has
13 been reflected in the books and records of the
14 Partnership, yes.

15 Q. And there is one account for each Partner, one
16 for the General Partner and one for the Limited Partners?
17 How does that work?

18 A. In the Master Fund, yes, there is a General
19 Partner and a Limited Partner.

20 Q. Account?

21 A. Yeah.

22 Q. And how often are those Capital Accounts records
23 updated?

24 A. Our capital activity is effective the first day
25 of each month, so officially updated monthly.

1 Q. Monthly?

2 A. Yes.

3 Q. Thank you.

4 So, if you were to go back to the office now, you
5 could potentially consult the Capital Account records for
6 July 2015?

7 A. Sure, yeah.

8 Q. Now, the Capital Account of each Partner reflects
9 both the initial capital contribution of the Partner and
10 their allocated share of profits and losses?

11 A. If you're looking at that Partner from their
12 inception, yes. We look at monthly snapshots, so the
13 month would be the ending prior month, opening one month
14 is the ending of the prior.

15 Q. Right.

16 A. But if you wanted to look from the inception of
17 the Investor, yes, it would be opening capital.

18 Q. And you would be able to determine the initial
19 capital contribution of each Partner; right?

20 A. Sure.

21 Q. If you please could turn to Paragraph 11 of your
22 Second Witness Statement.

23 A. Yes.

24 Q. And you state here that you've performed some
25 calculations to provide some further background on Mason's

1 Capital Master Fund--that's the Cayman Fund's--performance
2 prior to May 2014; right?

3 Do you see that?

4 A. Yes.

5 Q. And you explained that you prepared these
6 calculations by extracting the relevant data from the
7 capital registers which are prepared by an external
8 administrator on a monthly basis?

9 Do you see that?

10 A. Yes.

11 Q. And so, those are the Registers, the accounts
12 which we've just been speaking about?

13 A. Yeah.

14 Q. Could you have extracted the data from your
15 system and provided this data with your Witness Statement?

16 A. The details underlying this statement, is what
17 you're saying?

18 Q. No, the monthly statements. Could you have
19 printed out the monthly capital register of statements
20 and--

21 A. Technically, yes, I could have, yeah.

22 Q. Right.

23 And they could have been appended to your Witness
24 Statements or provided in some sort--sorry, that's not
25 even a question.

1 Now, I'd like to speak about the calculations
2 that you've performed with the data from the capital
3 registers.

4 You said that you performed some calculations
5 regarding the performance of the Cayman Fund prior to
6 May 2014.

7 Do you see that?

8 A. Yes.

9 Q. Now, is it fair that you could have performed the
10 exact same calculation for any month for which the Cayman
11 Fund was operating?

12 A. Yeah. Those are monthly schedules, yes.

13 Q. And you could have performed this calculation as
14 of July 2015; right?

15 A. Sure.

16 Q. So, let's look at your calculation. I think
17 it's--and first Paragraph 13 of your Second Witness
18 Statement. You explain here that: "By the end of 2010,
19 the General Partner had accumulated approximately USD
20 3.9 billion in net contributions from the Limited Partner
21 in the Cayman Fund."

22 Do you see that?

23 A. Yes.

24 Q. So, those are the net capital contributions from
25 the Limited Partner, is that cash received from the

1 General Partner?

2 A. That's cash received from the Limited Partner,
3 which would be Mason Capital Ltd.

4 Q. Thank you.

5 And that cash or those contributions would be
6 reflected in the capital account of the Limited Partner;
7 right?

8 A. Yes.

9 Well--yes.

10 Q. Now, the money--this cash is essentially money
11 that the Limited Partner sourced from third-party
12 investors; right? As far as you understand.

13 A. Yes.

14 Q. And you say that you provide the net
15 contribution, is that because there were withdrawals
16 during the period that you looked at?

17 A. There would be--yeah, there would be
18 contributions and withdrawals probably each month.

19 Q. Some Partners would take money out of the--

20 A. Sure.

21 Q. Reading on, you then explain that, between the
22 end of 2010 and the end of May 2014, the General Partner
23 received a further net \$1.57 billion from the Limited
24 Partner.

