Elliot Associates, L.P. v Republic of Korea

Day 2

November 16, 2021

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(11.00 am)

Housekeeping

THE PRESIDENT: Good morning, all. I understand the technical issues have been resolved and we are good to go. Any housekeeping issues that either party would like to raise before we start?

MR PARTASIDES: Not on our side, thank you, sir.

THE PRESIDENT: Thank you. And the Respondent?

MR TURNER: We have one, sir. Last night we had a -- I was going to say an unexpected letter from the Claimant. I suppose in a way we were half expecting it -- at midnight and 12 minutes we had a letter from the Claimant which enclosed a spreadsheet which purports to set out a long series of trades in Cheil which is, as you will remember, the other side of the merger that we are all talking about over this fortnight.

We were told by the Claimant that counsel, as part of discussions with Mr James Smith, whom we will see later today, had come to understand that a possible interpretation -- I'm reading from their letter, sir, and no doubt this can be provided to you -- of the documents disclosed for request number 15 is that they are hedging transactions.

Sir, we have to go back to understand this to

exactly two years ago when we asked for a certain number of documents and in particular I need to refer you to requests 15 and 16 of our request for documents which was sent to the Claimant on 19 November 2019 and in respect of which the arbitral tribunal made an order the following January, if memory serves.

Request number 15, which counsel referred to in their letter, refers to all documents evidencing any shares, swap contracts or arrangements or other interests that EALP, which is the Claimant company and/or the Elliott Group, may have held in Cheil between 26 May 2015 when the merger was formally announced and 17 July 2015 when the shareholders of SC&T and Cheil voted on the merger and you will remember, sir, because I have faith in your almost supernatural abilities in this respect, that the Respondent -- that the Claimant objected to that request. The Claimant said that the Respondent offered no evidential basis for speculating that EALP or other entities in the Elliott Group held an interest in Cheil in the stated period or at all.

The tribunal granted the request and a small number of documents was disclosed. I will come back to that in a moment because the Claimant's letter goes on. They say:

"We have come to understand that a possible

interpretation of the documents disclosed for request number 15 [that's the one that I have just read out to you] is that they are 'hedging transactions'."

You will remember that Professor Dow has reached that conclusion as well and I'll raise that in a just a moment.

"As such, the documents disclosed for request number 15 would also on that interpretation fall within the terms of the tribunal's order in respect of request number 16."

Which says:

"All documents evidencing any hedging transactions such as short selling or transactions in derivatives other than the swap contracts ..."

Which was a defined term and you will remember the debate about whether the original swap contracts were investments:

"... conducted by EALP and/or the Elliott Group involving SC&T and/or Cheil in the period from November 2014 to the end of September 2015."

That was again objected to on the basis that we had put forward no evidential basis that the Claimant had engaged or anybody else in the Elliott Group had engaged in undefined hedging transactions but the tribunal granted that request as well.

Sir, the Claimant goes on:

"The date range for request number 16 extends to 25 September 2015 and is thus broader than the date range for request number 15 ..."

I hope you're following:

"... the Claimant has checked the position and has identified additional transactions in Cheil swaps entered into after 24 July 2015."

The Claimant has enclosed with its letter a spreadsheet, an Excel, I imagine, spreadsheet.

They invite us to draw a conclusion from that spreadsheet. The conclusion they invite us to draw is that there remains no basis for the Respondent's assertion that the Claimant did not suffer a trading loss on its positions in Cheil and SC&T.

Now, we will come on to that, but let me just remind the arbitral tribunal of the position.

So we suspected -- and the Claimant's disclosure proved -- that it had taken positions in Cheil, the other side or other entities in the Elliott Group had taken positions on the other side of the merger in Cheil.

You will recall that after that production in Professor Dow's second expert report, which is RER-3, dated 12 November 2020, so a year after the document

request, and which we also picked up, of course, in our Rejoinder filed on the same day, in his Appendix E, Professor Dow explained that he had on the basis of the documents that had been disclosed making reasonable assumptions come to the conclusion that a profit had been made on the Cheil swaps of a number that was almost exactly the same as we explained in our Rejoinder as the trading loss that the Claimant accepts it made and we accept —— the numbers are not in dispute between the parties —— on its transactions in SC&T shares.

We made the point in our Rejoinder that therefore if you look at both sides of the ledger, there is no trading loss, and that is the reason for the Claimant's request to us to accept that there remains no basis for our assertion that the Claimant did not suffer a trading loss. There are a number of double negatives in all of that, but essentially they say they suffered a trading loss of something like 49 billion Korean Won and we say, well, we accept on the numbers that we have seen that that is the trading loss that the Claimant made on its shares in SC&T, there was an almost exactly equivalent profit on the Cheil swaps.

So —— and the tribunal will appreciate that we have had little time to look at the detail of this and it's only a spreadsheet. The Claimant goes on to say that it

will take steps to locate and disclose the underlying trade confirmations from which the information in the spreadsheet was drawn upon request. I don't think it's up to us to make that request, but nonetheless that's what they say.

So we have, without the underlying documents, looked at the spreadsheet. It seems to us that the overall profit by, I think, three entities within the Elliott Group, one of which is the Claimant, two of which —— one of which is a subsidiary of the Claimant and one of which is not the Claimant —— there was an overall trading profit on the Cheil swaps that the Elliott Group entered into of 64.8 billion Korean Won, a much larger number than the 49 billion Korean Won of the trading loss on SC&T shares.

Now, those documents have not yet been produced. We have a spreadsheet. The tribunal does not yet have that spreadsheet. That is our understanding of what the spreadsheet shows. If my learned friend were to make an application to introduce the spreadsheet and supporting documents into evidence, we would not oppose that application. If those documents are introduced into evidence, we will ask for more time for the presentation of Professor Dow to address those new documents, and we will reserve the right to recall Mr James Smith, the

Claimant's fact witness, if we feel that there are questions that arise out of the spreadsheet and/or the underlying documents that require answers from Mr Smith.

That is the position, sir. I wanted to draw all of that to your attention now as there may be an application from my learned friend to introduce further documents relating to the Cheil swaps into evidence. At the moment there is no such application. We are invited to agree that there was no overall —— that there was an overall trading loss and my learned friend is very careful to say a trading loss suffered by the Claimant. I don't know whether he is going to take the point that the trading profit was in part made by other entities, and therefore not for you to take into account, but that will be a matter for him in due course.

As I say, there is no application at the moment. I am not withdrawing my assertion that there was no overall trading loss. Indeed, it seems apparent from the document that we received late last night that there was a trading profit overall taking the SC&T shares and the Cheil swaps together, a profit of something like 15 billion Korean Won.

There we are. I have drawn that to the tribunal's attention. There may be an application from my learned friend in due course.

THE PRESIDENT: Thank you very much. There is at present no motion from the Respondent?

MR TURNER: No, sir. There is no —— there's nothing that we intend to do. You have our position. We have had this document. That is our understanding of this document. We are not applying for it to be put into evidence, although it's been sent to us by the Claimant. If my learned friend applies to put it into evidence, we will not oppose that application.

THE PRESIDENT: Claimant?

MR PARTASIDES: Thank you, Mr President, members of the tribunal. Let me correct some errors in nomenclature that we just heard. We're not talking about swaps in Cheil. We're talking about short swaps in Cheil. That is a financial instrument that was disclosed to the Respondent pursuant to its category 15 request as ordered by the tribunal, although your order limited the request only to those held by EALP rather than other Elliott entities consistent with your order in 2020.

The Respondent has had those short swap transactions since disclosure at that time and indeed relied upon those short swap transaction documents in its Rejoinder submission and in the report of its expert, Professor Dow.

So this is not a revelation of transactions that

were previously unknown and consistent with that category of documents which was category 15, the disclosure extended to the date range, 26 May 2015 to actually a few days after 17 July 2015, which was the date range identified by the Claimant in its category.

As we sat with James Smith, who you will hear from later today, on Sunday to walk through with him documents on the record in this arbitration in the normal way, he offered a characterisation or interpretation of those documents which was different from our understanding. His interpretation was that they could be interpreted also as hedging transactions.

Let me explain why, and the reason why this is significant is the difference between category 15 and 16 of the Respondent's document production request.

I should say that I imagine that Mr Smith could do a better job of explaining these financial instruments than I can.

These short swaps are entered into broadly on the following basis. You agree on a certain date that you will sell the swap at a price X and that you will purchase the swap at a certain point in time in the future. And if that price reduces, so you will see the benefit of the difference. That is a short in this case of a swap.

On the assumption that the merger would not have proceeded, Elliott doubled down on its expectation and therefore entered into these transactions, and if the merger had not proceeded, the first thing that would have happened is the Cheil traded price would have dropped, and as a basis of that assumption, the swaps would result in further trading gains that would result from the merger not proceeding. That is the interpretation of these transactions that comes —— that leads to them falling within category 15 of the document production request made by the Respondents.

Mr Smith said that there is an additional interpretation that can be placed on them, and that is that they also serve the function of amounting to a hedge because if the merger does proceed against expectation, you might still expect something of a reduction in the share price of Cheil, new Cheil, and therefore these shorting transactions could somehow compensate or protect you from some of that loss.

So his interpretation, when we spoke to him on Sunday, is that these should also be seen as a hedging transaction.

Now, the consequence of that is that they were not only relevant as disclosed under category 15, but also under category 16, and category 16 had a longer time

period. The time period for category 16 would extend to 25 September rather than 17 July.

On receiving his view as to that alternative interpretation, we made a request of our client that would identify all of those transactions that took place in that additional time period. Indeed, we made a request that our client identify all of those transactions even if they extended beyond the time period of category 16, ie up to 25 September.

Our client during the course of yesterday provided us with that information and as soon as we were able to review it, as responsibly we had to, and put together a spreadsheet, we disclosed it consistent with our ongoing duty of disclosure now as responsive to category 16.

These are further examples of transactions that the Respondent has been aware of since our disclosure in early 2020 and the spreadsheet that we have provided them with, and we are making efforts to obtain all of the underlying proof of transactions and we will be happy to provide those to the Respondent as well, confirms on our calculation indeed contrary to Professor Dow's assumption that the Claimant did not make a trading gain on the event of the merger not taking place. It made a trading loss.

It appears from what I have just said that there is still a dispute about that with those opposite, and so that will lead to my proposition at the end of my remarks as to what we do with this information.

Let me say before I get to that question of whether and who should make an application for the admission of these documents on to the record —— let me say that it is our case, as you will have understood yesterday, that trading losses or trading gains are not relevant to the claim that we are making before this tribunal. In fact, these transactions, had the merger not taken place as Elliott expected would be the case, would have resulted in greater return for Elliott because if the merger hadn't taken place, these transactions would have resulted in a greater distance in the short between the sale price, fixed before the event, and the subsequent purchase price identified after Elliott anticipated the merger would fail.

We are not claiming those trading losses in the same way as any trading gains would not be relevant to the claim that we are making here, because our claim is about the realisation of the intrinsic value of the shares that we held, and by the way, these hedges pertain not to the vast majority of the 11 million shares in SC&T that we held. It only pertained to that

proportion of them that were not put shares, that would benefit from the appraisal right process at that we have already netted off from our claim.

So our case, as explained in the second round of submissions, already debated with Professor Dow, including by Mr Boulton, is that trading gains and losses are not relevant to the claim for damages and loss that we are making here.

That having been said, our position has been that there was a trading loss. Professor Dow's position has been that there was a minor trading gain. If there is still a dispute about which of those propositions is correct, then I suggest that the best way of dealing with this, whoever has to make the application, is that these documents also be admitted to the record so that that debate can be definitively determined.

Now, the reason why we have not made an application to introduce them thus far is because these are documents that we are producing in response to a document production request made by the Respondent. It then is for the party that has requested the documents to make the application to introduce them on to the record.

But I see no reason why that should interfere with having them added to the record as soon as possible, and

so let me say this, Mr President, members of the tribunal. If the tribunal feel that these documents would be of assistance, we have absolutely no objection to them being introduced into the record as soon as the tribunal would like.

THE PRESIDENT: Just to understand for the time being what has been produced is a spreadsheet listing those documents but the underlying documents have not been produced to the Respondent?

MR PARTASIDES: That's right, and we are making efforts to gather those underlying documents. I think it should take a small number of days to do so, and as soon as they are available, we will make them available to the Respondent.

THE PRESIDENT: Mr Turner?

MR TURNER: Thank you, sir.

I won't fall into the same trap as my learned friend and try to give evidence about what these transactions were. We will no doubt hear from the experts in due course about them.

Again, I don't think we should stand on ceremony as to who makes the application. I think we all agree that these documents should be introduced into evidence and the spreadsheet as soon as possible and then it will be a matter of their being dealt with now that the full

picture is available by Professor Dow, and as I say, we ask for more time for him to deal with those in his presentation, and depending upon the nature of the documents, when we get them, and what Mr Smith may have said in answer to questions today and tomorrow morning, we reserve the right to ask Mr Smith to return.

THE PRESIDENT: Okay, thank you very much. So for the time being it looks like there is no need to take any decisions. We wait for the Claimant to produce those documents to the Respondent and once you have received them, I suggest we have another debate about what the next steps should be. Very good.

So then we go on back to the agenda and the Respondent's opening. Mr Turner.

Opening submissions by MR TURNER

MR TURNER: Thank you very much, sir. Good morning properly to all members of the tribunal.

I will begin our closing —— our opening; I'm getting too optimistic in my old age, our opening submissions. My colleagues Nicholas Lingard, Jack Terceño and Sanghoon Han will take over, and then I will come back at the end.

As a preliminary matter we heard at the end of the Claimant's opening submissions yesterday a series of questions to the tribunal. It's obviously very kind of

the Claimant to formulate those questions. We will not be taking up the challenge to answer them. We will give you our case rather than simply dealing with the questions put by my learned friend Mr Partasides yesterday.

What the tribunal has before it, and as we were told by the Claimant yesterday, is a very serious case, or at least a case that arises out of a matrix of facts, some of which are very serious.

We all know that a number of people, including the former head of State of the Republic of Korea, have gone to prison, even if some appeals are pending, and that events surrounding the transfer —— the inheritance of Mr [redacted] from his father and his taking over the chairmanship and the running of the Samsung Chaebol were at the heart of those events.

We do not deny the facts as they are presented to you in relation to the convictions that have been pronounced by the courts. I stress the Republic of Korea is a State governed by the rule of law. Wrongdoing was found and that wrongdoing has been dealt with by the courts, or is being dealt with by the courts.

I should add that I deprecate the seeming attempt to assimilate the prosecutor, the Independent Prosecution

Office of the Republic of Korea, with the Republic of Korea as we heard from our learned friends yesterday. The prosecutor makes allegations. Those allegations are tested in an independent court system and the courts will pronounce upon those allegations, having heard not just from the prosecutor, but obviously from the defendant.

Once the court has made its decision, we do not deny that we, the Republic of Korea, are stuck with accepting that decision. We don't want not to be stuck with the decisions of our own courts. We are a State governed by the rule of law.

But your task, members of the arbitral tribunal, is to try the Claimant's claim under the Korea–US free trade agreement. You need to be satisfied that the Claimant has a claim under the terms of that Treaty, including dealing with all of the Republic of Korea's preliminary objections, and not simply to look at the very grave, to adopt my learned friend's word, events that gave rise to the court proceedings about which we will hear a lot.

In so doing, the arbitrators will need to decide who did what, when. There are large numbers of disputed facts in this proceeding and you will hear from my learned friend Mr Lingard about a number of those during

the course of today. But you will have to look at the precise dates on which things happened. You will have to decide whether there is evidence, and we say there is none, that there was a bribe from Mr [redacted] to former President [redacted] to help push the merger through.

You will have to decide whether acts complained of by the Claimant were acts that are those of the Republic of Korea or wholly different entities. I'm not even talking here about the question of attribution that my learned friends Mr Terceño and Mr Han will talk to you about later, but whether it was any State owned entity at all or whether, for example, the allegations of manipulation of SC&T's share price, it was Samsung and Mr [redacted] who were responsible.

Sir, as you will hear from Mr Lingard, the Claimant has been selective in the way in which it has addressed you on the facts of the court decisions, the facts of the evidence given by individuals in those court proceedings, confusing those statements with those made to the prosecutor before the proceedings went ahead. You will need to look very carefully at all of those and Mr Lingard will draw your attention to a number of them this morning.

Sir, I now pick up as part of this brief introduction the theme of the Claimant's loss.

I understand my learned friend's point this morning. His case is that there was a loss that greatly exceeds the trading loss in SC&T shares. He seeks 707 million US dollars.

Now, I won't deal with that today, but the tribunal knows that the Respondent does not accept that it should be making an award, if an award it is to make at all, denominated in US dollars, but in Korean Won which is the only currency which has any relevance to the events of which the Claimant complains.

But taking my learned friend's dollar figures, he is asking for –– and we'll come back to quite what the Claimant's case is now on the numbers –– $540 million in principal and interest added on.

This requires the tribunal to believe that shares bought for –– again the US dollar number –– the equivalent of 603 million US dollars were worth or would have been on my learned friend's case twice that just two months later.

As you heard this morning, the Claimant actually made a trading loss in dollar terms of approximately 43 million US dollars. Professor Dow had assumed on the basis of the disclosure on which he based his report that the investment in Cheil swaps, and I remind you that you the Claimant itself says in paragraph 12 of its

Reply that swaps, even if they are not an investment, expose the holder to all of the economic gain and loss –– he believed that the trading profit on the Cheil swaps was almost exactly equivalent, wiping out the trading loss. We now know from the spreadsheet we received last night that the trading profit on the Cheil swaps was actually very much greater than the trading loss on the SC&T shares.

Furthermore, the tribunal needs to bear in mind –– my learned friend alluded to the appraisal litigation, the buy back litigation. The tribunal will recall the debate about whether the Settlement Agreement between the Claimant and Samsung should be disclosed. My learned friend objected to it and the tribunal ordered it to be disclosed. There was a proceeding in the Korean courts whereby Elliott and other shareholders of SC&T challenged the price at which Samsung had to buy their shares back. Under the Capital Markets Act you will recall there is the right for shares that were held before the merger announcement date to be bought back, and there's a statutory formula for assessing the price. That price was challenged and the Seoul High Court determined that it should be appraised –– the price of the shares should be appraised at a date at which all influence of the merger was removed, and they chose the

period leading up to December 2014.

I will talk about this in more detail in due course, but as a result of that proceeding the Claimant has already received money. My learned friend Ms Snodgrass set the receipts out in her tables yesterday, and the Claimant has indeed given credit for what it has received.

It stands to receive, if the decision of the Seoul High Court is upheld on appeal, a further, we think —— it's all arithmetic, but there are moving parts —— approximately on the Claimant's own preferred exchange rate 64 million US dollars more.

We will have to determine with you how we deal with that potential further recovery. But you need to bear in mind three numbers: a $43 million trading loss, a profit on Cheil swaps of, we now think, something over $60 million on the Claimant's exchange rate, and a potential further recovery of some $64 million in the buy back litigation.

Sir, you will also hear from us during the course of today about the continuing changes and contradictions in the Claimant's case on damages. Quite how they expect to be able to recover, to realise the so—called intrinsic value of the —— of SC&T.

We say that is wholly unrealistic. We say because

both of the experts agree that the market was efficient, that the market price is the way of assessing any loss that you may find the Claimants deserve.

If there is a doubt about the reliability of that price, then the market price should be adjusted, exactly as the Seoul High Court did in choosing a time to assess the price for the buy back litigation before the merger had any effect upon it.

We will hear from the experts in due course on that, and that will be the subject of, I hope, very serious discussion.

There is a further point that was not really touched upon by my learned friend yesterday, and that is that although the Claimant had bought 7.7 million shares before the merger announcement date, and those are the shares the subject of the buy back litigation, it bought a further 3.4 million shares after the merger announcement date. Clearly —— I don't deny this —— the Claimant hoped that the merger would not happen. But it took a gamble. It is not the job of this tribunal to effectively give the Claimant the benefit of a bet it made and lost. It did gamble. That's a bit its job. It lost. It now has to live with the consequences of the gamble that it willingly undertook.

Sir, I now turn to Mr Lingard who will talk you

through the facts.

Opening submissions by MR LINGARD

MR LINGARD: Mr President, members of the tribunal, good morning. In the next hour or so my aim will be to proceed methodically and importantly chronologically through the facts in the record before us.

I begin underscoring the importance of chronology, as we proceed we would urge the members of the tribunal respectfully to pay particular attention to the timeline of events and the interrelation or lack of interrelation between events in that timeline.

So I start with the context for the Claimant's investment in Korea. That is, as the members of the tribunal well know, and as we heard at some length yesterday, Korea's Chaebol system. That is the system in which the Claimant made its investment.

Let me begin with a definition. You heard it yesterday but it's important, so I repeat it.

A Chaebol is a diversified business group comprising companies under the control of the founder or his heirs. Now, that definition is the definition put forward by the Claimant's own expert on corporate governance matters from whom we will hear in the coming days, Professor Curtis Milhaupt.

The question that then arises how that founding

family maintains control and the answer to that question lies at the very heart of the Chaebol concept.

The answer is not in the form of majority shareholdings. At least as Chaebols traditionally have been understood, we need to move away from traditional hierarchical corporate structures familiar to many of us with well—defined parent subsidiary relationships down a vertical corporate tree.

On the contrary, as they have traditionally been understood at least, Chaebol are characterised by inextricably complex, labyrinthine even, shareholding structures. These are not simple hierarchies.

So, for example, as we heard yesterday, they tend to be cross shareholdings where companies hold shares in each other.

There also tend to be circular shareholdings where companies notionally down the corporate tree hold shareholdings in notional parents several layers up.

It's through these complex structures that founding families maintain control over all of the companies in the group, even if in fact their equity interests in each company are comparatively small.

In other words, equity is divorced from control, and that separation of equity and control is described in the expert reports before you and in the corporate

governance literature more generally as the wedge. We'll hear more about it over the coming days.

So I turn from general context to the specific corporate setting for the dispute before this tribunal. It is the Samsung Chaebol. It is Korea's largest, and I'm now on slide 2 in our deck.

As you can see there, the Financial Times reported that, and I quote:

"By almost any metric, the fate of Korea is closely tied to that of the Samsung Group."

Let me make good on that general statement with some data, most of it also on the slide in front of you.

In 2019 Samsung's revenues accounted for 12.5% of the country's entire GDP.

Today, just one company in the group, Samsung Electronics, a company about which we'll hear a great deal more, accounts for about a quarter of the total market capitalisation of Seoul's KOSPI index. And that same single company, just one company in the group, Samsung Electronics, Samsung Electronics alone employs nearly 200,000 people.

We say it's hard to think of an analogue of similar import in similarly advanced economies. We also say, and we will come on to that, in those circumstances in that context it is wholly unsurprising that a government

might want to monitor corporate developments at Samsung.

Let me show you the Samsung Group before the merger that is our subject. That's on slide 3 in our deck, setting out the structure of the Samsung Chaebol premerger.

You might, gentlemen, call it a spaghetti diagram or, if you've had the opportunity to travel to Korea, you might call it the Seoul subway map. Whatever metaphor you are inclined to adopt, you understand immediately this is a complex picture. This is not a simple corporate hierarchy. You see immediately arrows run in both directions, up and down. In other words, circular shareholdings.

At this point, at the point of the structure chart on slide 3, Chairman [redacted] was at the helm. He was described by counsel opposite yesterday as the [redacted] family patriarch. He was at the helm at this point.

But we also know that succession issues are inherent in every Chaebol, and I have that again from the Claimant's own expert, Professor Milhaupt, on slide 4. He tells us that what he characterises as dynastic succession is a key characteristic of the Chaebol.

Now, for Samsung in particular those long standing succession issues took on a new importance, a new immediacy, in the spring of 2014. And that's because,

as we also heard yesterday, in May of 2014 Chairman [redacted] suffered a heart attack and was hospitalised.

Let me note parenthetically, although importantly, and it's a point I'll return to as we proceed, at this point in our chronology, the Claimant still owned no shares and no swaps referencing SC&T, none at all.

So as would be expected, the chairman's ailing health promptly triggered media analysis of an acceleration of a restructuring of the group in order to pass control to the chairman's son. That is, as we know, [redacted] or [redacted]

I have an example of that analysis on slide 5 from just days after the chairman's heart attack.