25 Do you see that?

1 A. Yes.

2 Q. And again, that's net cash received from the
3 Limited Partner; right?

4 A. Yes.

5 Q. It's not cash received from the General Partner?

6 A. Limited Partner.

7 Q. Now, is there a reason that you've presented the
8 data in two tranches by the end of 2010 and then from the
9 end of 2010 to May 2014?

10 A. I was asked to.

11 Q. You were asked to--

12 A. I was asked to, yeah.

13 Q. So, that has nothing to do with potential capital
14 raises that the Cayman Fund conducted during that period;
15 right?

16 A. No.

17 Q. Now, you calculate the total amounts of net
18 contribution from the Limited Partner is \$5.56 billion;
19 right? That's what you have in the parenthetical.

20 Do you see that?

21 A. Yes.

22 Q. And it's a straight addition of the two amounts
23 that you have?

24 A. Yeah.

25 Q. Even before we go there, do you have an

1 understanding why you were asked to--

2 MR. WATSULA: So, just to be clear, when you're
3 talking about instructions you received from counsel, do
4 not answer those questions.

5 THE WITNESS: Okay.

6 BY MR. NYER:

7 Q. To the extent that the instruction did not come
8 from counsel, do you understand the reason for this
9 presentation?

10 A. I don't.

11 Q. Now, if you go to the next paragraph in your
12 Witness Statement, Paragraph 14 of your Second Witness
13 Statement.

14 A. Yes.

15 Q. You state here that: "As of the end of May 2014,
16 the Cayman Fund's assets had a value of approximately
17 \$6.52 billion."

18 Do you see that?

19 A. Yes.

20 Q. Now, what you're saying is that the assets held
21 by the fund were worth about \$960 million more than the
22 cash that had been put in by the Limited Partners; right?

23 A. Yeah, yeah.

24 Q. Now, was \$960 million, they're not cash that the
25 General Partner put in the Partnership; right?

1 A. No, that would be appreciated capital.

2 Q. The \$960 million is the appreciation of the?

3 A. The appreciation from the General Partners
4 investing of that capital.

5 Q. Sorry, I just want the Transcript to be clear,
6 the \$960 million represents the capital appreciation of
7 the cash invested by the Limited Partners?

8 A. Yeah. I'm saying the investment discretion of
9 the General Partner caused the increase in assets.

10 Q. Understood. As well as potentially the markets
11 fluctuations during that period?

12 A. Sure.

13 Q. Now, if you could turn to Tab 4 in your binder,
14 and you will find a copy of the Rejoinder filed by Mason
15 in this arbitration. And I will direct your attention to
16 Paragraph 58, Page 19 of the Rejoinder.

17 And you will see here a paragraph that should
18 reference in Footnote 69 your Second Witness Statement
19 Paragraph 13 and 14, those are the paragraphs we just
20 looked at; right?

21 A. Yes.

22 Q. Right.

23 And it is explained here, that consistent with
24 what you said in your Witness Statement, the initial and
25 subsequent contribution of the Limited Partner totaled

1 approximately \$5.56 billion.

2 Do you see that?

3 A. Yes.

4 Q. Now, then it is stated that the General Partner's
5 historic contribution of its investment decision-making
6 management and expertise totaled approximately
7 \$.96 billion.

8 Do you see that?

9 A. Yes.

10 Q. And those \$960 million, that's what you told us
11 was the capital appreciation of the assets held by the
12 fund over the period?

13 A. Yes.

14 Q. They're not cash contribution by the General
15 Partner; right?

16 A. No.

17 Q. Okay. You do not state anywhere in your two
18 statements, Mr. Satzinger, the amount of net cash
19 contributed by the General Partner to the Partnership.
20 You don't?

21 A. No.

22 Q. Now, that amount would presumably be reflected in
23 the General Partner's Capital Account; right?

24 A. It would, yes.

25 Q. And were you asked to determine that amount?

1 A. No.

2 Q. Did you calculate the amount of net cash--

3 MR. WATSULA: Same objection as well. If your
4 answer requires to you discuss conversations you had with
5 counsel, I'm instructing you not to answer.

6 THE WITNESS: Got it.

7 BY MR. NYER:

8 Q. Did you calculate the net cash contributed by the
9 General Partner up to May 2014?

10 A. I think I was asked to do--I'm sorry, no, I can't
11 answer.

12 Q. Did you calculate, or did you not calculate?

13 A. I didn't.

14 Q. You didn't?

15 A. No.

16 Q. Was any cash contributed by the General Partner
17 up to May 2014?

18 A. The General Partner's--I will say "no" to that,
19 but the General Partner had Incentive Allocations that
20 were not taken in full which carried over and were carried
21 forward into the capital balance. It wasn't necessarily a
22 cash--

23 Q. Yes, understood. That's helpful.

24 No cash contributed by the General Partner? The
25 "no" that you said, there was no cash contributed by the

1 General Partner? And we will come back to the Incentive
2 Allocation. I promise.

3 A. I'm just saying I'm not sure I agree with that.
4 It didn't redeem cash that was due to them. If you want
5 to look at it two different ways. It's not they didn't
6 wire in money but they also didn't wire out money they
7 were entitled to wire out. These were relatively small
8 balances, but just to be clear.

9 PRESIDENT SACHS: Your answer was not clear to
10 the Tribunal, so maybe we restart with your question and
11 then you try to formulate your answer in a clearer way.

12 THE WITNESS: Okay.

13 COURT REPORTER: And slower.

14 BY MR. NYER:

15 Q. And that goes for the two of us. David tends to
16 make this comment quite often.

17 Was any cash contributed by the General Partner
18 to its Capital Account up to May 2014?

19 A. No.

20 Q. Now we can speak about the Incentive Allocation.

21 A. Sorry.

22 Q. And I would be looking at the next paragraph.

23 PRESIDENT SACHS: May I interject the question?

24 So, on the Capital Account of the General Partner
25 in 2014 when you say there was this accumulated incentive

1 amount, was that reflected on the Capital Account of the
2 General Partner? Where would that be booked?

3 THE WITNESS: Yes, that would be in the Capital
4 Account of the General Partner, yes.

5 PRESIDENT SACHS: And that was all that was on
6 the Capital Account, that amount that you referred to?

7 THE WITNESS: Yeah.

8 PRESIDENT SACHS: At that point of time?

9 THE WITNESS: My remembrance, yes.

10 PRESIDENT SACHS: Okay. Thank you.

11 BY MR. NYER:

12 Q. I just want to follow up on something you said
13 earlier. You said that some of the accumulated allocation
14 or the Incentive Allocation had not been taken out? You
15 mentioned that, do you remember?

16 A. Yes.

17 Q. So, did the General Partner take some of its
18 Incentive Allocation out of the Capital Account?

19 A. It took the majority of it.

20 Q. The majority of it?

21 A. Yes.

22 Q. And do you have--when you speak about the
23 "majority," is it 95 percent or is it 60 percent of it?
24 What is it?

25 A. Closer to 95, yes.

1 Q. When did it take it out?

2 A. Anyway, if we're talking specifically about 2014,
3 fees earned from 2013 would have been--substantially
4 withdrawn in January of 2014.

5 Q. So, every year the General Partner would take the
6 Incentive Allocation out of the Fund?

7 A. To the extent there is an Incentive Allocation,
8 yes.

9 Q. And that makes sense because that's how the
10 General Partner and its founders are making money; right?
11 That's through the Incentive Allocation?

12 A. Yes.

13 Q. Thank you.

14 Now, when you say at Paragraph 16, just to
15 clarify then, that the General Partner had accumulated
16 Incentive Allocation of approximately \$350 million, those
17 are the Incentive Allocations that the General Partner
18 received and they took out some part of it, majority of it
19 you told me?

20 A. Yes.

21 Q. Okay. Now, if I wanted to determine how much of
22 those Incentive Allocations was left in the Capital
23 Account as of May 2014, I could look at those Capital
24 Account registers that we spoke about earlier?

25 A. Yes.

1 Q. Okay. I would like to touch on briefly the topic
2 of Mason's registration process in Korea.

3 A. Sure.

4 Q. As a foreign entity that wishes to purchase
5 stocks on the Korean Stock Market, Mason has to register
6 with the Korean authorities. Do you understand that?