As we look at this extract on the slide, let me note that the company we all have gotten to know in these proceedings as Cheil Industries was at this time, before its public listing, known as Samsung Everland.

We can see the reporting was that Samsung Everland would be listed and that Samsung Everland might thereafter merge with another company in the Samsung Group. This, gentlemen, may well be starting to sound familiar.

Less than four months later, and I'm now in September of 2014 and slide 6, Korean media reported that Samsung C&T was that other company at the centre of

the Samsung group's restructuring, and that was because of its significant ownership of shares in Samsung Electronics.

The report describes a growing possibility of Samsung C&T merging with Cheil. You will see a theme emerging here. At this point the Claimant still owned no shares in nor any swaps referencing SC&T. None at all.

Predictions of the merger between Samsung C&T and Cheil only intensified thereafter. I don't propose to take you to each of the many examples in the record before you, but I do want to show you just one more because of the significance of its timing. It's exhibit R—74. It's a report from a leading Korean business paper dated November 26, 2014. I have it on slide 7.

It's consistent with the reporting we've already seen and it is unambiguous. Rumours of a merger between Samsung C&T and Cheil, two companies described there as important in the Samsung Group's governance structure, and you can see the merger supported by the securities analyst there quoted.

Now, I call up this particular report not because it's unique. To the contrary, it's wholly consistent. But this one, as I have said, is interesting for its timing. Recall once again that at this point in time

the Claimant still owned no shares and no swaps referencing SC&T, none at all.

But the very next day, November 27 of 2014, the Elliott Group entered into its first swap contracts referencing Samsung C&T.

By that date, the date of its first swap contract, Elliott was, perhaps unsurprisingly, running a spreadsheet model on its investment. I have an extract from that model on slide 8. It's exhibit C—365 in your record.

That model, from the day of Elliott's very first swap contract referencing Samsung C&T, included a dedicated tab labelled "Merger" with what it called, and I quote, potential restructuring scenarios involving, and again I'm quoting from the Elliott Group's own model from the day of its first swap contract, merger between SCT and Everland.

Recall that Everland was at the time the name of the company that became Cheil Industries.

This Elliott model, again from the day of its very first swap contract in SC&T, went so far as predicting a new de facto holding company for Samsung, resulting from that modelled merger of Cheil and SC&T.

So having begun with that model, what did the Claimant group then do? The answer is a surprisingly

simple one. Every single trading day from November 27 of 2014 through January of 2015, Elliott entered into more swap contracts and still more swap contracts referencing Samsung C&T.

It's all set out in the Appendix to Mr Smith's second witness statement and I have it extracted on slide 9.

Now, as Elliott built up this interest in Samsung C&T by way of swap contracts, coverage of the long projected merger between Samsung C&T and Cheil, the merger that is our subject in this arbitration, further intensified in late 2014 and early 2015.

It was in that period that the projected merger —— excuse me, projected IPO of Cheil Industries, its listing on the Korea Exchange took place. That listing was on December 18, 2014.

I'll take you to just one of the press reports from shortly after the IPO. It's a report dated January 6, 2015, and I have it on slide 10.

You can see that Korea's Business Post reported that there had been what is described as a predominant view that there would be a merger between Cheil Industries and Samsung C&T so that [redacted] could gain control over Samsung Electronics.

Now, I keep returning to this as I work through our

chronology because of its importance. At this point the Claimant still owned no shares in Samsung C&T, none at all. But Elliott did continue to enter swap contracts on the back of this predominant view. In fact, as we see then on slide 11, again, extracting from the Appendix to Mr Smith's second statement, Elliott entered into swap contracts each and every trading day until January 29, 2015.

Now, as we move then to slide 12, we see a significant event on that date, January 29, 2015. That is the date of the Claimant's first purchase of shares in Samsung C&T, January 29, 2015.

It was able to buy that first parcel of shares at what it calculated as a substantial discount to its own net asset value of Samsung C&T. Less than a week after that purchase, it memorialised its calculation of the discount. It wrote to the directors of Samsung C&T, setting out its calculation of the discount at which it was able to buy in, and with that I'm on slide 13.

In this same letter, it's exhibit C—11, Elliott explained what it saw as the reason for the discount. The discount at this point on Elliott's calculation you will see was 41%. The reason being the possibility of the merger between Samsung C&T and Cheil.

In fact, in this letter to Samsung C&T, Elliott

described that merger as a widespread concern.

You will note that in this extract from its February 4, 2015 letter to the company, Elliott went so far as to refer to the merger ratio for any such merger transaction. We will return to the law on the merger ratio in due course. But let me note here, less than a week after its first share purchase the Claimant is rightly describing that merger ratio as, and I quote Elliott's own words, mandatorily applicable.

Now, at this time the record evidence shows us that Elliott began an extensive research process. That research extended to Samsung's succession process. It looked at relationships among Chaebol senior management, their controlling families, and the Korean Government. And it also looked at the National Pension Service or the NPS, which held about 11% of the stock in Samsung C&T.

We know from the record now before us that Elliott's internal research efforts were extensive indeed. And I want over the next couple of slides to show you some extracts from the Claimant's own contemporaneous research. I'm now on slide 14.

This is an internal Elliott research note from February 18, 2015, shortly after that first purchase of shares in SC&T. We can see that Elliott held the view

that SC&T was controlled by the [redacted] family and that Samsung might get government support for the merger if only Samsung lobbied for it, given Samsung's size and status.

Again, to bring this back to the Claimant's purchases of shares in SC&T, at this point in time it held less than 2 million of the 11 million SC&T shares it would come to own.

The next month, so I'm now in March 2015, Elliott consolidated its own research on Samsung's relationship with the Government and also on how the NPS managed its investments. I have an extract from that updated internal research note on slide 15.

We see that Elliott's view as reported in this internal note was that the Korean Government viewed Samsung's performance as a proxy —— that's the word Elliott used, a proxy —— for the performance of the wider Korean economy.

As I foreshadowed, Elliott was at this time also looking at how the NPS made its investment decisions. I have some extracts on that over on slide 16 that's now on the screen.

As we can see, Elliott noted at the time, March of 2015, that the NPS tends to consider its portfolio in the aggregate rather than as investments in single

specific companies. Elliott got that wholly correct, as we'll come on to see.

In the final part of this extract on slide 16, Elliott describes its understanding of the NPS as various decision-making committees. It got some of these details wrong, but one point on the screen in this extract is right, and it concerns lawyers serving on the so-called Special Committee, or as the Claimant describes it, the Experts Voting Committee.

You can see that Elliott described the lawyers on that committee as the swing votes, and you, gentlemen, will hear from the lawyer on the committee, the Special Committee at the time of this merger vote in the coming days. He is the ROK's fact witness in these proceedings, Mr [redacted]. It is his testimony before you in these proceedings that he simply does not know how the Special Committee would have voted had the matter come to it.

We have been looking at Elliott's internal research efforts, but that was not where Elliott stopped, as one would expect, it also engaged a whole raft of external advisers to assist it with this investment.

One of those external advisers was a company called Investor Resources Counselors, or IRC. It issued a report to Elliott in March 2015. I don't have it on

the slide, but for your note, it's exhibit C-151. It repays close study.

On Elliott's instruction, IRC studied the voting pattern of the NPS on previous Chaebol mergers; and IRC advised Elliott that without exception, without exception, the NPS had objected to a Chaebol merger and instead taken its buy back right, appraisal right, if the buy back price was higher than the stock price on the market.

Now, I'll come on to this too in more detail in due course. That's the law on the appraisal right. But as we know, in short, it is a put right for shareholders who object to a particular merger instead of supporting the merger, they can exercise a statutory right to be paid a statutorily fixed buy back price.

The advice from IRC to Elliott was simple. Based on past practice, without exception, the NPS would oppose a merger if the appraisal price was higher than the stock price on the market.

The converse was also true: the NPS would support a merger if the stock price exceeded the buy back price.

That's IRC's unambiguous advice to Elliott from the earliest days of its investment.

I have been focused on IRC, but as I have said, there's a whole range of other advisers' reports

referenced. I use the word "referenced" advisedly in the record before you.

Now, until we received the Claimant's privilege log, we knew nothing of Elliott's work with the consultancy called Spectrum Asia. No mention of that at all in the written testimony of Mr Smith or in the Claimant's written submissions.

The members of the tribunal will recall that we objected to the Claimant's withholding of the reports produced by this consultancy, Spectrum Asia, and indeed to hundreds of other documents listed on that privilege log. For my part, I think the longest and yet the barest privilege log I've ever seen in arbitration practice.

In the event of an extensive correspondence, the Claimant eventually produced one of the Spectrum Asia reports. It is another report that repays close study. It is another report that evidences immediately why the Claimant went to such lengths to withhold it from this tribunal.

It's in the record before you at exhibit R-255. It's dated March 19, 2015, but we know from that privilege log I have already referenced that the first version of the report came even earlier. The first version evidently was dated February 27, 2015. For your

note, in deliberation, gentlemen, that's entry 1050 on page 178 of the Claimant's privilege log.

But perhaps the date is not that important. Whether one takes the date of the first Spectrum Asia report or the version that is now available to us, at this point in time, early 2015, the Claimant had barely dipped its proverbial toe in SC&T shares. Recall that the first share parcel was bought on January 29.

So with that introduction, let's look briefly at the Spectrum Asia report that we do have available to us, and I'm now on slide 17.

Elliott's advisers at Spectrum Asia noted that the merger between Samsung C&T and Cheil was, and I quote, "the only feasible possibility to manage Samsung's succession issues". They went on to advise Elliott that a merger between Samsung C&T and Cheil was inevitable, "inevitable" is the word used. They also advised that shareholders in Samsung C&T may not necessarily benefit from this inevitable merger. But that was not the point. The overriding purpose in this advice to Elliott from the earliest days of its investment was keeping the Samsung Group under family control.

So armed with this comprehensive and we say altogether unambiguous advice, what did the Claimant do?

It made a gamble and it bought up big. It continued

to increase its shareholding and its total interest in Samsung C&T every single trading day through March with the exception of just two days. It's on slide 18 again from Mr Smith's second statement.

As we turn then to slide 19, we see that the Claimant kept going. It continued to increase its shareholding and its total interest in Samsung C&T each and every single trading day until the formal announcement of the merger that it had been told was inevitable.

So we come to the formal announcement of this inevitable merger. That announcement was made on May 26, 2015, and I have the announcement extracted on slide 20.

We see that the boards of both companies announced that they had approved a proposal for Cheil to acquire and merge with Samsung C&T. The proposal was for the new merged company to be named "Samsung C&T Corporation". The merger ratio was set at 1:0.35 which meant that shareholders in the old SC&T would get 0.35 shares in the new entity for every one share they held in the old SC&T.

Now, I'll come on shortly to the reactions in the market to this announcement, but I first need to step briefly off our chronology to introduce several relevant

provisions of the Korean law on public company mergers.

We've already seen Elliott's knowledge of the mandatorily applicable formula for the merger ratio. Let's look at that formula just a little more closely. It's summarised on slide 21 in an extract from one of the proxy advisory firm reports on which the Claimant relies. This is the report of Glass Lewis. It's fair to say that the underlying statute is somewhat harder to follow, but none of this is contested so I hope that the summary on this slide will suffice.

The formula uses, as you heard yesterday, the merging companies' average closing prices on the securities market for the most recent month, week and day. And because this mandatory statutory formula is based on recent trading prices, it follows obviously enough that timing of a merger announcement is critical. That timing is wholly up to the merging companies.

So we've seen by way of the announcement I showed you just a moment ago that the merger had been approved by the boards of the two companies, SC&T and Cheil. The next step of course is shareholder approval.

So with that I turn to the Korean law setting out the hurdles for the merger to pass. I have it extracted on slide 22 from Korea's Commercial Act. There are two relevant thresholds for the merger to pass the

shareholder vote.

The first relates to shareholders actually present at the extraordinary general meeting. That is those actually voting. Of that group, of those actually voting, two-thirds had to vote in favour in order for the transaction to be passed.

The second threshold relates to all shareholders. Of that group, of the entire shareholder population, one-third had to vote in favour in order for the merger to be passed.

I have already referred a couple of times to the buy back option available to shareholders who opposed the merger. Let me say a few more words on that to make good on the statements of principle I have offered already.

The basic point is this. If the shareholder objected to the merger, it could exercise a statutory right to require the company to buy back its shares at a fixed price. That right is the appraisal right and the price is the appraisal price.

Again, the legal regime on this is summarised neatly in one of the proxy advisory reports on which counsel opposite relies. This is a report from ISS and I have it extracted on slide 23.

For this particular merger the buy back price was

set by statute. We can see it a little over 57,000 Korean Won per share.

We can also see in this extract from the ISS report, the trading price, the market price of SC&T shares was consistently above the appraisal price. At the time of the ISS report, it was a little over 66,000 Won a share.

That, as I have already suggested, is one simple way a shareholder might decide whether to support a deal. The rational choice may well be the simple choice. Support the deal if the stock price is above the buy back price, but oppose the merger and take the buy back price if the buy back price is higher.

Indeed, as we've seen, Elliott knew that that was the NPS's usual assessment. Elliott knew in the words of the advisers at IRC that that, without exception, is what the NPS had done on other Chaebol mergers.

So with that background set, let me turn, as I presaged, to the market reactions to this announcement of the inevitable merger.

As I do that, I want to take us to four perspectives, four reactions to the merger announcement. The first is to look at what happened to the share price of Samsung C&T. I show that on slide 24.

Its share price jumped by 14.83%, and at one point in the days after the announcement peaked at 38% above

the pre—announcement price. That's SC&T.

Let's then as our second perspective come to Cheil. That's to slide 25, and Cheil is the blue line there. Its price similarly surged. The Cheil stock price jumped by 14.98%.

So those are the two merging companies. Let me come to a third perspective. Our third perspective on the announcement is that of the merging companies' competitors. I have that on slide 26. Quite unlike the shares of SC&T and Cheil, the stock prices of their competitors in the construction sector fell on the day of the announcement.

I turn then to our fourth perspective on the formal announcement of the merger. It is of course the Claimant's own perspective. It's on slide 27, once again from Mr Smith's second witness statement.

The Claimant's reaction was to buy still more shares and enter still more swap contracts referencing SC&T. Now, obviously enough it could at this point have made a different choice. It could have sold and in doing that, cashed in on the plum increase in the share price.

On this counsel opposite yesterday told us, and I'm quoting from page 194 of the transcript, once that proposal —— that is the merger —— was on the table, the question of what rules of thumb should be followed for

making purchase of SC&T shares, which is the question that the trading plans principally answered, was displaced by the more exigent: what loss are we facing and what can we do to avoid it?

If in fact, members of the tribunal, that was the question animating the Claimant at this point in time, the Claimant's approach after the merger was announced could have been a very simple one indeed. It could have sold and in doing that it would have made a handsome profit.

But instead it piled in. The Claimant kept buying until, as we now know, and accumulated a little over 11 million shares in Samsung C&T. With that, a 7.12% interest in the company.

Let me put that 7.12% stake in the context of the overall shareholder landscape. As I do that, recall once again that for the merger to pass required the support of one—third of all shareholders and two—thirds of those shareholders actually voting, actually present at the extraordinary general meeting.

There's a helpful doughnut chart one might call it from one of the press reports setting out the overall shareholder landscape, and I have that extracted on slide 28.

We see Elliott there to the left in green with its

7.12% holding. There's also a significant slice of other foreign investors totalling nearly 27%. That's the blue portion towards the bottom of the circle.

And over to the right of the circle in grey you see domestic institutions identified as holding 10.19% of the stock. We come then to Samsung and its affiliates. They're shown at the top of the circle in blue with 13.82%. And then just under that a company called KCC is identified separately in orange with a stake of 5.96%.

KCC is identified separately here because it was said to be aligned with Samsung, and that was a fact that Elliott knew.

We come then to the NPS, to the bottom right in yellow. We see it had 11.21% of SC&T stock.

So before we leave this overview of Samsung C&T shareholders, just a little arithmetic territory into which I wade with trepidation, but the arithmetic is simple.

Recall that for the vote to pass required the support of 33.3% of all shareholders. So we see immediately that Samsung, KCC and the NPS, if one assumes the NPS was to vote in favour, were not enough. That would get you to just 31%.

That's before we even come to the second voting

threshold. That is the requirement of the support of two−thirds of those shareholders actually voting at the extraordinary general meeting. The arithmetic on that is somewhat more complicated, but again, relatively simple, and the result is clear. If we assume for these purposes a voter turnout of between 75% and 85%, Samsung C&T would require an additional 19 to 25% of all shareholders to support the merger in order for it to pass. That's beyond the affirmative votes of Samsung, KCC and the NPS.

So we've seen the NPS's shareholding in Samsung C&T. Let me step once again briefly off our chronology to describe the process by which the NPS was to decide how to vote its shares in this merger.

The starting point is this. The NPS's investment decisions, including how to vote shares, were made by a committee comprised of the Chief Investment Officer of the NPS and 11 other senior members of the investment management division of the NPS. That, as we well know, is the Investment Committee of the NPS.

Let me take you to the NPS's Voting Guidelines. In doing that, I'm on slide 29.

We've heard a great deal about another committee, the Special Committee or the Experts Voting Committee. What do the guidelines have to say about that? They

tell us that the Investment Committee found that if it was difficult to decide on how to vote on a particular matter, it could refer that decision to the external committee, the Special Committee.

That's set out in both the Voting Guidelines of the NPS and the Fund Operational Guidelines, and relevant extracts are on this slide 29.

We can see that if the Investment Committee finds −− that's the word used, "finds" −− a matter difficult to decide, it has the right, and note again in the blue highlighting in the second row in the top extract, the permissive "may", it may refer the matter to the Special Committee.

So those are the regulations on the decision−making process.

Let me come next to a point I foreshadowed earlier this morning, coming out of Elliott's own research on the NPS's investment practices. It's this. It's the NPS's practice of viewing its portfolio in the aggregate in an holistic fashion before making any investment decision.

On this point, the record shows that the NPS held extensive holdings right across the Samsung Group. I have it on slide 30, showing the NPS's shares at the time in various Samsung Group entities.

So at the time of this merger, the NPS was an investor in both Samsung C&T and Cheil. But the NPS also, as the slide shows us, had material stakes in some 15 other Samsung Group companies.

As we'll come on to discuss, the proposed merger between SC&T and Cheil was to affect not just those two companies, but the entire group. That's because it would have the effect of making the merged entity the de facto holding company for the group.

So, as Elliott knew, the merger was relevant to the NPS's entire portfolio of investments in the Samsung Group. And as Elliott also knew, that's exactly how the NPS would look at the matter.

In fact, NPS research that's in the record before this tribunal showed that similar deals involving other Chaebol in the past which had moved similarly to a holding company structure had increased the value of equities right across the relevant Chaebol group by more than 15%. I don't have that on the slide, but for your note, it's at exhibit R−61 at page 10. That's NPS research from May of 2014.

I turn then to other views on the merger that concerns us. It's fair to say that views in the market were diverse, among the leading domestic Korean securities analysts views the record shows were strongly

positive. I have a summary of those on slide 31.

We can see that 21 of the 22 analysts polled for this report viewed the merger positively and held an optimistic view of the growth potential and future corporate value of SC&T.

Now, it's worth noting that a year later −− I'm now on slide 32 −− after a special prosecutor had been appointed to investigate President [redacted], these analysts' answers were consistent. 21 out of the 22 Korean securities analysts still maintained their approval of this merger.

But of course, as we know, the merger also had its detractors and Elliott was prime among them.

Having then increased its stake in Samsung C&T to 7.12%, Elliott set about seeking to convince everyone, analysts included, to side with it. In particular, the record shows, and I don't have this on the slide, but it's at exhibit R−262, that Elliott sought to garner the support of proxy advisory firms to join Elliott's opposition to the merger.

So I want briefly to look at the report of one of those proxy advisory firms. It's ISS. You heard it referenced yesterday by Claimant's counsel, and I have it extracted on slide 33.

We can see despite, as ISS describes it, the very

positive market reaction to the merger, ISS, as was said yesterday, recommended that SC&T shareholders vote against the transaction. But there's an important note of nuance and it's in the final extract on the slide. ISS also recognised that SC&T share price could fall by as much as in its calculation 22.6% in the short−term if the merger vote failed.

So having engaged with the proxy advisory firms, the results of one of which we see on this slide, the Claimant then turned next to the Korean courts.

I have on slide 34 an extract from its application to the court for an injunction to restrain the merger vote. The gravamen of that application was the Claimant's objection to the merger ratio.

The claim there was that although the ratio complied with the statute, it was, according to the Claimant, substantively unfair as compared to what it at the time called fair value derived by one of the big four accounting firms at Elliott's request. Elliott at that time did not disclose the identity of that big four accounting firm and it does not disclose it before this tribunal.

In the event, the Korean court dismissed the injunction application. I have the court's decision extracted on slide 35. It represents, we would say,

a return to economic orthodoxy. The court observed that the merger ratio was set by mandatory statutory formula, pegged to market prices, because such prices, and I'm quoting from the court, reflect an objective value of the shares.

That was July 1, 2015. Elliott next took its campaign to the Korean Government. In doing that, it wrote to the Financial Services Commission. It wrote to the Korean Fair Trade Commission. It wrote to the Ministry of Health and Welfare. And it wrote to the Chief of Staff of President [redacted].

Now, the first letter of those I need to show you is from July 7 of 2015. It's on slide 36 and it's to the Ministry of Health and Welfare.

In this letter Elliott urged the Ministry to, and I quote, properly discharge its responsibilities with regard to NPS by which Elliott evidently meant to force NPS to have the Special Committee take jurisdiction over how the NPS would vote on the proposed merger.

The next day, July 8, Elliott dispatched some five letters to the Korean Government, and I'm going to show you just one of them. It's on slide 37 and it's Elliott's letter to the Chief of Staff to President [redacted].

We can see that Elliott sought the attention of the office of the President, given what Elliott described as the importance of this merger to the Korean securities market and the broader Korean economy.

So we've seen Elliott's efforts to engage various agencies of the Government, including the office of the President with respect to the merger. And so I turn to look at the Government's consideration of this merger.

For its part, the Ministry of Health and Welfare monitored progress of the NPS's preparations for making a decision on the merger. I have an example of that on slide 38. It's a report from June 8, 2015, and we will see that having explained the background to the merger, there is a record there of the NPS's voting mechanism.

The report notes that [redacted]. And we can see that [redacted].

We also know from the record in this arbitration that the Ministry kept the office of the President −− that is the Blue House −− informed of developments with respect to this merger. I have an example of that on

slide 39.

It's an email from July 8, 2015 from a Ministry of Health and Welfare official to a Blue House official, [redacted].

One of the reports that appears to have been attached −− I have extracted that on slide 40, and in terms consistent with those we've seen elsewhere, it [redacted]. And in doing that, it [redacted].

So with that segue, let me then return from the organs of Government to the NPS and its preparations for deciding how to vote the funds' rights on this merger.

Counsel opposite yesterday spoke at great length about the NPS's vote on a close in time but wholly unrelated Chaebol merger. That's a merger involving companies in the SK Group, and it came for decision the month before the formal announcement of the SCT Cheil merger.

In particular, on June 17 of 2015, the Investment Committee of the NPS met to decide a whole host of issues, including, as they related to the SK Chaebol, as agenda item 1 for that meeting, the SK merger. We see

that on slide 41.

As we also see on this slide, it was proposed that that merger, the SK merger, be submitted to the Special Committee.

As we turn to slide 42, we have the minutes from the Investment Committee meeting where that matter was considered, and we see immediately that they record no more than that the IC members present at the meeting agreed to submit the SK merger to the Special Committee. And that's what happened.

It went to the Special Committee and the Special Committee decided by a majority that the NPS should oppose that other again wholly unrelated merger.

In the meantime we now know that the research team ——

MR GARIBALDI: Can I ask a question?

Mr Lingard, do you happen to know what the price of the SK shares were at the time? In other words, does the SK merger vote bear the theory that you have espoused that the NPS follows that particular policy you described?

MR LINGARD: Thank you, Mr Garibaldi. I have the question. Let me revert to you, if I may, after the lunch break with evidence, lest I misquote it before you now. We will have an answer to you after the break if that's

acceptable, sir.