7 A. Yes.

8 Q. And as a matter of fact, it's a part of your
9 responsibility as a CFO to deal with these type of
10 requirements for investment registration?

11 A. My responsibility is to get the accounts opened
12 one way or another, yes.

13 Q. And the registration requirements--did the
14 requirements for investment outside of the U.S., sorry,
15 that's what you say in your Witness Statement. That's
16 part of your responsibility.

17 A. Sure.

18 Q. So, let's look at Tab 6 in your binder, and that
19 would be we're looking at Exhibit C-65, and we're looking
20 at an e-mail chain, and for privacy purposes, I will only
21 use the first names of the participants.

22 A. Okay.

23 Q. Now, this is an e-mail from Nick to Charlie at
24 Goldman Sachs; right?

25 A. Yes.

1 Q. And Goldman is Mason's broker?

2 A. They're one of our broker, yes.

3 Q. And the e-mail is dated June 2014; right?

4 A. Yes.

5 Q. Now, this e-mail concerns the registration of the
6 Cayman Fund as an investor in Korea; right?

7 A. Yes, getting--acquiring the ID needed to trade in
8 Korea, yes.

9 Q. Now, if you turn--maybe keep a finger on this
10 e-mail and if you turn to Tab 7, you look at what has been
11 labeled Exhibit C-66, and it's entitled "Application for
12 Investment Registration Certificate."

13 Do you see that?

14 A. Yes.

15 Q. And that is the attachment to the e-mail under
16 Tab 6; right?

17 A. I'm not sure.

18 Q. Well, I think you do discuss those documents in
19 your Witness Statement, sir.

20 A. I mean, this is the document we would have sent
21 to Goldman.

22 Q. Right.

23 A. Yes.

24 Q. So, Nick sent the e-mail to Goldman at your
25 direction; right?

1 A. Yes.

2 Q. He works for you. He's one of the four people?

3 A. Yes.

4 Q. Does he check the content of his e-mail to
5 Goldman with you before sending it?

6 A. No.

7 Q. I mean, would you expect him to be cautious and
8 diligent in compiling information in sending e-mails?

9 A. I would expect Goldman to be diligent, which they
10 usually are.

11 Q. Which they usually are?

12 A. Yes.

13 Q. Now, looking at the Application for Investment
14 Registration Certificate under Tab 7, you'll see if you
15 look at the third page, it's signed by John Grizzetti.

16 Do you see that?

17 A. Yes.

18 Q. And John Grizzetti is the COO of the Mason Group?

19 A. Yes.

20 Q. Do you expect John to have been cautious in their
21 preparing this form and signing it?

22 A. No. Nick would have prepared this form and John
23 would have signed it.

24 Q. Okay. You can look on Page 3, at the bottom of
25 Page 3, you have a note, and Note 1: "The information

1 above should be true and accurate."

2 Do you see that?

3 A. Yes.

4 Q. And then if you look at the last paragraph, in
5 the last sentence of the paragraph, it says: "I will be
6 held responsible for any consequences arising out of
7 incorrect and inaccurate or incomplete information."

8 Do you see that?

9 A. Yes.

10 Q. Do you, sitting here today, do you think Nick, in
11 preparing this document, for the signature of the COO of
12 the group would have been cautious and careful?

13 A. Yeah, yes, I do. To the best of his abilities he
14 would have.

15 Q. So, Nick sent that document to Goldman Sachs--you
16 mentioned that in your Witness Statement--and then there
17 was a response from Goldman Sachs, and I think it's--we
18 can look at it. It's Tab 8 in your binder, and we would
19 be looking at C-67.

20 Sorry, sorry. Before even we go there, coming
21 back to Tab 7 in the draft application for investment
22 registration. If you look at Item 4(c), so that would be
23 on the second page, "Background Information on Applicant."

24 Do you see that?

25 A. We're on Tab 6?

1 Q. Tab 7, sorry.

2 A. Tab 7. Oh, I'm sorry.

3 "Background Information," yes.