So that was the SK merger.

THE PRESIDENT: Just to understand, the question is about the relationship between the appraisal price of SK and the market price at the time?

MR LINGARD: That is how I have understood the question, sir.

MR GARIBALDI: Yes, thank you.

MR LINGARD: That's the SK merger. Let me return to our merger of SCT and Cheil.

It's in this period of time that the research team within the NPS's domestic equity office began preparing its analyses of this merger, of the SCT Cheil merger, and that was its role, to perform analyses to support the IC's decision—making.

Let me say plainly, as we heard from counsel opposite yesterday, some of the central issues in the criminal proceedings ongoing in the Korean courts concern the analyses conducted at this time by the NPS research team.

You heard this at some length yesterday, but there are questions about whether the research team manipulated its analyses or prepared them with a view to achieving certain outcomes on instructions from figures of authority within the NPS itself or from the Ministry

of Health and Welfare, figures who were abusing their positions.

Again, let me say it plainly. Those are serious questions and they are of importance in the ongoing Korean criminal proceedings.

But we say the relevant question in these international proceedings before this arbitral tribunal is how the Investment Committee in fact decided, whether the Investment Committee in fact relied on that work, that research work, that we understand to have been problematic.

Indeed, that work may well have been flawed, and it may very well give rise to liability in the Korean proceedings. But the actual decision on the vote as taken, we say, the relevant question before this tribunal, shows that that analysis, that analysis of the research team, was not relied upon by the members of the Investment Committee.

So to make good on that statement, let me come first to the agenda of the NPS Investment Committee meeting. The meeting took place on July 10, 2015, and I have the agenda on slide 43.

You will note right away that in contrast with the agenda for the SK merger that I showed you a moment ago, the agenda prepared for the SCT Cheil merger did not

contain any recommendation as to how the members of the IC should vote. You see the blank squares where in contradistinction for the SK merger the proposal was direct passage to the Special Committee.

Here for our merger we see instead, as we return to slide 44, that members of the IC were presented with four options. Those were: affirmative, that is to vote in support of the merger; dissenting, that is to oppose the merger; so—called shadow voting, that is to follow the result of the majority of other shareholders but not affirmatively take a position; and fourth, abstention.

Now, this so—called open voting system, presentation before the members of a full array of options, differed from what the IC members had been presented with in the context of the SK merger.

And so as we turn to slide 45, now extracted from the minutes of the IC meeting, we see that members of the Investment Committee initially questioned this approach by which they were presented with this full array of options.

In particular, we see here in the minutes [redacted] questioning whether the committee was being asked to consider the merger in substance or merely pass it along to the Special Committee. As we turn over to slide 46, we see the substantial discussion that follows.

The head of the management strategy office explained that on this occasion, and I'm quoting from the minutes, the Voting Guidelines are being more faithfully adhered to. Evidently it was further explained that, and again I'm quoting, if it is difficult to determine whether to agree or disagree based on the voting results, the agenda may be submitted to the Special Committee.

If we go to the next extract in the minutes, over on slide 47, we see the precise mechanism for determination of whether the matter was difficult. It's this: if none of the four options garnered a majority of votes of Investment Committee members, the committee would then have found the matter difficult and it would exercise its right to refer it to the Special Committee.

I have been focused on the process for the Investment Committee's deliberations. I come then to the substance of those deliberations in this next extract from the IC minutes on slide 48.

We see questions being debated about the merger ratio and also about the recommendations of various securities advisory firms with respect to the merger.

You see an acknowledgment here in this extract that shareholders on each side of the merger might take different views. There's a reference there again to the advisory report of ISS, the firm with which Elliott had

engaged, noting that the merger is positive from the perspective of anybody with an interest in Cheil Industries. We know of course that the NPS had such an interest.

We turn then to the next extract from the minutes on slide 49. And here we see recorded a sustained debate about the synergies that could be expected from this merger. Note immediately the express recognition that synergies are difficult to calculate. We see [redacted] noting, rightly, that in his words there are limits to evaluating future synergies and they are difficult, he says, to specify or verify.

Evidently, we say, no reliance on a single calculation of synergies, flawed or otherwise. That calculation, we say, was plainly not central to the decisions of the Investment Committee.

Now, we've been looking at the minutes of the Investment Committee, and I have showed you just a few extracts. It's an important document. Again, it's exhibit R—128 and we would respectfully ask you to study it closely in its entirety.

But given the importance of this meeting, I want to add two additional elements of colour. The first comes from testimony given by at least one IC member in subsequent proceedings. I have that extract on

slide 50. It's an example. It's IC member [redacted]. You can see his testimony was that [redacted], and I quote:

"[redacted]"

And the merger "[redacted]". He then went on to testify in the local proceedings, I quote:

"[redacted]"

Consistent with the ISS advice:

"[redacted]".

That's one element of the additional colour I proposed to add to the minutes.

The second requires me to return to the Claimant's opening from yesterday. And on that, gentlemen, we have provided a standalone demonstrative. I hope it is in your binders distributed by my colleague earlier this morning.

With this standalone demonstrative we offer a response to Claimant's demonstrative 3 which was used twice in counsel's opening yesterday at slide 68 and 134. It's a table that the Claimant used with brief

submissions to suggest that, as is seen in the column with the red nos, that many members of the Investment Committee would have voted against the merger on the Claimant's case had they known that the synergy analysis was flawed.

Regrettably, the citations to the evidence in that demonstrative from the Claimant, we say, misleadingly selective, and so what we have sought to do in this standalone demonstrative is correct the record with the necessary context, with the necessary additional extracts from the testimony of members of the Investment Committee, and given the centrality of this point at the risk of belabouring it, I will propose, if I may, gentlemen, to take you through just a few examples.

The first is on slide 2 of our standalone demonstrative. The first of the IC members that the Claimant tells us would have voted no, but for the flawed synergy calculations, that's [redacted]. We see that in fact what he said was that [redacted]. You see that in the first extract of the testimony there. [redacted].

We also see he then clarifies that [redacted], and we have already shown you this in our slide

deck, [redacted].

He was then asked at the bottom of this extract: [redacted]? His answer was [redacted]. [redacted].

If we then turn to page 3, the next name from the Claimant's demonstrative is [redacted], the head of the Domestic Equity office. His testimony, we see it plainly, I would say, it's in black and white, in fact it's in yellow, was that [redacted].

If we go to the bottom of this extract from his testimony, he says:

"[redacted]"

Turn then to page 4. The next name in the Claimant's demonstrative is [redacted], head of investment operation. The Claimant tells us that Mr [redacted] would have voted no but for the flawed synergy calculation. In fact, his testimony, as we see in the

middle of this extract, he's asked, [redacted]? And he says, [redacted]. [redacted].

Turn then to slide 5 in our standalone demonstrative. The next name from the Claimant's list, IC member [redacted], head of overseas alternative investment. He was asked, and this is the second highlighted extract on slide 5 of our standalone demonstrative. He was asked:

"[redacted]"

His answer:

"[redacted]"

We come then to page 6, the next name in the Claimant's list, [redacted], and I need to be fair to counsel opposite. This, members of the tribunal, is a rare example in the Claimant's demonstrative of fidelity to the evidence. The evidence is fairly read, suggesting that this one member of the Investment Committee, Mr [redacted], would have voted differently but for the synergy calculations.

Turn then to page 7. The next name in the

Claimant's list, [redacted], head of risk management. His testimony, like that of many others we've seen, was that [redacted].

If I could invite you to turn back with me then to the first page of this standalone demonstrative where we have the Claimant's slide extracted to the left, we see four individuals listed as having abstained or shadow voted towards the end of Claimant's table. And to the right, under the "Evidence" column of the Claimant's table, it is noted that, as to three of those individuals, they would have voted no —— likely would have voted no had they known of the issues with the synergy calculations because, according to the Claimant's table, they were told they could rely on those calculations.

That assertion, gentlemen, is not supported by the evidence the Claimant there cites. I don't have this in the extracts before you, but for your note, again it's exhibit R—128. It's the Investment Committee minutes at page 11.

That is the cite offered by the Claimant. In fact, if we go to those minutes, we see no more than Mr [redacted] describing the calculation in some detail. He references businesses in China. He references trading

and fashion businesses. There are no representations made as to the reliability or otherwise of those calculations.

In any event, if one continues to work through the IC minutes thereafter —— and again, we respectfully urge you so to do —— we see at least IC member [redacted] asking again about over—estimation of synergy effects. No suggestion whatsoever that those synergy calculations were relied upon.

Now, the tribunal is being told by the Claimant that IC members would have voted differently but for those synergy calculations. That evidently is the point of the Claimant's slide 68 and 134. But, as ever, the evidence is more complicated and we urge you, gentlemen, to study that evidence in its entirety.

I have gone through it rather painstakingly, for which I apologise, but it is a point of some importance. We offer further observations on this evidence in our Rejoinder at paragraphs 231 to 234 and 250 to 252.

So that's the Investment Committee. I need to turn next to the Special Committee. As I do that, I am conscious of the time, and in particular conscious of the stenographers' time, and I wonder if this might be an appropriate moment to break. I'm conscious we're 15 minutes behind our already delayed schedule.

THE PRESIDENT: I think this would be a good time. We agreed that we would break around 12.30. But given the time it took to go through the housekeeping issues, we have some flexibility. But let's break now and we continue at 1.50.

(12.48 pm)

(The short adjournment)

(1.46 pm)

THE PRESIDENT: Mr Lingard.

MR LINGARD: Thank you, Mr President.

We left before the break on the Investment Committee deliberation of this merger. I'm also acutely aware that I have Mr Garibaldi's question to answer. So on that question, if I may, I propose to return to it slightly later this afternoon when I address the merits of the case against us. I will return there to the SK merger and seek to address your question head on there, Mr Garibaldi, if I may.

Having then looked at the deliberations of the Investment Committee members before we broke, I turn briefly to the Special Committee and as we return to the slide deck, I have an extract from the second witness statement of Mr [redacted] again you will recall he was the lawyer member of the Special Committee at the time of this vote and he testifies that in fact he expected the

merger to be referred to his Special Committee. That is his testimony.

But if we turn to slide 52, we see that Mr [redacted] expresses no view on the process by which matters got from the NPS to his committee, the Special Committee.

Instead, he explains that he only ever saw the agenda that had come to the Special Committee, matters that had been referred to his committee. He was never privy to the perspective of the Investment Committee on how matters were or were not referred to the Special Committee.

So let me now take a step back from the NPS. The NPS was of course just one shareholder, one shareholder among tens of thousands of others.

The shareholder vote in our merger took place on July 17, 2015. And I have on slide 53 a diagrammatic representation of how the voting panned out.

Start with me, if you would, members of the tribunal, in reviewing this diagrammatic at the far right of the horizonal axis at the bottom. We see there that Samsung C&T had a little over 156 million issued shares. Moving then to the left of that, we see that nearly 85% of those shares in fact actually voted at the extraordinary general meeting.

If we stay on that bottom horizonal axis, we see the

first voting threshold in the red bubble furthest to the left. That's the requirement of one-third of all shareholders to vote in favour. That would require a little over 52 million votes in support.

Jumping then to the top of this schematic, we see the second threshold in the red bubble at the top. That's the requirement for two-thirds of those actually voting to vote in favour. Given the 85% turnout, that would require more than 88 million votes in support.

So how in fact did the vote go? In the middle at the bottom we see that the first threshold was readily satisfied. Support was required from 33.3% of all shareholders. In fact, as we see there, nearly 60% of all shareholders voted in favour.

On the second threshold, the requirement for the support of two-thirds of those actually voting, if we look to the top, to the right, we see that 69.53% of voting shareholders were in favour, and so our second threshold was also satisfied.

So who voted in favour? Obviously Samsung affiliates did. And as I foreshadowed already, so too did KCC and we know now that the NPS also voted its shares in favour.

So too did a sizeable contingent of other foreign and domestic shareholders. We see them represented in

the key at the bottom of this schematic on slide 53.

To run the numbers here, even if we put aside the Samsung affiliates, KCC and the NPS, other domestic and foreign shareholders holding a total of almost 28% of the stock voted in favour.

Now, to situate us once again in our chronology, this shareholder vote took place on July 17 of 2015. We've heard yesterday and in written submissions from counsel opposite a great deal that we would characterise as hyperbole. The Claimant's Rejoinder on preliminary objections went so far as describing these proceedings as distressing; that's the word used, "distressing" for Korea. That characterisation, hyperbolic though we say it is in general terms, is at least accurate as to the next event to which we come in our chronology, and as counsel for the Republic, I come to it with a heavy heart.

I have on slide 54 an extract from the local judgment in the case against former President [redacted]'s confidante, [redacted].

We see a week after the shareholder vote in favour of the merger, a week after that vote, the President's confidant, Ms [redacted], returned to Korea from a trip to Europe. And we can see the court's finding that upon her return, again a week after the shareholder vote,

this confidante, the Ms [redacted], facilitated a meeting between the then President, then President [redacted], and Samsung heir apparent [redacted].

We can also see the court's finding that at this point then President [redacted] decided to exchange her backing for the Samsung Group's succession plan in return for financial support from Samsung. BY in this extract is [redacted]. Q is the destination of that financial support; it's former President [redacted]'s favoured elite centre for winter sport.

I offer those explanations of the coded references here. A note of caution: they are different as between the judgments. So care is needed as one reviews those judgments. The coded references differ across the judgments.

We also see at the top, the second paragraph of this extract, a reference to the recent —— that is recent past —— merger of what are described in this extract as AJ and RD, namely Samsung C&T and Cheil.

So the finding is that after this merger former President [redacted] and [redacted] reached an agreement where the former President [redacted] would accept bribes from [redacted] in return for helping with evidently later steps in the Samsung Group's succession plan.

The key point here of course is that that succession

plan is not equivalent to support for the merger which had already passed the shareholder vote through which I just took you.

Again, the extracts on this slide, 54, have been from the case against President [redacted]'s friend and confidant Ms [redacted]. As we turn to slide 55 I have an extract from the Seoul High Court case against former President [redacted] herself, this being the judgment on remand, I note for completeness, though on this point the judgment stands unaffected. And it echoes the finding in the case against Ms [redacted].

In short, the bribery for which former President [redacted] has been impeached, tried and jailed took place only after the merger had been approved by shareholders.

We have a timeline of the relevant events on slide 56 to illustrate this point, a point of some importance.

That corruption, the corruption for which former President [redacted] has been impeached, tried and jailed, was found to have occurred only at the meeting of July 25, 2015, that is at the bottom right of this timeline.

It is, we say, on the evidence wholly irrelevant to the shareholders' vote on the merger that the Claimant impugns in this arbitration.

Again, let me say plainly that does not stop it from being deeply troubling, indeed distressing, to use counsel opposite's words, which is precisely why the Republic so vigorously has investigated and prosecuted the underlying conduct.

But that, we say, is not the task of this tribunal in these proceedings. The Claimant evidently does not like the fundamental but inconvenient fact that the only finding of corruption in the local proceedings relates to conduct after the merger had already been voted through. The Claimant's claim, after all, is that the merger —— is about the merger, not about broader generalised allegations of political collusion, or at least that is the claim that could be advanced in international investment law. That is the claim for this international tribunal to resolve.

The Claimant's response to this inconvenient—for—its—claim timing is to try on make something of an earlier meeting. We heard it yesterday and the evidence does show that there was indeed an earlier meeting between the then President, then President [redacted], and [redacted]. It was a meeting on September 15, 2014, and it's in the top left box in our timeline on slide 56.

There is no evidence in the record before you, none

at all, to suggest that that meeting had anything to do with the merger.

The Korean courts have determined that there was no promise to give and receive bribes at that meeting, nor was there any payment of bribes in the interval between that meeting and the next meeting, the July meeting, which took place after the merger had been approved.

I have then, as we turn to slide 57, an extract from the latest Seoul High Court decision in the prosecution of former President [redacted]. In this extract M at the top is Samsung, and the court's finding is plain. Samsung did not take any action to provide the requested support between the first and second meetings.

Now, evidently aware of what we say is its timing problem in its reliance on the allegations and findings of bribery, the Claimant describes flippantly that earlier meeting, the September meeting, as, and I quote from its writings, a downpayment on corrupt help from the government.

There is, let me stress this, nothing in the record before you to support that allegation, an allegation that we say is irresponsible.

As we've seen, the courts consistently have found that [redacted] in fact provided no financial support until after the second meeting. The second meeting of July

2015 which took place after the merger that is our concern in these international proceedings had been voted through.

So with that I turn back to that merger. On August 20 of 2015, the Claimant gave the company, Samsung C&T, notice that it would be exercising its buy back rights, its appraisal rights, for those shares it possessed as of the day of the merger announcement. The Claimant had no appraisal rights with respect to the shares it bought thereafter. That is a function of the relevant Korean law and it is of relevance also to our submissions on damages before you with respect to the shares it bought after the merger was formally announced.

Next step in the corporate chronology, as it were, is September 1 of 2015. On that date the merger closed.

After the merger was consummated, the Claimant returned to litigation. In the latter part of 2015 the Claimant sued Samsung C&T once again, this time alleging that the appraisal price was insufficient.

In March of 2016 Samsung C&T and the Claimant settled that Korean litigation. You will recall both from Mr Turner's observations earlier today and from the record before you that the Claimant initially refused to produce that Settlement Agreement to you, gentlemen, and

to us, but eventually produced it. That Settlement Agreement included a comprehensive waiver of claims and provided for payment from Samsung C&T to the payment of an amount of 402 billion Korean Won or about 345 million US dollars.

You have also already heard from Mr Turner that there is still more payment to come to the Claimant pursuant to that Settlement Agreement, depending on the outcome of ongoing related litigation in Korea. That's an amount, if the Seoul High Court's decision is upheld on appeal at the Supreme Court, of about 60 million US dollars further still to come to the Claimant under its settlement terms with Samsung C&T.

I have on slide 58 the description of the claims waived by way of that Settlement Agreement. We can see that the waiver is of all known and unknown claims against, among others, SC&T and its and its affiliates' directors and including obviously [redacted], as long as those claims had something to do with the merger.

The next step in the Claimant's litigation then of course was in 2018 when it commenced these international proceedings before this tribunal.

I turn then finally in our exposition of the facts to bring us up to date on events since these proceedings were filed. The tribunal is of course aware of the

ongoing criminal proceedings in parallel in Korea. I have dealt with some of the allegations and some of the findings in those cases already.

What I propose to do briefly now is to lay them out for completeness. I would also note that we have provided to the tribunal on November 3 an updated version of our annex A to our Rejoinder which sets out in neutral terms a summary of each of the pending Korean criminal cases, pending and resolved cases.

Before I turn to the criminal cases, let me stress once again there was also civil litigation over this merger and the Korean courts' judgment in that civil litigation repays study. It's at exhibit R-9.

Coming though to the criminal cases, by way of summary there are five cases on which the Claimant seeks to rely. They are these: first, the prosecution of former President [redacted]; second, the prosecution of former President [redacted]'s confidante and friend I mentioned earlier, Ms [redacted]; third, the prosecution of Samsung's [redacted] for bribing the former President; fourth, and this is a joint prosecution proceeding together against the former Minister of Health and Welfare [redacted], altogether with former Chief Investment Officer of the NPS [redacted] for abuse of authority and breaches of duties; and fifth, a new prosecution we heard a great deal about

from counsel opposite yesterday of Samsung's [redacted] and other Samsung officials, no government staff is involved, of [redacted] and Samsung staff this time for accounting fraud, breaches of fiduciary duties, and market manipulation.

The first three of those criminal proceedings, those against the former President, Ms [redacted], and [redacted], have now finally concluded. They reached their final conclusions earlier this year. I have already spoken to the prosecutions against the former President and Ms [redacted].

To reiterate: the former President was prosecuted and sentenced for bribery, but not in relation to the merger that is our concern in these proceedings, and similar findings were made in the prosecution against [redacted].

The fourth case then, as I said, is the joint prosecution of [redacted] and [redacted]. It remains pending before the Korean Supreme Court. The latest judgment we have on that is from the intermediate appellate court, namely the Seoul High Court, on appeal from the first instance court.

The High Court found that [redacted] had abused his authority and that [redacted] had breached his duties as an NPS employee.

The court was not, however, concerned in that case against [redacted] and [redacted] about whether the influence they sought to exert was effective, in other words whether the influence they sought to exert in violation of their employment duties was effective on the merger, whether it made a difference. The court was not concerned with that subject.

The fifth prosecution then is the new case against [redacted]. It began with a commence -- with an indictment, excuse me, issued in September of last year, 2020. There is no judgment yet. Trial is ongoing, is ongoing every day. It is that ongoing trial from which the Republic recently has made document production to the Claimant from, as I say, the trial being conducted each day as we speak.

That new prosecution, like the others, does not involve any allegation that [redacted] or Samsung bribed the President in any way connected to the merger. That is our concern. And of course it involves no findings whatever yet. It remains pending trial.

I'll return later this afternoon, when we address the merits, to what we say is to be taken from this corpus of cases, but the short point for now is we submit that the Claimant hopes to rely on the allegations in the local proceedings as a substitute for

the necessary careful analysis of the facts in the record before this international tribunal with respect to the merger that the Claimant impugns before you as a matter of the Treaty between Korea and the United States with respect to alleged damage to its investment arising from this merger.

It is not, we say, enough to point to the Korean cases as part of a generalised critique of political developments in Korea as part of a generalised critique of bad behaviour by a former Korean administration and an enormous Korean conglomerate. All of that bad behaviour, as everything I have said, will be obvious is the subject of thorough investigation and ongoing local cases pending in Korea and wholly outside the proper remit of international investment law.

With that, we come to the end of our exposition of the facts, and I would ask that you next, gentlemen, recognise my partner, Mr Terceño, for our submissions on preliminary objections and thereafter our co-counsel, Mr Han, on that same subject.

Opening submissions by MR TERCEÑO

MR TERCEÑO: Thank you, Nick, and good afternoon, Mr President, and members of the tribunal. My name is Joaquin Terceño and we will now turn to certain threshold issues.

As the tribunal knows, showing there was some kind of wrongdoing here is not alone enough to give the Claimant a right to bring a Treaty claim.

The Treaty requires -- includes various requirements that must be satisfied before a Treaty claim can exist, and we say those requirements are not met here.

I will start with the question of whether the conduct of which the Claimant complains constitutes a Treaty measure. That conduct involves the Government's alleged efforts to influence a shareholder vote and, most importantly, that shareholder vote itself.

The Claimant in its opening yesterday seemed to be trying to distance itself, its claims, from the shareholder vote, but it has alleged throughout its pleadings, and we have included some examples of this on slide 59, that it is the shareholder vote that allegedly violated the Treaty and caused it harm.

Article 11.1 of the Treaty expressly states that the investment chapter which governs the ROK's consent to arbitrate disputes only applies to measures adopted or maintained by a party relating to an investor or its investment in the territory of the Respondent State.

I will come on to the import of the relating to requirement, but first let's consider the meaning of the

term "measure".

To do so, we must consider the context as instructed by Article 31.1 of the Vienna Convention on the Law of Treaties.

The context here of course is the words used to describe State activity that might engage the protections of an international investment Treaty.

Now, in paragraph 264 of its Reply, and we have this on slide 61, the Claimant claims to consider the meaning of measure in its context. But instead it cites definitions saying that a measure is any step planned or taken or any plan or course of action, and this offers no context whatsoever.

The Claimant may as well have said that measure means to determine the length of a piece of string. Its definitions are not wrong, but they do not help the tribunal understand what "measure" means when used in an international investment Treaty to describe covered State actions.

The ROK did consider definitions of the term "measure" in the context here. We begin with Article 1.4 of the Treaty which defines "measure" as including "any law, regulation, procedure, requirement, or practice".

That's here on slide 62.

I would note here that practice must be understood in context as well. Here, with respect to its inclusion in a list alongside laws, regulations, etc, which informs our understanding as I'll come on to discuss.

So in this proper context, "measure" means, for example, a proposed legislative act, a legislative enactment proposed or adopted or a legislative bill. These definitions are listed in the ROK's Statement of Defence at paragraph 205 and we have them here on slide 63.

To be clear, the ROK does not take the position that a Treaty measure is limited to an act of the legislature alone, but again these meanings provide us context.

That context points us to the process of legislative or administrative rule-making and procedure.

We cite cases in support of this understanding in paragraph 206 of the Statement of Defence, and we address the Claimant's counter arguments at paragraphs 23 and 24 of the ROK's Rejoinder.

To quote an instructive passage from one of those cases, the Azinian v Mexico tribunal made clear that not every action taken by a government can found a Treaty claim, holding in that case that NAFTA cannot possibly be understood to cover every course of action by a State, because that would "elevate a multitude of

ordinary transactions into potential international disputes". This is RLA-16 which we show an extract of here on slide 64.

One case that the Claimant relies on is SAUR International v Argentina. But even there, in adopting in what it called a broad sense of the term measures, the tribunal expressly limited the scope of measure to "administrative, legislative or judicial acts".

Now, let me just briefly address that the measure must be adopted or maintained in order to give rise to potential Treaty protections. For a measure to be adopted in the context of a State's conduct, a law, regulation, procedure, requirement or practice must be put in place. This is simple common sense and the relevant definitions, that is those in the right context are set forth in paragraph 209 of the Statement of Defence, and you see them here on slide 66.

Further, we say it is nonsensical to say that you can maintain something before it is caused to exist. Clearly something must give rise to the thing before you can then maintain that thing.

Even an omission, which is the example the Claimant uses to support its contrary view, is adopted if at all the first time that that information should have been shared and is not shared. It is only after that first

instance that the omission could later be maintained.

Of course, any claim must be based on an actual measure. Here we say the claims are not.

Let's start with the heart of the Claimant's claim. This is the NPS shareholder vote in favour of the merger, a commercial act by a minority shareholder.

The Claimant's case depends on its attempt to elevate this ordinary commercial transaction into an international dispute with the ROK. As my colleague Sanghoon Han and I will come on to in a few minutes, the NPS vote cannot be attributed to the ROK, and thus on that basis alone it cannot be considered a Treaty measure.

But even if it could be contributed to the ROK, the shareholder vote fails to satisfy the definition of measure under this Treaty.

Now, let's recall, the Treaty defines measure in Article 1.4, the definitions. You see it again here on slide 67.

Now, a shareholder vote is obviously not a law or regulation, and the vote applied no procedure to nor imposed any requirement on a qualified investor or an investment.

So that leaves us with practice, which again we say should be understood in the context in which we find it,

in relation to legislative or administrative activities, and we say a vote is also not a practice. It is self-evident, we say, that a practice implies repetition. And it is that repetition that might give it status similar to a regulation or a procedure.

So while a one-off measure might implicate the Treaty because it is law or regulation, a one-off act cannot fairly be considered a practice. It is merely an occurrence.

Now, even if we rely on the Claimant's own definition, the NPS shareholder vote is not a Treaty measure. That definition is found in the Claimant's Reply at paragraph 261, which you see here on slide 68, and they say that a measure under the Treaty is "any governmental action, step or omission". A governmental act, as we will come on to discuss more, is one that can only properly be taken by a government, not by a private actor. A commercial act, meanwhile, is one that any private actor, as well as a government, can take, and a shareholder vote falls into this category.

The Claimant's only answer to this is to claim that the NPS's shareholder vote was not an "ordinary shareholder vote" because of the NPS's supposed connection to the Korean State.

It is well-settled under international law that even

if a government engages in a commercial act, that does not make the act suddenly a governmental one. For example, this was addressed in Almås v Poland which is RLA−80 at paragraph 2.12 and just to note there the tribunal there found that an agricultural lease is a commercial transaction even if entered into with a State entity and even if it involved State−owned land. So if it is the State doing it, it can still remain a commercial act.

The shareholder vote is a commercial act, not a governmental one, and so it is not a measure even under the Claimant's own definition.

This leaves us with the former administration's efforts to influence that shareholder vote. It primarily did this, the Claimant argues, by directing that one committee should take the decision instead of another committee. The ROK did not pass any law or regulation, nor did it impose any new procedure or requirement on the Claimant, and as for practice, we say that the efforts to influence that vote are not sufficient to arise to a practice adopted by the State that could be considered a Treaty measure.

Now, counsel opposite yesterday feigned amazement that we might expect the tribunal to ignore the ROK's conduct that it points to. But of course if that

conduct is not subject to the Treaty, then this tribunal has no basis to sit in judgment over it.

We see this in Hamester v Ghana, where the tribunal made clear that conduct, even if it violated a Claimant's rights, did not matter where the end result was not a Treaty violation. This is in the record at CLA6, and it's paragraph 331 where that is discussed.

Now, the Claimant also argued yesterday that if governmental statements lead to an expropriation, for example, then a Treaty claim lies, but of course because an expropriation is a Treaty violation. A shareholder vote is not a Treaty violation so the conduct at issue here does not found a Treaty claim.

Now, finally, on this point, coming back to Article 11.1's relating to requirement, even if measure was read as overly broad, the Claimant also must prove a significant legal connection to the Claimant or its investment.

With all due respect to Claimant's counsel, this is a serious argument, and one they failed to rebut. The Claimant's position is essentially that because the NPS voted as a shareholder in SC&T, and the Claimant was a shareholder in SC&T, the two were significantly connected. We say this simplistic approach ignores the law. Relating to has been found to "signify something

more than the mere effect of a measure on an investor or an investment". And instead it "requires a legally significant connection between them" and this is from the Methanex tribunal at RLA−22, paragraph 147, confirming the view put forward there by the United States.

The Claimant agrees this is the test, as it must, and in confirming the need to show a legally significant connection, the tribunal in Resolute Forest Products v Canada explained is that there needs to be "a relationship of apparent proximity" and that "a measure which adversely affected the Claimant in a tangential or merely consequential way will not suffice for this purpose".

This is you see on slide 70, and it is RLA−86 at paragraph 242.

Now, here the NPS's shareholder vote related to its own sharing and was an exercise of its individual voting rights. Counsel opposite claimed yesterday that "it is difficult to conceive of a case other than the present case that is more investor or investment specific". That was in the transcript at page 86, rows 12 to 15. {Day1/86:12}

Now, I like a challenge. So I tried to conceive of such a case and it was not difficult. Expropriation of

an investor's property like a factory or a hotel is an obvious example of a far more investment−specific case. Revoking a mining concession also comes to mind, or sending an army to invade a farm, or seizing a Claimant's shares and selling them.

Indeed, the Claimant doesn't actually argue that the NPS vote is specific to it. Instead, the Claimant argues in paragraph 294 of its Reply, and you see this on slide 71, that its investment "could be expected to be affected" by the NPS vote.

This describes no more than a tangential and consequential impact. That was also felt by more than 50,000 other Samsung C&T shareholders, and also every Cheil shareholder and by shareholders throughout the Samsung Group. This cannot rise to the level of a legally significant connection to the Claimant or its investment.

The Claimant then argues in paragraph 295 of its Reply that the ROK was motivated by the specific intention to harm the Claimant. While the former administration's officials may have used the Claimant's opposition to the merger to seek support for their own support of it, on the Claimant's own case, that position was adopted without any consideration of the Claimant or any interest in harming the Claimant. We explained this

in paragraphs 234 to 236 of the Statement of Defence.

There is certainly nothing to show that harming the Claimant was a motivation behind the Investment Committee's decision to support the merger. The ROK addresses this in our Rejoinder at paragraph 41.

Now, with that, let me move on to discuss attribution.

The question here is whether the conduct of the NPS can be attributed to the ROK. Article 11.1.3 provides two bases for determining whether a measure has been adopted or maintained by the State party. We see this on slide 72.

This is a self-contained provision that gives only two possibilities for attribution of conduct to the State under this Treaty. Article 11.1.3(a) is similar to ILC Article 4, and part B is similar to ILC Article 5. And so we say they can be understood by reference to those two ILC Articles. But there is no provision in the Treaty that is similar to ILC Article 8 which I'll come back to.

So let's consider the Treaty's two options for attribution.

Article 11.1.3(a) provides that measures adopted or maintained by central, regional or local governments and authorities are attributable to the ROK.

As I noted, this provision can be understood with reference to ILC Article 4 which states that the conduct of a State organ is an act of that State, and that "an organ includes any person or entity which has that status in accordance with the internal law of the State".

This is on slide 74.

The jurisprudence under ILC Article 4 points to two important principles. First, you can have a de jure State organ where the law of the State classifies an entity as a State organ. Second, you can have a de facto state organ, and this is where it is not classified as such under domestic law, but it may still be considered a State organ under international law in certain circumstances.

Numerous cases have pointed out this distinction that I have just described. I'll cite only one of them which we have put up on slide 75. This is Staur v Latvia which held that the entity at issue there was not a State organ under Latvian law and so it was not a de jure state organ, but recognised that it may nevertheless be a de facto state organ.

The point here is very simple: if an entity is a State organ under domestic law, it is presumptively a State organ for the purposes of attribution.

If it is not classified as a State organ under domestic law, then we turn to whether it nevertheless should be considered a State organ for the purposes of international responsibility.

The Claimant again got this wrong yesterday. Domestic law is absolutely relevant to the proper analysis, and it can either be decisive, as in the case of a de jure organ, or at least instructive, as in the case of a de facto organ.

I should also note that opposing counsel made reference to two cases yesterday. These were CLA-127 and CLA-88, but these do not support the Claimant's proposition which we had already addressed at paragraph 62(e) and (f) of the ROK's Rejoinder and we invite the tribunal to review those submissions.

So our first question is: is the NPS a de jure State organ? We say no, it is not.

You will hear from my colleague Sanghoon Han who will explain that the NPS does not form part of the Korean State under Korean law. But first it is worth recalling that from an international law standpoint, the fact that an entity has separate legal personality has been considered decisive by some tribunals to the question of whether it is a de jure State organ.

For example, the tribunal in Almås v Poland, citing

cases such as Bayindir v Pakistan and EDF v Romania and cited in turn by Staur v Latvia, which we saw on the last slide, found that an entity "is not a State organ according to the terms of a State's legal order when it has independent personality in that order". We show this on slide 76.

So we do not, as the Claimant again got wrong yesterday, claim that an entity with separate legal personality can never be a State organ. What we say is that tribunals have found this decisive with respect to a de jure State organ, and this is one factor when considering whether it is a de facto State organ, which I will come back to.

But first let me turn over to my colleague, Sanghoon Han, who will explain the status of the NPS under Korean law.

Opening submissions by MR HAN

MR HAN: Thank you, good afternoon, Mr President, and members of the tribunal. As Mr Terceño has explained, whether Korean law used the term "State organ" is not relevant to the issue of attribution in this case.

What matters is whether the NPS falls within the concept of a State organ under Korean law.

With that clarification, let me proceed to deal with the position of the NPS under Korean law.

In order to understand its position, it is necessary to first understand the organisation and structure of the Korean Government.

As our expert Professor Sung-soo Kim explained in his report, State organs under the Korean legal system are classified into three categories.

First, State organs that are constitutional institutions.

Second, State organs that are established under the Government Organization Act and other acts enacted pursuant to Korean Constitution.

Third, State organs that are specifically established by other individual statutes as a central administrative agency under Article 2 of the Government Organization Act.

I'll explain these three categories in turn.

First, there are constitutional institutions established directly under the Korean Constitution. As you can see on the slide, these include the office of the President, the National Assembly, and the Korean courts.

Second, there are entities established under the Government Organization Act or other Acts enacted pursuant to the Korean Constitution.

This second category of State organs include central

administrative agencies which are key institutions that constitute the structure of the Korean Government.

As I'll explain shortly, a Bu, a Cheo and a Cheong are central administrative agencies that fall under this category.

Third, there are entities specifically established as central administrative agencies by other individual statutes. As you can see on the slide, these entities are exhaustively listed in Article 2, paragraph 2 of the Government Organization Act.

This threefold classification is supported by the very text of the Korean Constitution. As you can see on the slide, Article 96 of the Korean Constitution requires that the establishment, organisation and function of each executive Ministry shall be determined by Act.

As will be explained by our expert, Professor Kim, Article 96 embodies the Korean law principle of administrative organisation legalism which requires that administrative organisation shall be determined by statutory law.

Among the entities that form the organised structure of the Korean Government, central administrative agencies are an important entity. Let us explore this further.

First, there are central administrative agencies established by the Government Organization Act which therefore fall under the second category of State organs.

As you can see on the slide, there are three different categories of central administrative agencies, a Bu, a Cheo and a Cheong.

A Bu is a Ministry affiliated with the President, as you can see on the slide.

Next, a Cheo is a Ministry affiliated with the Prime Minister. You can see this on this slide.

Lastly, a Cheong is an agency established under the control of a Bu. We have set out two examples of a Cheong on this slide: the National Tax Service and the Korea Disease Control and Prevention Agency.

Second, central administrative agencies are also set up by other individual statute which fall under the third category of State organs. Examples include the Financial Services Commission and Korean Communications Commission.

But the NPS sits outside this structure. First, the Korean Constitution makes no reference to the NPS, and therefore it is not a constitutional institution.

Second, the NPS is not an entity established as a Bu or Cheo or Cheong under the Government Organization Act.

This is obvious from article 38 which deals with the Ministry of Health and Welfare.

Under the Government Organization Act the Ministry of Health and Welfare has only one agency that is affiliated to it. This agency is not the NPS. As you can see on the slide, this agency is the Korea Disease Control and Prevention Agency.

If the NPS were an agency under the Ministry of Health and Welfare, Article 38 would have made specific reference to the NPS, but it does not.

Third, the NPS is not a central administrative agency under any other individual Act. This is unlike, for example, the Financial Services Commission, established as a central administrative agency pursuant to the Korean Financial Services Commission Act.

Now, then, what is the NPS? If you look at the slide, you can see that the NPS is set up under National Pension Act. However, unlike the entities that form the Korean Government, the NPS is set up as an independent corporation.

The NPS manages and operates the National Pension Fund set up under Article 102 of the National Pension Act, specifically, as you can see on the slide, the NPS operates the fund, for example through stock transactions in the market. This is just similar to how

other financial management entities operate fund.

The NPS is set up as a corporation that has a separate independent legal personality from the state. The NPS has its own bank account and is subject to corporate tax.

The NPS signs contract and owns property under its own name and can become an independent party in litigation .

The Claimant has placed much emphasis on the fact that the NPS is a public institution under the Public Institutions Act, and it argues that just because this designation, the NPS forms part of the Korean Government.

But this is a grave misunderstanding of Korean administrative law. A public institution is not an entity that forms part of the organised structure of the Korean Government. A public institution is not expressly defined. However, as you can see on the slide , the Public Institutions Act expressly provides that the Minister of Strategy and Finance may designate a legal entity , organisation or institution other than the State or a local government as a public institution . Therefore, public institutions are by their very nature not part of the State or a local government.

While public institutions are entities that carry

out certain duties of a public nature, the Public Institutions Act seeks to establish a self−controlling and accountable management system with the aim of rationalising management. As you can see, these are not descriptions that are associated with entities that form a State government.

As of 2019, there were 339 public institutions in Korea. As you can see on the slide, these public institutions include, for example, Kangwon Land, a casino in Korea. Kangwon Land has about 27% foreign investment and 17% domestic institutional investment.

The Claimant argued during its opening yesterday that public institutions and central administrative agencies form the entire Korean administrative branch. That can be found at yesterday's transcript, page 105, lines 10 to 19. {Day1/105:10}

This Claimant twofold categorisation is in contradiction with the Claimant's own expert, Professor CK Lee. In his second report, at paragraph 25, Professor Lee states that the designation as a public institution is not alone determinative of the question whether an entity forms part of the administrative branch.

As you heard, Claimant's submission is in direct contradiction to its own expert position and has no

ground under Korean law.

The Claimant has also placed much emphasis on the fact that the NPS is an administrative agency, but again, the Claimant argument misunderstands the core concept of Korean administrative law.

As the Claimant expert, Professor CK Lee, explained in paragraph 70 of his first report, an administrative agency defined in Article 2, sub−paragraph 4 of the Administrative Appeals Act, includes a governmental agency, a public organisation, and even an individual that exercises certain administrative power.

As you can see on the slide, the definition of an administrative agency under this Act encompass all public and even private entities that perform some administrative functions.

Whether an entity is an administrative agency under these two statutes is determined by the function it serves. If one entity serves any administrative function, it can be classified as an administrative agency.

Therefore, even private parties such as the private Social Welfare Corporation operating on open issues can be an administrative agency if they exercise administrative power. The Claimant does not deny this.

In short, as the Claimant expert acknowledged in his

report, an administrative agency is a broadly defined concept used in two Korean statutes, only relating to administrative proceedings.

This concept cannot be used in determining whether an entity forms part of the organised structure of the Korean Government.

Now we reach the conclusion.

Korean law exhaustively defines entities that form part of the Korean Government. These entities are set up either under the constitution, under the Government Organization Act, or as central administrative agencies under other individual statute.

The NPS is not a constitutional institution , and is not an institution set up under the Government Organization Act. Nor is it an institution set up as a central administrative agency under other individual statute.

On the other hand, the NPS is an institution with separate legal personality that has its own bank account and pays corporate tax.

Even though the NPS is classified as a public institution or an administrative agency, this does not make it a State organ for the purpose of Korean law.

Thank you. My colleague Mr Terceño will address the issue of de facto State organ.

Further opening submissions by MR TERCEÑO

MR TERCEÑO: Thank you, Sanghoon.

So, as Mr Han has explained, the NPS is not an organ of the State under Korean law, and therefore it's not a de jure State organ under international law. So is it a de facto State organ? Again, we say the answer must be no.

As explained by Judge Crawford, and we see this on slide 99, an entity may be a de facto State organ under ILC Article 4 only in exceptional circumstances.

Exceptional circumstances can be shown where there is a particularly great degree of state control over the entity, as Judge Crawford noted, and turning to slide 100, as also stated in the Bosnian Genocide case: where the persons or entities concerned have acted with respect to the impugned conduct in "complete dependence" on the State due to that State control.

The Bosnian Genocide decision confirmed the complete dependence test is one of State responsibility under international law and international law is of course the law applicable to the present dispute.

Further, the complete dependence test has been applied by investment tribunals in the past, thus showing it is a test under investment law generally. These include Union Fenosa v Eqypt which cited and

relied on the Bosnian Genocide case in the context of an investment dispute and we see that here on slide 101.

The Claimant's only legal authority, CLA—135, which is an article on Attribution in Investment Arbitration, provides at page 29 Judge Crawford's confirmation that this test applies in the investment law context. We see this on slide 102.

So the first question is whether the ROK exercises a particularly great degree of control over the NPS. It is undisputed that the NPS has a separate legal personality. As we've seen from the Almås v Poland award, that creates a high bar to finding it to be a de facto state organ.

The Almås tribunal was concerned with the status of the Polish Agricultural Property Agency, and it found that the agency was supervised by the Minister for Rural Development, that Poland had control over the appointment and removal of its president and vice—president, that Poland could direct the agency through regulations, that the Council of Ministers was required to approve sales of shares held by the agency in companies of strategic importance to agriculture, and that the agency had the power to manage, sell and lease agricultural property on behalf of the state.

Yet the Almås tribunal held that the Polish

Agricultural Property Agency was not a State organ.

It found that the existence of a separate bank account, the ability to own property and the ability to engage on its own account in commercial transactions were decisive in showing that the agency was not a State organ.

All of those factors are true of the NPS as well, as Mr Han has explained.

We also direct the tribunal to other cases we have cited that support this proposition, including Ulysseas v Ecuador in RLA 52 which you see here on the slide, particularly paragraph 154, which explains that States create such independent entities to limit State responsibility in certain areas and this is perfectly proper.

So to sum up, an entity with independent legal personality, that is managed by its own board of directors, that has its own bank account, that is subject to corporate tax, and that signs contracts and owns property in its own name, should not be found to be a de facto State organ under international law.

We say that applying this type of test shows that the NPS is not a de facto State organ.

Accordingly, this tribunal should find that its conduct cannot be attributed to the ROK under Treaty

Article 11.1.3(a).

Now, let me just briefly address the Claimant's continued focus on the KAMCO finding in the Dayyani case, which I have to point out was properly withheld from production in this case on confidentiality grounds.

I'll just make two points. First, the underlying tribunal decision was that KAMCO asserted before a US court that it was a State organ, and so the Tribunal held it to that assertion and this is explained at exhibit C—299, and so that is of no help to the analysis that this tribunal must conduct.

Second, the English High Court case that counsel opposite mentioned yesterday did not address whether KAMCO was a State organ. The question there was solely whether attribution was a jurisdictional question that that court could review, and the court found that it was not.

The English court never considered KAMCO's status, and you can see this in exhibit C—722. In any event, of course, KAMCO is not the NPS.

So this brings us to Article 11.1.3(b). The tribunal will recall that this allows attribution of measures adopted or maintained by non—governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

The term "powers" has a specific meaning here as explained in the travaux, which, as this tribunal is aware, and the Claimant agrees, is an appropriate source for interpreting the Treaty. We see an excerpt from it on slide 106, and it explains that powers, as used in this Treaty, refers to "regulatory, administrative, or other governmental powers".

The Claimant disagrees that the specific conduct alleged to have breached the Treaty must have a governmental quality. Indeed, in its presentation yesterday, the Claimant seemed to suggest that once an entity is delegated, some governmental powers, everything it does is attributable to the state. That is of course not the law.

The tribunal in Maffezini v Spain, a case the Claimant seems to think supports its position, held exactly the opposite, and showed, and this responds, Mr President, to the question you asked yesterday, that there is indeed daylight to be found between providing pension services and other activities in which the NPS engages.

As we see on slide 107, the Maffezini tribunal expressly recognised that the "dividing line between those acts or omission that can be attributed" to the State is the line between governmental and commercial

activities, and that the tribunal "must accordingly categorise the various acts" as commercial or governmental to determine attribution.

The United States in its non-disputing party submission confirms the ROK's position on this, affirming that attribution requires that the conduct in question was undertaken in exercise of governmental powers. You see this on slide 108.

Investment arbitration jurisprudence also confirms this view. In Jan de Nul v Egypt, for example, the tribunal considered whether the acts of the Suez Canal Authority were attributable to Egypt under ILC Article 5. That tribunal found that the Suez Canal Authority was empowered to exercise elements of governmental authority, but in relation to the acts that were complained of, it was not acting as a State entity. You see this extract on slide 109. It is from CLA-7 at paragraph 169.

What that tribunal said was that it was only acting "like any contractor trying to achieve the best price for the services it was seeking".

The Claimant's response in its pleadings is to reject Jan de Nul and those tribunals that followed it as wrongly decided. It says this in its Rejoinder on preliminary objections at paragraph 94.

The ROK addresses these arguments in its Rejoinder at paragraphs 79 to 83 and shows that they must fail, including, because the fact that the NPS considers public interests, a factor the Claimant finds decisive, does not change the nature of a shareholder vote.

The Claimant tries to avoid this reality by asserting at paragraphs 342 of its Reply that the shareholder vote "may have been a commercial act for any other shareholder but it is very distinctly an exercise of governmental functions for the NPS". You see this on slide 110. With respect, this makes no sense. An act is either commercial or governmental, and it does not change -- and its nature does not change as a matter of international law based on the actor. This is why States can perform commercial activities, and is the entire point of the distinction in this regard.

The Claimant also tries to mischaracterise the United States comment that a State can approve commercial transactions to argue that this means a commercial act can be a governmental act. It's an error that is in their pleadings and that that they repeated yesterday.

The United States was not talking about commercial activity. It was talking about governmental approval of commercial acts, such as approving mergers in an

anti-trust context.

This is confirmed by the United States submission in united parcel service, which clarifies that this is what is meant. And you see this on slide 111 which is an extract from RLA-123.

In the end, the Claimant has failed to show that the NPS vote or any of its other conduct at issue was an exercise of governmental power, and thus has failed to show that that conduct can be attributed to the ROK under Treaty article 11.1.3b.

Now, finally, the Claimant cannot save its attribution case by relying on grounds that are not provided for by this Treaty. As I indicated earlier, Article 11.1.3 is a self-contained provision on attribution that provides the only means of attribution under this Treaty.

Our position is simple. The ROK and the United States turned their minds to how attribution would be allowed under their Treaty, and they decided to provide two ways, and only two ways.

There is no Treaty provision that is similar to ILC Article 8 which covers situations involving binding instructions or direction or control of the persons whose conduct is at issue.