4 Q. Right.

5 Do you see Item 4(c), "The largest shareholder"?

6 A. Yes.

7 Q. And that would be the largest shareholder in the
8 Cayman Fund, as far as you understand?

9 A. I would have to go through the document, but...

10 Q. Fair enough.

11 And you will see under the table it lists
12 Shareholder's name, shareholding ratio, and nationality.

13 Do you see that?

14 A. Yes.

15 Q. And it's empty.

16 Do you see that?

17 A. Yes.

18 Q. Now, you also see under Item 4(d)(i), little "i"
19 one, that's the top item on Page 3, "Related parties to
20 the Applicant, please specify nationality," and Item I(1)
21 is management company, and it's listed Mason Management
22 LLC.

23 Do you see that?

24 A. Yes.

25 Q. And that's the General Partner in the--

1 A. That's the General Partner.

2 Q. And the nationality is not listed here; right?

3 A. Correct.

4 Q. Now, Nick sends that draft application to
5 Goldman, and we can--let's look at Goldman's response.
6 It's Tab 8.

7 A. Yes.

8 Q. Now, Charlie of Goldman here writes back to Nick
9 and says: "Please see below the review from the agent
10 bank. Thanks."

11 And if you look down, IRC application form--do
12 you understand that to be the Investment registration
13 certificate application that we just looked at?

14 A. Yeah.

15 Q. And you look at Item 4(a) here from the--Goldman
16 states, "4(a) and (b) and (c). Please state the requested
17 information on the form." Right?

18 Do you see that?

19 A. Yes.

20 Q. And that Item 4(c) was the Shareholder--largest
21 Shareholder information that we looked at earlier?

22 A. Yes.

23 Q. Now, immediately underneath Goldman states:
24 "Item 4(d) (i). Please specify the nationality."

25 Do you see that?

1 A. Yes.

2 Q. And Item 4(d)(i) is the item we looked at
3 relating to the management company identifying Mason
4 Management LLC in the draft form; right?

5 A. Yes.

6 Q. So, Goldman seems to be asking Nick to provide
7 the nationality of the management company; right?

8 A. Yeah.

9 Q. Now, you state in your Statement that Nick then
10 followed up with Goldman Sachs, and he provided additional
11 information; right?

12 A. That's my understanding, yes.

13 Q. Now, if you turn to Tab 9 in your binder, you
14 will be looking--you should be looking at a document
15 labeled R-7.

16 A. Yes.

17 Q. And it's entitled "Application Form for
18 Investment Registration."

19 Do you see that?

20 A. Yes.

21 Q. And it's apparently an English translation of a
22 Korean document that is under the blue tab in--under the
23 tab. And I'm not asking you to confirm that it is a
24 translation of that document, but it is presented in that
25 format.

1 A. Yes.

2 Q. Now this document, I will represent to you, is
3 the completed application form for investment registration
4 of the Cayman Fund. And if you could please turn to
5 Page 2, Paragraph 4(c), you will see again the entry above
6 the first major Shareholder of the Applicant, first major
7 Shareholder of the Fund; right?

8 A. Yes.

9 Q. And you see that now Mason Capital Limited is
10 identified?

11 Do you see that?

12 A. Yes.

13 Q. And Mason Capital Limited is the Limited Partner;
14 right?

15 A. Yes.

16 Q. Now, you will see also the share of equity of the
17 Limited Partner is listed as 100 percent; right?

18 A. Yes.

19 Q. And you will also see that next to the left of
20 the share of equity, it is stated that the amount
21 contributed is--and I assume it's in U.S. millions of
22 dollars--is \$6.162 billion.

23 Do you see that?

24 A. Yes.

25 Q. Now, if you look at the information on the

1 financial status of the Fund that is provided immediately
2 above the box, you will see that there is a list of
3 assets, liability, and capital.

4 Do you see that?

5 A. Yes.

6 Q. And the capital is also listed in millions of
7 dollars and listed at \$6.162 billion.

8 Do you see that?

9 A. Yes.

10 Q. Now, on the face of this information, the Limited
11 Partner and Partner, Mason Capital Limited, contributed
12 the entire capital of the Cayman Fund; right?

13 A. As is stated here, yes.

14 Q. Well, and it's also consistent with what you told
15 us about the General Partner having withdrawn its capital
16 or end capital--

17 A. Well, of this 6.126 billion, the General Partner
18 would have a Capital Account. It would be a rounding
19 error.

20 Q. It would be rounding error.

21 A. Essentially, yeah. A couple hundred thousand
22 dollars would be their balance.

23 Q. The Capital Account--yeah, it would be--you said
24 a couple of hundred thousand dollars, the Capital Account
25 of the General Partner, that would--

1 A. Yeah, yes.

2 Q. And so that would be a rounding error compared to
3 the Capital Account of the Limited Partner; right?

4 A. Yes.

5 Q. Now, if you go to Item 4(d) in this application,
6 the management company is identified as Mason Management
7 LLC.

8 Do you see that?

9 A. Yes.

10 Q. And now we have the nationality which is entered
11 next to it. It's identified as a Cayman Islands entity.

12 Do you see that?

13 A. I do.

14 Q. All right.

15 To your knowledge, did Goldman Sachs ask Nick to
16 identify the management company as a Cayman Island
17 company?

18 A. No, my understanding was that Goldman Sachs asked
19 Nick to update nationalities to be Cayman Islands, and he
20 applied that throughout the form and should not have.

21 Q. Could you please turn to your First Witness
22 Statement, and that would be Paragraph 15, one-five.

23 Of the First, sorry. First Witness Statement,
24 one-five.

25 Now, I'll draw your attention--or I'll direct

1 your attention to the second sentence in that paragraph
2 starting with "In 2015."

3 A. Yes.

4 Q. You explained that: "In 2015, due in part to
5 losses associated with the investments in the Samsung
6 Shares, the previous high watermark was not surpassed, and
7 the General Partner received no Incentive Allocation."

8 Do you see that?

9 A. Yes.

10 Q. And the "high watermark" that you're referring to
11 refers to the mechanism in the Limited Partnership
12 Agreement for calculation of the Incentive Allocation;
13 right?

14 A. Yes.

15 Q. And that high watermark depends on the cumulative
16 Net Profits of the Fund--or is based on the Net Asset
17 Value of the Fund at one point? Or how does that work?

18 A. It's based on the dollar values of a loss, a Net
19 Loss for a year. That would be your high water mark going
20 into the next year.

21 Q. So, let's say in 2014 you made a loss on your
22 investments.

23 A. Yes.

24 Q. Going into 2015, you would have to make up for
25 that loss before being entitled to Incentive Allocation;

1 right?

2 A. Yes.

3 Q. Now, as of 2015--you're speaking about 2015. In
4 2015, we didn't get--you said that Mason didn't get an
5 Incentive Allocation in this paragraph, but when had the
6 previous high watermark been established?

7 A. December 31st, 2013.

8 Q. December 31st, 2013.

9 A. That was the last time we had charged an
10 Incentive Allocation.

11 Q. Right.

12 And the reason for that is the Fund did not
13 perform so well in 2014; right?

14 A. Correct.

15 Q. And as I understand, you incurred substantial
16 losses on the planned merger--when the planned merger
17 between the Cheil and--it failed; right?

18 A. That's part of it.

19 Q. I also understand that the Fund was down about
20 12 percent that year, in 2014?

21 A. That's about right, yeah.

22 Q. That's roughly an \$800 million loss in 2014?

23 A. I don't know the math.

24 Are you talking specifically for the Master Fund?

25 Q. For--yes, for the Master Fund.

1 A. For the Master Fund. I will trust your math.

2 Q. Well, maybe for the two funds. Really, I don't
3 want to mislead--I'm in your hands, actually, as to the
4 maths. You have big advantage as a witness here.

5 A. I have no calculator.

6 Q. I do have a calculator.

7 A. Okay.

8 (Calculator handed to the Witness.)

9 A. 12 percent of 6 billion would be about
10 \$700 million.

11 Q. 780?

12 A. 720 million.

13 Q. \$720 million.

14 Loss in 2014, roughly?

15 A. Roughly.

16 Q. Right.

17 Now, the loss--you lost the Rhode Island Pension
18 Fund in 2014; right, as a result of those losses?

19 A. I don't know about that.

20 Q. Fair enough.

21 Now, if the fund was down \$720 million at the end
22 of 2014, going into 2015, to be entitled to an Incentive
23 Allocation, you needed to make up over \$720 million loss;
24 right?