There's a directly relevant precedent that supports

the ROK's reading here which the Claimant urges this tribunal to ignore, claiming that its findings were "wrong in law" and that is the Claimant's Reply in paragraph 309. This precedent is Al Tamimi v Oman, where the tribunal held that:

"Contracting parties to a Treaty may by specific provision [That is lex specialis] limit the circumstances under which the acts of an entity will be attributed to the State".

That tribunal recognised that Article 10.1.2 of the US Oman FTA applied a narrow test for attribution, that displaced the ILC articles to the extent they provided any broad her test of attribution, particularly Article 8. You see this on slide 113.

In doing so, that tribunal recognised that the treaty's specific attribution provision limited Oman's responsibility under the FTA to certain categories of State action.

The Treaty here has also expressly set forth the bases for attribution allowed under this Treaty, and ILC's Article 8's method is just not there. That should end the debate. It is not for the Claimant or with respect for this tribunal to add a third wholly separate and distinct ground that the United States and the Republic of Korea chose not to include.

The Claimant argues in its Reply at paragraph 305 that customary international law should not be excluded by "dint of silence", and that if general rules could be excluded "the Treaty must do so expressly or by necessary implication".

But the Treaty is not silent on attribution. It is specific and it is limited. The necessary implication or in the less demanding words of the commentary to ILC Article 55, a "discernible intention" is clear. Where the grounds for attribution are specified in plain language, these are the only grounds that the Treaty allows.

Now, if the tribunal nevertheless were to go beyond the express language of the Treaty and add a third ground for attribution based on ILC Article 8, the conduct at issue, we say, would not satisfy the requirements of effective control or binding instructions to allow for attribution under that article. We set this out at paragraphs 294 to 314 of the Statement of Defence, and paragraphs 86 to 102 of the ROK's Rejoinder which we ask the tribunal to carefully consider.

Thus, the conduct of the NPS cannot be attributed to the ROK.

Now, finally let me briefly touch upon a further

basis for the tribunal to bar this claim at the door, the underlying investment itself is not protected under the Treaty.

As the tribunal made clear in procedural order number 3, the Claimant bears the burden of proving the existence of a covered investment. We say that the Claimant has failed to meet this burden.

The ROK addresses this issue at paragraphs 357 to 368 of the Statement of Defence, and 109 to 128 of the ROK's Rejoinder.

I just wish to make a few brief points this afternoon. The Claimant said yesterday that it has seen these two characteristics of an investment, assumption of risk and expectation of gain, and that is more than enough. We submit that it is not that simple.

We say the proper test for considering whether an asset is a covered investment was set forth by the Seo v Korea tribunal which held that "the prudent course of action is a global assessment of which characteristics are present and how strongly they show in the asset in question."

This is on slide 115, and it comes from CLA−138.

We respectfully ask that the tribunal, in conducting such a global assessment, give particular weight to the duration and commitment elements of an investment.

Now, the Claimant argues that duration is not expressly listed in the Treaty, but the three examples given in Article 11.2.8, the commitment of capital, the expectation of domain or the assumption of risk, are not exhaustive, as other tribunals have held, such as the KT Asia v Kazakhstan tribunal, "the element of duration is inherent in the meaning of an investment".

Now, along with the commitment of capital, we see duration indicates whether an investment will be beneficial to the host state, and that is the entire purpose of a BIT, to attract foreign investment that benefits the State. This is apparent from this Treaty's preamble, which focuses on promoting economic growth and stability, as you see here on slide 117.

Now that the investor has taken a risk or expects to profit are relevant to identifying an investment, but we say they deserve less weight in this global assessment because they do not serve the purpose of the Treaty.

MR GARIBALDI: Mr Terceño, I have a question.

About this duration requirement, suppose that the Republic of Korea −− let's say on the day before the vote of the Investment Committee, the Republic of Korea had expropriated the shares owned by Elliott without compensation. It follows from your argument that Elliott would not have a claim under the Treaty; is that

correct?
MR TERCEÑO: No, Mr Garibaldi, thank you for the question. But respectfully, that does not follow from our argument. Our argument accepts that the intention of a duration can be enough to prove that it gets Treaty protection, because of course in the case of an expropriation the Claimant has no power or control over when its investment has ended, and so we would not say that a Claimant is punished for that.
But it is the intention —— I would say that if that Claimant was actually planning to exit the investment the same day it was expropriated, then perhaps it wouldn't have a claim.
MR GARIBALDI: I'm not talking about a hypothetical investor. I'm talking about this investor. The intention of Elliott on that date does not vary depending on the actions taken by the Republic of Korea on that date.
MR TERCEÑO: That is true. We would agree with that. We would say their intention was always to exit this particular investment in the short term, regarding ——
MR GARIBALDI: Therefore, in your submission, the requirement of duration would not be met and therefore Elliott would not have a claim for expropriation; is that right?

MR TERCEÑO: Correct, and we set this out in paragraphs 367 to 368 of the Statement of Defence and 115 to 122 of the ROK's Rejoinder. But that is our position.
MR GARIBALDI: Thank you.
MR TERCEÑO: Now, as for commitment of capital, the Claimant asserts in paragraph 27 of its Rejoinder on preliminary objections that it has proved it made a commitment and —— as evidence it points to exhibits R—3 and C—442. So let's just briefly take a look at these.
First, on slide 118, we have R3. This says only that the 3.4 million shares acquired after the merger was announced were acquired with internal company funds and we do not know from this document whether that reference to company is to the Elliott Group in general or to the Claimant, and indeed in introducing the Claimant yesterday, you may have noticed that opposing counsel described the entire Elliott Group, ignoring that the Claimant here is a specific company within that group.
Turning to slide 119, we see exhibit C—442, their other evidence for their commitment of capital. But this shows transactions on the Claimant's account, but it lists multiple Elliott Group companies as conducting many of the trades, including Elliott Advisors (HK) Limited, Elliott Advisors (UK) Limited, Elliott

Management Corporation, Elliott MB2 Associates ML and and Elliott Capital Advisors LP.
Again, despite counsel's description yesterday, none of these are the Claimant here. We address this further in paragraphs 358 to 363 of the Statement of Defence, and paragraphs 125 to 128 of the ROK's Rejoinder, but put simply, the Claimant's secretive approach to the origins and details of its investment leaves the tribunal without enough evidence to prove that the Claimant rather than one of its affiliates committed capital with respect to a large portion of its purported investment, meaning that the Claimant has failed to meet its burden at least with respect to that large portion. Without a commitment of capital into the Korean market, an American investor cannot take advantage of Treaty protections.
Finally, the ROK argues that the Claimant's claims are an abuse of process, both because it restructured its investment to take advantage of the Treaty protections —— and to be clear, swaps that were not in the territory of Korea are not covered investments, as we have shown in our pleadings —— and because it has already settled with Samsung C&T regarding the dispute that allegedly caused it harm.
In the interests of time, the ROK rests on its

submissions at paragraphs 370 to 386 of the Statement of Defence and 129 to 147 of the ROK's Rejoinder on these points.
With that, I will hand it back to Mr Lingard who will discuss the merits. Thank you.
Further opening submissions by MR LINGARD
MR LINGARD: Mr President, members of the tribunal, good afternoon once again.
I will address relatively briefly the merits of the claim against us. That claim is for alleged breaches of two provisions of the Free Trade Agreement between Korea and United States, Article 11.5, which guarantees a minimum standard of treatment, and Article 11.3 which provides for national treatment.
Before I turn to each of those heads of claim against the Republic, I need to begin with one overarching observation and it concerns the importance of timing.
Timing, we say, is relevant in at least two respects. The first is this: it is the Claimant's reliance on bribery.
As to bribery, we urge the members of the tribunal to ask two related questions: when did this bribery happen; and second, therefore, what connection, if any at all, did it have to the merger about which the

Claimant complains before you?

Now, let us be clear. The Claimant builds its case on bribery, bribery that took the form of [redacted]'s purchase of horses for equestrian athletes in return for the former President's support for the merger, the Claimant says, between Samsung C&T and Cheil. That is made plain by way of example in paragraph 435 of the Claimant's Reply.

But it is a misrepresentation of the facts and of the findings of the Korean courts. As we have said time and again, the independent Korean courts have indeed found that there was bribery. But —— and this, we say, is the critical point for these international investment law proceedings about damage supposedly caused by the merger —— that bribery was only after the shareholder vote in which both companies, shareholders in both companies, had approved the merger.

I earlier showed you an extract from the first judgment of the Seoul High Court in the proceedings against former President [redacted]. I won't repeat it, but that was slide 55 in our deck.

Here I show you an extract from the Supreme Court's judgment in the proceedings against [redacted]. Again, because of the coded references to various individuals in compliance with Korean privacy law, this requires

some parsing, but it is, we say, important.

We can see that the court refers to a meeting on September 15, 2014, between [redacted] and [redacted]. There is no mention there in that earlier meeting whatsoever of the merger, but evidently there was a request by former President [redacted] for support to Korea's equestrian teams. The two empty dots there clearly refer to Samsung.

But it was a request that was not honoured. If we go ahead in the extract to the highlighting, we see that at a second meeting between [redacted] and [redacted] on 25 July 2015 —— again after the merger vote —— President [redacted] noted that [redacted] had not provided the requested support. It was only thereafter that he did so.

Now, we say on this, members of the tribunal, the Claimant obfuscates. It conflates the timing of the [redacted] meeting in September of 2014 with the court's findings of bribery which took place months later in July of 2015, after the successful merger vote.

We also say there is nothing in the record before you, nothing, to support a finding of any such quid pro quo before the merger that is the subject of this arbitration.

Again, let me say it soberly and directly: the former President engaged in unlawful conduct for which

she was impeached, tried, convicted, imprisoned. That, we say, is the legal system of the Republic of Korea functioning. But the claim before this tribunal is a different one. It is a claim under an investment protection Treaty and it turns on the merger. It does not turn on the general probity of a former Korean administration.

The evidence simply does not support any relationship between the former President's misdeeds and the merger that the Claimant so dislikes. Timing is important, innuendo is less important.

The second point then on timing is this. It is the timing of the Claimant's investment.

The timing of the Claimant's share purchases shows, we say, that it bought those shares with the knowledge and assuming the risk of the merger.

The record shows that the Claimant contemplated the possibility of the merger being proposed by the company since at least November of 2014. That was before the Claimant bought any swaps referencing Samsung C&T, let alone any shares.

The Claimant knew that SC&T was entitled to propose a merger at any time, and the Claimant knew that in such a transaction Korean law would require that SC&T be valued according to its share price on the market, and

naturally the Claimant never had any guarantee that the shareholders in the company, like the NPS, would reject the merger.

Nor, as a matter of fact, we now know, did the Claimant in fact rely on the NPS voting against the merger. As late as July 13 of 2015, and again let me situate us in our chronology, that's just four days before the merger vote, just four days before the merger vote, the Claimant told the NPS in writing that it was, and I quote, "very unlikely that the approval threshold would be met", even if the NPS voted in support.

That is an extract from Elliott's letter of 13 July 2015 to the NPS. It's on slide 122.

So we say that when the Claimant built up its shares in Samsung C&T it did so for the purpose of taking the fight to Samsung C&T. Perhaps I misspoke. I said we say that, in fact, those are Mr Smith's own words, "taking the fight to Samsung C&T". Those are in exhibit C—686.

The Claimant, we say, assumed the risks of losing that fight regardless of how the NPS voted its shares as tens of thousands of other shareholders voted theirs.

It's axiomatic that the FTA, under which this claim is brought, does not offer an insurance policy for a corporate transaction the Claimant knew was in the

offing when it invested.

I have an extract on slide 123 with that seminal proposition as expressed by the tribunal in Maffezini v Spain.

So those are introductory observations having been made. Let me turn to the first alleged breach, the alleged breach of the minimum standard of treatment.

I begin with a note on the applicable standard which I trust is uncontroversial and I understand to be agreed between the parties but nonetheless may be useful for framing my observations that follow.

Conduct must be egregious. It must be manifestly arbitrary to amount to a breach of this obligation.

A finding of arbitrariness supporting a finding of breach of the minimum standard cannot be based merely on a determination that the State made a choice that an international tribunal considers to be the wrong choice.

On slide 124 I have an extract from the award in Cargill v Mexico that sets it out. Mere mistakes in process or the weighing of various factors at play are not enough.

With that standard in mind, I turn now to address briefly three subjects. The first is the process in the NPS's decision on how it would vote its shares. The second is the substance of that decision, the NPS's

weighing of the various factors before it. And the third is causation in the context of liability.

So first on process, the NPS's decision on the merger was, as we know, made by the members of its Investment Committee on July 10, 2015, by vote of its members and it voted to support the merger by a majority.

To answer the process question, that is the question of whether the process involved the kind of arbitrariness that could sound in a breach of the minimum standard of treatment, we say, gentlemen, you need only look to the language of the Voting Guidelines by which the NPS made that decision to vote in favour.

The decision to have the matter decided at the Investment Committee was supported by those guidelines. Those guidelines provide expressly that decisions as to how the NPS should exercise its voting rights are in the first instance to be made by the investment committee. They go on to provide that if the IC finds —— and again that is the verb used —— that it is difficult to decide whether to vote for or against a particular matter, the IC may —— again that is the word used, may —— refer the matter to the external Special Committee. The relevant guidelines are once again before you on slide 125.

Here there was no such finding of difficulty by the

Investment Committee, and it did not avail itself of the right to refer the matter to the external Special Committee Committee.

Now, this process question, which committee should have decided, that is so central to the Claimant's claim, has been considered in Korea by the NPS compliance department, by the NPS audit department, and by the Korean courts. None of them, not one of those bodies, has found that it was wrong for the Investment Committee rather than the Special Committee to have considered and decided how the NPS should vote. I don't have the extracts in the deck, but for your note, those determinations are in the record at C—505 at page 33, C—509 at page 28, C—446, C—84 and R—20 at pages 43 to 46.

Now, our focus is on the language of the NPS guidelines. By contrast, we say, the Claimant muddies with reference to what the NPS did in another vote. As we know, that is the vote in the wholly unrelated but close in time merger of two companies in the SK group.

Now, in light of the express language of the guidelines, we say that is altogether irrelevant. What the NPS did for the Samsung merger finds support in the applicable guidelines.

But a point of context from the data is important.

The NPS's referral of voting decisions to the Special Committee was altogether the exception rather than the norm.

THE PRESIDENT: Mr Lingard, what is your position on the —— which I understand is the Claimant's argument that the Voting Guidelines should be read in light of the fund's regulations which you say is slightly different language?

MR LINGARD: Let me make two observations, if I may, Mr President, in response to that question.

The first is this. As a matter of fact, that is not what has happened in practice. Let me support that observation with some data. Of the 25,000 votes handled by the NPS in a decade period, 2006 to 2015, only 14 of that 25,000 were referred to the Special Committee.

And in that same decade period only one vote on a merger was referred to the Special Committee. Only one, and that is the SK merger on which the Claimant so heavily relies.

So as a matter of practice, we say that reading, Mr President, is not borne out.

As a matter of text, we say ——

MR GARIBALDI: I'm sorry, I did not understand your answer. What reading is not borne out?

MR LINGARD: As I understand the position put to me by the

President, Mr Garibaldi, it is that the voting —— the Fund Operational Guidelines say something different than the guidelines I have shown you on the screen. I may have misunderstood the President's question.

MR GARIBALDI: No, I understood the same way, but your answer is that in practice the NPS did not pay attention to the fund guidelines.

MR LINGARD: No, sir. My answer is in practice that is not what has happened. And I'll come on to the language, and perhaps we can turn them back up on the screen.

MR GARIBALDI: We know that is not what happened.

MR LINGARD: It is not what happened over many thousands of votes is my point, Mr Garibaldi; indeed, some 25,000 votes on which the NPS was called upon to exercise a shareholder vote. We know that a very small number, 14, went to the Special Committee and of votes involving merger, only one did. We say that's wholly consistent with the guidelines, and perhaps we can pull the language back up on the screen.

We can see that the Investment Committee is the first body to decide. If the Investment Committee finds it difficult to choose between an affirmative and negative vote, it may request for a decision to be made by the Special Committee.

That is the starting point, and so the question

is: did it find it difficult? I took us through the determination on that subject, that is to say the four options presented to the members of the Investment Committee. And it having been set out that if none of those four options garnered a majority of votes, the Investment Committee would then and only then have found it difficult in livening its discretion to refer the matter to the Special Committee. We say that is the plain reading of this provision.

I need in this context also to address, Mr Garibaldi, your earlier question today about the SK merger, and that is the prices in that merger. I have said the referral of that merger to the Special Committee Committee was the exception. In fact, the data show it was the singular exception, the only merger vote referred to the Special Committee. It was also an exception on price. With respect to that SK merger, it involved two companies, SKC&C and SK Holdings. As to both, the market price was higher than the buy back price. We see that at exhibit R—108, and a subject we address in our Rejoinder at paragraph 211.

It's a subject that generated substantial criticism that is a merger that the ISS, the KCGS and others supported, but the NPS rejected by a majority, and the merger ultimately failed. We see evidence in support of

the proposition I just offered at footnotes 488, 703 and 733 of our Rejoinder. Short point: the merger —— excuse me, the buy back price was lower than the market price, a singular exception to the general rule both as to substance, and, we say, process.

Now, on this process question we recognise that the members of the tribunal may disagree with our textual argument about how the fund guidelines are to be read and it may be your view that the Special Committee should have considered this merger. We say that would do violence to the plain language of those guidelines, but it may well be your view. It is a construction open on the text of those guidelines if one were to read them as the Claimant wants them to be read.

But we say that would not rise to the level of a breach of the minimum standard. That would be no more than a different interpretation of Voting Guidelines in issue.

So with that I turn, if I may, from process to substance; in other words, the NPS's weighing of the various factors before it.

The threshold point of course here is that this was a shareholder vote, a shareholder vote exercised by the NPS just as tens of thousands of other shareholders exercised their vote. The NPS, we say, could vote its

shares as it pleased.

As a matter of fact, we know, and we know that at the time the Claimant knew, that the IC members were motivated by the impact of this merger on the NPS's sizeable holdings across the entire Samsung Chaebol. I showed you the IC minutes earlier. Again, they are at exhibit R—128, and I have an extract on slide 126.

Evidently IC members considered that the NPS's specific position as an investor right across the group was materially different from an investor in SC&T alone. So this extract on slide 126 draws a distinction from the analysis conducted by ISS from the perspective of a shareholder in SC&T alone, and the NPS with shares on both sides of the merger.

But even as to the perspective of a shareholder in SC&T alone, the perspective addressed in the ISS report, recall, as I showed you earlier, that even there the ISS predicted a short—term decline of over 20% in the SC&T share price if the merger failed. Again, that's exhibit C—30.

Evidently members of the IC were also motivated by benefits of Samsung's transition to a holding company structure. On this slide 127 I have extracts from informal minutes of the meeting made by one member. You will see [redacted]

[redacted]. And we can also see [redacted].

Let me turn then to causation in the context of liability. It is a closely related question to the substance of the deliberations I have already been looking at.

You will of course be aware that there are allegations that individual IC members were pressured into voting for the merger. And also, as I addressed earlier today, that there were fabrications of synergy calculations conducted by members of the research team at the NPS.

So the first point in the context of causation for liability is whether those allegations, if made out, would have made a difference, would have changed the vote of the members of the Investment Committee.

As I sought to show you earlier today, the members of the Investment Committee evidently considered the merits of the merger well beyond the data that was presented to them by the research team. And there is no evidence in the record before you that any of the IC members were swayed by the alleged pressure that was brought to bear.

Let me illustrate that point on slide 128 with a statement to the special prosecutor by investment committee member Mr [redacted]. We see [redacted].

In the event, what is this Mr [redacted]'s response? Well, [redacted], as we see, [redacted]. So what did he do when it came time to vote? He abstained, and that abstention was wholly consistent with his stated view that [redacted], and I say that is wholly consistent because, as you will recall from my earlier comments, if there was no decision one way or another at the IC, the decision would in fact be referred to the Special Committee.

The short point is this. Mr [redacted]'s conversation with [redacted] evidently did not change his mind. We address the other allegations of so-called pressure at paragraphs 260 to 264 of our Rejoinder.

There is as we've already heard a closely related causation point at the IC level about whether the members would have voted differently but for the synergy calculations presented by NPS staff. You will recall,

as I took you through earlier, the Claimant's slide 68, repeated at slide 134 of their deck, and my response to it earlier today by way of our standalone demonstrative. We say the evidence as set out in that demonstrative defeats the Claimant's case on causation for liability because the evidence does not support the conclusions there drawn by the Claimant that a majority of members of the IC would have voted differently but for the alleged miscalculations of the synergy effect.

MR GARIBALDI: Mr Lingard, I do have one question on causation. It's a clarification question.

I understand your argument now to be that in this chain of causation in which it is indirect causation through or alleged indirect causation through human agency, the -- you say that there is no evidence that there was sufficient influence brought to bear to cause this human to act in the way that he did.

Now, that part I understand. In your pleadings there are some statements that I understood to be to the effect that if the individual in question could have made the same decision on his own for his own reasons, the chain of causation would have been broken or would be broken for that reason alone.

Did I understand that correctly?

MR LINGARD: You did, sir. We maintain both points. There

is a question about what we characterise as ineffectual pressure being brought to bear. I understand, Mr Garibaldi, to be in your characterisation a question of human agency, causation. That is one question.

There is a separate question, we say, about whether this decision, the decision to support, was open on the evidence, was a reasonable decision on the evidence, that members of the Investment Committee could have made absent wrongdoing, and on that we say again the answer is yes, and each of those, in our case, is sufficient to break the chain of causation.

MR GARIBALDI: All right. The problem I have is that I don't understand what is the theoretical or conceptual basis for the second argument, that causation is broken, a chain of causation is broken when the human agent that -- who acted could have achieved the same result acting on his own without influence. That part I don't understand.

Maybe there is a good reason for that, but I have not seen it provided.

MR LINGARD: If I'm understanding your question, Mr Garibaldi, and please tell me where I'm not, as evidenced in my answer, I wonder if we can take a step back. The starting point for us is this: it is for the Claimant to establish a causal connection in the

liability context. That's what concerns me now. Mr Turner will come to damages and causation for damages in due course. It is for the Claimant to establish a causal connection between the alleged wrongdoing and the breach. I'm not entirely clear how the case is put against us as to what the alleged wrongdoing is, but if it is the synergy calculation, for example, we say there is simply no evidence to support that causal connection between the synergy calculation by Mr [redacted] in the research office and the votes of these IC members. That is the purport of our ——

MR GARIBALDI: That I understand. That I understand. It's a failure of evidence of the causal connection or the influence part of it. But the other argument which is that none of this matters because the people who voted could have voted —— could have made a decision on their own, to vote the way they did, whether they were influenced or not. That part of the argument I don't understand. I don't see the theoretical basis for it. I don't see it in Hart and Honoré and I don't see it anywhere.

MR LINGARD: I have the point, Mr Garibaldi. I'm not sure I can assist you further as I sit here, except to underscore what we say is a failure of evidence.

MR GARIBALDI: All right.

MR LINGARD: And perhaps, if I can reiterate this point, we would urge that the tribunal need not be troubled by that theoretical question, interesting though it is, because the evidence simply does not make out the chain of causation, and it is for the Claimant to make out that chain of causation and it fails so to do, we say.

MR GARIBALDI: Thank you.

MR LINGARD: There is a separate causation question. We have been focused in this exchange, Mr Garibaldi, on the Investment Committee. There is a separate causation question that we understand also to be central to the case against us relating to the Special Committee, and that question is whether if the Special Committee had decided, as the Claimant urges it ought have decided, whether that would have led to a different vote by the NPS.

We say there is no evidence there either that that would have happened, and that also, we say, is a failure in the Claimant's case on causation for liability.

You know you will hear in the coming days from our fact witness, Mr [redacted], who was a member of the Special Committee at the time. It's his evidence that there is simply no certainty as to how the Special Committee would have voted.

He was also on the Special Committee when it voted

to decide —— when it voted by majority to decide to vote against the SK merger, and that is a subject you may also wish to explore with him.

I have on slide 129 there an extract from his second witness statement where he says it was simply in his view not possible to predict how the Special Committee would decide on a matter before it actually did so, before it actually came to deliberate and vote.

He further explains —— I'm over on slide 130 —— that there were important differences. I've shown some of them already. There were important differences between the SK merger on which the Claimant focuses and the Samsung merger.

And those differences may well, in Mr [redacted]'s evidence, have been central to the Special Committee's deliberations. You will see in particular his reference to a civil court case in Korea which had found that the Samsung merger was compliant. There was an absence of any equivalent judicial imprimatur with respect to the SK case.

Let me then come to make a final point on the minimum standard claim. It relates as I have said already to the timing of the Claimant's share purchases.

The short point here is this. The Claimant bought shares and kept buying shares, knowing that it would

have to trade in those shares for shares in a merged entity just months later.

I need to make two observations here on the risks that Elliott assumed in so doing. The first is this: the tenor of the claim advanced against us, we say, reeks of faux naivete. More importantly, it is a claim that is patently inconsistent with Elliott's own emails and research reports in the months over which it built up its position in SC&T.

I showed you some of these earlier, and they demonstrate that Elliott knew, as it bought its shares, that Samsung might in Elliott's thinking get government support for the merger if only Samsung lobbied for it, given Samsung's size and status.

We see that in an internal Elliott email on slide 131 from February 2015. See there the reference to Government support for the merger.

As we turn to slide 132, with another internal email from the next month, March of 2015, Elliott evidently considered that the stability of the Samsung Group was important to the Korean Government and the Blue House in particular because the Samsung Group was so large that its performance was a proxy for the performance of the Korean economy as a whole.

Now, to be clear, it is not our case that the

Claimant's internal research accurately reflected the state of relationships between Samsung and the Government in 2015. We do not need to take that position. But this evidently is what the Claimant believed and what it was advised as it continued to build up its shareholding in Samsung C&T. And yet these very same facts, these very same facts on which it knew and on which it was advised are now the basis for its claim before you.

I have been speaking with these extracts on the slide to risks of, as the Claimant would characterise it, government support for a Samsung merger, but let me be clear to go to something I addressed earlier today. We say the Claimant likewise assumed the commercial risk of this very deal. In making that observation, I won't take you back to the documents that support it, but please, if you would, recall the unambiguous advice to Elliott from the earliest days of its investment here from Spectrum Asia, that the merger was inevitable. That's the word used. It was inevitable, and it's at R-255.

Recall also, please, the Claimant's very own model from the day of its first swap contract modelling the shape that this merger might take. Again, that's exhibit C-365.

Let me turn briefly from the minimum standard claim to the national treatment claim.

THE PRESIDENT: Mr Lingard, we have been going on for one hour and 45 minutes. One option is to have the break now. Also to consider the time that we have already spent and the technical team is a bit -- they have requested --

MR LINGARD: I'm quite sure.

THE PRESIDENT: The technical team has requested a break after each hour and a half. We know you still need to cover the second claim and you still need to cover quantum.

MR LINGARD: We do. I can cover the second claim extremely briefly, Mr President. There was nothing said about it yesterday by counsel opposite. So I can address it very briefly. It might be appropriate thereafter to take a break and return to the subject of damages if that would be acceptable to the tribunal and the stenographers.

THE PRESIDENT: Let's break now. We will pay more attention to what you're paying after the break.

MR LINGARD: For better or for worse, sir.

(3.34 pm)

(A short break)

(3.52 pm)

THE PRESIDENT: Before we start, a request from the tribunal. It would be helpful if the parties could provide the tribunal with a complete version of the FTA. We only have extracts. It is available online, but the version that is currently available is an updated version. So it would be helpful to have the complete version as it was during the relevant period. The parties should be able to agree on what the relevant period is. It should cover at least the date of the breach and the date -- the period until the filing of the request for arbitration or Notice of Arbitration.

That would be helpful. It can be, I believe, provided electronically, no need to provide hard copies -- at your convenience.

Thank you very much.

Mr Lingard, please.

MR LINGARD: Thank you very much, Mr President, members of the tribunal.

One of the benefits or disadvantages, depending upon one's perspective, of taking a break is the opportunity to review the transcript and I fear I may have misunderstood, Mr President, your question about the Fund Operational Guidelines, and their intersection with the Voting Guidelines in the hopes I can clarify the position. I understand, having now looked at the

transcript, that, Mr President, you might have been referring to a point made by counsel opposite yesterday which I understand effectively to be that the Fund Operational Guidelines, which are at C-194, provide a right in the chairperson of the Special Committee to have matters referred to that Special Committee.

THE PRESIDENT: It was actually about the -- I think it's also -- it was an issue or an argument made by the Claimant in the written submission and we also have expert evidence on it. It's about the normative hierarchy between the fund regulations and I think you answered the right question. You began to answer the right question. I'm not sure if you completed the answer about what is precisely the Respondent's position on the -- on the question of whether the fund regulations trump the language of the Voting Guidelines engaged over conflict or whether they should be taken into account when interpreting the Voting Guidelines. That was the question.

MR LINGARD: I understand, thank you, Mr President. Perhaps I can round out what I had feared was your question that I hadn't answered, that is the right, as the Claimant would have it of the chairperson of the Special Committee to have matters referred to his committee.

We say that is on a wrong reading of the Fund

Operational Guidelines. Mr [redacted] testifies to that subject, and we would invite you just to take it up with him in the coming days. But in particular he testifies that those guidelines were amended so that they now provide what the Claimant says they provided at the time, and we say the language does not support that. In other words, the current iteration of the guidelines does in fact allow the chairperson of the Special Committee to ask for matters to be referred to it. They did not at the time.

Your separate question, sir, I think then turned on Article 17(5) of the Fund Operational Guidelines. I understand that to be the provision in the Fund Operational Guidelines on which the Claimant relies.

It's the provision that says, and I quote, while voting rights are in principle exercised by the NPS, items for which it is difficult for the NPS to determine whether to approve or disapprove shall be decided by the Experts Voting Committee, and so on, and there is no dispute as to the translation of that provision. It is as it is before you.

I would make two observations and again this will be explored with the experts in the coming days. The first is we accept that the Fund Operational Guidelines sit higher in the hierarchy to your direct question,

Mr President.

The second is we do not accept that they say what the Claimant wants them to say. Read together, as they must be read together with the Voting Guidelines, we say it is plain that the first decision is to be taken at the Investment Committee level, and if the Investment Committee first finds that is the requirement, finds a matter difficult, then it goes to the Special Committee. We say that is wholly consistent with Article 17.5 of the Fund Operational Guidelines, and so the hierarchy between the two simply is not engaged because there is no inconsistency between them.

MR THOMAS: Just before you move on, you had made a point before the break about the fact that the audit, and I think you said two court cases, looked at the question of the procedures which had been followed by the Investment Committee.

The question I had is: did the court specifically examine and interpret the relevant guidelines?

MR LINGARD: The answer is yes, Mr Thomas. I'm going to struggle to give you a pincite as we sit here. Allow me to come back to you, if I may, with the precise citation, but the short answer is yes.

I think that takes us to our really very brief submissions on the national treatment claim. I don't

propose to detain the tribunal for long here. As we turn back to the slide deck at slide 133, we see set out two reservations in the Korus FTA that we say unambiguously exclude the national treatment claim. These are submissions we make in the alternative to our submissions on attribution. They apply if you are against us on attribution.

The first reservation pertains to disposition of equity interests by State owned entities, and we say it is here squarely engaged. This is a case about the disposition of shares in the old SC&T to obtain shares in the new merged company.

The second reservation is equally applicable. On the Claimant's case the vote by the NPS, as we heard yesterday, concerned Social Services in the form of the national pension and thereby is excluded by operation of this reservation.

That is the end of the matter on the national treatment claim, we say. Even if you are against us on those reservations though, the claim fails for the additional reason that it hinges on a comparison to a monolithic [redacted] family that we say the Claimant fails appropriately to disaggregate, and that comparison simply cannot work. Different members of the [redacted] family had different holdings in different Samsung Group

companies. It cannot withstand scrutiny as an appropriate comparator for a national treatment claim.

That is all I propose to say on the subject, and with that, I thank you for your attention and pass the floor to my partner, Mr Turner.

Further submissions by MR TURNER

MR TURNER: Thank you. Hello again, everybody. I will be as concise as is consistent with the importance of the question of damages and the complexity of the question of damages in this case.

I will begin by reiterating points that we discussed this morning in the context of the actual damages claim.

I will remind the tribunal that the Claimant, or at least the Elliott Group, made money on the merger. We have seen that the Elliott Group had swaps in Cheil, and we have seen that on its own —— you haven't seen the famous spreadsheet yet, but this will be a joy to come for you —— that that spreadsheet shows that a trading profit on those Cheil swaps was made of some 65 billion Korean Won.

That is much more than the agreed amount of the Claimant's trading loss of some 49 billion Korean Won.

You will remember that we talked this morning about our document request where we asked for details of any such transactions in Cheil, and where the Claimant,

having by definition not spoken about them in its Statement of Claim, either of its statements of claim, simply objected to that request on the basis that it was a fishing expedition and we had not provided the evidentiary basis to suppose that they ever did hold such transactions.

The Claimant was seeking to keep the fact of those transactions which my learned friend Mr Partasides called this morning hedging transactions from the tribunal.

We now know the full details of that, as we discussed this morning, Professor Dow on the limited disclosure that was made two years ago in his Appendix E on certain assumptions calculated that the trading profit was in the region of some 48.8, I believe, billion Korean Won, and if we can begin with slide 134, you will see, although this will need to be redone by Professor Dow in the light of the full information that we now have, you will see how Professor Dow calculated the trading profit on the Cheil swaps in his second report.

We are now therefore faced with a position where the Claimant seeks to recover very large sums of money -- we'll discuss what those precise sums may be a little later -- which represent a return of nearly 90% on its

investment in dollar terms. I'm not sure if -- assuming the same exchange rate has been used, it should be the same in Korean Won terms as well, but we have calculated all of this in dollars. While it is seeking or was seeking until your order to disclose details of the Cheil swaps, to keep from you the fact that it made money on the other side of the merger.

The profit that the Claimant or the Elliott Group made is real. The loss is not, as I will now discuss.

We will begin by taking a commonsense view. It may not be traditional to take a commonsense view of complex damages calculations, but we say that when you look at the facts you will see that this cannot be a sensible and tenable damages claim.

The Claimant invested, again in dollar terms it's easier, I find, but we do not accept that the Claimant's claim should be denominated in dollars -- invested a total in dollar terms of $603 million and sold its shares, again in dollar terms and rounding, for approximately $560 million.

Now it claims, I think, and we'll come on to this, $540 million in damages plus interest. That is, as I have said, a nearly 90% return on its investment. Its investment that it began just a few months before the breaches that it alleges on the part of the Republic of

Korea.

Indeed, as my learned friend Mr Lingard has explained, it continued to invest pretty much up to the date of the vote on the merger.

The effect of its damages claim is that it alleges or it asks the tribunal to accept that shares it bought for 603 million US dollars would have been worth double, $1.2 billion, just a few months later. In fact, from one day to the next when it comes down to the final moment.

My learned friend Ms Snodgrass yesterday confirmed that the Claimant's case is indeed of an instantaneous price increase. Had the merger been rejected, the price would have effectively doubled.

When faced with the return that this represents on the Claimant's investment, what we heard yesterday from the Claimant, and I refer you to the bottom of page 194, line 25, and the very top of page 195, lines 1 to 2 of yesterday's transcript, {Day1/194:25} was that the very large sums that are sought are justified by "the epic criminal scale of corruption" that is alleged against the Republic of Korea.

I do not understand how the two are linked unless what is effectively being said by the Claimant is that there is some element of moral or punitive damages

involved. This was very bad conduct and it deserves a very big award.

But that is not how things work. It is certainly not how things should work.

We say, and we'll come on to this, that the tribunal should look at the Claimant's loss, if loss there were, because we say there must be a balance between the two sides of the ledger as I have explained, on the basis of the realisable market price.

The Claimant wants you to ignore the market price and to substitute the market price with its own subjective calculation of what it would like SC&T to have been worth.

We say a Claimant is not entitled to recover an imagined value for its investment that ignores reality. And we say that what the Claimant is trying to do in these proceedings is to obtain a windfall that it could never have obtained in real life. It is not seeking compensation for what it had lost. Perhaps here the question by Mr Garibaldi just before the break or before the break to my partner Mr Terceño is of some help. The question was: would there have been a claim had there been an expropriation of the Claimant's shares in SC&T before the merger vote?

I would like you to think what, assuming that you

accepted that in those circumstances there was a claim, what the damages for that would have been. What would the fair market value of those shares have been? We say it can only have been the market price, and the right that the Claimant had, which it has exercised, and in respect of which, as we will see in a moment, it may recover tens of millions of dollars more, it has been compensated through the buy back proceedings and the -- the buy back right and the appraisal price proceedings.

We will also come on to talk about the changing story on the Claimant's part of how it would have realised this so-called intrinsic value.

The Claimant began with saying that it was going to unlock the full potential of SC&T so the market would then pay it what it calculates as the intrinsic value of its shares, and it would do that, and we see this in its Notice of Arbitration and Statement of Claim, paragraphs 20 and 21 on slide 135, by taking a positive stand against proposed management decisions likely to devalue a company.

This is what it says its business is and what it would have been able to do to unlock the full potential of SC&T.

As we heard yesterday, Elliott has been going for some time and this is not the first investment that

Elliott has tried in South Korea, trying to use its famed activist skills in order to unlock the full potential, as it would put it, of a company.

If we look at slide 136 we will see that it tried this with Hyundai, and this is a report from the NIKKEI from 23 January 2020 which shows that there was an attempt, again very significant amounts of money involved, to influence Hyundai in just the way that Elliott says and asks you to find it would have been able to influence Samsung, and it left with losses totalling 500 billion Korean Won, $430 million.

That was the first of the Claimant's -- the first iteration of the Claimant's plans as to how it would unlock the allegedly hidden value.

Secondly, the Claimant was going to do nothing because the share price would organically grow to match what it called its intrinsic value. This passive plan can be seen if we go to the next slide from its amended Statement of Claim and, as we see here, from Mr Smith's first witness statement at paragraph 14.

Mr Smith explains that the discount may reduce more or less organically over time as the trading price tends towards the intrinsic value of the company.

So that's the organic passive plan.

What the Claimant ignored in its first submissions,

and what Mr Boulton ignored in his first report, was that the discount to what it called intrinsic value is a perennial feature of the Korean market. It had persisted for decades and there was nothing to suggest that it would simply disappear. No other Chaebols have seen their discount simply fade away.

Thirdly, we have learned that it was neither the Claimant's activism that was going to double the value of the SC&T shares, nor an organic natural process of the market seeing the light that would have caused the narrowing of the discount. Instead, and this is the case that was put to you yesterday, it was the merger itself, the rejection of the merger would serve to immediately increase the share price by more than double overnight. This has been referred to as a catalyst. It is the catalyst plan and if we go to slide 138 we see from my learned friend's Reply at paragraph 595 that Mr Boulton has confirmed that the substantial majority of the observed discount would disappear immediately after the merger. This is then the catalyst plan.

Now, since the Reply and Mr Boulton's second report, we have had the Claimant's Rejoinder on preliminary objections which was accompanied by a third witness statement from Mr Smith.

Mr Smith says that once the merger had been defeated

he would have put restructuring proposals to the Samsung Group and the [redacted] family. Because the proposal for restructuring was complex, it would have taken up to a year for this to be completed. It is not clear to us whether this is a further iteration of the Claimant's damages position, whether in fact the discount would have disappeared only after a year, but you can see that the Claimant blows hot and cold, to adopt one of my learned friend's authorities from yesterday, in how it puts its damages claim.

In any event, taking what we heard yesterday, the catalyst plan and the instantaneous increase, we will see that the Claimants cannot agree on this among themselves, or at least the Claimant's experts can't.

Mr Boulton says there would be the instantaneous increase. Professor Milhaupt, however, who is the Claimant's expert on Korean capital markets, disagrees. He disagrees with Mr Boulton, and the most that he is willing to say is that this would probably be one step along the road to eventually eliminating some part of the discount, and the Claimant, again yesterday my learned friend Ms Snodgrass was not at least to me crystal clear as on whether this is still the Claimant's case that the whole of the discount would disappear. Mr Boulton, as you heard yesterday, maintains that there

are two parts to the discount, and we will come on to that.

But one part, he says, would disappear instantaneously; the other part 5 to 15% of discount, he says would continue.

The Claimant's position seems to have been that there would be no discount when it came to sell its shares or realise its —— the value of the shares, and that is why on Ms Snodgrass' slides yesterday we had three columns, a 5% remaining discount, a 15% remaining discount, and a nil remaining discount, and it is that last which is the Claimant's claim in its Reply when it quantifies its loss at approximately $540 million.

Be that as it may, the Claimant invested in two broad periods. It bought shares before the merger announcement and it bought shares after the merger announcement.

So far as the shares bought after the merger announcement are concerned, as I mentioned this morning, we say that the Claimant bought those shares in full understanding of the commercial risk that it took that the merger would in fact go through.

I have a couple of slides with extracts from the decision in RosInvest Co v Russia which I will take you through very quickly. RosInvest Co, as you will know,

is another Elliott or was another Elliott company, and it is a very similar situation that that tribunal was faced with that you are faced with now.

It is where the Claimant in that case RosInvest, in this case Elliott, takes a risk, a gamble, and buys shares in the hope that it has bought at a low price and will be able to sell at a higher price when the shares more closely match what it considers to be their real value. That is what the RosInvest tribunal is saying in this extract on slide 140.

If we go back to Mr Smith's witness statement, that is a paragraph that we have seen before, and that is pretty much what Mr Smith says at that stage his plan was.

We say that so far as the 3.4 million shares that the Claimant bought after the merger announcement are concerned, this is exactly the same position, and as the RosInvest tribunal found on the next, as you see from the next slide, it is not for this tribunal to realise and implement the Elliott Group's buy low and sell high strategy.

So that's one parcel of shares. The tribunal should reject any claim in relation to those shares. Elliott willingly undertook the risk about which it now complains that the merger would happen.

As to the other shares, the 7.7 million shares that Elliott bought before the merger announcement, it has been fully compensated. It availed itself of the buy back right that we have talked about and it complained, with other SC&T shareholders, about the price that was offered under the relevant statute at which those buy back shares would have been bought by SC&T.

It therefore went to court with other SC&T shareholders, and after a first instance decision which valued the shares at 57,000—odd Korean Won a share, there was an appeal to the Seoul High Court and the shares were then re—evaluated and the new value was 66,602 Korean Won per share. The judgment of the Seoul High Court is at exhibit C—53.

That judgment is itself under appeal, as we discussed this morning and as my learned friend said yesterday, but it is important for you to understand that the Claimant had a right to be compensated —— I come back to the learned arbitrator Mr Garibaldi's question about expropriation —— for the value of its shares. It availed itself of that right and it has been compensated for it.

What is interesting about the Seoul High Court decision is that the court decided —— first it decided that there had been no proof of share price manipulation

but that there had been many rumours of it, and it therefore decided that the fairest way to value the shares that were being sold back to the company was when all influence of the merger could be said to have been removed.

So it valued the shares for a period leading up to December 2014 to come up with the higher price of 66,000—odd Won per share compared to the first instance decision's 57,000—odd Won per share.

Simple arithmetic will show that if you multiply the difference between those two figures by the number of shares, 7.7 million—odd shares in SC&T, you get to 72.4 billion Won, which at the exchange rate used by the Claimant is something like 64, just under $64 million.

That is what under the Settlement Agreement with Samsung, if the Seoul High Court decision is upheld, that is what Elliott will receive over and above the amount that it has already received in the appraisal price litigation and the settlement.

There was some doubt —— we heard from my learned friend Mr Partasides yesterday that you needn't worry about that. That's a question of double recovery if it happens at all.

There is some doubt about the enforceability or the unenforceability as a matter of Korean law of the

settlement with Samsung in the event that you find in favour of the Claimant in this proceeding and award damages.

It is not a given as a matter of Korean law, I am advised, that Samsung would be able to refuse to pay if Elliott sought to enforce its contract with them. It's not for now, but it may be for the end of this hearing we will need to discuss a way in which that eventuality can be excluded, whether it is the Claimant making over any rights against Samsung to the Republic of Korea or whether it is some form of clawback.

I will now turn to the measure of damages and I will go more quickly.

Both parties agree that the correct measure of damages, if the Claimant succeeds on the merits, is the fair market value of the shares. The question for the tribunal is how to ascertain that fair market value.

We say you ascertain the fair market value by looking at the market. If the market is efficient, which both experts agree that it was. We will see that Mr Boulton in his second report, having not spoken about this in his first report, agrees that the market was semi-strong form efficient. That means that the market participants analyse relevant information and the market absorbs and reflects that information straight away. In

other words, says Professor Dow, no formal theory of value is needed. We can take the market's word for it, as we see on the next slide, 145.

Where the market is efficient there is no reason to conduct other more subjective valuation analyses and if we go to the next slide, another of Professor Dow's exhibits explains that in an efficient market you can trust prices for they impound all available information about the value of each security. The courts agree. On the next slide we have a Delaware court decision. On the slide after, a decision of the Korean courts, and we heard from Mr Lingard this morning that in this very context, in the Claimant's proceeding to have the merger ratio changed before the Korean courts, the Korean court held that there was no need to do more than to look at the market and once the market had fixed the merger price, that was all that was needed. It's exhibit R-9 and the extract is at our slide 35.

The same is true with the way in which the court approached matters in the buy back litigation at exhibit C-53 as I have said.

SC&T shares traded in an efficient manner in an active and liquid market. They were widely covered by analysts. They were widely held, as Mr Lingard's slides have shown, by institutional and retail investors. They

were actively traded. Indeed, SC&T was more actively traded than Samsung Electronics and LG Corporation, two of the very large companies on the Korean Stock Exchange.

We have seen that the SC&T share price responded immediately to the merger announcement, as well as, as Professor Dow has shown, other material corporate news. We see this on the next slide, 149.

Mr Boulton and the Claimant's only argument for disregarding the traded price is that there are allegations of share price manipulation. None of this has been proved. Indeed, what we heard yesterday from the Claimant about the allegations in the second prosecution of [redacted] relate to allegations first that are after the date of the merger announcement and secondly, that are allegations of attempts to manipulate the price.

Clearly you can go to prison for attempted murder, but there doesn't need to have been a murder, and the same is true of share price manipulation. You can be accused of attempting to manipulate the price without there being any proved manipulation.

The only example that is put forward by Mr Boulton or by the Claimant of an attempt to manipulate the market is a purportedly delayed announcement of

a construction contract in Qatar won by SC&T. Mr Boulton says the Claimant artificially suppressed -- the failure to disclose artificially suppressed SC&T's share price, but he says he does not have enough information to adjust his analysis with respect to that contract, and that is the full extent of Mr Boulton's discussion of this question in his first report.

In his second report, Mr Boulton says that he rejects the market price but he says this based on no more than outstanding allegations of market manipulation that, if true, would render it inappropriate to rely on the premerger listed price as a measure of its fair market value. And on those allegations alone Mr Boulton rejects the standard measure of fair market value and provides his own subjective analysis of the sum of the parts.

I would add here in passing that the buy back litigation decision of the Seoul High Court at C-53 finds that there was no improper holding back of the news of the Qatar contract.

Professor Dow, taking the allegation of manipulation at face value, has looked at its effect. He has shown that the alleged delay in disclosing the Qatar contract could have had only a minimal impact on the share price.

Professor Dow's study shows that had SC&T disclosed

the construction contract when the Claimant says it should have, the maximum impact to the merger ratio would have been between 0.9 and 1.9%, leading to an increase from 1 to 0.35 to between 1 to 0.3531 and 1 to 0.3567, wholly negligible in terms of the Claimant's claim for damages.

We say you need do no more than look at the market price. The market price leads you to the trading loss. The trading loss which has been wholly expunged by the equivalent trading profit on Cheil swaps. But the damages claim also fails on the Claimant's own calculation.

First, let's look at what the Claimant itself thought when it began to invest in SC&T. In November 2014 the Claimant estimated the discount, the gap between the traded price and what it considered to be the intrinsic value, of between 30 and 35%. That's Mr Smith's first witness statement at paragraph 17, and it's the Claimant's document C−395 which Mr Lingard took you to earlier this afternoon.

By February 2015, the Claimant calculated that the discount had grown to almost 45%, but that growth was, as Professor Dow has explained in his second report at paragraphs 31 to 36, wholly a matter of the Claimant having made a mistaken assumption in its first

calculation.

On the bases of these analyses, the Claimant drew up trading plans. There were three trading plans whereby it would invest, hoping that it would be able to sell when the discount narrowed.

The first, the January 2015 trading plan, the Claimant planned to invest up to $200 million, buying shares up to a perceived discount of 40%, and it would then begin selling its shares when the discount dropped to 27.5% and would completely divest before it got to 20%. Thus the Claimant showed −− the Claimant did not expect the discount to fall below 20% and indeed planned to sell its shares when the discount was between 20 and 30, nearly 30%, compared to the supposed intrinsic value.

Professor Dow has shown this in his second report graphically, as we see on the next slide.

The same basic scheme was true of the second trading plan in March 2015. In this the Claimant decided to keep investing until the discount which it observed reached up to 52.5%, and it committed more money, $350 million, to this. This is shown on the next slide, 151, and under this plan the Claimant would begin to sell its shares when the discount dropped back to 40% and would completely divest when it hit 27.5%.

Mr Smith's third witness statement produced a third trading plan. It's C−684. A trading plan dated 27 March. There is no slide from Professor Dow in relation to trading plan because it was revealed to us after our Rejoinder had been filed and therefore after Professor Dow's second report.

On that trading plan the Claimant goes back to a complete divestment before the discount hits 20%.

What does the Claimant say here? What the Claimant says here is that in fact these trading plans no longer became −− were no longer relevant once the merger became a real possibility, and Mr Lingard has explained how the Claimant put that in their opening submissions yesterday.

We say this shows what the Claimant actually believed would happen. It believed that the discount would stay. It might narrow. It betted on it narrowing. It might not. They had a stepped investment and a stepped divestment plan.

Furthermore, we say, it shows that the Claimant understood that the trading price was the price that it should have reference to, and in addition to this evidence, we ask the tribunal, as you know, to draw an adverse inference that the Claimant was advised by Deutsche Bank that indeed the shares, the traded price,

was the appropriate value to adopt.

We know that Deutsche Bank prepared a Samsung C&T earnings model for the Claimant on 30 April 2015. And we requested all such valuation models in a request that the tribunal granted which we have on slide 152.

The Claimant identified the Deutsche Bank report but refused to produce it, claiming commercial sensitivity and confidentiality as is shown from its very long privilege log, page 178 of its privilege log, row 1,056. The only basis for this refusal was a boilerplate disclaimer by Deutsche Bank that the document was provided for the sole use of the recipient for internal purposes, and this was explained in correspondence from counsel for the Claimant that you see on the next slide.

We say this disclaimer does not satisfy the obligation under Article 9.2(e) of the IBA Rules to show compelling grounds to withhold responsive documents, and we ask the tribunal to draw an inference that the Deutsche Bank valuation valued the SC&T shares at no more than the market price that the Claimant paid at the time.

Meanwhile, the Claimant has abandoned the contemporaneous assessments to chase this huge windfall before you. Mr Boulton's analysis of a sum of the parts contains many fundamental flaws.

By ignoring the market price, it ignores the collective wisdom of the market in favour of speculative and subjective views of a single investor.

Furthermore, Mr Boulton himself relies on market prices when he is assessing the price of SC&T's holdings, thus contradicting his own thesis.

In rejecting the market price he supplies no analysis or fact driven reasoning. He rejects it really only on instruction, and his valuation fails to take the Korea discount into account.

In his second report, Mr Boulton approaches the valuation —— and this touches the learned arbitrator Mr Garibaldi's question to counsel for the Claimant yesterday —— as if cross shareholdings among Chaebol companies did not exist, when in fact they are an essential element of those companies.

In other words, the holdings are held for control and not for value and would not be disposed of.

Mr Boulton ignores the inherent weak corporate governance in Chaebols, and he therefore mistakes the nature of the discount that he calls the observed discount and which he breaks down into two parts as we will see.

He furthermore ignores the Claimant's own estimates of SC&T's value conducted just a couple of months before

his valuation date, and we can see this on the next slide.

We have the Claimant's valuation on —— in November 2014 on the left. We have the Claimant's June 2015 valuation in the middle down from 107,000 to 93,000 on their calculation of net asset value per share. But Mr Boulton, purely by his own modelling choices, increases that to no less than 115,000 Won per share.

We will talk to him about all of his subjective choices and I won't go through them with you today, but his subjective modelling choices allow him to estimate a so—called intrinsic value that is not only much higher than the actual market price, but also higher than any analyst who calculated that price estimated that it should be, and higher than the Claimant's own values at the time, and we see this on the next slide.

Mr Boulton's estimated net asset value per share at the top compared to Elliott's June 2015 analysis. You've seen that in the previous slide, the market price and the average target price from analysts.

Moreover, Mr Boulton's division of the discount into a holding company discount and an excess discount is unsupported and contrary to all economic evidence.

Mr Boulton concedes in his second report that

Professor Dow was right about the discount both attributable to holding companies generally and also attributable to the specific characteristics of the Korean market. But in dividing that discount into a holding company discount and an excess discount that he says was caused entirely by the market's fear of the predatory merger, he distorts the economics of the discount completely.

What does Mr Boulton actually do? He doesn't —— well, what he does is he takes a number of holding company discounts observable across Chaebols in the Korean market, but he doesn't take the average that he arrives at because that average is seemingly too high for him.

What he does is calculate what he calls an implied holding company discount and he fixes that, as we have seen, at between 5 and 15%.

This finds no support in any economic analysis. The average discounts for comparable companies that Mr Boulton himself calculates reveal an average discount of 43% and a mean of 39%.

Indeed, only one out of 11 companies looked at by Mr Boulton, and we see this on the next slide, had a holding company discount within Mr Boulton's range of 5 to 15%, and that is at 11.8%.

Now, there are a couple of companies that seem to have traded at a premium to net asset value. Mr Boulton concedes that they are uncommon and so can be disregarded. His paragraph 6.4.8 in his second report.

But of the remaining 10, the next lowest discount after the 11.8 is 32.1 and the average, as I have said, was 43.

Analysts' estimates of SC&T's holding company discount are all well above 15%, even after Mr Boulton himself scaled them downwards. Yet Mr Boulton claims that all of these numbers broadly support his adoption of a discount of 5 to 15%.

In the interests of time, and I notice that I've been speaking for longer than I had intended, and I apologise to all, I will skip over slide 158 and I will say two words before closing about Mr Boulton's theory, the so—called therapeutic one day to the next theory that the discount would all but disappear had the market —— had the merger been rejected.

There is no evidence of this at all. Mr Boulton seems to rely on Professor Milhaupt, although he does not credit him, and he seems to rely on the statement of a single NPS analyst. We saw this in the Claimant's opening submissions yesterday —— who suggested, when talking to the public prosecutor, [redacted]

[redacted]—— you will remember the slide that you were shown yesterday a number of times by the Claimant —— if the merger were to be rejected.

Mr Boulton seems to take comfort from that.

He does not take comfort, or indeed address the fact, that the same analyst also said in the same interview, and it's at document C—510, that [redacted]. It's on page 14 of that document.

Professor Milhaupt himself, as we have seen, is not of much help to Mr Boulton in his therapeutic theory, saying that only shareholder activism, and it's on slide 159, has the potential to reduce the Korea discount, and that a rejection of the merger would be no more than an important step in ongoing efforts to enhance shareholder protections.

The reality is that the Korea discount is persistent and Professor Dow has looked at a contemporaneous Samsung Group merger to look at what happens in the real world when a merger is rejected.

Minority shareholders, including the NPS, rejected the merger between Samsung Heavy Industries and Samsung Engineering in 2014, just a year before this

transaction. And the share price of both companies declined when the merger rejection was announced. I refer you to Professor Dow's second report at paragraphs 190 and following and at Figure 20.

Professor Bae, whom we will hear from later this week, also —— or at the beginning of next week —— also opines that the discount would persist.

Professor Bae —— I will not go through his details here, but Professor Bae is clear that there is nothing to suggest that the rejection of the merger would have, coming back to Mr Garibaldi's question, caused SC&T to sell its extensive holdings in affiliated companies which itself would be necessary to move the share price closer to a calculated net asset value.

Sir, I will close with the last slide which is again extracts from the Claimant's own pleadings.

This is the amended Statement of Claim, paragraphs 16 and 21, where you will see that the Claimant's case at the beginning of this proceeding was that where the issue is temporary and unrelated to the business fundamentals of the company, Elliott judges that the discount is likely to reduce more or less organically over time, and the investment in SC&T presented just such an opportunity.

Elliott's analysis suggested that the discount was

temporary and that the price would increase over time to reflect its intrinsic value.

There is nothing to support Mr Boulton's therapeutic cure theory which he has brought before you purely to justify an inflated damages claim. I ask you to reject it. I ask you to look at the market price that both experts say is reliable and draw the appropriate consequences that I have outlined for the Claimant's damages claim.

I have gone over the time that I had wished to spend with you this afternoon on damages, and I apologise to you and to the court reporters, but if I can help you with any questions, I'm very happy to do so.

MR LINGARD: Mr President, if I might very briefly make good on my promise to Mr Thomas earlier to offer a pincite. Mr Thomas asked if the Korean courts had expressly considered the Voting Guidelines and I answered yes, and promised to come back with a pincite. I now have that. It is exhibit R—20. It is the decision of the Seoul Central District Court in the merger annulment proceedings. It's a 2017 judgment.

I need to be clear. It is one of the judgments that is under appeal. So I am giving you the citation to the first instance decision, and if I can offer pincites, members of the tribunal, at pages 40 and 41, there are

lengthy quotations from the guidelines. There is then an analysis of those guidelines at pages 44 and 45, and in particular at page 44 the court determines that:

"It would be in strict adherence to the guidelines for the Investment Committee to determine whether it is difficult to decide ..."

And it goes on. That's at page 44, and the analysis on this judgment then concludes at page 46. Again the file reference is exhibit R—20. Thank you very much for allowing me the opportunity to provide that pincites.

THE PRESIDENT: Thank you very much.

I suggest we break now for ten minutes and we will continue with the examination of Mr Smith. 5.10. Thank you very much.

(4.57 pm)

(A short break)

(5.07 pm)

MR JAMES NICHOLAS BARRY SMITH (called)

THE PRESIDENT: Welcome back. Are both parties ready to proceed?

MR PARTASIDES: We are, sir.

THE PRESIDENT: Thank you very much.

Good afternoon, Mr Smith.

You have a declaration of fact witness in front of you, or should have. Could you please read that for the

record?
THE WITNESS: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth, and nothing but the truth.
THE PRESIDENT: Thank you very much.
If you could speak up a little bit, it will be easier for the court reporter.
You have submitted three witness statements in these proceedings. The first one dated 4 April 2019 and the second one 16 July 2020 and the third one dated 23 December 2020. You should have copies of those witness statements in front of you. Can you please confirm?
THE WITNESS: Yes, I have copies of all three.
THE PRESIDENT: Do you have any corrections to make to those statements?
THE WITNESS: No. No.
THE PRESIDENT: Would you confirm their contents?
THE WITNESS: Yes, I confirm their contents.
THE PRESIDENT: Very good. Thank you very much.
I'm sure you have been explained by counsel how this works, but just to make sure that there is a full understanding, you will be first examined by counsel for the Claimant, direct examination, a short examination. Then there will be a cross-examination by counsel for

the Respondent which will take a bit longer, and then at the end there will be an opportunity for counsel for the Claimant to put additional questions for you.
The tribunal may ask questions at any time. Is that understood?
THE WITNESS: That's understood, thank you.
THE PRESIDENT: Thank you very much. Claimant.
MR PARTASIDES: Thank you, Mr President.
Examination-in-chief by MR PARTASIDES
MR PARTASIDES: Good afternoon, Mr Smith. You were asked a question about corrections by the President of the tribunal. Let me ask you to turn to your first witness statement and I'm going to ask you to turn in particular to the first sentence of paragraph 29 on page 10 of that witness statement.
A. Yes.
Q. I'm going to ask you that same question, if I may, again. Do you have any corrections to make to your first witness statement?
A. No, it's my error. The word "immediately" in paragraph 29 is -- should be removed. The words "it -- sorry, just the word "immediately" should be removed. A letter was sent but it was at the beginning of June rather than immediately after the meeting in early March 2015 that's referred to here.

Q. Thank you, Mr Smith. Do you have any other corrections to make to either your first or your other two witness statements that you're aware of?
A. Not that I'm aware of.
MR PARTASIDES: Thank you very much. Mr President, there will be no direct examination of Mr Smith beyond that.
Cross-examination by MR LINGARD.
MR LINGARD: Mr Smith, very good afternoon. We met earlier. My name is Nicholas Lingard, I'm one of the members of the counsel team representing the Republic of Korea in these proceedings. It falls to me to ask you some questions this afternoon.
So we can situate ourselves, we've provided you with three binders. The first contains only your three witness statements. There are then two binders of documents, some of which we will look at together over the coming hours. Those are to your left, sir, and I will do my best, no doubt sometimes I will fail, but I will do my best to identify which volume and tab I'm referring to.
Having situated ourselves in the materials, I wonder if I might, Mr Smith, begin with some ground rules. I am going to do my best to put my questions to you clearly and precisely. As with the binders, I'll inevitably fail sometimes, but in return, I would ask,

sir, that you do your best to answer my questions clearly and precisely, and in particular, if a yes or no will suffice, please give me a yes or no; is that acceptable, Mr Smith?
A. Yes, that's acceptable.
Q. And if you don't understand anything I put to you, please be sure to ask me to clarify it. It is most important that we understand each other. So please do ask me any clarifications that you may require. Is that understood, Mr Smith?
A. Yes.
Q. Very good. Thank you.
Some preliminaries then by way of background. I understand you joined Elliott in 2001; that's right, isn't it?
A. That's correct.
Q. And that was in London?
A. Yes.
Q. You were an analyst at that time, sir?
A. Yes.
Q. And you moved to Hong Kong in 2005?
A. Yes.
Q. And with that move you became portfolio manager; do I have that right?
A. It was at the end of 2005 actually, but after that move,

yes.
Q. Understood, thank you.
Did that represent a promotion from analyst, Mr Smith?
A. Yes.
Q. And as portfolio manager you had responsibility for Elliott 's Asian investments. I have that right?
A. As head of office which I was promoted to in early 2007, I had responsibility for the investments. There was a period from when I was promoted to portfolio manager before I was promoted to head of office, just over a year when I had responsibility for certain of the Asian investments, but that became all of them upon my promotion to head of office.
Q. I see, that's clear, thank you. Your promotion to head of office was accompanied by promotion to managing director in 2007; do I have that right?
A. Yes.
Q. And with that promotion, am I to understand that you managed a team of about 35 professionals overseeing Elliott 's Asian and Australian investments?
A. Yes.
Q. And just to understand the lay of the land in terms of those individuals on your team, Mr Smith, did they include a Joonho Choi?

A. Yes.
Q. And a Mr Nicholas Maran?
A. Yes.
Q. And a Mr Daniel Chinoy?
A. Yes.
Q. And did Messrs Choi, Maran and Chinoy report to you, Mr Smith?
A. Yes —— yes, they did.
Q. Let's come to look at least at a high level at how you analysed those investment for which you had responsibility .
Would I be right, sir , that reviewing media coverage in companies in which you had invested was part of your responsibility ?
A. Being aware of the news flow on companies is a part of the role , yes.
Q. And reviewing analyst reports, sir ?
A. Yes, to an extent.
Q. If we come to Korea specifically, am I right in saying that Elliott had been analysing investments in Korea since at least 2002?
A. That's correct. I wouldn't say it was continuous, but yes, a number of times during that period of time.
Q. And more specifically still , as to Samsung C&T, would I be right, Mr Smith, to say that Elliott had been

tracking the performance of that company since 2003?
A. Again, that's correct. That tracking wasn't continuous in all of the time, but off and on from that period of time, obviously 2003 to 2007 I wasn't involved in that, but thereafter I was.
Q. And I have it right, don't I, that Elliott first took an interest in Samsung C&T in 2003?
A. That's correct.
Q. Briefly back to your CV, if I may, sir. Do I have it correct that you returned to London, moved back to London, in April of 2018?
A. Yes.
Q. And when you made that move, you continued to oversee Elliott 's Asian investments; that's right, isn't it?
A. Yes.
Q. And as you returned to London, your title reverted to portfolio manager?
A. Yes. I'm still head of the Hong Kong office as well, but I maintained both those titles after that point in time.
Q. And if I have it correct, sir , you resigned from Elliott about a year after your return to London in April of 2019?
A. That's correct.
Q. And you of course will know that Elliott filed its

amended Statement of Claim and your first witness statement in these proceedings on April 4 of 2019. How long after that filing did you resign, Mr Smith?
A. Shortly afterwards.
Q. And you tell us in your second witness statement that you resigned in order to pursue a new stage in your career. Might I ask, sir , what are you doing now?
A. I founded a new investment business called Palliser Capital, pretty much —— well, as soon as my restrictions , my employment ended at Elliott, that fund was launched on 2 August this year and we are —— we are running a team and making investments in a similar way to which I did at Elliott .
Q. And now that you've left Elliott , sir , do you have any carried interest in any Elliott funds?
A. An LP of one of the Elliott funds. I have no specific stake in any particular investments. I'm just an investor like any other institutional investor would be in Elliott International LP, one of the funds.
Q. And are you, sir —— I ask for good order only —— being compensated for your testimony in these proceedings?
A. Yes, I am being compensated only the —— on the basis really of time spent. I have no stake or interest in the outcome of these proceedings.
Q. We talked about the Claimant's filing of its amended

Statement of Claim on April 4, 2019. On that same date the Claimant filed the first expert report of a Mr Richard Boulton QC. Did you review that report, sir?

A. I have not reviewed that report in depth. I'm aware of it. I have seen it. I haven't reviewed it in depth.

Q. You haven't reviewed it in depth. I see.

What about Mr Boulton QC's second report, that's dated July 17, 2020. Did you review it?

A. I'm aware of it. I haven't reviewed it.

Q. Have you read it, sir?

A. I haven't read it. I haven't read it, no.

Q. And what about the expert report of a Professor Curtis Milhaupt that bears the date July 16, 2020?

A. I haven't reviewed that report.

Q. Let's then come in our chronology to 2014, Mr Smith, and before Elliott's investment in Samsung C&T that is the subject of this arbitration. To situate ourselves in our chronology, you know, do you not, that in May of 2014 chairman [redacted] of the Samsung Group suffered a heart attack?

A. Yes, I'm aware he had significant health issues beginning around that time.

Q. And by that time Elliott was already conducting some

preliminary analyses of certain potential restructuring scenarios within the Samsung Group. That's right, isn't it?

A. I disagree with that statement. We had brainstormed around the concept of potential restructuring within the group. That had not become detailed work. It's also worth saying that in my experience of the Samsung Group and many other corporate groups in Korea, there's often a great deal of speculation most of the time around potential restructuring steps or corporate changes within those groups.

Q. It may be, Mr Smith, that we're only dealing with difference in nuance of language, but for the record, might I ask you to turn up your second witness statement, sir. It's in -- you clearly have it.

{D1/2/1}

Members of the tribunal, it's tab 2 in volume 1 of the cross binder. Mr Smith's second statement.

Do you have it, Mr Smith?

A. Yes.

Q. If you would go with me, please, to paragraph 29 of that statement {D1/2/15}. It's at the bottom of page 14. You testify there:

"When rumours of potential restructurings within the Samsung Group increased following Mr [redacted]'s health

issues in mid 2014, I was aware, albeit at only a very high level, that this might mean that a restructuring of some kind within the Samsung Group could be more likely or in other words that the unusual speculation surrounding Chaebol restructuring issues might become more relevant."

And then the next sentence:

"Accordingly, I instructed my team to conduct some preliminary analysis of certain potential restructuring scenarios within the Samsung Group ..."

That's the question I put to you a moment ago. Is that -- does that mean brainstorming, Mr Smith?

A. Yes, I mean, that's consistent, I believe, with the answer I gave you. I recall some discussion in the April actually with my team where we brainstormed around potential scenarios. I requested that the team look into some of those scenarios and do some analysis. That analysis didn't end up getting back to me or being presented to me for quite some time.

Q. You just referred to April of 2014. You've presaged my next question, Mr Smith. In fact in that month, April of 2014, you projected that Samsung Everland, the company that became Cheil Industries, may get listed. That's right, isn't it?

A. Could you refer me -- it would be helpful to look at the

information you're referring to in making that statement.

Q. Of course, sir. It's exhibit R-247. It's in volume 3 of the cross binder, and it's at tab 52. {R/247/1}.

A. 52?

Q. 52.

A. Yes, I'm at 52.

Q. Thank you, Mr Smith. I'll wait for the members of the tribunal.

A. Sorry, I do apologise. Sorry.

Q. If we situate ourselves then in this exhibit, R-247, several short emails at the top of the page, at the bottom of the first page we saw an April 4, 2014 email from yourself, sir, to your colleagues I understand Joonho Choi and Sachin Mistry. The subject line is "Samsung", and if you go to the first point there, at point 1, second sentence, you say:

"As such, Samsung Everland may get listed -- do we know of any plans?"

So my question, sir, was simply to ask you to confirm that in April of 2014 you projected that Samsung Everland, the company later known as Cheil, may get listed?

A. Yes, I'm suggesting it may get listed in this email, yes.

Q. And you were also projecting, were you not, sir, that Cheil was likely to be the ultimate owner of stakes in any Samsung holding company?
A. I wouldn't say projecting necessarily. Considering the possibility of. You will point me to which point in the email that that's referred to.
Q. I'm still on point 1, sir.
A. Okay.
Q. I'm focused on the first sentence there. You said at the time:
"The ultimate owner of stakes in the IHC ..."
Which I understand to be industrial holding company:
" ... and the FHC ..."
Which I understand to be financial holding company:
" ... is likely to be Samsung Everland ..."
A. Yes.
Q. So my question was simply you were projecting in April of 2014 that Cheil, at the time known as Everland, was likely to be the ultimate owner of stakes in any Samsung holding company?
A. Yes, I think at the time that I wasn't aware that the name of the entity was Cheil or to become Cheil, but that's correct. I know it is now.
Q. Perhaps we can turn to the second page of the email then, and if you would go with me, sir, to point 8.

{R/247/2} Perhaps you can take a moment to read it. (Pause)
Do I understand correctly, Mr Smith, that in April of 2014 you recognised that the greatest problem for the Samsung Group ——
A. Sorry, I didn't finish reading it.
Q. Sorry, take your time. (Pause)
A. Yes.
Q. So looking at point 8 on page 2 of R—247, do I have it right, sir, that you recognised in April of 2014 that the greatest problem for the Samsung Group was the [redacted] family's relatively low aggregate ownership of Samsung Electronics?
A. Here I'm recognising that as one of their issues if they want to maintain control of the group in the future, that's correct.
Q. And you recognised it as the greatest issue; that's right, isn't it, sir?
A. In this high level brainstorming memo, yes, I call it the greatest problem.
Q. And staying in this email, April 2014, I'm now moving to point 6, Mr Smith, perhaps you can take a moment to study point 6 before I put my question to you.
(Pause)
A. Yes, I have read it.

Q. Do I have it right, sir, at that at this same time, April of 2014, you recognised that as the [redacted] family sought to shore up its ownership of Samsung Electronics, there was a risk of value transfers between different parts of the group?
A. Yes, I'm talking there about a transfer from the perspective of the family. So they have a greater value of their investment in the financial businesses within the Samsung Group, as you know, a very complicated group, and a lower portion of their investment in the non—financial entities, and what I'm highlighting here is an expectation that they would need to find ways to increase the level of their investment in the non—financial side and I'm presaging that they would do that by reducing their level of investment in the financial side. That's what I'm referring to when I say value transfer.
Q. The value transfer would involve some companies with high valuations and others with low valuations. What did you mean by that?
A. What I'm referring to is if they were to reduce their exposure to the financial investments they have, being Samsung Life and things like that, I assume they would want to do that at good prices, and that as with all investments, if they were to increase their investment

in the non—financial businesses that they would do that at a low price.
Q. You understood that to be their objective. I'm looking now at the final sentence of point 6 in the page number 2 of R/247. There you ask your colleagues:
"Any problems and/or disruption we can cause there?"
What did you have in mind there, Mr Smith?
A. So what I'm referring to, and this is a colloquial form of words, I'm referring to things that we could do, or suggestions we could make to increase value. Rather like if you thought of the analogy of the tech sector, there's a lot of disruption in the tech sector that generally leads to value creation. I'm talking about suggestions that we could make that might increase value.
Q. Those suggestions being the problems to which you refer, Mr Smith?
A. Those suggestions I think you see some time later when we develop a series of restructuring scenarios that —— if it might be helpful to turn to, if not now, perhaps later. We had the intention later in time to make proactive suggestions to the family as to how they could restructure in a fair and value enhancing way a number of their subsidiaries in the group.
Q. We have your testimony and we will come on to the

restructuring plans in due course.

Let's for now stay with our chronology, and I want to come to your first purchase of shares in Samsung C&T, Mr Smith.

To set us up for that, might I invite you, please, to go back to your second witness statement, and as you do, to paragraph 30 of that statement, please.

A. Yes.

Q. {D1/2/16}.

A. 30 of the second one, yes?

Q. 30 of the second, yes.

Perhaps you can take a moment to study it, Mr Smith, and then I'll put my question.

(Pause)

A. Yes, I have read the paragraph.

Q. You say there that it was upon your team reviewing a research note from Nomura that you first considered the specific possibility of the merger between Samsung C&T and Cheil. I have that right, Mr Smith?

A. That's correct.

Q. And that was at the end of January 2015?

A. I think it was the 25th or the 26th.

Q. Very good. To situate us precisely, the first share purchase was January 29th; that's right, isn't it?

A. The first share purchase was January 29, but obviously

we had exposure through swap contracts from November 2014.

Q. We just mentioned the Nomura research note that you refer to in paragraph 30. I want to go to that Nomura research note if we can, please. It's exhibit {C/144/1}, and it's in volume 2 of the cross binder at tab 11.

A. Yes, I'm at that tab.

Q. You have that Nomura report in front of you, Mr Smith?

A. Yes.

Q. This is the Nomura report that you say caused you to consider the specific possibility of the merger between SC&T and Cheil for the first time?

A. Yes.

Q. Let's look at it together. We see the sub-heading on page 1, concerns overdone, trading at 50% discount to NAV?

A. Okay, yes.

Q. Do you see that sub-heading?

A. Yes.

Q. Yes?

A. I was looking at the red headings. It's the high one, yes.

Q. Not the first time you've foreshadowed my next observation. Let's go through the red headings. The

third on this cover page of the Nomura report that caused you to consider the specific possibility of the merger for the first time.

Let's go to the third red heading. It says:

"Valuation: new TP of KRW84,000 cut from KRW96,000."

What is TP?

A. Target price.

Q. And then Nomura describes how it valued Samsung C&T, and it says first:

"... value of stakes in affiliates at 30% holding company discount ..."

Do you see that, Mr Smith?

A. I see that.

Q. And then if we turn over to page 3 of this Nomura report that caused you to consider the specific possibility of the merger for the first time, I'm in the middle of page 3, under those first two graphs {C/144/3}. Do you see the heading there that reads "Holding company discount of 30%"?

A. Yes.

Q. And then thereafter Nomura explains that -- it says: .

"We think that the appropriate holding company discount" --

A. Sorry, can I make notes and underline things as you speak?

Q. Of course. Please.

Nomura says:

"We think that the appropriate holding company discount for SSCT's investment portfolio should be 30% based on the LG Corp's average discount to NAV ..."

Do you see that there, Mr Smith?

A. Yes, I see that.

Q. And then flip over with me if you would to page 5 of this Nomura report {C/144/5}. Again, the first block of text on page 5, you see Nomura say:

"We value SSCT in two parts: 1) value of stakes in affiliates at 30% holding company discount (based on LG Corp's discount to NAV) ..."

Do you see that?

A. Sorry, I lost my concentration there. Say that again?

Q. The top of page 5. I'm simply asking: do you see how Nomura describes how it's done its valuation?

A. Yes.

Q. And evidently they've calculated a 30% holding company discount based on LG's historical discount to NAV. Do you see that, sir?

A. I see that, yes.

Q. And that calculation of the holding company discount has nothing to do with the risk of the merger that Nomura is elsewhere discussing in this report. That's right,

isn't it?
A. Yes. What I would say is there are a range of views in the market as to what holding company discount should be, and it's frequently been my experience that where there's the possibility of change, a much lower holding company discount can be warranted on a conglomerate like this. But I see the points that you're referencing.
Q. And to make sure I have that, and I have understood, we share an understanding of the Nomura report that encouraged you first to buy shares in SC&T, as you testify in your second witness statement, the 30% holding company discount here applied by Nomura has nothing to do with the risk of the merger it's considering elsewhere in the report?
A. It doesn't appear in Nomura's opinion that it's linked to that because they are advising people to accumulate shares in the 50% discount.
I should also say I don't know the methodology they're using well enough, for example, whether they're applying theoretical taxes to these —— the market values of these stakes. And that can often make a difference if you're not applying tax, you might use a larger holding company discount. We would always apply tax. So there are often differences in methodology, and I'm —— my —— certainly in this forum, my mind is not

working quick enough to run the calculations in my head to check that.
Q. I promise I shan't ask you to do that. I just wanted to ensure that we share an understanding of what Nomura here is saying in the report that encouraged you to buy SC&T shares for the first time, and I understand that we are.
In other words ——
A. Sorry, I just want to make a point. I wouldn't say the Nomura report encouraged us to buy shares. At a point when we had already developed exposure and before we expressed that as shares rather than swaps, I was aware of the report. We didn't do anything on the basis of this report. We were aware of this report. You said the report that caused you to buy shares. That's not correct.
Q. I see your point, sir. To make sure I have your testimony then, this is the report that caused you first to consider a serious possibility of the merger between SC&T and Cheil?
A. It was the report that first raised the possibility of a merger to my attention, yes.
Q. Very good.
Let's close out on page 5 of the report before we leave it, then, just to make sure I understand what

Nomura has done in this report.
If we look at Figure 7 there, am I correct to understand, as you read it, that they first list listed holdings of Samsung C&T?
A. Yes.
Q. The first of those is Samsung Electronics. We're looking in the same place, sir?
A. Yes.
Q. And then underneath that Nomura lists unlisted holdings of Samsung C&T?
A. Yes.
Q. And if we go to the bottom right of this chart we see the subtotals there, and the second line is:
"At holding company discount of 30%."
And although I promised you I won't ask you to do the mathematics, and I won't, I am to understand correctly that Nomura has taken those valuations and subtracted from them a holding company discount of 30%?
A. If you are telling me that 13,806 times 0.7 equals 9,664, then I'll go with your view on that.
Q. Very good. Thank you.
We can leave Nomura for now, although we may come back to it as we proceed.
Before we leave it, though, let's just note once again its date. It was end January 2015. We see that

on the cover?
A. It may be instructive just to make one point. That's a discount they are applying to the listed stakes. They don't appear to be applying that discount to the core business.
So what they call core operation value, that's the real unlisted business, so the construction division and the trading decision. It doesn't look like they're applying the discount to that.
Q. Understood.
A. Just people call discounts different things and apply them in different ways.
Q. I understand. And so the discount they are applying is to Samsung C&T's holding of stock in affiliates?
A. That's what I understand from what I'm looking at here.
Q. Very good. That was the end of January 2015. Let's come on to February 2015, Mr Smith.
A. Yes.
Q. In February of 2015 Elliott considered that the [redacted] family had a thin shareholding in Samsung C&T. That's right, isn't it?
A. Compared to other Korean family so—called Chaebol groups, their holding in this particular company was low, that's correct.
Q. It was precariously thin, even?

A. It was low in the context of comparable businesses. I'm not sure I would go as far as to say precarious.
Q. Well, let's look at a document together. It's exhibit R/252. It's in volume 3 of the cross binder {R/252/1}. It's tab 53.
A. Yes.
Q. Do you have it in front of you, Mr Smith?
A. I do.
Q. Let me say straight away in fairness your name does not appear on this email. I don't wish to mislead you that it does. I understand it to be an email between your colleagues, Messrs Choi and Maran?
A. Yes.
Q. If you would turn to the second page of the email for me, the longest email, it's from Mr Choi to Mr Maran, February 18, 2015; do you see that?
A. I see that email.
Q. Have you seen that email before, sir?
A. I have seen that email, yes.
Q. When did you see it, sir?
A. I have been shown it by counsel in the last months.
Q. I see. Go with me, if you would, to the fifth bullet there?
A. Yes.
Q. Your subordinate, Mr Choi, is saying the [redacted] family

has a precariously thin shareholding of other Samsung affiliates , including Samsung Electronics, and Samsung C&T.
Do you see that, sir?
A. Yes.
Q. I have it right, don't I, that at this time, February of 2015, Elliott considered that there was a real possibility that the [redacted] family might attempt to merge Samsung C&T with Cheil?
A. It was something that we were aware of and, as with any potential merger or other element of restructuring, it was always our assumption that whatever was done would be done fairly. But it was something that we had in our minds.
Q. Staying with me on this same email on the second page of exhibit R—252, which you told me you were shown by counsel in preparation for this hearing, go with me just two bullets below the one we were looking at together. It's in the middle of the page. It's the seventh bullet down. It begins "Given Samsung C&T's 7.1% holding ..."
Do you see that?
A. 4.1%.
Q. I'm sorry, 4.1%, you're quite right.
"Given Samsung C&T's 4.1% holding in Samsung Electronics, we view it a real possibility that the

family may attempt to merger Samsung C&T Corp with Cheil Industries ... "
Do you see that, sir?
A. I see that, yes.
Q. At this time, February 2015, Elliott also believed that the board and management of Samsung C&T were installed and controlled by the [redacted] family. That's right, isn't it?
A. If you could take me —— is there a document you're referring to?
Q. Yes. It's the same document, sir, and it's the third bullet from the bottom. You will see it begins "The board of Samsung C&T". Do you have it?
A. Yes.
Q. "The board of Samsung C&T would likely act in favour of the family ... despite the open registrar; we believe both the board and the management were installed and controlled by the [redacted] family."
Do you see that?
A. Yes, I see that. And yes, I see that.
Q. Very good. We've been looking at Elliott internal analysis of the Samsung Group. What I want to do now, if I may, sir, is turn with you to external advisers, external advisers who assisted the Elliott Group with this investment.

Before we come to look at any particular document together, I was hoping you would help me to establish the lay of the land in terms of the range of external advisers with whom Elliott worked in looking at Samsung's C&T.
I have it right, don't I, that in January 2015 your team engaged a consultancy called Spectrum Asia?
A. That's correct. Spectrum Asia were one of a number of specialists that we would go to, consultants in this case, to help us understand a variety of issues on many projects.
Q. You didn't mention Spectrum in your report, excuse me, in your witness statements, but I have your testimony now, for which thank you.
You do though in your witness statements refer to another consultant called IRC.
Do I understand correctly that you had IRC prepare a report on the NPS?
A. That's right.
Q. So we have Spectrum and IRC. Let's come to other advisers. What about accountancy firms? Did you have accountancy firms assist you, sir?
A. Yes, we did, yes.
Q. Which firms, sir?
A. I believe it was [redacted].

Q. And how about investment banks?
A. We did not -- I believe it was [redacted]. To be honest, I can't remember with precision. Investment banks -- we didn't engage that I recall an investment bank specifically to help us on this situation.
Q. You don't know, sir, that Deutsche Bank prepared a valuation of SC&T for Elliott?
A. Not that I'm aware, unless it was done for one of my colleagues.
Q. Unfortunately I don't have it, but counsel opposite have referred to it, the Claimant in this arbitration has refused to produce it in evidence. I don't have it to put to you to discuss, so perhaps I will leave Deutsche Bank there.
Before we come to any particular reports though from external advisers, let me ask you this. We've covered IRC, Spectrum, [redacted] and we discussed just now Deutsche Bank. Were there other external advisers assisting you?
A. We had law firms assisting us. None that I specifically recall, but I think it's -- you know, it's members of my team such as Mr Maran may have worked with other specialists in building a broad view of a situation and I might not necessarily be aware of smaller advisers name by name, person by person.

Q. Does the name IPREO, I-P-R-E-O, mean anything to you?
A. Yes, IPREO -- I thought you were meaning at this period of time, IPREO is a proxy specialist that we engaged after the merger was announced.
Q. I understand. What did they do for you, sir?
A. So they were a group that specialises in helping you understand the identity of the shareholders of a company and to engage with them on particular issues.
Q. Much like the Deutsche Bank model, I'm afraid I don't have IPREO's report because it has been withheld in these proceedings. So perhaps we can't take that further. I have your testimony.
Let's then come to look in more detail at the first of those advisers, the one you refer to your witness statements. It's IRC.
First on nomenclature, just to make sure I have it, IRC is in fact Investor Resources Counselors; that's correct, isn't it?
A. That's correct.
Q. And do I have it right that your principal interlocutor at IRC was a gentleman by the name of Martin Yupangco?
A. Yes.
Q. And before Mr Yupangco founded IRC, he was in fact your head of research at Elliott Hong Kong?
A. That's correct.

Q. Let's look at IRC's first report to you. It's at exhibit C151. It's at volume 2 of the cross binder at tab 12. {C/151/1}.
A. Yes, I'm at tab 12.
Q. We see that this first report of IRC is dated March 1 2015. You see that on the cover, Mr Smith?
A. I do, yes.
Q. And just to contextualise once again by reference to Elliott's interests in Samsung C&T up to point, I have it correct, do I not, that the day after this report, March 2, 2015, you closed out of your remaining swap positions and replaced them with shares?
A. Yes, on that day we undertook what's known as a cross, I suppose, where we terminated swap contracts and purchased shares. We did that, if I recall, because we had been corresponding with Samsung C&T who were not being helpful and engaging freely with us, which caused us some concern.
Q. We will come on to that engagement in due course, Mr Smith.
Focusing now on IRC, the report you have in front of you, I understand your testimony to be that this report confirmed that the NPS could be expected to be supportive of Samsung's strategy as a general matter. Do I have that right, sir?

A. I don't agree with that characterisation. This was one of a number of reports from IRC that included a lot of information. Part of the reports actually talked about the voting procedures at NPS, the presence of an outside voting committee, and a number of aspects that we viewed as ensuring that they would behave in accordance with shareholder value in making decisions.
Q. I promise we will come on to look at those aspects, sir, but just on this general characterisation of the IRC advice, can I ask you to turn up your first witness statement, please, Mr Smith?
A. Yes.
Q. And go with me to paragraph 26.
A. Yes.
Q. You say in the second sentence there:
"The report further confirmed [that's the IRC report] that although the NPS could be expected to be supportive of Samsung's strategy as a general matter, that support would not trump the application of its investment principles in performance of [what you call the] NPS's governmental duties."
Do you see that, sir?
A. I do, yes. {D1/1/11}
Q. Very good. Let's look at what IRC actually said together. You can put the witness statement away for

now.
So it's {C/151/1}, the first IRC report of March 1, 2015.
Go with me, if you would, to {C/151/3}.
A. Yes.
Q. This is IRC's summary of its advice to Elliott. Take a moment to read the last bullet there for me, sir. (Pause)
A. Yes.
Q. It says:
"According to historical events involving conglomerates' affiliates and NPS, NPS has without exceptions exercised its appraisal right when the execution price for appraisal right was higher than market price."
Do you see that, sir?
A. I do, yes.
Q. And if we jump ahead to the merger in issue in these proceedings, you know, don't you, sir, that in July 2015 the execution price for the appraisal right for Samsung C&T was not above its market price?
A. Yes, but the -- you can only exercise your appraisal right if you voted against a merger, is my understanding of Korean law. So -- yes, I think that's an important point in the context of that bullet there, and actually

you will be aware in the bullet prior it talks about them abstaining in a Samsung merger just recently. So yes, you said in 2015 the price of the dissenting option was below. Yes. Is that what you said?
Q. That's right, yes.
A. Yes.
Q. And you agreed with me, sir.
A. I can't remember the exact stock price, but yes, I think that's correct, that sounds correct.
Q. Making good on that general statement of principle in the final bullet point of IRC's summary of its advice to you, it then goes through several prior Chaebol mergers, and it does that on page 4 of the IRC's first report to you. Do you have page 4?
A. I do, yes. {C/151/4}
Q. We can see there it sets out the appraisal right price and the market price for each of the mergers there listed.
Do you see that, sir?
A. So I have the name of the transaction. You said the appraisal price, yes?
Q. Yes.
A. And the share price, yes.
Q. And the table shows, to make sure we're reading it the same, that as long as the share price was higher than

the appraisal price, the NPS voted in favour of the merger?
A. Say that one more time?
Q. And the table shows to make sure we're reading it the same that as long as the share price was higher than the appraisal price, the NPS voted in favour of the merger?
A. No, I think in some of these cases NPS's voting is not identified. Isn't that what it says?
Q. Let's go to look at that in more detail then.
The first of those that is said here to be not identified is a Hyundai merger. If you come with me to page 7 of the IRC report {C/151/7}. It's actually an unnumbered page but it is the page between 6 and 8?
A. Yes.
Q. And the page is headed "Merger of Hyundai Mobis and Hyundai Autonet – 2008."
Do you have it?
A. Yes.
Q. And we see there in the first sentence of the second paragraph the NPS exercised its appraisal rights; do you see that?
A. In the -- sorry, the --
Q. First sentence of the second paragraph under the graphs.
A. Yes.
Q. And the merger failed then, didn't it?

A. I don't remember reviewing this merger in particular, but if you're -- if you're telling me it failed, then I'll take your word for it.
Q. Let's then look at the last sentence on this page 7 on the Hyundai merger. After it failed the first time, Hyundai tried the same merger again six months later; you see that, sir?
A. Yes.
Q. And that second attempt succeeded; do you see that?
A. Yes.
Q. Let's then go to the next example. It's on page 8 of IRC's first report to you, {C/151/8}. Page 8 is headed "Merger of Lotte Chemical and KP Chemical – 2009"; do you see that?
A. Yes.
Q. And go with me to the last sentence of the second paragraph. You see there in IRC's advice to you that the NPS likewise exercised its appraisal rights for this merger; do you see that, sir?
A. Yes.
Q. And again, the appraisal price was higher than the stock price?
A. Are you asking me to look at the two diagrams and deduce that?
Q. You can look at the diagrams, sir, or at the text in the

second paragraph.
A. Yes, they exercised their appraisal right. I see that.
Q. And the appraisal price was higher than the stock price?
A. Yes.
Q. And the merger failed; that's right, isn't it?
A. Yes.
Q. And if we look to the final sentence here, after that Chaebol merger failed, Lotte attempted it again about three years later. Do you see that, Mr Smith?
A. Yes.
Q. And it succeeded this time in February 2012; do you see that?
A. Yes.
Q. Now, in this report to you, IRC also looked at the NPS's investment holdings across the Samsung Group. Let's look at those together. It requires us to go back a couple of pages to page 6, if you would, please {C/151/6}.
A. Sorry, you said page 6?
Q. Page 6.
A. Does it have a number?
Q. It does have a number.
A. There you go.
Q. And I'm looking at the second table on page 6, headed "NPS's holdings of Samsung equities in order of amount";

do you see that, sir?
A. I do, yes.
Q. If we look at the second column from the right, it has amount in Korean Won, and we go down the bottom, we see total NPS holdings according to this IRC advice to Elliott of some 20.4 trillion Korean Won in Samsung Group companies. We see that, sir?
A. I see that number, yes.
Q. And crudely I'm violating my promise of not asking you to perform mathematics, crudely that's a little under 20 billion US dollars; is that right?
A. It sounds correct, I think. Korean Won was 1,110 around that time. So it sounds correct.
Q. Very good, thank you.
IRC, as you rightly said earlier, also advised Elliott on NPS decision-making processes. Let's move to that subject. To do that can I ask you to go back with me to the summary, please, on page 3 {C/151/3}.
A. I'm on page 3.
Q. And look with me at the second bullet point there. Do you see it, sir?
A. Yes.
Q. It says:
"The CIO is Chairman of the Investment Committee which is the highest decision-making body for particular

investment-related issues, such as voting at shareholders' meetings and exercising appraisal rights."
Do you see that, Mr Smith?
A. I see that, yes. Yes.
Q. IRC never advised you that the so-called Special Committee or Experts Voting Committee would necessarily vote on a Chaebol merger, did it, sir?
A. IRC's analysis indicated to me that the -- for percentage stakes that were as high as this, there would be a strong likelihood that decisions could be referred to the outside voting committee. I believe that actually happened for the SK merger shortly after this merger was announced. What it didn't do was suggest that the only criterion that NPS used in assessing how to vote in mergers was the appraisal price. My take-away from the report was that they would be focused on what was in the best interests of all shareholders -- best interests of shareholder value, rather, in making their decisions.
Q. I have your testimony, sir, that there was a strong likelihood that decisions could be referred to the outside voting committee. To test that we need to look at a further iteration of the IRC report. It's the final IRC report. I would ask if you would turn it up for me. It's exhibit C-166. It's in volume 2 of the

cross binder, the same volume, and it's tab 14 {C/166/1}.
A. Yes.
Q. We can see on the cover it's dated April 20, 2015. Do you see that, Mr Smith?
A. I do, yes.
Q. And the cover tells us that new material is highlighted in yellow in this final edition of the report; do you see that?
A. I see that, yes.
Q. And then turn with me past the table of contents once again, the page numbering leaves a bit to be desired, past the table of contents and to page 2 in the body, the entire page is highlighted in yellow. The page is headed "National Pension Fund's decision process on the exercise of voting rights". Do you have it, Mr Smith {C/166/6}?
A. Yes.
Q. On that page 2, that yellow highlighted page 2, go with me to the third bullet down, please.
A. Yes.
Q. Just take a moment to read that third bullet.
(Pause)
A. Yes.
Q. IRC's advice was that if the NPS fund's interest in

a particular company exceeded a de minimis level such that decisions could not be taken by a single NPS executive alone, then the fund's voting rights shall be exercised after deliberation and resolution by the Investment Committee. Do you see that in that third bullet point?

A. I see that in the bullet, yes.

Q. And then if we go to the top of page 3 in the same document {C/166/7}?

A. Page 3?

Q. Page 3. Also all highlighted in yellow.

The first full bullet at page 3, it begins "When it difficult to make a decision", do you see that, sir?

A. The hyphenated section?

Q. Exactly. It's a dash rather than a bullet?

A. IRC's grammar is lacking here.

Q. It is indeed:

"When it difficult to make a decision, Investment Committee reports to the CEO about the item concerned, and the CEO requests the Council of Experts on the Exercise of Voting Rights to make the decision."

Do you see that?

A. I see that, yes. I'm also aware in this report that the Voting Committee could also proactively request decisions which I believe appears later on, but I see

the point you're referring to.

Q. Very good.

You were encouraged by this advice. That's right, isn't it, Mr Smith?

A. Yes, I was encouraged that there were procedures in place and that the NPS would be focused on shareholder value.

MR LINGARD: I have your testimony, thank you, sir.

I'm conscious of the time. I'm sorry that the adjustment to our schedule means, although perhaps it was always the case, means that you will have to be held in purdah overnight. But this may be a convenient time to break and we can resume our discussion in the morning.

Thank you very much, Mr Smith, and Mr President, thank you.

THE WITNESS: Thank you. Thank you.

THE PRESIDENT: Only two of them work at the same time.

Thank you, Mr Smith. I should remind you, as already Mr Lingard foreshadowed, you should not be speaking with anybody about your testimony today on either side. So there would be a sort of a quarantine, even if it's not because of the pandemic.

You can go to the gym, of course, and have a dinner in peace and quiet. Thank you very much.

Is there anything else that either counsel would like to raise before we close today?

MR PARTASIDES: Not on our side, thank you, Mr President.

MR TURNER: Not on ours. Thank you.

THE PRESIDENT: Thank you very much. We will then resume 9 o'clock tomorrow morning.

(6.13 pm)

(The hearing adjourned until 9.00 am on Wednesday, 17 November 2021)

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