25 A. I don't know how in the weeds we want to get with

1 this, but big picture, yes--I don't know how in the weeds
2 we want to get, but yes, you would have to recoup the
3 losses in order to be able to charge an Incentive
4 Allocation again, yes.

5 Q. And assuming the loss was \$720 million, you would
6 have first had to make \$720 million before being entitled
7 to any sort of Incentive Allocation.

8 A. Yes.

9 Q. Now, I want to turn back to Paragraph 15 of your
10 Witness Statement. You said that: "In 2015, the previous
11 high watermark was not surpassed and the General Partner
12 receive no Incentive Allocation due in part to losses
13 associated with investments in the Samsung Shares."

14 Do you see that?

15 A. Yes.

16 Q. Now, what else contributed to the Fund's
17 inability to obtain an Incentive Allocation in 2015?

18 A. Investment losses is not my--not my
19 responsibilities. I just book them.

20 Q. Including investment losses from previous years;
21 right? From 2014?

22 A. I don't understand. You're saying that carried
23 forward from '14?

24 Q. Right.

25 A. Yes.

1 Q. Right.

2 Now, when you say that the Investment in the
3 Samsung Shares contributed to Mason not receiving an
4 Incentive Allocation, were you expecting to make
5 \$700 million on the Samsung Shares in 2015?

6 A. I don't know.

7 Q. Well, did you consider when making this statement
8 that your failure to get an Incentive Allocation was due,
9 in part, to losses associated with the Investment in the
10 Samsung Shares? Did you consider at all, whatever absent
11 the loss on the Samsung Shares, the rest of your portfolio
12 would have made up for the loss in 2014, the \$720 million
13 losses?

14 A. Losses never help an Incentive Allocation. If we
15 had investors come in in January 2015, they wouldn't be
16 subject to that \$720 million high watermark. So, in
17 effect, Samsung could have affected their ability to
18 charge an Incentive Allocation on those guys.

19 Q. Now, did you consider--did you consider how much
20 losses the rest of the portfolio had done by the end of
21 2014-2015, absent the Samsung Shares?

22 A. In making this statement?

23 Q. Right.

24 A. No.

25 Q. Do you know if you made a profit from the rest of

1 your portfolio in 2015, excluding the Samsung Shares?

2 A. I don't know.

3 Q. Now, in January 2015, Mr. Satzinger, was there
4 anything in the General Partner's Capital Account?

5 A. I don't remember specifically. It would be a
6 couple of hundred thousand dollars.

7 Q. A couple of hundred thousand dollars?

8 A. If at all.

9 There would be a small balance, yes.

10 Q. And do you know what percentage of that amount,
11 of that small balance, the General Partner took out of its
12 Capital Account before July 2015?

13 A. Any capital--any balance sitting in that Capital
14 Account in 2015 was from unwithdrawn Incentive Allocations
15 from 2013.

16 Q. So, it would have to wait until the next year
17 to--

18 A. No, they could have taken it at any time.

19 Q. They could have taken it at any time.

20 A. Absolutely, sure.

21 Q. So sitting here today, you don't know whether
22 they, in fact, did take that amount out before July 2015?

23 A. I don't know.

24 MR. NYER: Thank you very much, Mr. Satzinger.

25 PRESIDENT SACHS: Thank you.

1 Will there be redirect?

2 MR. WATSULA: No redirect.

3 PRESIDENT SACHS: We have no further questions.

4 Thank you very much.

5 THE WITNESS: All right.

6 PRESIDENT SACHS: Mr. Satzinger, you are now

7 released as a witness.

8 (Witness steps down.)

9 PRESIDENT SACHS: And this ends our fact witness
10 testimony and today's session.

11 Unless you have any observations, we will close
12 today's hearing and resume tomorrow morning at 9:30, we
13 said. All right? I wish you good evening.

14 (Whereupon, at 4:49 p.m., the Hearing was
15 adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN