

# OPUS2

Elliot Associates, L.P. v Republic of Korea

Day 1

November 15, 2021

Opus 2 - Official Court Reporters

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1 Monday, 15 November 2021  
 2 (9.00 am)  
 3 Housekeeping  
 4 THE PRESIDENT: Good morning all, ladies and gentlemen,  
 5 welcome to the hearing, the main hearing in PCA case  
 6 number 2018–51. It's very good and encouraging to see  
 7 all of you in person in flesh and blood  
 8 three-dimensionally. It's a pleasure.  
 9 We haven't met all of you before, so maybe we just  
 10 start with introduction of the members of the tribunal.  
 11 My name is Veijo Heiskanen, I have the privilege of  
 12 chairing this hearing. On my right is Mr Thomas, on my  
 13 left Mr Garibaldi.  
 14 There is a big crowd on both sides, but maybe  
 15 I would ask still the counsel to introduce their teams.  
 16 You can choose whether you only introduce the counsel  
 17 team or everybody else in the room. I start with the  
 18 Claimant. Mr Partasides.  
 19 MR PARTASIDES: Thank you, Mr Chairman, members of the  
 20 tribunal. Let me echo your sentiments; it's nice to see  
 21 you all in person. Given the amount of work that  
 22 everyone in this room has done, I'll endeavour to  
 23 introduce you to the cast of many. What I will do is  
 24 read names and invite the relevant people to raise their  
 25 hands so you can attach a name to a face, and I will do

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1 it in order of significance.  
 2 Therefore beginning with our client representatives,  
 3 Mr Richard Zabel, the general counsel of Elliott. We  
 4 also have Ms Alice Best, who is in our break-out room  
 5 listening to this hearing, from Elliott.  
 6 Let me introduce our co-counsel. We are  
 7 co-counseling the two firms, members of the tribunal.  
 8 The first is KL Partners. Let me introduce you to  
 9 Young Suk Park and Ian Lee. We also have with us  
 10 Byung Chul Kim and Ms Yujin Her.  
 11 We have attending remotely from Seoul Mr Beomsu Kim,  
 12 partner of KL Partners.  
 13 Let me introduce you to our second co-counsel firm,  
 14 the firm of Kobre & Kim. Firstly, Mr Michael Kim. He  
 15 has with him Mr Andrew Stafford, Mr Robin Baik,  
 16 Mr Kunhee Cho, Mr Nathan Park, Mr Michael Bahn,  
 17 Ms Julia Lee, and Mr Ki-Baek Kim, some of whom are  
 18 attending from our break-out room, I should say.  
 19 Let me also, if I may, introduce the team from  
 20 Three Crowns, members of the tribunal, starting with  
 21 Mr Anish Patel, who is behind me, Ms Kelly Renehan,  
 22 Mr Zach Mollengarden, Ms Julia Sherman, Mr Yikang Zhang  
 23 who is in our break-out room presently, Ms Nicola Peart,  
 24 Mr Simon Consedine, and my partners, Ms Liz Snodgrass,  
 25 Mr Georgios Petrochilos and I'm Constantine Partasides.

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1 Thank you.  
 2 THE PRESIDENT: Mr Turner for Respondent's team?  
 3 MR TURNER: Thank you, sir. Now I know why we foresaw half  
 4 an hour of housekeeping. I have rarely seen so many  
 5 people in one room for a hearing.  
 6 Is that better? Sorry.  
 7 There's always a tradeoff between having the thing  
 8 stuck in your head and actually it catching your voice.  
 9 My apologies if it didn't before.  
 10 Sir, I shall with gratitude adopt my learned  
 11 friend's way of introducing the team. Everybody has  
 12 a namecard, I believe, as well as your being able to see  
 13 them now.  
 14 I will begin as well by introducing the  
 15 representatives of the Republic of Korea and first  
 16 Mr Changwan Han, who is the director of the  
 17 International Dispute Settlement Division of the Korean  
 18 Ministry of Justice. He is here with his colleagues  
 19 Ms Young Shin Um, Heejo Moon, Donggeon Lee, Jeemin Park  
 20 and Damuen Lee.  
 21 Mr Han, Director Han, will be here for the first  
 22 week. He will be following remotely for the second week  
 23 of the hearing.  
 24 Alongside us we have from Lee & Ko our co-counsel  
 25 from Seoul, Mr Moon Sung Lee, Mr Sanghoon Han,

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1 Minjae Yoo, Joon Won Lee and Han—Earl Woo, together with  
 2 Suejin Ahn and Yoo Lim Oh.  
 3 We have also with us today two representatives from  
 4 our quantum experts, Brattle, Alexis Maniatis and  
 5 Bin Zhou.  
 6 I don't — Professor Bae is here, in  
 7 Professor Kee—hong Bae, our expert on the Korean capital  
 8 markets, is also present today and our other — some of  
 9 our other experts will be following remotely,  
 10 Professor Dow is following us remotely today, and so  
 11 I understand is Professor Sung—soo Kim.  
 12 Other than that, sir, you have the team from  
 13 Freshfields, myself, the lone representative from Paris,  
 14 but then I have no timezone difficulties, together with  
 15 my partners in order, Nicholas Lingard and Jack Terceño,  
 16 and then we have, and I cannot and see exactly the order  
 17 in which people are sitting from here, Samantha Tan,  
 18 Rohit Bhat, Nicholas Lee, and David Perrett all of them  
 19 from Singapore.  
 20 I think that has covered everybody.  
 21 THE PRESIDENT: Thank you very much, Mr Turner, and welcome  
 22 to all. Even if we are having an in person hearing,  
 23 I remind all of you and all of us of the COVID protocol  
 24 that has been agreed by the parties. We are grateful to  
 25 the parties for the — for an agreement on that point.

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1 I don't think I need to remind what those rules are.  
 2 They are in the protocol. Just more generally I ask  
 3 people to respect the rules regarding wearing face masks  
 4 with the exceptions that have been agreed, as well as to  
 5 respect social distancing to the extent that we can, and  
 6 perhaps in the hotel when you move around the hearing  
 7 room, you should all wear face masks. We don't really  
 8 hope and -- and hope we can avoid any incidents during  
 9 this hearing that nobody needs to be quarantined or  
 10 anything along those lines. It's a long hearing, so we  
 11 need to be careful and we hope everyone will respect the  
 12 rules that have been agreed.  
 13 Before I ask the parties to raise any housekeeping  
 14 issues that you may have, perhaps this would be a good  
 15 time to discuss the unfortunate power cut that we are  
 16 going to have tomorrow morning, I understand from around  
 17 10.10, 10.15, to 10.30. It's 15 minutes only, but  
 18 I understand that the technical people prefer to have  
 19 a one hour's break, which would run from 9.50 to 10.50.  
 20 Maybe we discuss this now rather than at the end of the  
 21 day, so both parties know what the protocol will be  
 22 tomorrow.  
 23 One option, and of course this is -- we defer to the  
 24 parties, one option is simply to extend the day at the  
 25 end of the day. We have a reasonably relaxed programme

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1 except precisely tomorrow. The other option is to start  
 2 a bit earlier in the morning, maybe if the parties have  
 3 had a chance to consider this, maybe I ask the  
 4 Respondent first because it will affect you more than  
 5 the Claimant.  
 6 MR TURNER: Thank you, sir and indeed we have considered  
 7 this, and those are the options. There is a natural  
 8 break in our opening speeches after about an hour and  
 9 a quarter. If one allows for time for tribunal  
 10 questions, and with luck answers to those questions  
 11 perhaps we should allow an hour and a half.  
 12 If we say that with a quarter of an hour's  
 13 housekeeping, we would need to begin at 8 o'clock,  
 14 I think, in order to get through with minimal risk that  
 15 part of our opening, allow the break to take place, and  
 16 we share the tribunal's understanding that it's an hour,  
 17 about 9.45, to about 10.45.  
 18 The other option is that we begin at 11 o'clock and  
 19 we run through.  
 20 In practice we think we would have to extend the day  
 21 by an hour or so. I think we run into the law of  
 22 diminishing returns if we sit too late. The second half  
 23 of tomorrow is the cross-examination of Mr Smith, the  
 24 witness for the Claimant, and I don't think it would be  
 25 right to go on too late in the light of the work that

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1 goes on in witness examinations.  
 2 So we thought perhaps a 6.15 or thereabouts stop for  
 3 tomorrow, which should enable us to -- it will be  
 4 Mr Lingard who will be talking to Mr Smith tomorrow. We  
 5 believe that we will be able to keep to at most  
 6 an hour's -- what is the English word, *déplacement*? --  
 7 for the rest of the timetable which will easily be  
 8 absorbed as we go through.  
 9 So we are agnostic as to which of those two options  
 10 we adopt, but we think if we do begin early, it must be  
 11 8 o'clock to allow the natural break in our opening  
 12 tomorrow to be attained. Otherwise allowing for  
 13 everyone to get back sitting down after the power cut  
 14 tomorrow, 11 o'clock, and then sitting until 6.15.  
 15 THE PRESIDENT: Yes, thank you, Mr Turner. One reason why  
 16 I understand we need an hour's break is precisely  
 17 because the systems need to be rebooted. So it may well  
 18 be more practical to start at 11 because then we would  
 19 avoid any technical problems that may arise if rebooting  
 20 doesn't work. But we are in the hands of the parties.  
 21 Mr Partasides?  
 22 MR PARTASIDES: Thank you, Mr Chairman. We are in your  
 23 hands if that's the tribunal's preference, we are happy  
 24 to accede to it. It affects the Respondent more than it  
 25 affects us. I understand they're willing to go either

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1 way. So are we. But if that's the tribunal's  
 2 preference, we're happy to accede to it, and I agree  
 3 that we should set a guillotine at 6.15 tomorrow  
 4 afternoon and I hope that that will be adequate.  
 5 THE PRESIDENT: Yes, and we are in a sense in the hands of  
 6 the Respondent. You will be doing the  
 7 cross-examination. So if the target is 6.15, we could  
 8 then stop when you find a convenient time in the  
 9 cross-examination.  
 10 But I also defer to my colleagues. There are lots  
 11 of jetlagged people around here with some exceptions.  
 12 So I don't know whether it would be better to start at  
 13 8.00 or at 11.00. That may depend on where you're  
 14 coming from.  
 15 Okay. So we start at 11.00 tomorrow so we avoid any  
 16 logistical issue. We start like as we started today.  
 17 Okay.  
 18 Any other issues we need to discuss now?  
 19 Mr Partasides?  
 20 MR PARTASIDES: On behalf of Claimants, none, sir, thank  
 21 you.  
 22 THE PRESIDENT: Respondent?  
 23 MR TURNER: Nothing from our side, sir.  
 24 THE PRESIDENT: Thank you very much.  
 25 So then we go ahead with the programme. So today's

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1 programme is the Claimant's opening statement. So the  
 2 Claimant, you have the floor.  
 3 Opening submissions by MR PARTASIDES  
 4 MR PARTASIDES: Thank you, Mr Chairman, members of the  
 5 tribunal. After presenting you with a lot of procedure  
 6 over the last three years, we're very happy finally to  
 7 speak to you about the merits of this dispute, and let  
 8 me use this opportunity to invite my team to circulate  
 9 to you if you don't already have it hard copies of the  
 10 slide deck of the evidence in this case that we shall be  
 11 referring to during our opening statement.  
 12 I should say at the outset that I will be sharing  
 13 this opening statement with my partners  
 14 Georgios Petrochilos and Liz Snodgrass in a manner that  
 15 I shall explain at the appropriate time.  
 16 Members of the tribunal, as you know by now, this  
 17 Treaty claim arises from the most infamous corporate and  
 18 governmental corruption scandal to rock the Republic of  
 19 Korea in decades. It has already led to the criminal  
 20 prosecution, conviction and imprisonment of the Republic  
 21 of Korea's former President, President [REDACTED], its former  
 22 Minister of Health and Welfare, Minister [REDACTED], and  
 23 various subordinates of the Ministry within Korea's  
 24 National Pension Service, convictions for demanding and  
 25 accepting bribes, for abuse of power, for misfeasance in

1 public office, all to enable a merger that would not  
 2 have occurred without that criminal governmental  
 3 intervention and that has damaged this Claimant by  
 4 occurring. So this is a Treaty case, members of the  
 5 tribunal, that involves facts of unusual gravity.  
 6 But it is not a case that rests on allegation. That  
 7 is because the central facts that the Claimant relies on  
 8 in bringing this claim have been alleged by Korea's own  
 9 public prosecutor and have been accepted as proven by  
 10 Korea's own courts.  
 11 Now, those convictions have given rise to findings  
 12 of criminality that certainly extend beyond the scope of  
 13 Elliott's claims here, to encompass wrongdoing by senior  
 14 members of Samsung's [REDACTED] family. But our case is  
 15 founded on a subset of those findings that pertain  
 16 specifically to governmental conduct, governmental  
 17 conduct that resulted in support for the merger by  
 18 Korea's National Pension Service that would not have  
 19 existed but for that illegal governmental intervention,  
 20 the passage of a merger that would not have taken place  
 21 without the NPS's support, and the transfer of value  
 22 from the shareholders of SC&T to the shareholders of  
 23 Cheil that was not only the effect of the merger but its  
 24 very purpose.  
 25 Let us be more specific. We now know as fact that

1 the merger was deliberately designed improperly to  
 2 transfer value from Samsung C&T shareholders to Cheil's  
 3 shareholders, most notably Samsung's [REDACTED] family.  
 4 We now know as fact that the [REDACTED] family's [REDACTED]  
 5 conspired with the Government of Korea illegally to have  
 6 it intervene in the merger. We know that intervention  
 7 began at the very apex of the Korean Government in  
 8 Korea's presidential Blue House with the President's  
 9 order that the NPS should exercise its voting power to  
 10 enable the merger to proceed.  
 11 We know that the Minister of Health and Welfare  
 12 passed on that presidential instruction to the NPS and  
 13 we also know that senior officials within Korea's  
 14 National Pension Service implemented that governmental  
 15 direction, and they did so by circumventing the NPS's  
 16 usual procedural safeguards for the making of  
 17 independent decisions relating to Korea's National  
 18 Pension Fund. They did so by falsifying valuations of  
 19 both Samsung, C&T and Cheil, and they did so by  
 20 fabricating entirely a so-called synergy effect  
 21 calculation that was criminally designed to conceal the  
 22 significant loss to the NPS that would be inflicted on  
 23 the National Pension Fund even on the basis of those  
 24 fabricated valuations by allowing the merger to proceed.  
 25 We also know that without that intervention, the NPS

1 would not have supported the merger. Now, we will walk  
 2 you through the key evidence that allows us to know all  
 3 this as fact in sequence and in depth during the course  
 4 of this opening submission. And you will see, as you  
 5 begin to see on slide 2, that [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED] indeed they were so aware  
 8 of [REDACTED] that they considered it [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 You will see, as we begin to see on slide 3, that  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]. And this awareness,  
 15 members of the tribunal, existed long before this  
 16 claimant even notified the possibility of a Treaty  
 17 claim, indeed, long before this Claimant even knew of  
 18 the concealed governmental conduct that we now complain  
 19 of.  
 20 You will see, as you begin to see on slide 4, that  
 21 this concealed subversion of the NPS's decision-making  
 22 process culminated in a crude and now confessed to  
 23 fraud. The words you see on the screen, members of the  
 24 tribunal, are the words of the NPS official who was  
 25

1 instructed to come up with the synergy effect  
 2 calculation , a calculation that he has confessed himself  
 3 [REDACTED] , an important word in these proceedings;  
 4 that he has confessed himself [REDACTED] ,  
 5 and that he has confessed [REDACTED]  
 6 than we spent on our case management conference at the  
 7 very beginning of this arbitration .

8 You will also see, as you begin to see on slide 5,  
 9 that this Claimant wasn't just an anonymous unlucky  
 10 bystander of this crude criminal intervention because  
 11 internal governmental documents show that [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED] . Indeed,  
 14 you will see that this was not just passive prejudice,  
 15 members of the tribunal, that was being expressed within  
 16 Government; it was prejudice that was instrumentalised  
 17 to achieve support for the merger.

18 Here on the next slide we see the NPS's Chief  
 19 Investment Officer, Mr [REDACTED] , a name you will hear many  
 20 times over the next two weeks, working to follow his  
 21 governmental orders, pressuring the NPS's Investment  
 22 Committee members to vote in favour of the merger with  
 23 a threat that if they did not go through with this, the  
 24 NPS would be considered an unpatriotic [REDACTED]  
 25 which is the name of an infamous historical Korean

1 national traitor .

2 So the prejudice and corruption came together, and  
 3 at all levels of the Korean Government.

4 Here on the next slide we see that this  
 5 discriminatory tone was set from the very top. This is  
 6 President [REDACTED] herself, framing the question of the  
 7 merger in terms of an attack from a hedge fund on a top  
 8 Korean company, Samsung, while refraining at this point  
 9 from any reference to the private inducements that we  
 10 now know that Korean company was lavishing upon her.

11 Now, we know all these facts as true because Korea's  
 12 own public prosecutor has alleged many of these very  
 13 same facts, because it was able to do so with the  
 14 support of the testimony of the key participants who  
 15 were compelled to cooperate in that criminal  
 16 investigation in a way that could not have been achieved  
 17 in arbitration proceedings such as these and because  
 18 Korea's own courts have accepted this evidence as fact  
 19 established to a criminal standard of proof.

20 So Korea, as we see on the next slide, was left to  
 21 adopt the rather awkward posture in its first round  
 22 statement of defence in this arbitration of purportedly  
 23 taking no view as to the accuracy of these facts. And  
 24 of course that meant that it didn't deny or contest  
 25 those facts.

1 Now, that was a non-position, members of the  
 2 tribunal, that was difficult to maintain in defending  
 3 the claim against it and it has not been maintained.  
 4 And so finally in its second round Rejoinder, the  
 5 Respondent has now joined battle on the facts underlying  
 6 this claim.

7 Slide 8, you see paragraph 2 of Korea's  
 8 545-paragraph Rejoinder, its second round submission, in  
 9 which it now identifies the battleground before you by  
 10 seeking to defend the process by which the NPS reached  
 11 its decision on how to vote on the merger in its  
 12 management of the National Pension Fund.

13 So that question, how Korea's NPS reached the  
 14 decision to support the merger, lies at the heart of our  
 15 debate, now according to both parties before you.

16 For our part, we maintain that that process was  
 17 anything but due process and although we don't need to  
 18 go further and demonstrate criminality, we can and do go  
 19 further and maintain that the wilful disregard of due  
 20 process that took place here was motivated by a criminal  
 21 scheme of bribery and accomplished, as you shall see, by  
 22 fraud.

23 In doing so, we are now able to present evidence of  
 24 criminality that has only grown, members of the  
 25 tribunal, in the months leading up to this now postponed

1 hearing.

2 On the next slide, slide 9, we see the most recent  
 3 indictment by Korea's own public prosecutor of Samsung's  
 4 [REDACTED] that states in terms that a corrupt bargain  
 5 existed between [REDACTED] and the now imprisoned  
 6 President [REDACTED] for President [REDACTED] to receive personal  
 7 financial favours for her pet projects and those of her  
 8 closest personal associates. Financial favours in  
 9 return for -- not my words, members of the tribunal, the  
 10 Respondent's prosecutor's words -- securing an  
 11 affirmative vote in support of the merger from Korea's  
 12 NPS.

13 Now, these are but the latest charges of Korea's own  
 14 public prosecutor made, members of the tribunal, in  
 15 September 2020, and you may recall, as you see on  
 16 slide 10, that only a few weeks later a prosecutor from  
 17 Korea's public prosecutor's office attended our case  
 18 management conference of October 2020, just a few weeks  
 19 later, as a Respondent party representative.

20 So what we are seeing outside of these proceedings  
 21 is the Respondent itself, quite properly, pursuing the  
 22 domestic legal consequences of illegality, including  
 23 governmental illegality within its jurisdiction, and in  
 24 bringing this claim, members of the tribunal, this  
 25 Claimant is simply inviting you to draw the

1 international legal consequences of Korea's own  
 2 simultaneous positions and judicial decisions  
 3 domestically.  
 4 So the claim before you is obviously not just a mere  
 5 private shareholders' dispute. This is not just  
 6 a question of a shareholder vote that this Claimant  
 7 disagrees with. This claim is about an already  
 8 established gross governmental illegality, and if that  
 9 is not a breach of the minimum standard of treatment  
 10 under international law, we respectfully submit that the  
 11 minimum standard is no standard at all.  
 12 Now, during the course of our opening we will now  
 13 address each of the subjects that you see on our roadmap  
 14 slide, slide 11, from Korea's preliminary objections to  
 15 the merits of our claims of breach and from the merits  
 16 to the causation and quantification of the Claimant's  
 17 resulting loss.  
 18 But we begin, members of the tribunal, where we  
 19 must, with the pertinent facts. In recalling those  
 20 facts, we begin with an introduction of the parties  
 21 before you.  
 22 First, the Claimant. Elliott is a private equity  
 23 investment fund group, founded in 1977, and so one of  
 24 the oldest funds of its type. It invests on behalf of  
 25 a range of stakeholders that include pension funds,

1 sovereign wealth funds, other funds, and Elliott's own  
 2 employees, executives and owners, to all of whom it owes  
 3 fiduciary duties.  
 4 It is headquartered in the United States and has  
 5 offices in addition in London, Tokyo and, until earlier  
 6 this year, in Hong Kong; with close to \$50 billion US  
 7 dollars under investment in various companies, in  
 8 various sectors, in various markets around the world.  
 9 And these include investments in companies as diverse as  
 10 Pernod, AT&T, Waterstone Books and the Italian Serie A  
 11 football team, AC Milan.  
 12 Elliott's overall investment strategy is to identify  
 13 situations in which the traded share price does not  
 14 reflect the intrinsic value of the investment. To  
 15 understand the reasons for that discount, and to  
 16 evaluate the prospects for reducing or eliminating that  
 17 discount. And this business model has given rise in  
 18 recent decades to an entire investment industry whose  
 19 existence is founded on that difference that can exist  
 20 between traded prices and intrinsic value.  
 21 Now, that is neither a difficult nor obscure  
 22 business model to understand and we have described in  
 23 our writings examples of such investments that this  
 24 Claimant has successfully made in a variety of different  
 25 markets around the world, both before and after the

1 investment that is the subject of this arbitration.  
 2 Sometimes an analysis of a historic trading pattern  
 3 might be sufficient to assess the delta, that  
 4 difference, and that that difference would close within  
 5 a reasonable timeline of its own accord.  
 6 On other occasions Elliott might assess that an  
 7 asset is undervalued because of issues that are unlikely  
 8 to be remedied without some form of active intervention.  
 9 For example, because of poor corporate governance or the  
 10 need to restructure.  
 11 In those circumstances Elliott's approach is  
 12 actively to pursue initiatives that can be expected to  
 13 address those problems, for example by taking steps  
 14 designed to improve corporate governance of the  
 15 investment that it has made.  
 16 Now, we've given you some examples of this active  
 17 approach of Elliott in our statement of Reply, and  
 18 James Smith, one of the Claimant's witnesses in this  
 19 case, has given a number more.  
 20 Let me just offer you one briefly for present  
 21 purposes. In June 2015, at precisely the same time as  
 22 the events before you occurred, Elliott also invested in  
 23 Citrix Systems. That will be familiar to all of us who  
 24 use Citrix remote access computer systems. And in  
 25 making its investment, Elliott proposed to Citrix

1 management a plan to improve its cost structure and to  
 2 restructure underperforming brands. In that case Citrix  
 3 management agreed to implement Elliott's restructuring  
 4 plan and appointed an Elliott representative to its  
 5 board.  
 6 As a result of the plan being implemented, the  
 7 company's shares which had traded at \$66 per share in  
 8 June 2015 at the time of the acquisition came to exceed  
 9 \$150 per share by April 2020, when Elliott's appointed  
 10 director stepped down from his position on the board.  
 11 That investment was made in June 2015. Elliott  
 12 remains a shareholder in Citrix more than six years  
 13 after making its initial investment.  
 14 Now, that is one example of many that we've given  
 15 you, an example of Elliott actively involving itself in  
 16 the business of its investment, developing  
 17 a sophisticated corporate plan to unlock intrinsic  
 18 value, proceeding with those plans consensually with its  
 19 other stakeholders and realising that unlocked value  
 20 both for its and other stakeholders' advantage.  
 21 Elliott developed a similar concrete plan, members  
 22 of the tribunal, for the restructuring of the Samsung  
 23 Group, to be put to Samsung's management, in particular  
 24 the [REDACTED] family, in the same way as it had done and has  
 25 since done successfully elsewhere.

1 What you see on the next slide is not a slide ,  
 2 members of the tribunal, we prepared for this  
 3 arbitration . Instead, it is part of a presentation that  
 4 Elliott prepared for Samsung back in May 2015 by which  
 5 it proposed its restructuring plan to the █████ family.  
 6 You will see a detailed explanation of that  
 7 restructuring plan and of Elliott 's attempts at  
 8 a consensual process with Samsung described in the  
 9 second witness statement of James Smith at paragraphs 52  
 10 to 63. That is a plan that would have seen the Claimant  
 11 remain an investor in Samsung C&T at least into 2016 and  
 12 perhaps beyond, as with others of its similar  
 13 investments, both before and since.  
 14 Let me be clear that equity investments such as this  
 15 investment before you are quite different from those  
 16 instances in which Elliott has purchased distressed debt  
 17 or sovereign bonds, which are more likely to involve  
 18 litigation . While the Respondent has tried hard to  
 19 brand Elliott as an organisation whose business model is  
 20 founded on litigation , the verifiable truth, members of  
 21 the tribunal, as Mr Smith has testified on this point  
 22 without contradiction, is that those cases represent  
 23 only a small part of Elliott 's business, and are  
 24 obviously distinguishable from the investment at issue  
 25 before you here.

21

1 That is our Claimant. Let's move on now to discuss  
 2 briefly the other participant in this arbitration , the  
 3 Respondent.  
 4 Now, the Korean Government's executive is headed by  
 5 the presidency, which is referred to, as you will know  
 6 by now, by the name of the President's official  
 7 residence, the Blue House. The Blue House therefore  
 8 sits at the apex of the Government's different  
 9 ministries . The ministry that is most relevant to this  
 10 dispute, members of the tribunal, is the Ministry of  
 11 Health and Welfare which is responsible for governmental  
 12 pension policy and managing the Korean National Pension  
 13 Fund from which the Government will pay pensions to the  
 14 Korean public.  
 15 You see on slide 14 an abbreviated organigram of the  
 16 Ministry of Health and Welfare found on its own website.  
 17 You will see that it divides the Ministry's various  
 18 areas of responsibility into different policy bureaux.  
 19 We shall focus on the Ministerial Bureau of Pension  
 20 Policy which you see encircled at the bottom of your  
 21 slide . This bureau within the Ministry has a Division  
 22 of National Pension Finance which in turn oversees  
 23 Korea's National Pension Fund. And Korea's National  
 24 Pension Service, and you will hear more about this,  
 25 exercises the governmental function of managing and

22

1 operating the National Pension Fund.  
 2 As we can see on the next slide, slide 15, it is the  
 3 Minister of Health and Welfare that has the authority to  
 4 manage and operate the National Pension Fund. As we can  
 5 also see, he delegates that governmental authority to  
 6 the National Pension Service pursuant to the National  
 7 Pension Act.  
 8 Of critical importance to the events that concern us  
 9 here, as you see on the next slide , are the principles  
 10 pursuant to which it is the NPS's legal duty to manage  
 11 the National Pension Fund.  
 12 These principles, members of the tribunal, are set  
 13 out in the Fund Operational Guidelines. They bind the  
 14 NPS as a matter of Korean administrative law and as you  
 15 also see on your slide, those obligatory investment  
 16 principles include, firstly , the principle of  
 17 profitability . Pensioners across Korea rely on the  
 18 adequacy of the National Pension Fund to finance their  
 19 pensions, and so the value of the fund must be maximised  
 20 in the interests of the Korean pensioners.  
 21 Now, you also see the principles of stability ,  
 22 liquidity , and public benefit mentioned. The latter of  
 23 those reflects the public purpose of the National  
 24 Pension Fund and distinguishes the NPS from other  
 25 shareholders.

23

1 But let us be clear . The public benefit will  
 2 ordinarily require the NPS to maximise the overall  
 3 profitability of the fund. Indeed, it is difficult to  
 4 imagine what public purpose would be served by impairing  
 5 the value of the fund.  
 6 Finally, in subsection 5 at the bottom of your  
 7 slide , we see the principle of management independence  
 8 which the guidelines explain to mean that the fund must  
 9 be managed in accordance with the above principles, and  
 10 these principles should not be undermined for "other  
 11 purposes".  
 12 So what is meant by "other purposes"? Well, Korea's  
 13 courts have made that clear, members of the tribunal, in  
 14 one of the criminal cases resulting from the subject  
 15 matter of this dispute. You see that at the top of your  
 16 slide 17, the fund which the NPS manages "must not be  
 17 used to promote political agenda or serve certain  
 18 interest groups in a way contrary to the interests of  
 19 pensioners".  
 20 As the court went on to hold in the same judgment,  
 21 which you see at the bottom of the same slide, the NPS,  
 22 which by the way is referred to as the "AM" in the  
 23 sanitised version of the judgment, is a custodian of the  
 24 retirement assets of the people of the Republic, and  
 25 therefore has the duty to observe the principle of

24

1 independence whereby the NPS cannot be operated for any  
2 other purposes.

3 This last point is of critical importance as  
4 a safeguard for reasons that I'm about to explain. So  
5 we come to the historically close relationship between  
6 the Korean Government and Korea's Chaebol conglomerates  
7 such as Samsung.

8 As you will know, Chaebol are diversified business  
9 groups under control of founding families that are  
10 characterised by complex, often circular shareholdings.

11 Now, large conglomerates are not unique to Korea.  
12 But Chaebols have historically had a distinctively  
13 intimate relationship with the Korean Government and  
14 that intimacy has been the subject of concern and  
15 criticism both within Korea and outside of Korea. At  
16 its worst, as you see on slide 18, this intimate  
17 relationship has been widely recognised as fostering  
18 a climate of corruption in Korea. And in the face of  
19 those shortcomings, many have commented on the  
20 importance of capital market discipline as being  
21 essential to improve Chaebol governance, with active  
22 investor engagement a fundamental source of such  
23 discipline .

24 So many have seen the shareholder activism of the  
25 sort exhibited by this Claimant and not only in respect

25

1 of this merger, as an important part of that ongoing  
2 effort to reform Chaebol governance, playing  
3 a therapeutic role by countering the historically  
4 passive unwillingness within Korea to enforce corporate  
5 securities laws.

6 Now, this is where our description of the Korean  
7 Government's relationship with its Chaebols and our  
8 description of Elliott come together because despite  
9 Korea's relentless criticisms of the activities of  
10 activist investment funds such as Elliott both outside  
11 and within these proceedings, Elliott 's actions have  
12 been seen as a positive contributor to the corporate  
13 governance reforms that Korea is in need of by many  
14 stakeholders in the Korean economy. And so, for  
15 example, as you see on slide 19, and unrelated to our  
16 present dispute, it was Elliott 's recommendation as  
17 a shareholder of Hyundai Motors that a remuneration  
18 committee be introduced to improve transparency in  
19 executive compensation in Korea, and it was this Elliott  
20 initiative that has since led to the more widespread  
21 adoption of such committees to improve transparency in  
22 corporate remuneration more generally in that  
23 jurisdiction .

24 So despite the casual use that we have seen of  
25 pejorative adjectives such as vulture funds, activist

26

1 investment funds such as Elliott have had a therapeutic  
2 role to play in addressing some of the corporate  
3 governance shortcomings in Korea.

4 Indeed it is because of that therapeutic effect that  
5 many international financial commentators have called  
6 for more shareholder activism within Korea. And as you  
7 see at the bottom of this slide , this includes  
8 the Financial Times who has in recent years joined this  
9 call for greater shareholder activism in the Korean  
10 jurisdiction .

11 Let us turn next to this Claimant's specific  
12 investment and involvement in Samsung C&T.

13 Elliott Associates LP has repeatedly invested in  
14 SC&T since 2003. So that is for the best part of  
15 20 years. And since that first investment, Elliott  
16 analysts have continued to monitor SC&T shares and had  
17 observed that they had often traded to close to, at or  
18 even on occasion above net asset value.

19 Now, despite that track record, in November 2014  
20 Elliott observed a widening of the discount of SC&T's  
21 traded price to its underlying net asset value. So  
22 Elliott funds began again to invest in SC&T and they did  
23 so in the expectation that this abnormal discount to  
24 intrinsic value would not endure.

25 By early 2015, against the backdrop of a struggling

27

1 share price , speculation about a merger between SC&T and  
2 a newly listed Cheil company began to grow. But the  
3 Elliott analysts advising the Claimant on the purchase  
4 of its shares were confident that the approval of such  
5 a merger by SC&T's shareholders, were it even to be  
6 proposed by Samsung's management, was extremely unlikely  
7 because of the obvious harm that it would inflict upon  
8 them, upon those shareholders, at the current traded  
9 share price .

10 Now, this confidence that the coming cloud of the  
11 merger would pass was built on the objective economics  
12 of any such proposal. It was built on Elliott 's own  
13 engagement with Samsung's management who assured them  
14 that any rumoured merger with Cheil was inaccurate, and  
15 Elliott 's own dialogue, it was built on Elliott 's own  
16 dialogue with the SC&T's largest shareholders, Korea's  
17 National Pension Service.

18 Now, as we have seen, the National Pension Service  
19 was required to manage the National Pension Fund in  
20 accordance with the principles of investment, including  
21 the principles of profitability and independence from  
22 political agendas and special interests. And the NPS  
23 had acted precisely in accordance with these principles  
24 in voting to reject another Chaebol merger, the SK  
25 merger, just before our merger here, and Elliott

28

1 expected it to act in the same manner in evaluating and  
2 voting on the rumoured SC&T and Cheil merger too.

3 Now, this isn't mere hindsight, members of the  
4 tribunal. Elliott's expectation was formed as a result  
5 of engagement with the NPS at the time, which included  
6 an in person meeting that took place in Seoul on  
7 18 March 2015.

8 Now, that meeting was attended by two of the  
9 Claimant's representatives, including James Smith, and  
10 Mr Smith, as you see on slide 20, has given a first-hand  
11 account in these proceedings about what was said at that  
12 meeting.

13 In particular, he has testified that at that meeting  
14 the NPS representatives agreed with Elliott that the  
15 merger at current share prices would be highly  
16 detrimental to the SC&T shareholders.

17 Mr Smith confirmed this by writing a letter to the  
18 NPS following the meeting that confirmed that this is  
19 what the NPS had said.

20 Now, this statement of the NPS's position was  
21 important, members of the tribunal, because it took  
22 place in mid-March 2015 which is before the governmental  
23 intervention in the NPS's decision—making that we will  
24 come to describe in detail.

25 So what is the Respondent's response to this

1 evidence of the meeting with the NPS that Mr Smith  
2 attended in person on 18 March 2015?

3 Well, for its part it has not presented the witness  
4 testimony of either of the NPS participants at that  
5 meeting, even though it surely could have. Instead, it  
6 has submitted as two of its documentary exhibits — odd  
7 evidential species, if I may — something that they have  
8 styled as a confirmation statement of facts, one of  
9 which is from Mr [REDACTED] It's at exhibit R-210,  
10 Morgan Stanley's Korea managing director, who attended  
11 the meetings only to make the introductions and who  
12 claims not to have heard the exchange that took place  
13 between Mr Smith — that Mr Smith has described and that  
14 his contemporaneous letter records.

15 But to be clear, this confirmation statement of  
16 facts from someone who only attended the meeting to make  
17 an initial introduction, members of the tribunal, is not  
18 a witness statement. And so Mr [REDACTED] has not given  
19 testimony on which he knows he will be examined and no  
20 explanation has been provided as to why neither of the  
21 NPS witnesses who attended the entire meeting has not  
22 been presented to testify here before you as — I say it  
23 again — surely they could have.

24 Now, there were a number of objective reasons why  
25 this investor fully expected that if such a merger was

1 even put to a shareholder vote, it would fail. That's  
2 not just because the NPS as the single largest  
3 shareholder had told it that it held many of the same  
4 concerns as this Claimant. Those objective reasons  
5 included the fact that there was a broad consensus  
6 amongst market analysts against the merger. Whether one  
7 looks, and we can see them all on slide 21, at the views  
8 of important advisers such as Glass Lewis, ISS, or many  
9 other proxy advisers, the market was overwhelmingly of  
10 the view that the merger would, and now I'm quoting,  
11 "give Cheil the core operations of C&T effectively for  
12 free".

13 Now, in the face of this weight of market warning,  
14 the Respondent has pointed to the fact that a small  
15 number of Korean securities analysts apparently held  
16 more positive views about the prospects of the merger.  
17 But these apparent local optimists must now be viewed  
18 with profound scepticism. I say that because as Korea's  
19 own public prosecutor has, in the last year, submitted  
20 in its second indictment of [REDACTED], as you see on  
21 slide 22, we now know that Samsung, flexing its immense  
22 market power in Korea, was behind the scenes working to  
23 induce the publication of some reports favourable to its  
24 merger proposal. I ask you to compare what Korea's  
25 prosecutor, as we can see on slide 22, is saying outside

1 of these proceedings about clandestine efforts to  
2 manufacture support. Compare that with what we see on  
3 slide 23, what the Republic is telling you within these  
4 proceedings that talk of analysts being induced to  
5 support the merger is mere conspiracy theory.

6 If it is mere conspiracy theory, members of the  
7 tribunal, why is Korea's own prosecutor referring to it  
8 in its most recent charge sheet that is being progressed  
9 in parallel with these proceedings? Nevertheless,  
10 despite Samsung's efforts behind the scenes, objective  
11 market opinion, Glass Lewis, ISS and others remained  
12 overwhelmingly critical of the merger. And importantly  
13 this included the Korean Corporate Governance Service,  
14 the KCGS, which the NPS had engaged specifically to  
15 advise it on the merger and which advised the NPS in  
16 unambiguous terms to vote against the merger.

17 Here on slide 24, the next slide, you see the advice  
18 that the NPS had asked for and the clear advice that it  
19 had received from the Korean Corporate Governance  
20 Service.

21 Now, as you will have noted, in an effort to explain  
22 away this edifice of independent opposition to the  
23 merger, the Respondent points to the fact that some  
24 other SC&T shareholders chose nevertheless to vote in  
25 favour of it. But given the overwhelmingly unfavourable



1 Yet despite this realtime expectation of an  
 2 immediate increase in the value of its own holding if  
 3 the merger was opposed, despite the unequivocal advice  
 4 it had asked for and received from the Korean Corporate  
 5 Governance Service, despite the unanimous view of  
 6 independent market analysts that the merger amounted to  
 7 the uncompensated transfer of value from SC&T  
 8 shareholders to Cheil shareholders, the NPS chose to  
 9 support the merger. And so we come to the obvious  
 10 question: why?

11 Now, there is no mystery about why Samsung's  
 12 controlling family proposed the merger. It is now  
 13 a matter of public record that it was a means of  
 14 achieving [REDACTED]'s succession plans, of preserving [REDACTED]  
 15 family control of the Samsung Group as the health of the  
 16 family patriarch [REDACTED] declined, and to do so at  
 17 a fraction of what otherwise would have been the price.

18 The way in which a merger at a distorted merger  
 19 ratio allowed them to do this was actually rather  
 20 simple. The [REDACTED] family only had a small shareholding in  
 21 SC&T and only through the family patriarch, [REDACTED], who  
 22 was ill in health. But it was SC&T that had the largest  
 23 interest in Samsung Electronics which is the crown  
 24 jewel, worth about 66% at the time of the Samsung market  
 25 capitalisation .

1 On the other hand, the [REDACTED] family had a large  
 2 interest in Cheil, but Cheil didn't have a large  
 3 interest in Samsung Electronics. And so the [REDACTED] family  
 4 had a clear interest, as you see on slide 30, as Korea's  
 5 own prosecutor again has maintained, outside of these  
 6 proceedings, in proposing a merger at a merger ratio  
 7 that would give Cheil shareholders a disproportionate  
 8 share of the new merged entity.

9 Very simply, this would give it a greater ownership  
 10 and control of SC&T's assets, including  
 11 Samsung Electronics, without paying for it. That was  
 12 the [REDACTED] family's plan, but to achieve its plan it needed  
 13 adequate shareholder support, and that adequate  
 14 shareholder support in turn could not have been achieved  
 15 without the support of Korea's National Pension Service.

16 I say that for two reasons, members of the tribunal.  
 17 The first was that, as Korea's own prosecutor has also  
 18 recognised in his second indictment of [REDACTED] that you  
 19 see on the next slide, slide 31, the NPS had significant  
 20 influence on the voting decisions of other shareholders.  
 21 Where it led, many others followed, and it had shown  
 22 this in its decision not to support another Samsung  
 23 merger just one year earlier in 2014. This was the  
 24 proposed merger between Samsung Heavy Industries and  
 25 Samsung Engineering, and holding in that case only a 4%

1 stake in Samsung Heavy Industries, the NPS decided to  
 2 abstain from voting at the general meeting, leading  
 3 other shareholders to follow suit and the merger to  
 4 fail, again not my words, the words of Korea's public  
 5 prosecutor.

6 Korea's public prosecutor did not get this from thin  
 7 air; it reached this conclusion on the basis of evidence  
 8 coming from within Samsung itself. Let's look at  
 9 slide 32 together because, as you can see on it, this is  
 10 another document, members of the tribunal, only recently  
 11 disclosed to us in October of this year, according to  
 12 Samsung itself [REDACTED]  
 13 Samsung thought, [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED].

16 Now, the second reason why the NPS's support was, to  
 17 quote Samsung itself, [REDACTED]  
 18 [REDACTED], pertained more simply, more arithmetically, to  
 19 its voting power. It is a matter of arithmetic fact, as  
 20 you see on slide 33, that for the merger to proceed, it  
 21 needed the support of 66% of SC&T's shareholders present  
 22 and voting at the EGM.

23 In the event, the plan achieved 69.53% support at  
 24 the EGM, of which the NPS accounted for just over 13%,  
 25 without which the merger would have attracted only 56.3%

1 support which was well below the necessary 66.66%  
 2 threshold required.

3 In fact, without the NPS's support, members of the  
 4 tribunal, again, it is an arithmetical fact that Samsung  
 5 would have needed the support of almost 80% of the  
 6 remaining shareholders for the merger to proceed with  
 7 Elliott alone holding about 10% of the remaining shares.

8 Arithmetic fact, in the words of Samsung, [REDACTED]  
 9 [REDACTED].

10 So it is not just us, members of the tribunal,  
 11 telling you now that the NPS had the casting vote  
 12 because of this unavoidable arithmetic, as you see on  
 13 the next slide, slide 34, all of Samsung itself, Korea's  
 14 presidential Blue House, its Ministry of Health and  
 15 Welfare, the NPS itself, the Experts Voting Committee  
 16 that we shall come on to discuss, and the Korean courts,  
 17 reached exactly the same view, [REDACTED].

18 So the [REDACTED] family undoubtedly needed the NPS's  
 19 support, but how and why, and I return to that key  
 20 question, did the NPS come to provide it?

21 Well, this is where the narrative becomes really  
 22 interesting, and so we come to the facts that would  
 23 likely never have seen the light of day but for a series  
 24 of historic criminal investigations and prosecutions  
 25 launched by Korea's own public prosecutor's office

1 itself , including prosecutions of some of its most  
 2 senior Government officials.  
 3 Now, this included Korea’s own former President,  
 4 President █████, who was impeached and removed from  
 5 office , members of the tribunal, by Korea’s  
 6 Constitutional Court in March 2017, some two years  
 7 effectively after the merger took place, who was then,  
 8 after impeachment, convicted by the Seoul Central  
 9 District Court of criminal charges, including bribery ,  
 10 abuse of power, coercion, and sentenced to over 20 years  
 11 in prison; and whose sentence, as we see on slide 35,  
 12 was subsequently increased to 25 years by the Seoul  
 13 High Court on appeal, with the High Court determining,  
 14 as you see on this slide , determining in terms that the  
 15 President had accepted bribes in exchange for assisting  
 16 █████’s succession of the Samsung Group, drawing an  
 17 explicit connection between the Samsung succession plan  
 18 and her receipt of personal favours.  
 19 Now, we say that it is odd indeed for Korea here  
 20 before you to suggest that this finding was somehow  
 21 undermined by the Korean Supreme Court that remanded the  
 22 case to the Seoul High Court because, as it well knows,  
 23 that case was remanded to the High Court only on  
 24 a narrow technical ground relating to sentencing, which  
 25 resulted only in a reduction of former President █████’s

1 sentence back down to 20 years which she’s now currently  
 2 serving, but without disturbing any of the prior factual  
 3 findings.  
 4 We say it is particularly odd because, as we have  
 5 seen, Korea’s prosecutors outside of these proceedings  
 6 have again recently alleged the existence precisely of  
 7 a corrupt presidential quid pro quo specifically in  
 8 relation to this merger in its latest indictment of  
 9 █████ that was issued at the same time as the  
 10 Respondent was preparing its Rejoinder in these  
 11 proceedings, contending the opposite to you.  
 12 That’s former President █████.  
 13 Korea’s own prosecutions have also extended to its  
 14 own former Minister of Health and Welfare,  
 15 Minister █████. As you see on the next slide, 36, he was  
 16 also prosecuted and convicted by the Seoul Central  
 17 District Court of an abuse of power, specifically , as we  
 18 can see, by infringing upon the statutory independence  
 19 of the NPS and by exerting improper pressure towards an  
 20 unjustified outcome.  
 21 Again, whose conviction was upheld by the Seoul  
 22 High Court, that also found him guilty of abuse of  
 23 authority.  
 24 While it is true, members of the tribunal, that the  
 25 High Court decision is presently on appeal to the

1 Supreme Court, the appeal is again limited to a narrow  
 2 question of law which is why Minister █████ is presently  
 3 behind bars.  
 4 We submit that there is no prospect, unsurprisingly ,  
 5 of overturning existing findings of fact unless new  
 6 evidence of fact emerges that indicates that there has  
 7 been a grave mistake of fact. And not only has no such  
 8 new evidence ever been presented, now many years after  
 9 the conviction, but the only additional evidence that  
 10 has emerged since has led Korea’s public prosecutor to  
 11 make new indictments and further allegations of Samsung  
 12 and governmental illegality . That is former  
 13 Minister █████.  
 14 In the same way, Korea’s own prosecutions have also  
 15 extended to the National Pension Service’s Chief  
 16 Investment Officer, Mr █████. As you see on the next  
 17 slide , he was also convicted by the Seoul Central  
 18 District Court for the crimes of misfeasance in public  
 19 office , by causing the NPS to suffer losses, and by  
 20 directing the head of the NPS research team, Mr █████, as  
 21 we shall soon see, to manipulate valuations and whose  
 22 conviction was once again upheld by the Seoul  
 23 High Court. That’s former Chief Investment Officer  
 24 █████.  
 25 So what is Korea’s response to this weight of

1 judicial decision by its own judicial emanations? Well,  
 2 here you see on the next slide , slide 38, that response  
 3 at paragraph 163 of Korea’s Rejoinder.  
 4 Now, you can set to one side immediately the  
 5 conspicuously vague reference at the end to these  
 6 decisions being nonfinal. As I have described, the  
 7 appeals are on narrow points of law, the individuals are  
 8 presently serving their sentences in jail . That has  
 9 never been contested and there is no indication that  
 10 after all these years, remarkable new fact evidence will  
 11 emerge to disturb existing judicial findings of fact.  
 12 To the contrary, the only new evidence that has emerged  
 13 has led Korea’s public prosecutor to indict █████  
 14 a second time because of further evidence on his part of  
 15 price market manipulation.  
 16 Nevertheless, they say that your findings can differ  
 17 from Korean criminal court findings where the evidence  
 18 before you compels a different finding. But there is  
 19 a problem here for Korea because it asks you to depart  
 20 from findings of its own courts arrived at by  
 21 application of a criminal standard of proof, a higher  
 22 standard that applies before you, members of the  
 23 tribunal , but without presenting you with any new  
 24 evidence that would support, let alone compel, that  
 25 departure.

1 This even though they of course are in a position to  
 2 control and present many of the witnesses in question  
 3 but have chosen not to. No witness from the Blue House,  
 4 no witness from the Ministry or from the NPS, not one;  
 5 no documents that somehow evaded the many failed  
 6 criminal defences that would impeach the conclusions  
 7 arrived at by Korea's own courts, not one.

8 So there is no basis on which to depart from the  
 9 findings of fact by Korea's own courts to a criminal  
 10 standard of proof.

11 So let's now look closer at those findings, and in  
 12 particular on the evidence on which those findings was  
 13 based. We will start, members of the tribunal, at the  
 14 top of the Government chain in the office of Korea's  
 15 President herself.

16 But before we do, and in order to set the scene, let  
 17 us first look at the evidence of what was being  
 18 considered both within Samsung and Korea's presidential  
 19 office before Samsung's ██████ paid a visit to the  
 20 president. Because before ██████ visited the President  
 21 in September 2014, as Korea's own prosecutor is now  
 22 submitting, and you see on slide 39, Samsung executives  
 23 determined as early as May 2014 that President ██████'s  
 24 support would determine the success or failure of  
 25 ██████'s succession planning because of her influence

1 over supervisory authorities and specifically the NPS's  
 2 voting rights.

3 Now, the evidence on which this allegation by  
 4 Korea's own prosecutor is based was evidence that we  
 5 asked for and that has not been presented, but it seems  
 6 to us entirely paradoxical to suggest that we should be  
 7 challenging or anyone should be challenging the  
 8 submissions made by Korea's own public prosecutor.  
 9 That's on the Samsung side.

10 On the Korean Government's side, and again before  
 11 the ██████ visit to the Government on 15 September 2014, in  
 12 the summer of 2014, following ██████'s, the family's  
 13 patriarch's, heart attack, a contemporaneous memo was  
 14 produced within Korea's Blue House which we now see on  
 15 slide 40 that noted that ██████  
 16 ██████, that ██████  
 17 ██████, that ██████  
 18 ██████y  
 19 ██████.

20 Now, this was the backdrop, members of the tribunal,  
 21 to the meeting that took place on 15 September 2014  
 22 between Chairman ██████'s heir apparent, ██████, and  
 23 Korea's then President ██████ at which, according to  
 24 Korea's own public prosecutor, most recently presented  
 25 in its second indictment of ██████, President ██████

1 solicited the payment of financial inducements for some  
 2 favoured personal projects in exchange for Government  
 3 support to the ██████ family to achieve its succession  
 4 planning by supporting the merger.

5 Now, we've looked at the specific charge before.  
 6 It's at slide 9. I'm not going to show it to you again.  
 7 We've also seen the existing conviction of  
 8 President ██████ that has already confirmed the existence  
 9 of a corrupt quid pro quo. That was at slide 35.  
 10 Again, I'm not going to show it to you again.

11 But it was that meeting, that quid pro quo, that  
 12 leads to the Government's intervention that took place  
 13 after the meeting that Elliott had with the NPS in  
 14 March 2015. We anatomised that intervention into ten  
 15 steps in our written submissions, members of the  
 16 tribunal, but in fact for the purposes of this opening  
 17 submission, and for the purposes of time, they can be  
 18 synthesised more simply into three steps. And perhaps  
 19 this is a good time, Mr Chairman, before I begin on  
 20 these steps, as we are approaching the half hour, if it  
 21 suits the tribunal for us to use this as a natural  
 22 break.

23 THE PRESIDENT: Certainly, Mr Partasides. Can you just  
 24 remind us of the date of that memo at slide 40?

25 MR PARTASIDES: The memo is undated, Mr Chairman. We've

1 understood from its use by the Korean prosecutor that it  
 2 is dated some time in the summer of 2014. So before the  
 3 September -- 15 September 2014 meeting with the  
 4 President.

5 THE PRESIDENT: Okay. Thank you very much.

6 We break for 15 minutes and continue at 10.40.

7 Thank you very much.

8 (10.25 am)

(A short break)

9  
 10 (10.42 am)

11 MR PARTASIDES: Thank you, members of the tribunal. I was  
 12 turning my attention, and hopefully yours, to the  
 13 anatomisation of the Government intervention that we are  
 14 complaining of here, and I told you that we would  
 15 synthesise them more simply into three steps. So let us  
 16 begin to do that with step 1.

17 Step 1 is senior governmental instructions that the  
 18 NPS should vote in favour of the merger.

19 On slide 42 we see again the public prosecutor's  
 20 most recent indictment of ██████ in which the prosecutor  
 21 contends that on 24 June 2015 -- this is four weeks  
 22 after the announcement by Samsung of the merger vote --  
 23 the NPS decided to vote against the SK merger that had  
 24 been announced by another Chaebol.

25 Now, that date, members of the tribunal, 24 June, is

1 important, because on the very same day and noting the  
 2 NPS's position blocking the SK merger, [REDACTED] and other  
 3 Samsung officials communicated again with the President  
 4 to the effect that they intended to provide the support  
 5 that she had requested for her personal projects at the  
 6 September 2014 meeting with [REDACTED]. So here we're  
 7 looking at that second indictment by the prosecutor of  
 8 [REDACTED], and according to Korea's prosecutor on that very  
 9 same day, the day that the NPS decided to vote against  
 10 the SK merger, [REDACTED] reiterated to the  
 11 President Samsung's willingness to support her pet  
 12 projects to elicit cooperation from the President in  
 13 respect of the merger.

14 Again, we asked for the evidence that the prosecutor  
 15 was relying on to be able to make this very specific  
 16 allegation, and that evidence has not been provided.

17 [REDACTED]  
 18 [REDACTED], as we see on slide 43, [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]. Here we are looking at the  
 22 statement made by one of those presidential secretaries  
 23 that received that presidential direction.

24 Now, the Respondent tells us that such a direction  
 25 was entirely innocuous. Of course the President should

1 be concerned that good care should be taken over such an  
 2 important commercial transaction. With respect, members  
 3 of the tribunal, that posture takes faux--naivete to  
 4 absurd lengths. This is a President that Korea has now  
 5 itself incarcerated for her interactions with Samsung  
 6 over its succession plans. And let's just remind  
 7 ourselves how those staff members who received this  
 8 instruction understood the instruction to take care of  
 9 the merger. According to her presidential secretaries,  
 10 as we can see, [REDACTED]  
 11 [REDACTED].

12 [REDACTED].

13 So one of those presidential secretaries,  
 14 Secretary [REDACTED], instructed senior executive officials  
 15 from within the Blue House that [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED].

18 It was this presidential instruction that was then  
 19 communicated to the Ministry of Health and Welfare to  
 20 the effect that the NPS must approve the merger.

21 Here on the next slide, slide 44, you see answers  
 22 given by a presidential secretary on questioning from  
 23 Korea's prosecutor that confirmed that [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED].

4 In accordance with that presidential direction,  
 5 Minister [REDACTED] proceeded as instructed to instruct his  
 6 director general of pension policy, Director General [REDACTED],  
 7 that the merger needed to be approved. You see here on  
 8 slide 45 at the top of the slide, this is an extract  
 9 from the Seoul Central District Court's first instance  
 10 conviction of Minister [REDACTED], and you see the same fact  
 11 confirmed on appeal with the Seoul High Court citing the  
 12 testimony, direct testimony of the Ministry's Director  
 13 General [REDACTED], who testified in terms that [REDACTED]  
 14 [REDACTED].

15 So the senior governmental direction is clear, and  
 16 this leads us to step 2, which is the Blue House and the  
 17 minister's instruction to the NPS that its merger vote  
 18 decision should not be taken by the independent Experts  
 19 Voting Committee, but rather by its own internal  
 20 Investment Committee, and that its Investment Committee  
 21 should approve the merger.

22 Now, you have seen a debate, members of the  
 23 tribunal, between the parties as to whether it was or  
 24 was not in accordance with the NPS's procedures for the  
 25 decision on the merger vote to be referred to the

1 independent Experts Voting Committee. We say that it  
 2 was precisely difficult and controversial voting  
 3 decisions such as this that the NPS directed to the  
 4 independent Experts Voting Committee as a matter of its  
 5 own corporate governance safeguards, as it had done in  
 6 other equivalent cases.

7 The Respondents say that even though other  
 8 controversial merger decisions such as the SK merger  
 9 that had taken place just a few weeks before had been  
 10 directed to the independent Experts Voting Committee, it  
 11 was nevertheless consistent with the NPS's Voting  
 12 Guidelines that this decision be taken by its internal  
 13 Investment Committee. Those are the parties' positions,  
 14 but we say in truth you don't need to engage in  
 15 a theoretical debate about whether one or other  
 16 committee could make the decision. We say, you just  
 17 look at the facts because the evidence shows, as you see  
 18 beginning on slide 47, that the Ministry's director  
 19 general of pension policy, Director [REDACTED], instructed the  
 20 NPS's Chief Investment Officer [REDACTED] to have the  
 21 Investment Committee decide on the merger.

22 Now, that, regardless of the theoretical debate, is  
 23 an instruction that came down from upon high, and the  
 24 evidence also shows, as we see on slide 48, that Chief  
 25 Investment Officer [REDACTED] immediately indicated to the

1 Ministry that this would be an irregular process because  
 2 [REDACTED]  
 3 [REDACTED]. And as we can  
 4 see on the next slide, slide 48, which is the testimony  
 5 given by the Ministry's Director General [REDACTED] himself to  
 6 the Korean court, that was a request that the Ministry's  
 7 Director General [REDACTED] immediately knocked back in  
 8 sarcastic terms, warning the NPS's Mr [REDACTED] that "[REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]" according to the Ministry's Mr [REDACTED] even  
 12 "[REDACTED]" would know to obscure that ministerial  
 13 instruction. There was nothing subtle, members of the  
 14 tribunal, about what was going on here, and the need to  
 15 conceal it.

16 That the Ministry's concealed instruction was  
 17 irregular is only confirmed by how hard senior NPS  
 18 officials nevertheless pushed back in the face of this  
 19 instruction. What you see on the next slide, slide 49,  
 20 is a transcript of a telephone conversation presented  
 21 and relied on by Korea's prosecutor. Now, you might ask  
 22 yourselves how such a transcript of a telephone  
 23 conversation could exist, and the answer is that we  
 24 understand that external calls to the NPS landlines were  
 25 recorded as a matter of NPS policy. And they were

1 obtained by Korea's prosecutors during their raids in  
 2 the criminal investigations.

3 You see this transcript record that, at the  
 4 beginning of July 2015, the NPS's head of responsible  
 5 investment division, Mr [REDACTED], telephoned the Ministry's  
 6 deputy director general of pension policy, this is  
 7 Director General [REDACTED]'s deputy, Deputy Director [REDACTED],  
 8 again expressing the view that [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED].

11 Now, in fact senior NPS officials met again on  
 12 6 July 2015 with the Ministry's Director General [REDACTED] to  
 13 explain that [REDACTED],  
 14 [REDACTED],  
 15 [REDACTED]. The NPS wasn't giving up on  
 16 this, what they thought was the proper process. You see  
 17 this on slide 50.

18 But in the face of that repeated NPS push-back, as  
 19 you see on slide 51, [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]

22 [REDACTED]  
 23 [REDACTED]. Again, we are  
 24 looking at the testimony of the Ministry's Director  
 25 General [REDACTED] who was involved in these interactions to the

1 Korean courts, accepted as fact by those Korean courts.

2 The Ministry's Director General [REDACTED], who has  
 3 testified that [REDACTED]  
 4 [REDACTED], Director General [REDACTED]  
 5 [REDACTED] once again. And  
 6 in the face of the NPS's attempt yet again to persuade  
 7 the Ministry to have the independent Experts Voting  
 8 Committee decide the merger vote, the director general  
 9 responded: [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED].

12 Now, I don't have time, members of the tribunal, to  
 13 take you through all of the evidence of the exchanges  
 14 that were taking place between the NPS, the Ministry,  
 15 and indeed Blue House on a daily basis in the days  
 16 leading up to this decision. That evidence is  
 17 plentiful. It shows in black and white how and why the  
 18 decision was placed before the internal organ, the  
 19 Investment Committee, not the independent Experts Voting  
 20 Committee, and in addition to the exhibits that I have  
 21 just shown you, you can find all of that record in close  
 22 to 20 exhibits between Claimant exhibits C409 and C427  
 23 on the record which we invite you in your own time to  
 24 study.

25 So once again, all of this evidence shows us that

1 you do not need to engage in a theoretical exercise of  
 2 determining whether or not this vote should have gone to  
 3 the independent Experts Voting Committee. All you need  
 4 to do is look at the facts. The fact that the NPS  
 5 itself thought the vote should be referred to the  
 6 independent Experts Voting Committee, and the fact that  
 7 the NPS was overruled, despite its efforts, in rather  
 8 unequivocal terms, by the Ministry, that not only  
 9 instructed the NPS on which committee should take the  
 10 decision, but what that decision should be, in favour of  
 11 the merger.

12 Again, members of the tribunal, in the words of  
 13 Korea's prosecutor, as you see on slide 52, "Due to the  
 14 instructions of the President" and the pressure he was  
 15 under from Minister [REDACTED] and [REDACTED], the NPS's Chief  
 16 Investment Officer [REDACTED] decided to cast an affirmative  
 17 decision on the said merger through the internal  
 18 Investment Committee under his influence instead of  
 19 submitting the agenda to what is referred to here as the  
 20 Special Committee, that is the independent Experts  
 21 Voting Committee.

22 That is our step 2, members of the tribunal, and  
 23 that leads us to our step 3: how Chief Investment  
 24 Officer [REDACTED] proceeded to comply with the direction that  
 25 he had received to ensure that his Investment Committee

1 decide in favour of the merger.  
 2 It's important to note in this regard, given the ink  
 3 that the Respondent has spilt in these proceedings on  
 4 suggesting that it was somehow consistent with the NPS's  
 5 normal procedures for the internal Investment Committee  
 6 to make this decision, that our complaint, members of  
 7 the tribunal, is not only about the fact that it was not  
 8 the independent Experts Voting Committee that took this  
 9 decision, because as we shall see, the Investment  
 10 Committee itself would have voted against the merger but  
 11 for the further improper intervention that perverted its  
 12 decision—making process that I am about to describe.  
 13 So we come to the work of the NPS's research team  
 14 because it was told that its task was to find  
 15 a justification to support Samsung's damaging merger  
 16 ratio. So let us look together at how it went about its  
 17 task.  
 18 Let's turn to its first valuation. You see it on  
 19 slide 54 that took place on 30 June 2015 and resulted in  
 20 the conclusion that [REDACTED]  
 21 [REDACTED]. Now, to arrive at this valuation, members  
 22 of the tribunal, you see the ratio there, 1 to 0.64, the  
 23 NPS research team [REDACTED]  
 24 [REDACTED]. The result was a valuation of

1 SC&T that left no doubt that the proposed Samsung merger  
 2 ratio of 1 SC&T share to 0.35 Cheil shares would be  
 3 hugely damaging to the NPS. To be clear, on the NPS's  
 4 own initial valuation that we are seeing here, the  
 5 merger ratio that the Samsung was proposing would result  
 6 in the SC&T shareholders receiving only 26% of the  
 7 merged entity rather than the 39% that they would have  
 8 been entitled to pursuant to the NPS's initial  
 9 valuation. That would equate to depriving the SC&T  
 10 shareholders of about a third of the value of their  
 11 equity stake in SC&T, according to the NPS's research  
 12 team itself.  
 13 That was — let's note the date — on 30 June 2015.  
 14 What's interesting is what happened next. Because in  
 15 the face of this initial valuation, as we see on  
 16 slide 55, Chief Investment Officer [REDACTED], with the  
 17 governmental instruction in his ear, himself instructed  
 18 the head of the NPS research team, Mr [REDACTED], to "[REDACTED]  
 19 [REDACTED]".  
 20 Now, we are looking at an extract from the NPS's  
 21 Mr [REDACTED]'s statement to the Korean public prosecutor, and  
 22 what did Mr [REDACTED] understand by this? Well, as we can  
 23 see, in his statement to the prosecutor, he has stated  
 24 that [REDACTED]  
 25 [REDACTED]

1 [REDACTED].  
 2 So issued with this instruction to try harder and  
 3 steer the merger ratio in a way that favoured the  
 4 merger, Mr [REDACTED] and his team proceeded within days to do  
 5 just that and to dramatically revise their initial  
 6 valuation.  
 7 So, as we see on slide 56, on 9 July 2015, so just  
 8 over a week after its first valuation, the day before  
 9 the internal Investment Committee was due to decide on  
 10 the merger, the research team pulled a dramatically  
 11 revised valuation out of the hat that now suggested that  
 12 [REDACTED]  
 13 [REDACTED], which  
 14 they now achieved by applying within days of their prior  
 15 valuation, now an astonishing [REDACTED] to  
 16 SC&T's listed assets.  
 17 It was this new valuation, dramatically different  
 18 from the earlier valuation of just some days earlier,  
 19 that was presented to the internal Investment Committee  
 20 the following day.  
 21 But what is really interesting about this revised  
 22 valuation with all of its anomalies, members of the  
 23 tribunal, is that the valuation manipulations did not  
 24 stop here. There was worse to come, and this brings us  
 25 to the total fabrication of a so-called synergy effect

1 to offset the still remaining losses that the NPS would  
 2 suffer, because this rushed revised valuation that we  
 3 are looking at was still not enough to offset entirely  
 4 the loss that would result to the NPS from the merger  
 5 proceeding at Samsung's proposed merger ratio.  
 6 Proceeding with the merger at that ratio would still  
 7 result, according to the NPS's revised valuation, in  
 8 a loss to the NPS from the merger of no less than  
 9 138.8 billion Korean Won, just over 120 million  
 10 US dollars. So there's still a hole and it's still  
 11 a big hole, and so the head of the NPS's research team,  
 12 Mr [REDACTED], as you see on slide 57, advised Chief  
 13 Investment Officer [REDACTED] that a [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED].  
 16 The problem was that time was now very short. The  
 17 Investment Committee was due to meet the very next day,  
 18 on 10 July 2015. So Mr [REDACTED] delegated the task of  
 19 coming up with a rough calculation of a synergy effect  
 20 to a member of his team, Mr [REDACTED], with very specific  
 21 instructions: to come up with an overall synergy effect  
 22 of 2 trillion Korean Won which was precisely the amount  
 23 needed, precisely to offset the 138.8 billion loss to  
 24 the NPS from its shareholding that would still result  
 25 from the merger even according to its revised valuation.

1 Now, the selection of Mr [REDACTED] to undertake this  
 2 calculation was interesting because, as we see on the  
 3 next slide, [REDACTED]  
 4 and had already been identified by Samsung in its  
 5 internal documentation as [REDACTED]  
 6 [REDACTED], given his role in undertaking  
 7 analyses within the NPS's economic decision-making  
 8 process. What we're looking at here, members of the  
 9 tribunal, is an internal Samsung document that is being  
 10 relied on by Korea's public prosecutor in its second  
 11 indictment of [REDACTED] that was produced to us pursuant to  
 12 your order only a few weeks ago in October of this year.  
 13 So we can perhaps understand why Mr [REDACTED] was chosen,  
 14 and I want us to look closely at Mr [REDACTED]'s own words of  
 15 what he did in the face of his rushed instruction  
 16 because we have the benefit of Mr [REDACTED]'s own statement  
 17 to the Korean prosecutor, and because, as we're about to  
 18 see, members of the tribunal, paraphrasing really won't  
 19 do it justice.  
 20 So let's take it slowly, and let's begin with the  
 21 beginning of his statement to the Korean prosecutor.  
 22 You see this beginning on slide 59.  
 23 At the beginning of his statement to the prosecutor,  
 24 we see Mr [REDACTED] identifying that [REDACTED]  
 25 [REDACTED]

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1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED].  
 5 That was his instruction and he confirms it in his  
 6 statement to the prosecutor. Yes, definitely.  
 7 Let's move to slide 60. Mr [REDACTED] moves on to telling  
 8 the prosecutor that [REDACTED]  
 9 [REDACTED]. He states that [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED].  
 13 As we see on the next slide, members of the  
 14 tribunal, slide 61, following his orders, Mr [REDACTED] came  
 15 up with a calculation that he himself considered to be  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED].  
 23 [REDACTED] -- his  
 24 words, members of the tribunal, not ours -- [REDACTED]  
 25 [REDACTED]. Again, his words, not ours.

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1 And it was this synergy effect calculation that was  
 2 presented to the NPS's Investment Committee on  
 3 10 July 2015.  
 4 Members of the tribunal, in a word, the synergy  
 5 effect calculation was a swindle, a swindle that has  
 6 been confessed to by the swindlers themselves.  
 7 Now, it is rare indeed, I submit, that one sees  
 8 evidence of criminality that is so clear in  
 9 international arbitration. So what, you might ask, has  
 10 been the Republic of Korea's response in these  
 11 proceedings? Let's turn to slide 62.  
 12 Well, first, members of the tribunal, it defends  
 13 itself by saying: but this confession isn't testimony,  
 14 merely statements from interviews. Well, I have to say,  
 15 members of the tribunal, that to this lawyer that  
 16 defence is almost as astonishing as the confession  
 17 itself because let's recall that these are statements  
 18 that were self-incriminating statements, and so there is  
 19 no reason to doubt them.  
 20 Let's recall that these are statements that were  
 21 made to Korea's public prosecutor on interview, and the  
 22 giving of false statements to a prosecutor is surely not  
 23 to be suggested lightly.  
 24 Let's recall that those statements were then relied  
 25 on by Korea's own prosecutor and then accepted by

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1 Korea's own courts. And the reason you haven't been  
 2 presented with the evidence that contradicts Mr [REDACTED]'s  
 3 own statement is that no such evidence exists. In fact,  
 4 the closest that the Republic of Korea comes to  
 5 addressing it later on in these proceedings -- you see  
 6 on slide 63, paragraph 236 of its Rejoinder -- is in one  
 7 paragraph in which it simply denies that the manner in  
 8 which the calculation arrived at amounted to  
 9 a fabrication, a bare denial.  
 10 Well, we will let you decide what Mr [REDACTED]'s own  
 11 confession at exhibit C477 reveals. We ask you to read  
 12 that one document from beginning to end. We say that it  
 13 is black and white evidence of a deliberately fabricated  
 14 synergy effect calculation that stands rebutted in  
 15 these proceedings.  
 16 We also now know that this fabrication proved to be  
 17 decisive in the Investment Committee's deliberations.  
 18 So let us turn to that point of decisiveness,  
 19 because on that point of decisiveness, as you see on  
 20 slide 64, the Republic contends that a mere synergy  
 21 calculation is of its essence, of course, speculative,  
 22 and therefore it could not possibly have been decisive  
 23 in the Investment Committee members' decisions. That's  
 24 its real way of addressing this confession of criminal  
 25 fabrication.

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1 Well, our response is again simple. Why would  
 2 anyone have gone to these criminal lengths if this  
 3 calculation was not likely to be significant? Why would  
 4 those involved in this conspiracy have emphasised the  
 5 so-called synergy effect calculation in seeking the  
 6 Investment Committee's support if it was not likely to  
 7 be significant? And what is more, as we shall see, why  
 8 have the Investment Committee members themselves  
 9 described the synergy effect calculation as decisive in  
 10 their decision—making if it wasn't?

11 On the next slide you see extracts from the minutes  
 12 of the Investment Committee meeting of 10 July 2015.  
 13 This is slide 65 for the record. We can see that  
 14 Chief Investment Officer [REDACTED] and Mr [REDACTED], who had both  
 15 conspired in this fabrication, as we've just walked  
 16 through, repeatedly emphasised to the committee members  
 17 that what is important is the synergy effect.

18 Indeed, we can also see in turn, in those  
 19 contemporaneous meeting minutes, that in the light of  
 20 that emphasis, the Investment Committee decided to agree  
 21 to the merger in view of its synergy effect, explicitly  
 22 identified as determinative for the Investment  
 23 Committee's decision.

24 If any more evidence was needed, members of the  
 25 tribunal, of the decisive effect of the fabricated

1 synergy effect calculation, it has since been provided  
 2 by many individual Investment Committee members who  
 3 themselves have also testified to that decisive effect.  
 4 Let us look at slide 67 together because, as you see on  
 5 that slide, this testimony from the committee members  
 6 themselves was then highlighted and relied on by the  
 7 Seoul High Court in the conviction of both Minister [REDACTED]  
 8 and Chief Investment Officer [REDACTED].

9 We say, on the basis of this extraordinary weight of  
 10 evidence, it is difficult to identify what further  
 11 evidence could exist to further demonstrate that  
 12 Investment Committee members would have voted no but for  
 13 this proper — this improper intervention. We have the  
 14 committee members' own statements to that effect,  
 15 presented by Korea's own prosecutor, and accepted by  
 16 Korea's own courts to a criminal standard of proof.

17 Now, to bring all of this together, members of the  
 18 tribunal, here on the next slide, slide 68, you see  
 19 a list of each of those 12 Investment Committee members.  
 20 You see their actual voting patterns in the second  
 21 column, and you see how they have themselves said they  
 22 would have voted but for the synergy effect presented to  
 23 them, and the references to the evidence in which they  
 24 have said so in the final column, all on one slide.

25 Bearing in mind that a majority was needed, so more

1 than six votes, for the NPS to resolve "yes", we can see  
 2 that the outcome that would have been reached is  
 3 overwhelmingly clear according to the Investment  
 4 Committee members themselves. The merger proposal would  
 5 not have come close to getting this necessary support of  
 6 the internal Investment Committee even if it was  
 7 appropriate that it had gone to the internal Investment  
 8 Committee. The only question mark here is that of  
 9 Chief Investment Officer [REDACTED], who was already, as we  
 10 know, directly colluding in this criminal conspiracy,  
 11 although one must wonder even what he would have voted  
 12 had he not been the subject of his governmental order.

13 Members of the tribunal, these are the facts. So  
 14 you can see that our complaint is not that the  
 15 Government's National Pension Service reached  
 16 a different considered view from this Claimant's.

17 Our complaint is that the Claimant was the victim of  
 18 a concealed and illegal government intervention. That  
 19 involved an order being issued to Korea's National  
 20 Pension Service that violated the investment principles  
 21 that were to govern how it was to make decisions in  
 22 relation to the National Pension Fund; a governmental  
 23 order that was motivated by corruption and fulfilled by  
 24 the crudest form of fraud, and that we now know led  
 25 directly to the National Pension Service's self-damaging

1 support for the merger, support without which the merger  
 2 would not have proceeded.

3 So the Republic of Korea can refer to investors like  
 4 Elliott pejoratively as short-termist, as opportunistic,  
 5 or even as vultures, as it did repeatedly during the  
 6 period relevant to this dispute, and as it has done or  
 7 implied even in these proceedings. But that does not  
 8 begin to address the fact of governmental misconduct of  
 9 which we complain.

10 Yes, investors like Elliott understand and assume  
 11 market risk. But when an investment is impaired not by  
 12 market risk but rather by a criminal scheme in which the  
 13 government colluded, reference to everyday market risk  
 14 is not an answer.

15 Members of the tribunal, those are the facts  
 16 and I should say that for the most part they do not  
 17 depend on witness testimony that will be tested in  
 18 cross-examination in this hearing before you. I say  
 19 this because although we presented with our Statement of  
 20 Claim the witness evidence of [REDACTED] from  
 21 [REDACTED] who personally attended the  
 22 criminal trials in Seoul that were open to the public  
 23 and who therefore saw and heard first hand the evidence  
 24 that was presented by the prosecutors in those cases,  
 25 their evidence has been largely superseded in this

1 arbitration by the underlying documentary evidence and  
2 testimony itself which has subsequently been produced in  
3 these proceedings and on which we have relied entirely  
4 in our second round submission in this arbitration, our  
5 Reply, and in our submissions to you this morning.

6 There is no reference in our Reply submission to the  
7 evidence of [REDACTED]. It is all to what is now  
8 the documentary record before you.

9 Now, the Respondent has nevertheless chosen to call  
10 [REDACTED]. And of  
11 course it is a matter for the Respondent how it chooses  
12 to use its time in this hearing. But we would say that  
13 in choosing to spend time on witness evidence that has  
14 been superseded by underlying documentary evidence and  
15 testimony that led to the Korean courts to reach the  
16 convictions which we've just walked through together, we  
17 ask you to note that the Respondent itself has not  
18 presented evidence that would contradict or indeed raise  
19 any doubt as to the evidence that its own courts have  
20 accepted as fact. No witness again from the Blue House,  
21 from the Ministry of Health and Welfare, or from the  
22 NPS, none of the individuals I have just referred to, or  
23 even their colleagues that were similarly situated at  
24 that same time. Not one.

25 And that allows us to say that the debate before you

1 is not principally, members of the tribunal, a factual  
2 debate.

3 Now, given the evidence that we have just walked  
4 through, the Respondent has perhaps unsurprisingly  
5 raised as many preliminary objections, members of the  
6 tribunal, in this case as is possible in the hope that  
7 you will never come to decide the merits of this  
8 dispute.

9 So we turn to those preliminary objections. You see  
10 them on slide 70. We submit that they are more numerous  
11 than they are discriminating, and we will deal with each  
12 in turn as swiftly as we can.

13 So to the first of those objections, namely: did the  
14 Claimant hold a qualifying investment?

15 Now, to recall, as I have already told you, by the  
16 date that the merger was approved by the shareholders of  
17 Samsung C&T, which was on 17 July 2015, the Claimant  
18 held over 11 million shares in Samsung C&T. We've  
19 proved the purchase, we've proved the ownership, and  
20 that is not disputed in this arbitration so far as we  
21 are aware.

22 So it is with that in mind that we come to look at  
23 the definition of the protected investments under our  
24 Treaty.

25 Let's look at it on slide 72. It's the definition

1 of "protected investment" that appears, as you know, at  
2 Article 11.28 of the treaty. And as we can see, it  
3 explicitly includes shares, and that is because, members  
4 of the tribunal, an equity holding is a paradigm example  
5 of an investment. So we don't need to go any further in  
6 establishing here that there is indeed at the very least  
7 a qualifying investment.

8 Despite this, the Respondent argues that  
9 a substantial shareholding does not prove the existence  
10 of -- now I use its words -- an 'active' 'substantial'  
11 'meaningful' 'contribution' of capital. Those are the  
12 words that you find in its writings. I say that these  
13 are the Respondent's words because those words,  
14 "active", "substantial", "meaningful", "contribution",  
15 you will not find in the terms of Article 11.28 of the  
16 Treaty that we're looking at together.

17 But that is not the only response that can be  
18 offered to the Respondent's objection. Let me offer you  
19 two more.

20 Whatever the relationship, members of the tribunal,  
21 between the illustrative characteristics of an  
22 investment that we see in the chapeau of 11.28, and the  
23 forms of investment that we see expressly identified as  
24 qualifying thereafter, the illustrative characteristics  
25 that we see are disjunctive, not cumulative. We can all

1 see the word "or".

2 By the way, the United States has emphasised that  
3 disjunctive in its non-disputing party submission at  
4 paragraph 7.

5 The Claimant's holding of shares squarely satisfies  
6 at the very least two of those illustrative  
7 characteristics, namely the expectation of gain or  
8 profit and the assumption of risk.

9 Finally, although the Respondent prefers to  
10 paraphrase the terms that we see directly before us by  
11 referring to meaningful contribution of capital, in fact  
12 the Treaty term refers to the commitment of capital,  
13 pure and simple, and the Claimant's purchase of over  
14 11 million shares in SC&T at a price in excess of  
15 600 million US dollars, members of the tribunal, we say  
16 surely amounts to a meaningful commitment of capital.

17 The Respondent moves next from its inaccurate  
18 paraphrasing of the terms of the Treaty to arguing that  
19 a qualifying investment has an unstated inherent meaning  
20 that it be held for a sufficient duration. You see that  
21 in paragraph 352, for example, of its statement of  
22 defence on slide 73.

23 Again, we say that there are a number of simple  
24 responses to this submission. To start with, the  
25 authority that the Respondent relies on for its attempt

1 to suggest the existence of an implied inherent duration  
2 requirement is a case, *KT Asia versus Kazakhstan*, which  
3 arises under the ICSID Convention and the Netherlands  
4 Kazakhstan BIT, two instruments neither of which  
5 themselves provided a definition of investment leading  
6 the tribunal in that case, acting under those  
7 instruments, to be compelled to derive a definition .

8 Our Treaty here does contain a definition of  
9 investment which includes an illustrative set of  
10 characteristics , none of which refer to a mandatory  
11 duration requirement.

12 And so our Treaty definition , rather than the case  
13 law pertaining to Treatyies that don't contain  
14 a definition , must prevail here. And as we've  
15 identified in our writings, this has been confirmed  
16 again and again by investment tribunals faced with  
17 Treatyies like ours here that do contain their own  
18 definition of investment.

19 We also say in any event that the Respondent hasn't  
20 demonstrated that the Claimant's investment here was of  
21 an inadequate duration. Indeed, the Respondent hasn't  
22 even offered a view precisely on what is or is not an  
23 adequate duration. You would have thought that they  
24 would have had to if they were arguing that here we had  
25 an inadequacy against a benchmark.

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1 Now, you will know, members of the tribunal, that  
2 the case law that refers to a duration requirement at  
3 all indicates that duration be considered in the light  
4 of all of the circumstances of a case, including what  
5 the investor would have done but for the events that it  
6 complains of. And all the circumstances here include  
7 the following .

8 The investment at issue here began with the purchase  
9 of swaps in November 2014 which the Respondent has  
10 itself correctly described as derivatives and  
11 derivatives you will also see identified expressly in  
12 Article 11.28 of our Treaty.

13 The Claimant added to its investment in the form of  
14 voting shares from January 2015, and at the time of the  
15 merger only held shares. And although the Respondent  
16 focuses on the Claimant's early trading plans in the  
17 first months of 2015, the Respondent totally ignores the  
18 evidence of the subsequent four-step restructuring  
19 proposal that the Claimant developed from February 2015.

20 We have looked at it before. Let's look at it  
21 again. It's on slide 74. It's an extract of  
22 exhibit C-380 which was a longer presentation of that  
23 restructuring plan that has been described in the  
24 evidence unrebutted on this point of James Smith in his  
25 three witness statements, and as we see on slide 75,

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1 both the contemporaneous documents and Mr Smith have  
2 confirmed that the plan would have taken up to a year to  
3 have been implemented which would have seen the Claimant  
4 maintain its investment well into 2016.

5 An investment and a plan that was only cut short by  
6 the very facts that we complain of here.

7 In the parallel case, members of the tribunal,  
8 you're aware that there is a parallel case brought under  
9 our Treaty by another shareholder of SC&T for precisely  
10 the same reasons, the Mason arbitration, the Respondent  
11 in relation to precisely the same government conduct  
12 made precisely the same jurisdictional objection that it  
13 makes here.

14 Now, that case was bifurcated. Those preliminary  
15 objections were all rejected, and the tribunal in the  
16 Mason arbitration already rejected this jurisdictional  
17 objection in the terms that you see on slide 76.

18 Now, that tribunal, as you read those terms, let me  
19 remind you, featured Professor Pierre Mayer, appointed  
20 by the Republic of Korea, Dame Elizabeth Gloster by the  
21 Claimant, and Dr Klaus Sachs as the presiding  
22 arbitrator , and that tribunal found unanimously that the  
23 duration of the purchase and sale of shares in SC&T by  
24 Mason Capital over a similar period to this Claimant's  
25 was adequate — even if arguendo such a duration

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1 requirement existed, which it felt it did not need to  
2 decide, given that even if it did exist , it would have  
3 been satisfied .

4 In the same way as Mason, this Claimant made  
5 individual buy and sell executions with a view to price  
6 optimisation in the months leading up to 17 July 2015,  
7 and this Claimant also had a longer term strategy, which  
8 would have seen it maintain its investment into the  
9 following year and which was only cut short by the very  
10 events that we complain of here.

11 So even if there was an unstated inherent duration  
12 qualifying requirement in Article 11.28 of our Treaty,  
13 this Claimant would have adequately satisfied it in the  
14 same way as the Mason Claimant has already found to have  
15 done.

16 Members of the tribunal, that is our treatment of  
17 the Respondent's first preliminary objection. For the  
18 next series of preliminary objections, I ask the  
19 tribunal to recognise my partner Georgios Petrochilos.

20 Opening submissions by MR PETROCHILOS

21 MR PETROCHILOS: Mr President, members of the tribunal, good  
22 morning. I will address two matters which are  
23 identified as numbers 2 and 3. Can you hear me well,  
24 sir?

25 MR GARIBALDI: Yes. Would you mind raising the volume?

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1 MR PETROCHILLOS: If I find how to do it, I will gladly do  
 2 so. Is that better?  
 3 So I will address two matters this morning which are  
 4 identified as numbers 2 it and 3 on the slide before  
 5 you, slide 77, over the course of an hour or so.  
 6 This will require us to go a bit after the lunch  
 7 break and I will identify what I will consider to be  
 8 a natural break point, but if the tribunal identifies --  
 9 MR GARIBALDI: I'm sorry, it may be the placement of the  
 10 microphone, but I cannot hear you very well.  
 11 MR PETROCHILLOS: Maybe I need to approach the microphone.  
 12 Is that better, sir?  
 13 I have it as close to my mouth as I can, and I will  
 14 try to speak up. But my voice doesn't naturally carry  
 15 very much, I'm afraid.  
 16 MR GARIBALDI: I have the same problem, I'm very  
 17 sympathetic.  
 18 MR PETROCHILLOS: We will both make an effort in different  
 19 directions then.  
 20 So the two matters I'll be addressing, the first is  
 21 Korea's objection that a key part of the conduct of  
 22 which Elliott complains, that is to say the actions and  
 23 omissions of the Blue House and the Ministry of Health  
 24 and Welfare, do not constitute measures within the  
 25 meaning of the Treaty.

1 So in other words, Korea says that the tribunal may  
 2 not even scrutinise under the legal standards of the  
 3 Treaty the conduct of the numerous government officials  
 4 involved all the way from President [REDACTED] down the chain  
 5 of command. Why? Because as Korea would have it, you  
 6 must axiomatically a priori characterise everything that  
 7 these officials did and said as an expression of  
 8 preference or an attempt to exert persuasion about the  
 9 merger. These are the terms used by Korea.  
 10 And that kind of conduct, Korea says to you, is not  
 11 a measure that can generate international responsibility  
 12 at all.  
 13 Let me be very plain about this. Ignore, Korea  
 14 says, the record which you considered with  
 15 Mr Partasides, which shows that the Blue House and the  
 16 Ministry of Health and Welfare gave orders and  
 17 instructions which were indeed understood and  
 18 implemented as orders and instructions. Ignore that  
 19 reality, Korea tells you, which of course Korea's own  
 20 courts and prosecutors have acknowledged, and call these  
 21 orders and edicts just an expression of private wishes  
 22 by Korea's President, Minister of Health and Welfare,  
 23 and their respective staffs.  
 24 That is Korea's submission to you, members of the  
 25 tribunal. Close your eyes to the record: presidential

1 edicts and ministerial orders, if given orally, are  
 2 private wishes, not measures to which the Treaty  
 3 applies.  
 4 It does help to be plain about what Korea submits to  
 5 you.  
 6 The second matter I will be addressing you on  
 7 concerns the conduct of Korea's National Pension  
 8 Service, or NPS for short. Korea urges you to ignore  
 9 that conduct as well, but the reason it gives here is  
 10 a different one. Korea accepts, as of course it must,  
 11 that the NPS is a type of administrative agency. And it  
 12 also accepts that the NPS performs a core state  
 13 function, namely the administration of the State  
 14 pensions programme.  
 15 Korea also accepts that the assets of the National  
 16 Pension Fund which is managed by the Minister of Health  
 17 and Welfare and the NPS -- there is a concurrent  
 18 competence, as we will come to see -- are a state  
 19 property. They are not owned by the NPS, these assets.  
 20 And Korea also accepts that the management of the fund's  
 21 assets by the NPS is tightly and exhaustively regulated  
 22 by law.  
 23 Now, these concessions notwithstanding, Korea says  
 24 that the NPS's conduct here is not attributable to the  
 25 State. I will come later this morning to discuss the

1 two main reasons given for this argument, but in a word,  
 2 they rest on technical points of Korean administrative  
 3 law which are important for you to understand, but with  
 4 respect, distinctions without a difference for the  
 5 purposes of attribution.  
 6 Now, I am mindful, members of the tribunal, that  
 7 I will not be addressing you this morning on a further  
 8 third objection that Korea has articulated, namely that  
 9 Elliott's claims fail for want of demonstrating the  
 10 exercise of what Korea calls, and I quote, "sovereign  
 11 power in approving the merger". We have dealt with this  
 12 point in the written pleadings and respectfully, we  
 13 believe you will not need help through oral submissions.  
 14 But having said that, I am naturally at your disposal to  
 15 answer questions either now, or in closing, or whenever  
 16 convenient for the tribunal.  
 17 So let me start with the objection by Korea which is  
 18 founded on the notion of measures which is in  
 19 Article 11.1, paragraph 1 of the Treaty, which is now  
 20 slide 78 on your screens.  
 21 You see here that the key Treaty terms are measures  
 22 adopted or maintained by a party and relating to covered  
 23 investors, investments, etc.  
 24 You will recall in Mr Partasides' opening that  
 25 Elliott's case rests upon a series of actions and

1 omissions which form a composite act. Both the  
 2 objective and the actual result of that composite act  
 3 were to subvert NPS’s decision-making process.  
 4 Now, these actions and omissions are summarised —  
 5 and I’m conscious that they are summarised in bare terms  
 6 which don’t even begin to give the colour of their  
 7 egregiousness — on your screens on slide 79.  
 8 They emanated from the top of the executive branch  
 9 of Korea’s Government, the Blue House, and they were  
 10 implemented through the administrative hierarchy chain  
 11 all the way down to the relevant committee of the NPS.  
 12 So in this case, as in an ordinary Treaty case, the  
 13 Claimant’s factual allegations invite two enquiries by  
 14 the tribunal: a factual enquiry as to what Korean  
 15 officials and bodies did or failed to do as a matter of  
 16 fact, and a legal enquiry as to whether or not these  
 17 actions and omissions are in breach of the Treaty as we  
 18 submit they are.  
 19 Now, our friends opposite say that there is a third  
 20 enquiry. They say that the tribunal may only consider  
 21 a narrow category of acts, I quote from paragraph 20 of  
 22 Korea’s Rejoinder, “ legislative , regulatory and  
 23 administrative rule-making or action”.  
 24 As I mentioned, Korea’s argument is that in ordering  
 25 that the merger be approved, ordering that this result

1 be attained, by the NPS, Korea’s President and other  
 2 officials were engaged in conduct which falls short of  
 3 being a measure in that narrow sense which Korea  
 4 proposes to you.  
 5 Now, the brief point, members of the tribunal, is  
 6 that Korea’s conduct here does come within its own  
 7 definition for your purposes. To quote again the  
 8 decision of the Seoul District Court, which you saw on  
 9 slide 36 earlier , and we don’t need to go back to it,  
 10 but I will quote it:  
 11 “Minister ██████ through the Ministry officials, made  
 12 detailed instructions to intervene in a matter that  
 13 should be independently decided by the NPS through its  
 14 voting process.”  
 15 Exhibit C—69, page 59.  
 16 The President and the Minister’s edicts were  
 17 conveyed. You heard earlier , were understood, again,  
 18 you heard earlier , and they were implemented as orders.  
 19 If they had been put on paper, the paper would have been  
 20 titled “Order”. And an order is an order is an order,  
 21 no matter what forum or medium it takes.  
 22 But there is a broader and purely legal ground as  
 23 well on which Korea’s objection fails. Korea is wrong  
 24 to suggest that the Treaty does not concern itself with  
 25 protection from material acts of the host State. We

1 submit that Korea’s suggestion is self-serving, or to  
 2 put it in more measured terms, it is wrong in principle  
 3 and wrong in law.  
 4 It is wrong in principle , because it cannot be the  
 5 case that certain conduct of the state which violates  
 6 its obligations under the Treaty, may nevertheless  
 7 escape censure on grounds that it is not a measure.  
 8 If the conduct is attributable and substantively  
 9 inconsistent with the Treaty, then by definition it  
 10 engages international responsibility and must perforce  
 11 be a measure.  
 12 Let me illustrate this. If an investor claims that  
 13 public statements by, say, the President of a country  
 14 inciting people openly to destroy foreign property or to  
 15 expel foreign managers led to, say, an expropriation of  
 16 property or violated the guarantee of full protection  
 17 and security, then if that is the pleaded case, it will  
 18 be for a tribunal to assess these statements as part of  
 19 the investors’ pleaded cause of action.  
 20 The Treaty — no Treaty excludes such claims on  
 21 an a priori basis.  
 22 Indeed, our Treaty here provides an example of  
 23 purely material acts that can generate international  
 24 responsibility . Article 11.5 in paragraph 5 of the  
 25 Treaty, which is now on your screens, slide 80, covers

1 requisitions at times of war, revolt , etc.  
 2 So this is the kind of action that can be taken by  
 3 the State’s forces on the ground. It is the fact of  
 4 requisitioning that the Treaty protects against. It’s  
 5 a purely material act.  
 6 I now come to why Korea’s position is also wrong in  
 7 law. The term “measures” in this Treaty, as in other  
 8 treaties and general international law, is intentionally  
 9 broad. Korea has come to accept that this is the case.  
 10 A little grudgingly, in the Rejoinder, accepting that  
 11 is, that the ICJ’s holding to that effect in the  
 12 Fisheries case applies here too.  
 13 Although Korea has made that welcome concession,  
 14 although a little late in the day, it maintains as  
 15 a separate but related argument that the conduct of  
 16 President ██████ and her subordinates did not relate to  
 17 Elliott ’s investment, but it related to something else.  
 18 Now, you will recall that the terms ‘relating to’  
 19 are part of the wording of Article 11.1, paragraph 1,  
 20 which is now again on slide 81 on your screen.  
 21 We do not expect you will have a difficulty with  
 22 this argument, gentlemen, with respect, it is not  
 23 a serious one.  
 24 The parties are ad idem on the relevant law. We  
 25 accept adopting the test set out in the Methanex case,

1 an extract of which is also abstracted on the same  
 2 slide , 81, that Korea's conduct must have a legally  
 3 significant connection with Elliott 's investment.  
 4 Now, is this a very stringent or exacting test? It  
 5 is not. As both Methanex and a subsequent NAFTA case  
 6 called Resolute Forest Products make clear, when a claim  
 7 concerns measures of general application, then the  
 8 investor needs to demonstrate more than just some  
 9 collateral effect on its investment. But the investor  
 10 is not required to demonstrate that such measures of  
 11 general application were exclusively or individually  
 12 targeted at its investment or at the investor itself .  
 13 The Resolute Forest case is exhibit RLA-86, and the  
 14 relevant paragraph is 242.  
 15 But the key point for the present case -- and this  
 16 is the short point, members of the tribunal -- is that  
 17 the Methanex test is by definition satisfied when the  
 18 acts complained of were in fact targeted, and the  
 19 present case is not about measures of general  
 20 application, but rather about one specific transaction,  
 21 the merger.  
 22 Korea's conduct was of course related to the merger,  
 23 and it was related to the shareholders of the two  
 24 companies involved in the merger: The pension fund.  
 25 That is to say the State acting through the NPS was

1 a major shareholder of these companies.  
 2 Indeed, Samsung and Elliott was also a major  
 3 shareholder. And as you have heard from Mr Partasides  
 4 earlier , the very design behind Korea's conduct to  
 5 induce the NPS to vote in favour of the merger was from  
 6 the outset to overcome Elliott 's open and reasoned  
 7 opposition to the merger. So Korea subverted the NPS's  
 8 decision-making process in connection with the position  
 9 that Elliott had taken in respect of that proposed  
 10 merger.  
 11 So the State, as you heard, made sure that the NPS  
 12 would approve the merger.  
 13 Now, in short, members of the tribunal, it is  
 14 difficult to conceive of a case other than the present  
 15 case that is more investor or investment specific . The  
 16 Methanex test is very comfortably satisfied .  
 17 So having put that to one side, I now turn, if  
 18 I may, to issue number 3, which concerns the three  
 19 alternative legal bases upon which NPS's conduct here  
 20 is, in our submission, attributable to the Republic of  
 21 Korea.  
 22 I propose to take these bases in turn, starting with  
 23 NPS's status as an organ of Korea. Then to turn to  
 24 NPS's governmental functions in connection with managing  
 25 the pension fund, and finally to conclude with the

1 direction and control that the government exercised on  
 2 the NPS in securing the approval of the merger.  
 3 Now, in dealing with attribution , let me stress  
 4 a point that I'm sure the tribunal already has. If you  
 5 are satisfied that as a matter of fact, law and  
 6 causation, Elliott 's claim succeeds because of the  
 7 numerous ways in which the Blue House and the Ministry  
 8 of Health and Welfare interfered with and subverted the  
 9 NPS's decision-making process, then it will be  
 10 unnecessary for you to deal with Korea's objections  
 11 regarding attribution .  
 12 Why? Because Korea's objections to attribution  
 13 concern only the conduct within and by the NPS which was  
 14 orchestrated, as you heard by its Chief Investment  
 15 Officer , conduct which Mr Partasides described earlier  
 16 at step 3, and he illustrated through slides 54 to 68.  
 17 So if you consider as Korea's own courts have  
 18 considered that what the NPS did was a foreordained  
 19 result , given the President's and the minister's clear  
 20 orders, that the merger must be approved by the NPS,  
 21 then you needn't focus on NPS's actions as an  
 22 international delict in themselves. They are just  
 23 a foreordained consequence, as I say, of an  
 24 international delict which was committed upstream in the  
 25 hierarchy chain, namely at the Blue House and the

1 Ministry of Health and Welfare.  
 2 But if in the tribunal's judgment it is necessary to  
 3 capture the NPS's conduct in order to establish Korea's  
 4 international responsibility , then attribution does  
 5 become relevant.  
 6 Before we turn to consider attribution under  
 7 international law, let me briefly recall what the NPS is  
 8 and what it does so far as relevant to all of the  
 9 possible bases of attribution so we have it all in mind  
 10 when we come to look at the rules.  
 11 Now, the main legal sources are now on your screen  
 12 as slide 83, and one can see schematically the chain of  
 13 delegation of public law duties in the legal text that  
 14 are applicable .  
 15 One starts at the top from the constitution which in  
 16 Article 34 sets out a duty for the state to promote  
 17 social security and welfare and this is exclusively  
 18 a state duty. Private actors do not have any such duty.  
 19 Now, this duty is implemented chiefly through  
 20 Article 38 of the Government Organization Act, which you  
 21 see one layer below and Article 2 of the National  
 22 Pension Act which you also see at the same level of the  
 23 hierarchy of norms.  
 24 These statutes delegate the constitution mission  
 25 which one finds in Article 34 of the Constitution to the

1 Ministry of Health and Welfare to discharge.  
 2 These acts explicitly mandate the Ministry to  
 3 collect pension contributions from the population and,  
 4 as you will hear from Professor CK Lee, this is  
 5 effectively a form of tax. And they also mandate the  
 6 ministry to provide State pensions and to fund these  
 7 pensions through investments.  
 8 So the Ministry must invest in assets which are  
 9 acquired through the mandatory contributions of the  
 10 population and then the Ministry must manage these  
 11 assets in order to be able to fund the State pensions.  
 12 This, as you can see, is a core State function.  
 13 Now, the State's responsibility to manage these  
 14 assets in the National Pension Fund is then delegated --  
 15 you see one level down in the hierarchy of norms -- is  
 16 delegated to the NPS. And it is delegated pursuant to  
 17 an authorisation which is to be found in Articles 24 and  
 18 102 of the National Pension Act and an implementing  
 19 Presidential Decree, which you see also one further  
 20 down, one level down, forgive me.  
 21 Now, the NPS has its own legal personality and it is  
 22 designated in Korean law as a quasi-government public  
 23 institution of the fund management type. I will come to  
 24 say a few more things about this later on.  
 25 So this is the NPS.

1 The National Pension Fund does not have legal  
 2 personality and it falls under the responsibility, as  
 3 I mentioned earlier, of the Minister of Health and  
 4 Welfare and the NPS.  
 5 We will have an opportunity to see in this hearing  
 6 and it is a point of some importance, I submit, that the  
 7 minister remains responsible for managing the pension  
 8 fund, notwithstanding the delegation of duties to the  
 9 NPS. It's a concurrent responsibility.  
 10 So in a word, the NPS's existence and mandate flow  
 11 directly from the National Pension Act and that Act in  
 12 turn implements the Constitution which sets out a core  
 13 State duty.  
 14 Now, all I have just said is of course common  
 15 ground. The salient characteristics of the NPS which  
 16 are, we submit, relevant for your purposes in terms of  
 17 attribution are also common ground, and these are  
 18 summarised on slide 84 which you now have on your  
 19 screen.  
 20 A number of things to note. The first thing to note  
 21 is that although the NPS has legal personality, when it  
 22 comes to acquire assets or later to dispose of assets of  
 23 the pension fund, the NPS's legal personality disappears  
 24 in the sense that, legally speaking, the relevant rights  
 25 accrue directly to the State. And so the NPS is in this

1 respect a mere conduit to the State. It is not the  
 2 subject of rights of ownership. It is at most you would  
 3 say a nominal holder of the rights. It is not the real  
 4 holder of the rights and we will come to look at the  
 5 evidence with the Korean law experts on this point  
 6 which, as I say, isn't controverted.  
 7 The second thing is that the fund's main resource is  
 8 mandatory contributions by Korea's population, as  
 9 I mentioned earlier, and the tribunal will recognise  
 10 that the power to levy taxes and social security  
 11 contributions is of course a quintessential State power.  
 12 The third thing is that the NPS's operating expenses  
 13 are a line item in the national State budget which is of  
 14 course approved in Parliament, and this is illustrated  
 15 on this diagram which we have on slide 85 and on this  
 16 diagram which was issued by the Ministry of Finance, you  
 17 will see that NPS's budget comes under the expenses of  
 18 the Central Government. And what does this tell us,  
 19 members of the tribunal? It tells us that practically  
 20 the NPS has no operating revenue of its own, and  
 21 therefore practically no economic activity that it  
 22 pursues for its own ends.  
 23 What does this tell us for attribution purposes? It  
 24 tells us that the NPS is a full-time provider of public  
 25 service.

1 If we go back to slide 84 and pick it up again on  
 2 the fourth point, here one sees that the NPS officers,  
 3 and these include of course the CEO and the CIO, the  
 4 Chief Investment Officer, are appointed and supervised  
 5 by the Minister of Health. And in some respects the  
 6 officers of the NPS are -- what is called in Korean law  
 7 -- deemed public servants. That is to say they are  
 8 subject to the same duties as public servants.  
 9 The fifth point or the fifth characteristic that is  
 10 important, we submit, is that when the NPS comes to make  
 11 decisions about the State property that are the assets  
 12 of the pension fund, and of course the merger was one  
 13 such decision, the NPS is tightly constrained by  
 14 principles which are set out first in the national  
 15 Finance Act and then in implementing guidelines which  
 16 are issued by the Ministry of Health and Welfare.  
 17 You will come to hear Professor CK Lee in detail on  
 18 those and other implications so I mustn't steal his  
 19 thunder. But the crucial point for present purposes is  
 20 that these principles are exhaustive. The NPS has no  
 21 discretion to apply different principles. It must apply  
 22 only these principles. It has no choice, for example,  
 23 to pursue a very short-term profit deal. It is not  
 24 consistent with its principles.  
 25 And it is also the case that these principles are

1 exhaustive — that is to say in each instance the NPS  
2 must apply all of these principles . It must have regard  
3 to all of these principles and satisfy them in each  
4 instance.

5 So in short, the NPS’s decision—making implements  
6 a core public duty, the provision of pensions to the  
7 population, and its decision—making is also fettered by  
8 various constraints in order to serve the stability of  
9 the portfolio which is the fund and the national  
10 economy.

11 So the NPS does not operate as a private actor which  
12 is motivated by private or commercial considerations and  
13 we will come to see a little more of that a little  
14 later .

15 The sixth and final characteristic which we submit  
16 is highly relevant for attribution is that the NPS can  
17 issue executive administrative acts which in Korean law  
18 are called dispositions .

19 These dispositions are subject to the public law  
20 rules that are applicable to all State authorities and  
21 in the same way as for all State authorities , they are  
22 reviewable in Administrative Court.

23 Members of the tribunal, it is against this  
24 background that we invite you to find that the NPS is an  
25 organ of the Republic of Korea within the meaning of ILC

1 Article 4 which from memory we have set out on slide 86.

2 The parties agree that Article 11.1, paragraph 3,  
3 subparagraph (a) of the Treaty, which you also have on  
4 the slide , is to be understood by reference to general  
5 international law and the parties agree that ILC  
6 Article 4 is applicable in that manner or relevant to  
7 you in that manner.

8 Now, before turning to matters of contention between  
9 the parties , it is helpful to situate these matters in  
10 context by way of making two general points which ought  
11 to be uncontroversial.

12 The first is that ILC Article 4 lays down a general  
13 rule which is formulated in intentionally broad terms,  
14 and that general rule has to be applied in the specific  
15 circumstances of each case. That is of course a legal  
16 technique that is very familiar to this tribunal .

17 Now, the enquiry that Article 4 calls for is  
18 structural in its nature. Does an entity or person form  
19 part of the structure that a given State has in place?  
20 And in answering this enquiry, and now I am quoting from  
21 the ILC official commentary which you have in the record  
22 as CLA–38, and I have page 40 in mind, but it’s not on  
23 your slide, in that analysis one may capture entities,  
24 I quote, "of whatever classification , exercising  
25 whatever functions, and at whatever level in the

1 hierarchy".

2 That is why the United States at paragraph 3 of its  
3 non—disputing party submissions emphasises, and I quote  
4 again, that "the measures adopted or maintained by any  
5 government or authority of a party are attributable to  
6 that party". You have that extract at the bottom of the  
7 slide before you.

8 The second general point by way of situating the  
9 contentious issues in context is that the functions, the  
10 duties and the powers conferred upon an entity are  
11 relevant in understanding whether it structurally forms  
12 part of the structure that a particular State has chosen  
13 to put in place.

14 Let me illustrate this a little more. In the Eureko  
15 case, which is CLA–34, at paragraph 129, the Polish  
16 Ministry of the Treasury was of course regarded as  
17 a State organ although it had its own legal personality .  
18 That tribunal was chaired by Judge Schwebel.

19 In the Genin case, Estonia’s Central Bank, which  
20 again was a separate legal person, was rightly regarded  
21 as a State organ. That was a tribunal chaired by  
22 Mr Fortier, and it is CLA–83 at paragraph 327.

23 Now, these entities, the Treasury, the central bank  
24 of a nation, performs core State functions of course  
25 which the State undertakes to perform, and if a State

1 chooses to organise itself in a structure that consists  
2 of interrelated entities which each have separate legal  
3 personality, that of course is a sovereign decision of  
4 the State as to which international law has nothing to  
5 say. International law doesn’t tell States how to  
6 organise themselves. International law is there to  
7 recognise the structure that each State has put in place  
8 and give legal effect to it on the plane of  
9 international law.

10 So if a State has created a structure which consists  
11 of interrelated entities with legal personality each,  
12 the State remains answerable for the conduct of these  
13 entities as its organs.

14 In this regard we know that the provision of  
15 pensions is regarded as a core State function in  
16 international law such that legal entities with separate  
17 legal personality — even which are in charge of  
18 pensions — are to be characterized as State organs. We  
19 know this from two cases. One by the European Court of  
20 Justice, as it then was, it’s CLA–127, and one by the UN  
21 Human Rights Commission which is at CLA–88.

22 The ECJ decision is particularly apt here as the  
23 court seemed to be facing in that case exactly the same  
24 kind of argument as Korea advances here, and the court  
25 had this to say and now I’m quoting from paragraph 31 of

1 the judgment:  
 2 "States cannot escape liability by pleading the  
 3 internal distribution of powers and responsibilities as  
 4 between the bodies which exist within their national  
 5 legal order."  
 6 C-127, paragraph 31.  
 7 Now, the point that emerges from all this, members  
 8 of the tribunal, is actually a broader one and it's  
 9 reflected in paragraph 2 of ILC Article 4. We are not  
 10 looking to domestic law to decide for us whether State A  
 11 or B is a unitary legal person and which departments or  
 12 officials belong within that unitary legal person. And  
 13 indeed, if each State were a unitary legal person on the  
 14 domestic law plane, then there would be no need for  
 15 rules of attribution in the first place because each  
 16 State would have to be only what is contained within  
 17 a unitary legal person on the domestic law plane.  
 18 But international law doesn't tell States that they  
 19 should be unitary legal persons, and one knows of no  
 20 State which is just one unitary legal person. States  
 21 consist of a number of organisations and entities which  
 22 form a structure and that is the structure that ILC  
 23 Article 4 calls upon you to recognise and give effect  
 24 to.  
 25 So we have rules of attribution precisely because

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1 each State organising itself differently from the next,  
 2 and the task of an international tribunal is to assess  
 3 whether a given entity, whatever its legal  
 4 classification and internal law or practice, and  
 5 whatever its level in the hierarchy within the State, is  
 6 or is not in fact part of the structure that a given  
 7 state has chosen to adopt.  
 8 Members of the tribunal, that seems to me to be  
 9 a natural break point for me, but I'm entirely in your  
 10 hands. It's 12.10.  
 11 THE PRESIDENT: Thank you very much, Mr Petrochilos. Let's  
 12 break for an hour and we will resume at 1.10.  
 13 (12.10 pm)  
 14 (The short adjournment)  
 15 (1.10 pm)  
 16 THE PRESIDENT: Let's resume. Mr Petrochilos,  
 17 Dr Petrochilos.  
 18 MR PETROCHILLOS: If our court reporters are ready, I'm  
 19 ready, Mr President.  
 20 Now, before the break we looked together at a number  
 21 of background points in respect of the analysis and  
 22 legal test under ILC Article 4 which, as I said, ought  
 23 to be uncontroversial which served as background before  
 24 I would introduce the points of disagreement between the  
 25 parties and I would address them.

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1 Let me describe for the tribunal what the parties'  
 2 disagreement is in respect of attribution as organ in  
 3 connection with the NPS.  
 4 This focuses on two matters which are separate but  
 5 closely interrelated.  
 6 The first matter is whether international law  
 7 precludes the characterisation of State organ when the  
 8 relevant entity has its own legal personality. We say  
 9 international law does not preclude characterisation as  
 10 organ; Korea says that it does.  
 11 The second disagreement turns on whether it is  
 12 relevant or not that the NPS has been established and  
 13 classified within the Korean legal order as  
 14 a quasi-government public institution, that is the  
 15 technical designation, under the Ministry of Health and  
 16 Welfare rather than as a Central Government agency  
 17 directly under Korea's President or Prime Minister, and  
 18 you will hear about this granular issue from our two  
 19 Korean law experts, Professor CK Lee and Professor Kim.  
 20 We say it is not relevant. It is a distinction of  
 21 internal law without a difference for purposes of  
 22 attribution because, as I mentioned earlier, as the ILC  
 23 official commentary makes plain, the precise  
 24 classification and position in the hierarchy that an  
 25 entity has on the domestic legal plane is immaterial for

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1 purposes of attribution.  
 2 Now, in respect of both of these points of  
 3 disagreement, I should say, members of the tribunal,  
 4 there is a decided case that would have been  
 5 particularly helpful to you, but which Korea has very  
 6 studiously kept from you. That is the award in the  
 7 Dayyani case against Korea which concerned a transaction  
 8 with an entity similar to the NPS, called KAMCO. KAMCO  
 9 is an acronym for the Korean Asset Management Company  
 10 which is set up by statute to acquire and to administer  
 11 certain underperforming assets for the sake of the  
 12 country's financial stability.  
 13 The dispute in the Dayyani case concerned a decision  
 14 by KAMCO related to a contract that KAMCO had with the  
 15 claimants in that case which concerned an investment by  
 16 the Claimants in the Daewoo group.  
 17 Now, KAMCO, just like the NPS, is designated as  
 18 a quasi-governmental institution with its own legal  
 19 personality in the form of a corporation, and you find  
 20 that in exhibit C-278 at page 6.  
 21 Also like the NPS in its role as the manager of the  
 22 pension fund, KAMCO acquires and then manages assets in  
 23 the public interest, supervised by other State organs,  
 24 and in a manner that is set out in law and regulations,  
 25 and you find the primary source for that at exhibit

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1 C113, Article 1.  
 2 Now, the Dayyani tribunal, Hanotiau, Pinsolle and  
 3 Griffith , held that KAMCO was a State organ. We know  
 4 that this holding was challenged in the English courts  
 5 on jurisdictional grounds, and that the challenge  
 6 failed , and you have the relevant part of the  
 7 High Court's judgment or a portion of it on your screen  
 8 as slide 87. It is rather short and you will see at  
 9 paragraph 86 that Korea claimed that KAMCO's acts are  
 10 not attributable to Korea, and for that reason Korea  
 11 claimed there could have been no dispute with the  
 12 Republic of Korea under investment Treaty, but only  
 13 a contractual dispute with KAMCO.

14 Now, paragraph 87 contains the court's assessment of  
 15 this jurisdictional claim and I quote:

16 "Despite the eloquence with which Mr Turner QC put  
 17 forward the Republic's case on this issue, I consider it  
 18 to be clearly wrong."

19 Now, I cannot assist with you the arguments that my  
 20 friend — my learned friend — put to the Dayyani  
 21 tribunal or to the English courts. One expects that  
 22 they are the same as those he's putting forward in the  
 23 present case. But only he can help with you that. In  
 24 any event, one can be confident that the Dayyani award  
 25 which Korea denies the benefit of is being denied

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1 because it supports Elliott 's case and it discredits  
 2 Korea's case. But let me now return to the analysis  
 3 under Article 4 of the ILC articles and address the  
 4 points of disagreement between the parties.

5 The first disagreement is Korea's argument that  
 6 a body with its own legal personality , so the argument  
 7 goes, by definition is outside the State's organisation.  
 8 Forgive me, and therefore cannot be an organ.

9 The answer is again, this is wrong in principle and  
 10 wrong in law. It is wrong in principle because it  
 11 amounts to allowing domestic law to trump international  
 12 law because it would be a very simple device indeed if  
 13 a State could avoid attribution by giving a State organ  
 14 its own legal personality .

15 Because the reality is , members of the tribunal,  
 16 that modern States perform so many different and complex  
 17 functions that it is impossible to manage the various  
 18 agencies and organisations that are charged with these  
 19 functions without giving some of them, many of them,  
 20 separate legal personality .

21 So often separate legal personality is in fact to  
 22 facilitate accountability and independent  
 23 decision-making.

24 In other words, it is there to serve better the  
 25 State objectives and mandate that are being entrusted to

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1 an agency or an organisation. And indeed, here both  
 2 sides' experts stress that this ought to have been the  
 3 case with the NPS, although we know that in fact this  
 4 was not the case. The NPS's independence was subverted.

5 So legal personality , considered in itself , is  
 6 immaterial. It is immaterial that unless it serves to  
 7 allow an entity to pursue its own separate objectives  
 8 from the State, for example, for profit trading.

9 And thus central banks, although they do have  
 10 separate legal personality typically exactly for reasons  
 11 of independence, they are undisputably State organs  
 12 because they perform a core function of the State rather  
 13 than objectives of their own. See, for example, the  
 14 Genin case which I mentioned earlier.

15 Korea's argument is also wrong in law because there  
 16 is nothing in the ILC Articles or the decades of work  
 17 that went into it to support it. So a host of entities  
 18 with separate legal personality have been held to be  
 19 State organs, and I mentioned just now the Genin case,  
 20 and the Dayyani case of course, but the Eureko case  
 21 which concerned the Polish Treasury is also particularly  
 22 apt.

23 The Deutsche Bank and Sri Lanka case, which you have  
 24 at CLA—29, concerned the central petroleum organisation  
 25 of Sri Lanka. That is an entity with separate legal

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1 personality and what is more, it is a corporation that  
 2 is a commercial corporation.

3 What did the tribunal there find? That this  
 4 corporation in fact operated as a State organ. That is  
 5 exhibit CLA—29.

6 Now, I am conscious that Korea relies on dicta which  
 7 it suggests support its position , principally from two  
 8 cases, the Almas case and the Ulysseas cases which you  
 9 will find at RLA—80 and RLA—61 respectively. You will  
 10 find chapter and verse in our Reply, but let me tell you  
 11 the key point.

12 In these cases separate legal personality was not  
 13 the decisive factor for attribution . True attribution  
 14 was not upheld, but that was for a number of cumulative  
 15 reasons, none of which applies to the NPS. The entities  
 16 in these two cases, Almas and Ulysseas, were not  
 17 performing State functions on a full time basis.  
 18 Primarily they had their own unique objective to serve  
 19 and in so doing they were acquiring rights and  
 20 obligations of their own. As I say, the NPS is not such  
 21 an entity and particularly so insofar as its management  
 22 of the National Pension Fund, that is to say State  
 23 property, is concerned.

24 Now, with this, let me turn briefly to the second  
 25 area of disagreement between the parties, and it is

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1 a limited one.  
 2 It is a limited disagreement because for one thing  
 3 the parties and their experts agree that the NPS is an  
 4 administrative agency of the Republic of Korea. They  
 5 also agree that there are a number of other  
 6 characteristics of the NPS which we submit are relevant  
 7 for purposes of attribution and which I have outlined  
 8 earlier on slide 84.  
 9 So there is a considerable ground of agreement  
 10 between the parties and their respective experts.  
 11 The disagreement of the parties centres on  
 12 a classification between government bodies under Korean  
 13 public law. Some entities are classified as central  
 14 administrative agencies and do not have legal  
 15 personality. Other entities, which do have legal  
 16 personality, are classified as public institutions, and  
 17 some of those, including the NPS and KAMCO, but by no  
 18 means all of them, are further classified as quasi-  
 19 governmental public institutions.  
 20 There is no third type of public authorities.  
 21 A Government agency has to be either of the one type,  
 22 a central agency, or the other type, a public  
 23 institution, and each type of agency has to be created  
 24 pursuant to a statutory framework and an individual  
 25 statutory authorisation authorising its creation.

1 This is called the principle of administrative  
 2 legalism and there is nothing remarkable in that  
 3 respect.  
 4 So far as the present case is concerned, the only  
 5 difference of any note between central agencies and  
 6 public institutions is that a central agency is subject  
 7 not only to ministerial control, but also presidential  
 8 control, whereas a public institution is subject to  
 9 ministerial control and so the minister can revoke or  
 10 cancel acts of the institution which appear to the  
 11 minister to be unjust or unlawful, and then the  
 12 minister's decisions are of course themselves subject to  
 13 presidential control because the minister is a Central  
 14 Government agency.  
 15 That is the situation on the internal legal plane in  
 16 Korean law, but none of this matters for purposes of  
 17 attribution of course. Why? Because, as we saw, the  
 18 precise placement of an entity within the State  
 19 hierarchy is immaterial as a matter of international  
 20 law.  
 21 So in our respectful submission, the task for the  
 22 tribunal is to form a sound understanding of the  
 23 structure of Korea's administration, but again  
 24 respectfully not to let fine distinctions of internal  
 25 law obscure the broad target that ILC Article 4 sets

1 forth.  
 2 So to conclude on this, for the purposes of ILC  
 3 Article 4, and Article 11.1, paragraph 3 of the Treaty,  
 4 what matters here is that the NPS performs  
 5 a quintessential State function, exercising a public law  
 6 mandate that descends to it from the Constitution and  
 7 the National Pensions Act, to be the custodian of monies  
 8 collected from Korea's population, and then the NPS uses  
 9 these resources to acquire and then to manage assets  
 10 that do not belong to it, but belong to the state, and  
 11 about which assets the NPS cannot make decisions as an  
 12 ordinary asset manager, but exclusively pursuant to  
 13 principles enshrined in law and regulations.  
 14 So unless there are questions from the tribunal at  
 15 this stage, I now move to the Claimant's second and  
 16 alternative basis of attribution on which I can be  
 17 briefer.  
 18 THE PRESIDENT: Yes, please go ahead.  
 19 MR PETROCHILLOS: Thank you.  
 20 Now, that alternative basis proceeds from the Treaty  
 21 and general international law again, and again the  
 22 parties agree that you are to read these two together,  
 23 the Treaty and customary international law, and you have  
 24 the relevant provisions of the Treaty and the ILC  
 25 articles on slide 88 now on your screen.

1 We say that in approving the merger, the NPS acted  
 2 in the capacity of an entity that was entrusted with  
 3 elements of the governmental authority within the  
 4 meaning of ILC Article 5, and what was that governmental  
 5 authority? Again, the custody of State property because  
 6 the funds' assets are State property, the pension fund's  
 7 assets are State property, and following principles that  
 8 are set out in regulations and in the law, and which  
 9 fully determine the NPS's decision-making.  
 10 Now, these principles are to be found first in the  
 11 National Finance Act. This is the Act under which the  
 12 national State budget is managed. This is exhibit  
 13 C-211. And then they are further particularised in  
 14 regulations, the chief among them being the Fund  
 15 Operational Guidelines which you find at exhibit C194.  
 16 Now, Professor CK Lee is a notable authority on  
 17 these matters, and the tribunal will have an opportunity  
 18 to hear him.  
 19 But in short, consistent with the principle of  
 20 legality of administration, in deciding on the merger,  
 21 the NPS was exercising a function specifically entrusted  
 22 to it by law and decree to manage State property, and in  
 23 so doing, the NPS was not acting as an ordinary  
 24 commercial party with full discretion. Rather, as the  
 25 custodian of assets owned by the State, the NPS was

1 required by its guidelines to act in the public interest  
 2 for the benefit of future generations, and to have  
 3 regard to the consequences for the national economy, the  
 4 ripple consequences, say the guidelines, rather than  
 5 seeking to make short-term profit or to curry commercial  
 6 or political favour, for example.

7 Furthermore, the NPS is not paid a commission or  
 8 a fee from the State for managing the pension fund that  
 9 is the State's property. This is a public service and  
 10 a duty and it is not a freely undertaken commercial  
 11 activity .

12 Finally , again unlike ordinary commercial actors,  
 13 the NPS was legally required to take its decisions  
 14 through various committees under specific processes,  
 15 although of course these checks and balances were  
 16 subverted by the Blue House and the Ministry of Health,  
 17 but also by NPS's own officers.

18 Now, with all this in mind, you will be able to  
 19 assess Korea's defence to attribution under ILC  
 20 Article 5. Korea says that voting on a merger, viewed  
 21 in isolation , and in the abstract, is not a governmental  
 22 function. This, you are told, approving a merger or  
 23 not, involves no special prerogative of power because in  
 24 other contexts private actors such as fund managers do  
 25 decide on mergers as well.

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1 We submit that Korea's approach, which is basically  
 2 to treat the NPS as a fund manager, is wrong, and it is  
 3 wrong for two separate but interrelated reasons.

4 First , it is wrong because it ignores the  
 5 fundamental purpose or purposes of ILC Article 5 and as  
 6 I say, there are two and they complement each other.

7 The first purpose was given by Judge Ago, the first  
 8 ILC rapporteur on matters of attribution. His  
 9 commentary to the precursor of our present ILC  
 10 Article 5, which was then numbered Article 7, and which  
 11 you have on your screen at slide 89 says this:

12 "If the same public function were performed in one  
 13 State by organs of the State proper and in another by  
 14 para-State institutions, it would indeed be absurd if  
 15 the international responsibility of the State were  
 16 engaged in one case and not in the other."

17 And this does echo what you heard was decided by the  
 18 European Court of Justice in the case that we saw  
 19 earlier which concerned a German public security body.

20 So the first rationale in ILC Article 5 is to  
 21 capture entities performing functions that are regarded  
 22 as core State functions in international law. And as we  
 23 saw earlier , the provision of pensions to the population  
 24 is such a function and indisputably so.

25 The second purpose is to capture entities that

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1 perform functions which are considered in a particular  
 2 State to be governmental even if that is not the case in  
 3 the international community. The ILC official  
 4 commentary spells this out, and the relevant extract is  
 5 on your screen at slide 90.

6 So these two purposes operate in a complementary  
 7 manner, and as we saw earlier the Korean constitution  
 8 does regard the provision of State pensions as a State  
 9 function, and so in this case the NPS's functions must  
 10 be regarded as governmental on any possible view. From  
 11 an international law perspective or from Korean --  
 12 Korea's law perspective.

13 There is a further second reason for which Korea's  
 14 argument is wrong. ILC Article 5 requires that the  
 15 conduct in question be taken in the capacity of  
 16 exercising delegated state powers. The provision does  
 17 not require that the conduct in itself be an act that  
 18 nobody other than the State may take in any context at  
 19 all . Because if that were required under Article 5,  
 20 then there would be vanishingly few State actions that  
 21 could come within the terms of the provision -- for  
 22 example to wage war, or to enact statutes or to conclude  
 23 international treaties , and these are typically matters  
 24 that are not delegated by States or governments.

25 The United States Non-Disputing Party Submission

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1 supports the claimants' position on this score, you have  
 2 it also on your screen on this slide 90. This  
 3 specifically notes that distribution under the Treaty  
 4 extends to entities exercising "regulatory,  
 5 administrative or other governmental authority"  
 6 including to approve commercial transactions.

7 In short, ILC Article 5 captures the conduct of  
 8 entities which, in part, not as their exclusive mission,  
 9 also perform functions which the State reserves to  
 10 itself .

11 The criterion here is essentially a functional one  
 12 as opposed to organisational, as is the case with ILC  
 13 Article 4, and so if the State reserves to itself an  
 14 activity , for example the procurement of materials for  
 15 the armed forces of the country or the stabilisation of  
 16 energy prices through targeted energy transactions in  
 17 the marketplace or the floating of State bonds or the  
 18 distribution of the post or the handling of customs, and  
 19 if the State has delegated these functions to, say, an  
 20 institute or a corporation, the conduct of that entity  
 21 in discharging the relevant reserved functions will be  
 22 attributed to the State.

23 Let me, if I may, illustrate this. The private  
 24 company which issues me a fine impounds my vehicle and  
 25 then tows it away for being parked in the wrong place is

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1 exercising a governmental authority. If that company  
2 destroys my vehicle after it has towed it away, this  
3 conduct is attributable to the State. It was taken in  
4 the context of exercising governmental powers.

5 If the preparation of school textbooks is reserved  
6 exclusively to the State, and the State has delegated  
7 this duty to a private institute or a company, that is  
8 a delegation of governmental authority. And if  
9 a textbook contains materials offensive to a foreign  
10 State, for example, it puts the international boundary  
11 at the wrong place, and the other State takes offence,  
12 then those materials would be attributable to the State.

13 In other words, one has to consider the context in  
14 which the conduct was performed. If the context is one  
15 of an activity that the State has reserved to itself but  
16 has decided to delegate to an entity that is not an  
17 organ, then the conduct is attributable to the State.

18 Now, Korea says that a number of cases support its  
19 position that the NPS must be seen as no more and no  
20 less than a private fund manager, no different from the  
21 hundreds of fund managers around the shores of this fair  
22 city.

23 Now, we respectfully disagree. The decided cases do  
24 not support the proposition that the assessment of  
25 governmental powers is divorced from the purpose and

1 from the context in which the powers were exercised.

2 Rather, we submit that each case turns on its own  
3 facts, and as the table that is now before you on this  
4 slide 91 illustrates, the cases that are the subject of  
5 debate between the parties turned on an overall  
6 assessment of the acts that gave rise to a Treaty claim.  
7 In each case the question for the tribunal was whether  
8 the relevant acts were or were not part of a reserved  
9 activity of the State and an activity which had been  
10 specially delegated then to a non-State organ.

11 We are submitting this table as an aide memoire of  
12 sorts, proposing not to take you to each entry in the  
13 interests of time, but inviting the questions of the  
14 tribunal in due course.

15 If that is agreeable, Mr President --

16 THE PRESIDENT: Yes, perhaps just to clarify the Claimant's  
17 position on this, is there any daylight between  
18 providing public services such as pension services and  
19 exercise of power within the meaning of 11.13 of the  
20 Treaty or exercise of governmental authority under 5 of  
21 the ILC articles?

22 MR PETROCHILOS: Thank you. The way we understand the  
23 position is as follows. The NPS is indeed exercising  
24 governmental powers because the power to collect the  
25 contributions of the Korean population, and then manage

1 the funds that belong to the State, which is the  
2 National Pension Fund, is a duty that is reserved  
3 exclusively to the State. And the NPS performs that  
4 duty which is reserved exclusively to the State.

5 So the management of the State property that is the  
6 pension fund is one such governmental activity, and we  
7 say that this is what matters, not whether or not  
8 particular acts within that reserved governmental power,  
9 that is to say to manage the fund, could in other  
10 contexts also be performed by private commercial actors.

11 Does this answer your question, sir? We do see this  
12 in terms of governmental power, not simply public  
13 service.

14 I turn now to a further alternative basis of  
15 attribution which also proceeds from the Treaty and  
16 general international law, and we say that the conduct  
17 of the NPS is in any event attributable to Korea  
18 because, as a matter of indisputable fact, throughout  
19 the decision on the merger, the NPS acted on the  
20 instructions of and under the direction and control of  
21 President [REDACTED], Blue House officials, Minister [REDACTED], and  
22 other officials of the Ministry of Health and Welfare.

23 To be clear, the Korean courts have characterised  
24 these instructions as you saw with Mr Partasides as  
25 being detailed. That is a direct quote, and there can

1 be no question, as you also heard from Mr Partasides,  
2 that the control over the merger approval by the NPS was  
3 both close and continuous throughout the process.

4 Now, under the customary international law rule  
5 which is codified in ILC Article 8, now on your screen,  
6 slide 92, the NPS's conduct is attributable to the  
7 Republic because it was secured in fact through the  
8 direction and control of those Government officials.  
9 And it is this fact which is required for attribution  
10 here.

11 Now, there is a debate between the parties as to  
12 whether ILC Article 8 applies alongside the relevant  
13 provision of the Treaty, which is Article 11.1,  
14 paragraph 3. Korea says that the Treaty provision is  
15 lex specialis, and not only lex specialis, but  
16 lex specialis intended to exclude customary  
17 international law contained in ILC Article 8. I'm happy  
18 to leave this point to the pleadings, but I'll note only  
19 that the negotiating travaux, which we're fortunate to  
20 have in the record, suggests no such intention on the  
21 part of the contracting States, and I will also note  
22 that nor does the United States brief indicate any such  
23 intention.

24 So that, we submit respectfully, of itself suffices  
25 to distinguish the present case from the Al Tamimi case

1 where a negotiating history was not available to the  
 2 tribunal.  
 3 Having put this point to one side, let us now look  
 4 at Korea's defences in respect of direction and control.  
 5 Two defences are advanced and I will take each in  
 6 turn.  
 7 The first defence is what I call the triumph of form  
 8 over substance -- or how to craft a defence out of one's  
 9 own wrongdoing.  
 10 Let me explain. Elliott's case is that NPS's  
 11 decision-making was subverted by numerous Government  
 12 officials acting in concert. These acts of subversion  
 13 contravene Korean law as the Korean courts have held, as  
 14 they also contravene the Treaty, but Korea seeks to use  
 15 this to its advantage, arguing that the notions of  
 16 direction and control require legally binding  
 17 instructions to be given.  
 18 Of course Korea says this knowing full well that no  
 19 such formal instructions could have been given for the  
 20 simple reasons that they were illegal under Korean law.  
 21 To paraphrase Director General █ of the Ministry of  
 22 Health and Welfare, "█".  
 23 █.  
 24 Members of the tribunal, if Korea's argument were  
 25 right, then all sorts of illegalities would not be

1 attributable. A requisitioning of property -- I'm  
 2 taking an example that we looked at earlier today, an  
 3 example from the Treaty. So a requisitioning by  
 4 paramilitary forces not based on a written order from an  
 5 official commander would escape scrutiny on the pretence  
 6 that no legally binding direction was given. Now, that  
 7 can't be right, and of course it isn't right.  
 8 Again ILC Article 8, which is still on your screen,  
 9 refers explicitly to the fact of instructions, direction  
 10 or control and that is the end of that matter.  
 11 Mr Partasides took you through the salient facts  
 12 earlier today, but let me recall briefly what kind of  
 13 direction and instruction descended to the NPS, so you  
 14 can place Korea's argument in its proper context and see  
 15 it for what it is.  
 16 You have a summary on your screen on this slide 93.  
 17 And there will be occasions in the course of this  
 18 hearing, one hopes, to look at the written record which  
 19 is rich and we will do so in detail.  
 20 But for attribution purposes, there are three points  
 21 which the evidence establishes. It establishes, first,  
 22 that the instructions were as specific and granular as  
 23 they needed to be at each level of the administrative  
 24 hierarchy in order to achieve the merger. And so the  
 25 President directs that the merger be passed -- in French

1 you might say an obligation de résultat, an obligation  
 2 to achieve a certain result: do what you must, she  
 3 says, just get it done. This is indeed what you would  
 4 expect a person in the position of the President of the  
 5 country to say.  
 6 But within the NPS more granular directions were  
 7 required to be given from time to time, and that  
 8 includes directions by the Director General of the  
 9 Ministry, Mr █ to the Chief Investment Officer of the  
 10 NPS, Mr █, to handle, these were the words, the  
 11 merger vote within the Investment Committee which  
 12 Mr █ controlled.  
 13 The references to the record are under item 4 of the  
 14 list on your slide, but you also have the Seoul High  
 15 Court decision at C-79 at page 18.  
 16 The second point that emerges and is relevant for  
 17 attribution purposes in terms of direction and control,  
 18 and I mentioned it from the outset, is that directions  
 19 and instructions were intended, understood and  
 20 implemented as compulsory orders. This starts from the  
 21 very top, the presidential Blue House, and you have the  
 22 main references under item 1 on this slide 93.  
 23 The third point is of course that the directions  
 24 were complied with all the way down the hierarchy chain,  
 25 and the NPS did approve the merger.

1 Now, this leads me to Korea's second defence in  
 2 respect of direction and control. Korea argues that  
 3 Elliott must establish both general State control over  
 4 the NPS and indeed individual members of the Investment  
 5 Committee and that Elliott must also establish specific  
 6 control over each individual vote that they cast.  
 7 Now, in our submission this argument is misplaced  
 8 because it is borrowed from areas of the law with  
 9 heightened evidential demand, notably armed conflict and  
 10 international criminal responsibility, but I need not  
 11 take the tribunal's time on this today. It has been  
 12 dealt with in the written pleadings. Because this,  
 13 members of the tribunal, is the rare case in which there  
 14 is direct evidence of specific control.  
 15 An aspect of it is on your screen as slide 94. To  
 16 quote Korea's High Court judgment, which is what you  
 17 have on your screen, in respect of the indictment of  
 18 President █, she and her staff caused the NPS to cast  
 19 a favourable vote, and as the most recent prosecutorial  
 20 documents encouraged, you have an extract on slide 52,  
 21 it was the instructions of President █, conveyed  
 22 through Minister █, that caused the NPS's Chief  
 23 Investment Officer to procure a favourable vote by the  
 24 Investment Committee which was, I quote, under his  
 25 influence.

1 So you have evidence of specific direction and  
2 control, and we therefore know that the direction and  
3 control which emanated from the Blue House was in fact  
4 sufficient to make the NPS vote in favour.

5 The evidence in other words establishes that the  
6 degree of direction and control that was necessary was  
7 in fact exercised.

8 Now, as against this, Korea argues that one needs to  
9 go further and establish what you might call unnecessary  
10 or gratuitous control and direction, that each  
11 individual member of the NPS Investment Committee was  
12 induced to vote in favour of the merger.

13 With respect to our friends opposite, their argument  
14 strays from attribution into the territory of causation  
15 as to which you will hear later on from Ms Snodgrass.

16 For attribution purposes, what Elliott is required  
17 to establish is that Korea's Ministry of Health induced  
18 the NPS to decide on the merger through the Investment  
19 Committee and to bypass the Experts Voting Committee,  
20 and that it induced the approval of the Investment  
21 Committee to the merger.

22 Now, these two points, we submit, are established on  
23 the evidence. Again, the references are under items 3  
24 and 4 on the previous slide, slide 93, to which you may  
25 turn in your own time.

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1 Our case stands on that evidence. We need not  
2 adduce evidence of unnecessary attribution for the  
3 wholly theoretical proposition that each member of each  
4 NPS committee was instructed or controlled by the  
5 Minister of Health and his subordinates. This is  
6 a theoretical proposition because, again, the evidence  
7 establishes that instructions, direction and control  
8 were exercised at the times on the persons in the terms  
9 and to the degree that was needed for the NPS to approve  
10 the merger, which of course the NPS did approve.

11 Now, that, members of the tribunal, would conclude  
12 my submissions today unless I can be of further help.  
13 Subject to that, I would ask you to call upon  
14 Mr Partasides again. Thank you.

15 THE PRESIDENT: Thank you very much, Mr Petrochilos.  
16 Mr Partasides.

17 Further submissions by MR PARTASIDES

18 MR PARTASIDES: Thank you, Mr President, members of the  
19 tribunal.

20 So we come to the Respondent's final preliminary  
21 objection to the effect that the Claimant's bringing of  
22 this claim amounts to an abuse of process.

23 As you know, the Respondent makes this allegation on  
24 two grounds, as we understand it. The first is that  
25 Elliott acquired a larger investment after the prospect

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1 of a merger became foreseeable. And the second ground  
2 is that in a different claim against a different party,  
3 namely Samsung, raising a different cause of action,  
4 this Claimant entered into a Settlement Agreement that  
5 has provided it with partial compensation, and therefore  
6 should not be allowed to avail itself of its  
7 international Treaty protections here.

8 So the first thing that will become immediately  
9 apparent to you is that this is not a usual contention  
10 of abuse of process. It does not involve a corporate  
11 restructuring to a new jurisdiction to gain Treaty  
12 coverage that this Claimant did not already have.

13 Now, as you've seen in mounting its abuse of process  
14 objection, the Respondent has attempted to brush aside  
15 the leading international Court of Justice Authority on  
16 the doctrines that the jurisdictional decision in the  
17 case of Equatorial Guinea versus France which made, we  
18 submit, apparent just how exceptional the circumstances  
19 need to be for a claim of abuse of process to be  
20 accepted.

21 That is because even in the rather exceptional  
22 circumstances of that case, it was held that they were  
23 not sufficient to establish an abuse of process.

24 Now, they have brushed that authority aside in  
25 favour of more recent applications of the doctrine by

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1 some investment Treaty tribunals, but here we say,  
2 members of the tribunal, there is no need for us to  
3 engage in a doctrinal debate because we say whatever  
4 authority we look at, the Respondent's objections fall  
5 well short.

6 So let me turn to the authorities that they have  
7 focused on, and let's begin with Phillip Morris  
8 Australia. You see it extracted at slide 96 in which,  
9 as many of us know, a tribunal found that there had been  
10 an abuse of process because an investor had changed its  
11 corporate place of location to gain protection of  
12 a Treaty that it didn't otherwise have when a specific  
13 dispute became foreseeable.

14 Now, in the case before you there was no corporate  
15 change of location at all. In the case before you the  
16 Claimant had the benefit of our Treaty when it first  
17 made its investment and it maintained its right under  
18 the Treaty throughout the duration of its investment.

19 Now, the Republic says, aha, that by the time you  
20 substituted, their word, your swaps for shares, you knew  
21 of the risk of a merger. And therefore the acquisition  
22 of shares thereafter somehow constituted an abuse.

23 Now, we say that proposition is wrong in at least  
24 three ways.

25 First, the Claimant didn't substitute swaps for

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1 shares to obtain Treaty protection at all. It had no  
 2 reason to do so because derivatives are also stated  
 3 expressly in the Treaty as a protected investment.  
 4 Second, we say, for the increase in a pre-existing  
 5 shareholding to be an abuse at all, the Respondent would  
 6 need to demonstrate that there were no other legitimate  
 7 commercial purposes to be served by the acquisition of  
 8 the shares that were acquired other than to gain  
 9 investment Treaty protection that a Claimant didn't  
 10 otherwise have. This is the test, as you see on slide  
 11 97, that was proposed in Phoenix Action, a case chaired  
 12 by Brigitte Stern which the respondents appear to like  
 13 but which doesn't help them, we submit, at all.  
 14 I say it doesn't help them at all because, as  
 15 James Smith has explained and as you see on the next  
 16 slide, slide 98, the Claimant purchased more voting  
 17 shares, members of the tribunal, in Samsung C&T for the  
 18 entirely legitimate commercial reason of increasing its  
 19 chances of resisting a merger should it be put to  
 20 a vote.  
 21 That isn't abusive. That is self-protective  
 22 commercial activity that has nothing whatever to do with  
 23 investment Treaty protection. So we are far away from  
 24 those circumstances in which a Claimant has moved its  
 25 place of incorporation uniquely to gain Treaty

1 protection that it did not already have.  
 2 Third, and this is why we submit that this objection  
 3 is, with respect, utterly misguided. Abuse, members of  
 4 the tribunal, would require the Respondent to show that  
 5 Treaty protection was gained at a time when the specific  
 6 dispute now before you was foreseeable and that  
 7 manifestly was not the case because the claim before you  
 8 is not directed at the commercial risk of the  
 9 possibility of a merger taking place. So the mere  
 10 foreseeability of that commercial risk is not relevant  
 11 to an enquiry of abuse. Rather, this claim is about the  
 12 arbitrary and discriminatory governmental intervention,  
 13 fuelled as we now know by criminal corruption, that  
 14 allowed this merger to take place. That is the specific  
 15 dispute now before you, to use the language of  
 16 Phillip Morris.  
 17 That conduct, members of the tribunal, certainly  
 18 could not have reasonably been foreseen at the time that  
 19 Elliott was purchasing its shares in SC&T because, as  
 20 we've seen together, it was deliberately concealed from  
 21 Elliott, as it was from every other shareholder of SC&T  
 22 other than the government's own NPS.  
 23 What is the Respondent's factual basis for claiming  
 24 otherwise? As you see on the next slide, 99, here it  
 25 tells us -- it's paragraph 374 of its statement of

1 defence -- that because the ROK itself was certainly  
 2 anticipating future Treaty claims, then the Claimant  
 3 must have been as well.  
 4 Well, as we've seen, members of the tribunal, the  
 5 Respondent itself certainly was anticipating the risk of  
 6 Treaty claims when it was improperly intervening in the  
 7 merger behind closed doors, but there is no evidence  
 8 whatever that Elliott was, and how could it, given the  
 9 very conduct complained of was concealed?  
 10 The two public letters to the NPS that the  
 11 Respondent cites in this one paragraph in its statement  
 12 of defence are, we submit, a very good example of the  
 13 care with which you must treat the Respondent's use of  
 14 evidence in this arbitration because we will invite you  
 15 to read those two letters cited and footnoted in this  
 16 paragraph from beginning to end and you will see that  
 17 they show nothing of the sort, certainly nothing to  
 18 suggest the anticipation of an investment Treaty claim  
 19 in respect of conduct that only became clear more than  
 20 a year after the merger took place when the criminal  
 21 investigations began.  
 22 That first of the two letters that is relied on by  
 23 the Respondent was dated 9 July 2015. And to be clear,  
 24 that was after the Claimant finished acquiring its  
 25 shares, and it was the day before the NPS's internal

1 Investment Committee meeting that you heard me  
 2 describing earlier.  
 3 That letter makes no reference to litigation at all,  
 4 much less any reference to a Treaty claim. Instead, it  
 5 simply states that the merger would cause significant  
 6 losses to all SC&T shareholders, and to the NPS's own  
 7 pension stakeholders as well, as indeed it did.  
 8 The second letter that was referred to here was  
 9 dated 24 July 2015. So this one was not only after the  
 10 Claimant had stopped acquiring shares, but it was also  
 11 after the SC&T vote approving the merger on 17 July 2015  
 12 and again, you will find no reference in it to a Treaty  
 13 claim.  
 14 Indeed, how could there be because it was long after  
 15 the vote and long after these letters, indeed not only  
 16 the following year in 2016 that Korea's own public  
 17 prosecutors began to reveal the facts of the concealed  
 18 illegal government intervention that forms the basis of  
 19 the specific dispute before you.  
 20 In short, members of the tribunal, we need not have  
 21 a doctrinal debate here. We are a very long way from  
 22 the circumstances that would justify the exceptional  
 23 remedy of rejecting a claim on grounds of abuse of  
 24 process.  
 25 That is the first of the two bases on which the

1 Respondent asserts an abuse of process.  
 2 The second basis contends that an abuse exists  
 3 because of the existence of a separate action taken by  
 4 Elliott which it took against Samsung in Korea that  
 5 resulted in a Settlement Agreement with Samsung in 2016.  
 6 So, the Respondent argues, that this international cause  
 7 of action against the Republic of Korea could not be  
 8 brought because the Claimant pursued and settled  
 9 a different claim against a different Respondent in  
 10 relation to a national, domestic and different cause of  
 11 action.  
 12 Now, to recall, members of the tribunal, as we have  
 13 ourselves described to you in our pleadings, the  
 14 Claimant did indeed pursue a Korean statutory remedy  
 15 that it had against Samsung itself. That local cause of  
 16 action arose from the statutory right of any opponent to  
 17 a merger to have its shares repurchased if they were  
 18 owned prior to the announcement of the merger itself.  
 19 And that repurchase would take place at a price that,  
 20 like the statutory merger ratio itself, arises from  
 21 another statutory formula, that is also based on the  
 22 short-term traded share prices of the applicant's shares  
 23 instead of it being based on a one-month average, which  
 24 is the merger ratio, it's based on a two-month traded  
 25 price average.

1 And so that limited remedy suffers from many of the  
 2 same shortcomings as the statutory merger ratio itself,  
 3 and it couldn't possibly compensate the Claimant fully  
 4 for the harm that we claim here.  
 5 Now, we have also described, members of the  
 6 tribunal, how that different cause of action against  
 7 a different party, Samsung, did result in a settlement,  
 8 and that settlement saw some payment back to the  
 9 Claimant for Samsung as reacquisition of those appraisal  
 10 shares.  
 11 All of those amounts, and this is important for you  
 12 to understand, received from Samsung by the Claimant  
 13 have been properly taken into account and fully deducted  
 14 from the damages calculation that we have presented to  
 15 you here.  
 16 So there could be no double recovery in relation to  
 17 amounts already received by Elliott. The claim we make  
 18 here is already net of amounts received from Samsung for  
 19 the repurchase of some of the Claimant's shares.  
 20 Now, we also accept, I should say, that under the  
 21 Settlement Agreement with Samsung there is a right to  
 22 further payment in future from Samsung if other  
 23 shareholders should receive a higher price than that at  
 24 which the Claimant settled. But, as things stand,  
 25 members of the tribunal, those other shareholder cases

1 which progress have now been pending for more than five  
 2 years and although those other shareholders have been  
 3 awarded a higher price, that decision has remained on  
 4 appeal since 2016 with no sign of progress towards  
 5 a final outcome.  
 6 So the Claimant has received no further payment over  
 7 many years. It is not clear that it ever will, and its  
 8 entitlement to any future payment by Samsung, if any,  
 9 will arise long after this tribunal has completed its  
 10 mandate.  
 11 If such a right did arise subsequently, it would  
 12 then fall to Samsung to contest that right to further  
 13 compensation on the basis that the Claimant has already  
 14 been compensated through these proceedings.  
 15 In other words, members of the tribunal, any  
 16 possible future risk of double recovery would not be for  
 17 this tribunal to grapple with, but rather for any future  
 18 Korean court convened to determine any future further  
 19 compensation due to the Claimant from Samsung.  
 20 In other words, any possible future risk of double  
 21 recovery is not for this tribunal to take into account  
 22 at all.  
 23 But in any event, as this discussion has revealed,  
 24 I hope, this, members of the tribunal, is not an issue  
 25 of admissibility of this claim. Rather, it would amount

1 to a question as to the quantum of the claim which  
 2 cannot possibly limit or inhibit in any other way the  
 3 admissibility of this claim against a different party on  
 4 the basis of a different cause of action in respect of  
 5 harm that has not been compensated for.  
 6 Members of the tribunal, with those words on an  
 7 alleged abuse of process, I believe we have said enough  
 8 about the Respondent's panoply of preliminary objections  
 9 and so now we turn to the merits of the claims properly  
 10 before you.  
 11 Now, it becomes clear why the Respondent has  
 12 attempted to assemble so many barriers, members of the  
 13 tribunal, to you reaching the merits of this dispute as  
 14 soon as we do reach the merits of this dispute, because  
 15 just as so many of the factual foundations of our claims  
 16 are indisputable, so the legal consequences, we submit,  
 17 are unavoidable.  
 18 Now, as you know, as you see on slide 101, we submit  
 19 that the Respondent has violated its investment  
 20 protection obligations in two ways and today in the  
 21 interests of time we shall focus on only the first of  
 22 those breaches: the Respondent's failure to accord the  
 23 Claimant the minimum standard of treatment under  
 24 Article 11.5 of the Treaty. Our submissions on the  
 25 failure to accord us national treatment stand and we're

1 available to answer any questions about it that you may  
2 have.

3 In making our claim of a breach of the minimum  
4 standard, let me suggest that the Respondent's original  
5 submission in its statement of defence, which you see on  
6 slide 103 to the effect that our claim is somehow about  
7 governmental conduct that was simply misguided or  
8 involved a misjudgment or a mere incorrect weighing of  
9 factors, was a woefully inadequate characterisation of  
10 both our complaint and the evidence that is now before  
11 you.

12 In its Rejoinder, which you see on slide 104, the  
13 Respondent moved on to quite a different  
14 characterisation of our claim. Now it's submitted that  
15 the merger vote decision at issue here was the result of  
16 careful consideration by the NPS, that this claim is  
17 about a policy that was considered beneficial to the  
18 national economy.

19 Now, while this marks a notable evolution from where  
20 Korea started in its statement of defence in this  
21 arbitration, we submit that this is again a wholly  
22 inadequate characterisation of the conduct we have  
23 described to you.

24 But first let us recall the applicable standard  
25 against which you must evaluate that conduct. And it is

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1 perhaps a consequence of the extraordinary nature of the  
2 conduct at issue here that, members of the tribunal, you  
3 are not faced with an extensive doctrinal debate,  
4 typical of other Treaty claims about the outer limits of  
5 the standard imposed by Article 11.5 of our Treaty.

6 Here on slide 105 we see that relevant standard as  
7 well as the parties' shared understanding of the meaning  
8 of the customary international law minimum standard of  
9 treatment that appears at annex 11—A of the Treaty.

10 As we can see, the standard is described as  
11 requiring treatment in accordance with customary  
12 international law and it is said explicitly to include  
13 fair and equitable treatment as part of that minimum  
14 standard.

15 This explicit incorporation of the standard of fair  
16 and equitable treatment as part of the minimum standard  
17 of treatment is not surprising because it is typical in  
18 modern statements of the standard, because the minimum  
19 standard has progressed since the early rudimentary  
20 statements that appeared now exactly a century ago in  
21 decisions such as *Neer*.

22 But again, let me say again, this case does not  
23 require us to debate exactly how far that minimum  
24 standard of treatment has progressed, and so, perhaps  
25 unusually in hard fought Treaty proceedings such as

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1 this, both parties before you have agreed on the content  
2 of the standard that you must apply. And it is the  
3 content elucidated in the decision in the case of  
4 *Waste Management v Mexico II*.

5 You see it on the next slide, members of the  
6 tribunal, the waste management II tribunal statement of  
7 the standard, and we've also provided you with the  
8 precise references to both parties' submissions in which  
9 they accept that statement of the standard, both the  
10 Claimants and the Respondents.

11 As you can see, conduct attributable to a State will  
12 breach the agreed standard if it is arbitrary, grossly  
13 unfair, unjust or idiosyncratic.

14 The lodestar of arbitrariness takes us in turn to  
15 the classic statement of that legal concept by the  
16 international Court of Justice in the case of *ELSI*.

17 On the next slide, 107, we say that classical  
18 statement which will be familiar to many of us:

19 "Arbitrariness is not so much ... opposed to a rule  
20 of law, as something opposed to the rule of law ... it  
21 is a wilful disregard of due process ... an act which  
22 shocks, or at least surprises, a sense of juridical  
23 propriety."

24 That is the standard, and we say, members of the  
25 tribunal, it is more than amply fulfilled on the

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1 evidence before you because the decision of Korea's NPS  
2 to support the merger was irrational because it was  
3 self-damaging. And not only departed from the National  
4 Pension Fund's operating principle of profitability, but  
5 contradicted it. Because that irrational outcome was  
6 indeed arrived at in the language we see there by  
7 a wilful lack of due process, which also violated the  
8 National Pension Fund's principle of independence.

9 Because it involved governmental criminality, both  
10 in inception and execution that was more than  
11 idiosyncratic in the language of *Waste Management II*,  
12 and we submit at the very least surprises a sense of  
13 juridical impropriety in the language of *ELSI*.

14 Now, it is open to the Respondent to deny that these  
15 facts violate their Treaty obligation, although we  
16 submit that such a denial is bound to fail. But what it  
17 is not even open to the Respondent to deny as a matter  
18 of law are these facts themselves, members of the  
19 tribunal, because these facts have been accepted and  
20 confirmed by Korea's own courts that as a matter of  
21 international law are an emanation of Korea itself.

22 Now, this is an important submission of law, members  
23 of the tribunal, so let me spend some time on it.

24 Of course it is not our position that this tribunal  
25 is bound by the decisions of Korea's domestic courts.

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1 That is not our position. But, as you know, it is  
 2 a statement of elementary international law that the  
 3 acts of a court are attributable to a State. That is  
 4 precisely why a judicial act or omission is itself  
 5 capable of constituting an internationally wrongful act.  
 6 It follows from that elementary principle that while  
 7 this tribunal is not bound by the decisions of Korea's  
 8 domestic courts, the Republic of Korea cannot take  
 9 a position before this tribunal that disavows or is  
 10 inconsistent with the findings of its own courts.  
 11 Now, this elementary proposition was confirmed  
 12 unanimously in authoritative terms by the eminent  
 13 tribunal in the case of *Chevron v Ecuador II*. That case  
 14 featured a tribunal in which Professor Vaughan Lowe was  
 15 appointed by Ecuador and the late Johnny Veeder  
 16 presided. As many of us know, the Veeder tribunal, both  
 17 for jurisdiction and the merits, had reason to study  
 18 closely the decisions of the Ecuadorian courts that were  
 19 relevant to the international law claim before it.  
 20 On an issue of temporal jurisdiction, the details of  
 21 which are not relevant for our present purposes, it was  
 22 in Ecuador's interests in the Treaty case to attempt to  
 23 contradict a factual finding of its own courts.  
 24 In the face of that attempt at contradiction, the  
 25 Veeder tribunal found that Ecuador could not do so.

1 Let's look closely at how it arrived at that finding  
 2 on the slide you see before you, slide 108. First, the  
 3 Veeder tribunal's point of departure, quoting various  
 4 well-known sources, the Veeder tribunal held that  
 5 parties who have concluded a Treaty have brought  
 6 themselves into a relationship of good faith. You see  
 7 that extracted at paragraph 7.84 of the award at the top  
 8 of the slide.  
 9 According to the Veeder tribunal, the duty of good  
 10 faith precludes clearly inconsistent statements by  
 11 a state that a State in its words cannot blow hot and  
 12 cold. You see that explained at paragraph 7.88, 7.91  
 13 and 7.106 in different formulations.  
 14 Let's move on to the next slide. In determining  
 15 inconsistency, the Veeder tribunal found that so far as  
 16 a State is concerned, its relevant statements include  
 17 the pronouncements of its judicial organs. That's  
 18 paragraph 7.109. This is notwithstanding the fact that,  
 19 as a matter of law, the courts enjoyed judicial  
 20 independence, and that is because, as I said earlier,  
 21 international law makes no distinction between  
 22 executive, legislative or judicial organs.  
 23 On this basis, the Veeder tribunal found that as  
 24 a matter of law, Ecuador could not disavow the findings  
 25 of its own courts. That's paragraph 7.111.

1 So here in precisely the same way, we say, it is not  
 2 open to this Respondent State to disavow the factual  
 3 findings of its own courts to a criminal standard of  
 4 proof on the basis of evidence presented by its own  
 5 prosecutor. So let us take stock, members of the  
 6 tribunal. We have identified our uncontroversial legal  
 7 minimum standard, our agreed minimum standard. We have  
 8 explained why it is not open to the Respondent to  
 9 contest the findings of fact arrived at by its own  
 10 courts as a matter of law. So now let us apply those  
 11 incontrovertible facts to our agreed standard.  
 12 To recap, as you see on the next slide, 110, this is  
 13 the specific governmental conduct that we complain of.  
 14 We've described those facts in detail already. So what  
 15 I propose to do now is simply to organise them under  
 16 three headings that are relevant certainly individually,  
 17 and undoubtedly together, to proving breach of the  
 18 standard.  
 19 You see those three headings on the next slide, 111.  
 20 Our starting point is that the NPS's decision to support  
 21 the merger was in a word at least irrational. How else  
 22 could we reasonably describe a decision to support  
 23 a merger that impaired on its own internal calculations  
 24 the value of the National Pension Fund itself? That  
 25 impairment is not just subjective opinion on our part,

1 members of the tribunal, as we see on slide 112; it is  
 2 objective fact that has been confirmed more than once,  
 3 as you see on this slide, by Korea's own courts.  
 4 Now, let's compare what the Korean courts have found  
 5 outside of these proceedings with what the Respondent is  
 6 suggesting to you within these proceedings.  
 7 Here on the next slide you see another extract from  
 8 Korea's Rejoinder in which it suggests that there may  
 9 have been a difference between the NPS's short-term  
 10 interests and its longer term interests, and we also see  
 11 it suggests that what was good for the Samsung Group was  
 12 good for the Korean economy.  
 13 As you consider those attempts to explain away the  
 14 damage that was inflicted on Korea's National Pension  
 15 Fund, let's recall that we haven't ever seen the Korean  
 16 courts observing that the merger might have been in the  
 17 fund's long-term interests when it convicted its  
 18 Minister [REDACTED] and Chief Investment Officer [REDACTED]. We  
 19 also haven't seen any reference to this being good for  
 20 the Korean economy because it was good to the Samsung  
 21 Group when the courts convicted Minister [REDACTED] and  
 22 President [REDACTED] for, amongst other things, abuse of  
 23 power.  
 24 To the contrary, members of the tribunal, [REDACTED] is  
 25 being indicted again by Korea's prosecutor, as we speak,

1 precisely because the criminal scheme that he  
 2 participated in was conceived to serve the interests of  
 3 the [REDACTED] family, not the Samsung Group as a whole.  
 4 Very simply, the NPS's decision to support the  
 5 merger has already been judicially recognised  
 6 domestically as an objectively damaging decision for the  
 7 National Pension Fund, that the NPS was charged with  
 8 managing.  
 9 So it was entirely at odds with the NPS's own  
 10 investment principle of profitability which you see on  
 11 the next slide, and which the NPS was statutorily  
 12 obliged to comply with under the National Pension Act.  
 13 So certainly irrational. But the conduct that led  
 14 to that decision was more than just irrational because  
 15 it also involved a wilful disregard of due process.  
 16 Now, as we've already seen, members of the tribunal,  
 17 the irrational decision that we've just walked through  
 18 was ordered from on high. That is evidence that has  
 19 come from those who received the Presidential order and  
 20 it has been confirmed by the Korean courts repeatedly.  
 21 That was a governmental order, as we see on  
 22 slide 117, that once again violated the investment  
 23 principles, in particular the principle of independence,  
 24 according to which investment decisions in respect of  
 25 the National Pension Fund were to be made. So the

1 Presidential order to support the merger, which was then  
 2 followed by a ministerial order, whatever its  
 3 motivation, and we will come to the motivation, was  
 4 itself a departure from due process.  
 5 To follow that order, further departures from due  
 6 process were committed.  
 7 So, as we've seen already, Korea's courts have found  
 8 that the Ministry also ordered the NPS to circumvent the  
 9 structural mechanism for independent decision—making  
 10 that was the Experts Voting Committee. This again  
 11 diverged from the NPS's due process.  
 12 Now, in its final pre—hearing submission the  
 13 Respondent has argued, and you see it on slide 119, or  
 14 at least we'll address it in slide 119, the Respondent  
 15 has argued that for a decision to be difficult such as  
 16 to justify a reference to the independent Experts Voting  
 17 Committee, the Investment Committee must itself choose  
 18 to find the decision difficult, and it didn't. So  
 19 according to the Respondent, there couldn't have been  
 20 a departure here from the NPS's due process.  
 21 But what the Respondent never deals with, as you can  
 22 see on this slide 119, is item 6 of Article 5 of the  
 23 Fund Operational Guidelines. Because item 6 provides  
 24 a separate right for the chairman of the Experts Voting  
 25 Committee to require a reference of a decision to the

1 Experts Committee even if the Investment Committee  
 2 itself decides that independent input is not needed.  
 3 Now, that is precisely, members of the tribunal, the  
 4 kind of safety valve that is an entirely typical process  
 5 safeguard and for obvious reasons. Let us please think  
 6 about this. If Chief Investment Officer [REDACTED]'s  
 7 Investment Committee alone controls whether an  
 8 independent mechanism can be bypassed, then it may be  
 9 bypassed precisely when it is needed most, as was the  
 10 case here. As we can see on the next slide, 120, the  
 11 chairman of the Experts Committee did make clear here  
 12 his explicit demand that the decision be referred to his  
 13 independent committee. At the top of the slide you see  
 14 his email very early in the morning of 10 July 2015, at  
 15 12.30 am, the day of the Investment Committee meeting  
 16 itself, [REDACTED], and at  
 17 the bottom of the slide you see his letter written on  
 18 11 July 2015, the day after the Investment Committee's  
 19 meeting, which expressed his view once he was told that  
 20 the decision had already been taken by the internal  
 21 Investment Committee, his view that it was extremely  
 22 inappropriate that this occurred, extremely  
 23 inappropriate that the reference wasn't made to his  
 24 committee.  
 25 As I told you earlier, members of the tribunal, in

1 truth you don't even need to agree with the unequivocal  
 2 view of the chairman of the independent Experts Voting  
 3 Committee himself because, as we've already seen, you  
 4 just need to accept the contemporaneous evidence of the  
 5 NPS's own internal view at the time because, as we  
 6 recall again on slide 121, whatever the Respondent now  
 7 says, the documents at the time leave no doubt that [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED].  
 10 What's more, the NPS and those who were directing it  
 11 themselves anticipated that bypassing that mechanism was  
 12 the kind of procedural misstep that might lead to  
 13 a Treaty claim.  
 14 Now, let us think about this last point, and let us  
 15 look one final time at the extract on slide 122.  
 16 Because it really is remarkable that before this  
 17 Claimant even notified a Treaty claim, indeed long  
 18 before this Claimant even knew of the facts that we now  
 19 complain of, the Blue House, the Ministry and the NPS  
 20 themselves were already concerned that [REDACTED]  
 21 [REDACTED].  
 22 So we have an irrational decision. We have a wilful  
 23 disregard of due process that led those within  
 24 government to anticipate Treaty claims, but the conduct  
 25 here goes beyond that. It goes beyond even a wilful

1 disregard of due process, and so we come finally to the  
 2 evidence of Government criminality that you are now  
 3 familiar with.  
 4 That criminality started at the very top with the  
 5 former Head of State, sitting in jail as we speak,  
 6 because the evidence has already established to  
 7 a criminal standard of proof that she solicited a bribe  
 8 advantage in exchange for abusing her governmental  
 9 powers to support the [REDACTED] family's succession plans.  
 10 We've seen the finding of a corrupt quid pro quo in  
 11 the conviction of President [REDACTED] before. Here it is  
 12 again on slide 124. The Respondents can't deny that.  
 13 So instead they point to the contrary finding that was  
 14 arrived at in the conviction of [REDACTED] that there was  
 15 insufficient evidence of a quid pro quo at the time of  
 16 his conviction. You see that alternative finding at  
 17 slide 125.  
 18 But the terms of the [REDACTED] conviction, members of  
 19 the tribunal, don't alter the finding against the  
 20 President. And the evidence of her corrupt quid pro quo  
 21 has not diminished over time. Rather it appears to be  
 22 growing, and so outside of these proceedings Korea's  
 23 prosecutor continues to pursue a further prosecution  
 24 alleging again that the former President received  
 25 financial inducements in exchange for supporting the [REDACTED]

1 family's succession plans.  
 2 We've seen the key extracts from that latest  
 3 indictment before. We don't need to spend time on it  
 4 again. It's at slide 126. But I invite you to keep it  
 5 firmly in mind as you consider Korea's latest  
 6 simultaneous denials of that very same fact within these  
 7 proceedings.  
 8 We say that the existing conviction of  
 9 President [REDACTED], together with Korea's latest additional  
 10 ongoing indictment of [REDACTED], that further alleges  
 11 a quid pro quo to assist in the merger, is more than  
 12 enough.  
 13 But in any event, let us repeat, we don't need to  
 14 prove criminality to succeed on our Treaty claim. All  
 15 we need to do is demonstrate that the governmental  
 16 order, whatever motivates it, involved an abuse of  
 17 government power.  
 18 Any doubt that it did, were it still to exist, is  
 19 removed by the fact that the intervention was knowingly  
 20 and carefully concealed by those involved in it. Here  
 21 on the next slide, one last time, we see the exhortation  
 22 from the Ministry's Director General of Pension Policy,  
 23 Mr [REDACTED], laced with heavy sarcasm, to the effect that [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

1 [REDACTED]  
 2 We agree. Anyone, even a child, would understand  
 3 that this was improper and that is why it was  
 4 deliberately concealed.  
 5 So we come finally to how this improper governmental  
 6 intervention, whatever its motivation, was implemented  
 7 by those further down the chain of command. We've  
 8 already described the NPS research group's valuations  
 9 and revised valuations of the SC&T in order to get  
 10 closer to justifying this value transferring ratio. I'm  
 11 not going to repeat that. So let me repeat only the  
 12 final step in this sordid chain because despite all else  
 13 that had been done, this governmental intervention would  
 14 not have achieved its aim without the fabrication of the  
 15 so-called "synergy effect". So the final word really  
 16 does belong to the man who pulled that calculation out  
 17 of a hat, Mr [REDACTED].  
 18 Mr [REDACTED], who came up with a calculation that he has  
 19 himself described as [REDACTED], members of the tribunal,  
 20 in the language of ELSI, that he has confessed himself  
 21 [REDACTED] and that [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED].  
 24 So what you have clearly before you, members of the  
 25 tribunal, is gross illegality, motivated by corruption,

1 and implemented by fraud, supported by a weight of  
 2 evidence, the like of which we will likely not see again  
 3 soon in investment Treaty arbitration, and so there is  
 4 no risk of floodgates opening in finding breach here.  
 5 To the contrary, if this kind of conduct is not  
 6 a violation of the minimum standard of treatment, then  
 7 we submit, with respect, that standard is no standard at  
 8 all because we submit that this conduct does or at least  
 9 should shock any reasonable sense of juridical  
 10 propriety.  
 11 With that, members of the tribunal, we turn to  
 12 matters of causation and quantum. And if this is an  
 13 appropriate time, as that will be the last segment of  
 14 our opening submission, perhaps this is a good time for  
 15 us to take a break.  
 16 THE PRESIDENT: Thank you very much. Let's break now for  
 17 15 minutes. We will continue or resume at 2.45.  
 18 (2.31 pm)  
 19 (A short break)  
 20 (2.46 pm)  
 21 THE PRESIDENT: Okay. Let's resume. Claimant. It will be  
 22 Ms Snodgrass.  
 23 Opening submissions by MS SNODGRASS  
 24 MS SNODGRASS: Thank you, Mr President. Members of the  
 25 tribunal, today I'm going to address you on causation to

1 loss and the quantum of damages.  
 2 On slide 130 you will see a roadmap of the topics  
 3 that I plan to cover. First, causation and fact in  
 4 relation to which I will briefly draw your attention to  
 5 two topics, evidence that has come to light since the  
 6 closing written pleadings that confirms that the ROK's  
 7 measures in breach of the Treaty certainly caused the  
 8 merger to occur, and the evidence of a notable and  
 9 widespread consensus that the merger caused a loss to  
 10 SC&T shareholders such as the Claimant, and I will then  
 11 address legal or proximate causation, showing that  
 12 contrary to the ROK's Rejoinder submissions on this  
 13 issue, the merger ratio cannot properly be characterised  
 14 as an intervening cause of the Claimant's loss, and then  
 15 finally I will address the quantum of damages in some  
 16 detail.

17 So first causation in fact.  
 18 The Claimant has outlined a straightforward chain of  
 19 causation which you see depicted on side 132. Link  
 20 number 1, the ROK's breaches of the Treaty caused the  
 21 NPS to vote in favour of the merger.  
 22 Link number 2, the NPS vote for the merger caused  
 23 the merger to be approved at the extraordinary general  
 24 meeting of SC&T shareholders, and link number 3, the  
 25 merger caused the loss to the Claimant by transferring

1 value from SC&T shareholders such as the Claimant to  
 2 Cheil shareholders such as [REDACTED].  
 3 Now, in their submissions that you heard earlier  
 4 today, Mr Partasides and Dr Petrochilos identified the  
 5 measures that amount to breaches of the Treaty.

6 Slide 133 is a reprise of Dr Petrochilos' slide 79,  
 7 and it recalls those measures, which together caused the  
 8 NPS to vote in favour of the merger.

9 Namely, as a result of a corrupt bargain with  
 10 [REDACTED], [REDACTED].  
 11 [REDACTED].

12 President [REDACTED]'s order was implemented by further  
 13 governmental orders from the Blue House to the Ministry  
 14 of Health and Welfare. In order to ensure the approval  
 15 of the merger, the Blue House and Ministry officials  
 16 instructed the NPS that the investment committee should  
 17 take the decision on the merger. In compliance with  
 18 these instructions, Chief Investment Officer [REDACTED]  
 19 orchestrated a vote in favour of the merger by the  
 20 Investment Committee, including through the deliberate  
 21 and criminal fabrication of knowingly false inputs to  
 22 the Investment Committee's decision-making process. And  
 23 this all culminated in an arbitrary and self-damaging  
 24 decision by the NPS to vote in favour of the merger.

25 So the slide and the evidence that it summarises

1 illustrates a clear chain of causation between the  
 2 governmental acts in breach of the Treaty and the  
 3 arbitrary and procedurally irregular decision by the NPS  
 4 to support the merger itself a breach of the Treaty.

5 In the light of that evidence, which my colleagues  
 6 walked you through earlier today, there can now be no  
 7 serious dispute that the ROK caused the decision as to  
 8 how the NPS would vote on the merger to be made by the  
 9 Investment Committee and not the Experts Voting  
 10 Committee.

11 You've already heard from both Mr Partasides and  
 12 Dr Petrochilos about the direction and control that were  
 13 exerted from the highest echelons of the Korean  
 14 Government down to CIO [REDACTED] who himself leveraged his  
 15 position of control to orchestrate a vote by the NPS in  
 16 favour of the merger.

17 Now, the ROK focuses its arguments on causation in  
 18 fact on casting doubt on whether the Experts Voting  
 19 Committee would certainly have voted against the merger  
 20 had the decision been put to it as it should have been.

21 This is the subject of the single fact witness  
 22 statement submitted in this arbitration by the ROK, that  
 23 of Mr Cho and you heard Mr Partasides' submissions  
 24 expressing scepticism about that issue this morning.

25 Of course, certainty is not the relevant standard

1 here, and there is ample direct and circumstantial  
 2 evidence that are identified in our written submissions  
 3 to support a finding that it is more likely than not  
 4 that had the vote gone to the Experts Voting Committee,  
 5 the vote would have gone against the merger.

6 More pertinently, to show causation in fact, the  
 7 Claimant does not have to prove what the Experts Voting  
 8 Committee would have done if the ROK had not breached  
 9 the Treaty and diverted the decision to the Investment  
 10 Committee. And that's because, as we see on slide 134,  
 11 the Claimant's case on causation is made out on the  
 12 basis of simple math and the ample evidence in the  
 13 record that at least nine of the 12 members of the  
 14 Investment Committee would not have decided in favour of  
 15 the merger if the ROK had not breached the Treaty by  
 16 fabricating and falsifying the inputs to the Investment  
 17 Committee's decision-making process.

18 Now, in the Rejoinder the ROK tries to break this  
 19 link in the Claimant's chain of causation on the basis  
 20 that the Investment Committee's decision was "not  
 21 determined by the alleged wrongful conduct".

22 This argument amounts to nothing more than  
 23 an irrelevant straw man that again sets the bar for  
 24 proving causation altogether too high.

25 As the tribunal will recall from our pleadings,

1 causation can be made out if it is shown that the ROK's  
 2 wrongful conduct induced or influenced the Investment  
 3 Committee's decision and applying this correct standard,  
 4 the evidence before the tribunal overwhelmingly  
 5 demonstrates that the ROK's wrongful conduct caused the  
 6 NPS to vote in favour of the merger.

7 Indeed, Mr Partasides already took you through the  
 8 evidence relating to the NPS's fabricated synergy  
 9 analysis and the decisive role it played in the  
 10 Investment Committee decision.

11 I want to draw your attention to a second fraudulent  
 12 and decisive input to the Investment Committee process,  
 13 evidence of which has only recently come to light  
 14 through the ROK's ongoing second prosecution of [REDACTED].

15 Now, this evidence, summarised by the ROK in the PPO  
 16 indictment, demonstrates that the NPS's Chief Investment  
 17 Officer [REDACTED] worked hand in glove with Samsung to  
 18 prepare the ground for the NPS Investment Committee's  
 19 vote and to influence the outcome of that vote.

20 Specifically, the ROK itself now indicates that the  
 21 NPS asked Samsung to fabricate favourable market  
 22 analysis and media coverage in order to influence the  
 23 Investment Committee's decision in favour of the merger.

24 Now, if we see on slide 135, an excerpt of the PPO  
 25 indictment describing a meeting on 18 June 2015 in which

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1 NPS Chief Investment Officer [REDACTED] asked Samsung to  
 2 procure "a recommendation for the merger" and to  
 3 generate favourable media reports around the  
 4 10 July 2015, which was the projected date for the  
 5 deliberation of the Investment Committee, and he was  
 6 seeking favourable media reports to describe the merger  
 7 as serving national interests in order to support his  
 8 efforts to achieve approval of the merger by the  
 9 Investment Committee.

10 In furtherance of CIO [REDACTED]'s request for favourable  
 11 media reports, as additional evidence in the PPO  
 12 indictment relates, Samsung then engaged in an  
 13 aggressive and fraudulent media strategy, specific  
 14 details of which are found in the balance of that  
 15 document.

16 Critically, the evidence in the PPO indictment also  
 17 proves that these fraudulent interventions had the  
 18 desired effect of inducing or caution the Investment  
 19 Committee to vote as it did. There's both direct and  
 20 indirect evidence of that fact.

21 So in terms of the indirect evidence, recall that  
 22 the NPS was originally minded to oppose the merger on  
 23 grounds that the proposed merger ratio was unfair to  
 24 SC&T shareholders. Specifically, as we see on slide  
 25 136, the PPO indictment describes the meeting that took

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1 place in a conference room on the 39th floor of  
 2 a Samsung office building among [REDACTED], three other  
 3 individuals from Samsung, NPS CIO [REDACTED], the NPS head of  
 4 equity investment, and a Mr [REDACTED] of the NPS research  
 5 team. According to the ROK, at the time NPS CIO [REDACTED]  
 6 was under strong pressure from the Health and Welfare  
 7 Minister, Minister [REDACTED], not to refer the merger to the  
 8 Special Committee but to approve it at the Investment  
 9 Committee. In the above meeting, defendants dismissed  
 10 Mr [REDACTED]'s -- CIO [REDACTED]'s request to readjust C&T's merger  
 11 ratio through a discount or mark-up of the merger price  
 12 so that the NPS can agree to the merger.

13 Now, plainly at this point the NPS was struggling to  
 14 reach a favourable decision on the merger and at  
 15 a merger ratio that was obviously unfavourable and  
 16 harmful to SC&T shareholders.

17 Now, the NPS's initial unfavourable view of the  
 18 merger and the merger ratio was consistent with the view  
 19 that the NPS had expressed to the Claimants' advisers,  
 20 including Mr James Smith, just a few months previously.  
 21 As Mr Smith related in his first witness statement, and  
 22 confirmed in his second statement, at a meeting on  
 23 18 March 2015, the NPS's Mr [REDACTED] and Mr [REDACTED], the same  
 24 Mr [REDACTED] who later attended the 39th floor meeting with  
 25 Samsung, concurred with the Claimant that a merger based

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1 on market prices that overvalued Cheil and undervalued  
 2 SC&T could not be considered fair to SC&T shareholders.

3 And the dates here are particularly noteworthy  
 4 because, as Mr Partasides drew to your attention, the  
 5 NPS's meeting with the Claimant in March occurred before  
 6 President [REDACTED]'s June 2015 instructions to Blue House  
 7 staff to ensure that the merger was accomplished, and  
 8 before any subsequent Blue House or Ministry  
 9 interventions with the NPS.

10 So we can take the views that were expressed at that  
 11 time to the Claimant as a reflection of the NPS's honest  
 12 assessment of the merger, untainted by the Treaty  
 13 breaches that were to come.

14 But then we know that due to the fraudulent inputs,  
 15 including the fabricated synergy calculations, the NPS  
 16 changed its view on the merger, and in the PPO  
 17 indictment the ROK draws the conclusion in terms that  
 18 the false and fraudulent materials that NPS CIO [REDACTED]  
 19 ordered up from Samsung ultimately did influence the  
 20 Investment Committee's decision.

21 We see on slide 137 that the ROK itself has  
 22 concluded that the evidence shows among other things  
 23 that CIO [REDACTED] presented the report entitled "CI SC&T  
 24 merger analysis" to the Investment Committee. That was  
 25 a report that reflected a fabricated Deloitte review

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1 report that was provided by Samsung, and in approaching  
2 individual Investment Committee members during the  
3 meeting, he referred to the "atmosphere in the media in  
4 support of the NPS's approval of the merger which" this  
5 is a quote from the PPO itself, had been artificially  
6 created through the request to Samsung earlier.

7 So in the light of the evidence that the ROK itself  
8 is relying on, it cannot now seriously be disputed that  
9 but for the fabricated and manipulated inputs to the  
10 Investment Committee process, those prepared by the NPS  
11 as to the synergy effect which Mr Partasides took you  
12 through, and those that it is now revealed the NPS  
13 knowingly procured from Samsung, the Investment  
14 Committee would not have voted in favour of the merger.

15 So any suggestion that the NPS vote would have been  
16 the same in the absence of the ROK's Treaty breaches  
17 does not really stand up to scrutiny.

18 We know what the NPS thought of the merger before  
19 any of the ROK's Treaty breaches because in March 2015  
20 NPS officials told Elliott's Mr Smith that they agreed  
21 with Elliott's assessment that the merger at market  
22 prices which then undervalued SC&T and overvalued Cheil  
23 would be a bad deal for SC&T shareholders.

24 We know that the NPS thought that the actual merger  
25 at the proposed merger ratio was a bad deal for SC&T

1 shareholders because they asked Samsung in the  
2 39th floor meeting to improve the merger ratio.

3 The terms of the deal didn't improve, but in the end  
4 the NPS Investment Committee voted for it anyway, and it  
5 did so because of the ROK's breaches of the Treaty.

6 So that was all I wanted to say about link 1 in the  
7 chain of causation. The ROK's Treaty breaches plainly  
8 caused the NPS to approve the merger.

9 I wanted to turn now to slide 138 and link 2.

10 Earlier today Mr Partasides set out the ample evidence  
11 and indeed the simple math that confirm that the NPS  
12 vote for the merger caused the merger to be approved at  
13 the extraordinary general meeting of shareholders which  
14 I don't intend to repeat. I wanted only to briefly  
15 reprise a selection of the evidence that we've already  
16 taken you through to show that it is not merely the  
17 Claimant's view that the NPS had the casting vote on the  
18 merger. Rather, as the evidence on slide 139 shows,

19 [REDACTED]  
20 [REDACTED], as we see on slide 140, this is confirmed by  
21 findings of the Korean courts and, as we see on slide  
22 141, we see the ROK's public prosecutor agreeing that  
23 the NPS had the casting vote on the merger.

24 So at all levels the ROK knew that the NPS vote  
25 would be decisive in this merger, and that is why its

1 measures were focused around the NPS, and so for the  
2 tribunal to decide otherwise, in this case, would mean  
3 to disagree with the key players on both sides of this  
4 dispute.

5 Turning now to link 3 in the chain of causation, the  
6 merger caused a loss. My brief submission here is that  
7 this is a case unlike some others you might have dealt  
8 with in which there is a notably high degree of  
9 consensus, including from independent and contemporary  
10 observers and analysts of the merger, and indeed from  
11 the NPS itself, that the merger would cause and did  
12 cause a loss to SC&T shareholders.

13 Now, Professor Dow, for the ROK, advances a theory  
14 of the quantum of damages which we'll come on to that  
15 attempts to zero out that loss. He attempts to dress  
16 this theory up as reasonable and mainstream by labelling  
17 it the "fair market value" approach. I'll come on to  
18 why we say the tribunal shouldn't be deceived by that  
19 label, and nor should it be persuaded by the zero  
20 damages theory, but the first point I want to draw  
21 attention to is the extent to which Professor Dow really  
22 is a lone voice on that subject, as we elaborated in our  
23 written pleadings, there was widespread recognition at  
24 the time of the merger and in commentary since that the  
25 merger did cause a loss to SC&T shareholders.

1 As Professor Milhaupt, Claimant's expert on the  
2 Korean capital markets, concluded, by reference to that  
3 commentary, the merger was a textbook example of  
4 a so-called tunneling transaction. As he explains in  
5 the excerpt on slide 143, it was a transaction between  
6 two related parties in a business group, designed to  
7 expropriate corporate value from minority shareholders  
8 to the benefit of the controlling shareholder.

9 Now, defined simply, tunneling, it's understood in  
10 the corporate finance literature, corporate governance  
11 literature, as the diversion of corporate resources from  
12 the corporation or its minority shareholders to the  
13 controlling shareholder. And as the ROK's expert,  
14 Professor Bae, acknowledges in the excerpt on slide 144,  
15 the structure of business groups can create conflicts of  
16 interest between controlling families of business groups  
17 and minority investors, and controlling families have  
18 incentives to siphon or tunnel the firm's assets out of  
19 the firm to increase their wealth at the expense of  
20 minority investors.

21 In his first expert report the Claimant's quantum  
22 expert, Mr Boulton, explained that that is exactly what  
23 happened here when the merger was concluded on the basis  
24 of a merger ratio that undervalued SC&T. As he said in  
25 that report, if SC&T was undervalued in the market, and

1 he concluded that it was, the merger caused a permanent  
2 value transfer from SC&T shareholders to Cheil  
3 shareholders.

4 In his second report Mr Boulton quantified the value  
5 transfer that was effected by the transfer as it related  
6 to the Claimant. He concluded, and we see on slide 145,  
7 that depending on — sorry, on slide 145 we see the  
8 Korean Won figures that he calculated the value  
9 transfer, and just I have done the conversion, it's  
10 maybe a bit easier to get your head around, it indicates  
11 an implied transfer of approximately 499 million to  
12 \$557.5 million, depending on the discount rate that's  
13 applied.

14 The value transfer at the lower discount rate of 5%  
15 is graphically depicted on slide 146 which shows somehow  
16 undervaluing SC&T in the merger ratio dilutes its  
17 interest in the merged entity and transfers value to the  
18 shareholders of Cheil.

19 Now, this value transfer analysis is a robust sense  
20 check or cross-check on Mr Boulton's detailed damages  
21 calculations to which I will turn in the final section  
22 of my submissions.

23 Now, despite having detailed and demonstrated  
24 expertise evaluating whether Korean Chaebol mergers are  
25 tunneling transactions, the ROK's expert, Professor Bae,

1 studiously avoids drawing any conclusions about whether  
2 the merger at issue here constituted tunneling, which is  
3 a reticence which we will have the opportunity to  
4 explore with him during the course of this hearing.

5 But numerous independent observers have had no  
6 hesitation in characterising the transaction in  
7 precisely this way. For example, as we see on  
8 slide 147, the influential institutional shareholders  
9 services, ISS, which is a proxy advisory service,  
10 recommended the SC&T shareholders should not support the  
11 merger on the explicit basis that voting for this  
12 transaction on the current terms permanently locks in  
13 a valuation disparity.

14 We see on slide 148 that the NPS itself was advised  
15 by KCGS, another proxy advisory service, that the merger  
16 would result in a loss or value impairment for  
17 shareholders of SC&T, and perhaps most tellingly of  
18 course we see on slide 149 that the NPS itself

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED].

22 So there could therefore be no real doubt that the  
23 merger in fact caused a loss to SC&T shareholders such  
24 as the Claimant by permanently expropriating from them  
25 some of the value of their SC&T shares and diverting

1 that value to Cheil shareholders who were benefited by  
2 the disproportionate terms of the merger.

3 That was all I proposed to say today about causation  
4 in fact, and moving on now to cause indication in law or  
5 proximate causation.

6 The issue I wanted to spend a few moments on today  
7 is the new argument that's put forward in the ROK's  
8 Rejoinder to the effect that the merger ratio is  
9 a superseding or intervening cause of the Claimant's  
10 loss, that itself was not caused by the ROK.

11 This, so it is said, breaks the chain of causation  
12 and relieves the ROK of any liability for the harm  
13 resulting from the Treaty breaches.

14 I wanted to make just a few brief observations in  
15 response to that argument.

16 First, as we note in our written submissions, the  
17 ROK bears the burden of proving that a chain of  
18 causation is broken by an intervening act, and the  
19 suppositions about what could have happened, had the  
20 ROK — that the ROK puts forward in its pleadings are  
21 plainly inadequate to discharge this burden, but second,  
22 and more substantively, the merger ratio is a surprising  
23 candidate for an intervening or superseding cause in the  
24 sense of being a cause that intervened in the chain of  
25 causation after the NPS vote for the merger since the

1 merger ratio was fixed weeks before that vote on  
2 26 May 2015 when the SC&T and Cheil boards announced the  
3 merger proposal.

4 Accordingly, when the Investment Committee decided  
5 how to exercise the NPS vote on the merger, it was  
6 deciding precisely whether to endorse the merger ratio  
7 that had already been fixed. And the NPS endorsed the  
8 merger ratio again when it did vote the NPS SC&T shares  
9 in favour of the merger at the extraordinary general  
10 meeting on 17 July 2015.

11 Now, in the Rejoinder the ROK gamely tries to  
12 downplay this reality. They say at paragraph 478 of the  
13 Rejoinder:

14 "The most that can be said about the NPS's vote to  
15 approve the merger is that it 'accepted' the merger  
16 ratio."

17 In fact, a good deal more can be said about it than  
18 that. It can be said that by giving the casting vote in  
19 favour of the merger, the NPS caused the merger at the  
20 harmful ratio to occur. This point has been addressed  
21 in our previous submissions.

22 It can also be said, as we discussed earlier, that  
23 the NPS originally opposed the merger, specifically on  
24 grounds that the merger ratio was unfair to SC&T  
25 shareholders. And finally, it can be said by reference

1 to evidence that we just discussed that NPS CIO [REDACTED]  
 2 specifically asked Samsung to adjust the merger ratio  
 3 because of the loss it would inflict on SC&T  
 4 shareholders, although in the event no such adjustment  
 5 was forthcoming.  
 6 Moreover, as we've explained in detail in pleadings  
 7 on proximate causation, causing a loss to SC&T  
 8 shareholders by consummating the merger at a merger  
 9 ratio that undervalued SC&T and overvalued Cheil was not  
 10 just the incidental effect of mechanically applying  
 11 a statutory formula here, it was not just an unintended  
 12 consequence -- it was the whole point of the merger  
 13 scheme.  
 14 The merger would have done nothing to address the  
 15 [REDACTED] family's succession issue if it didn't assist [REDACTED]  
 16 to increase and consolidate his hold on the crown jewel  
 17 Samsung Electronics, and the merger would only do that  
 18 if it was concluded on a ratio that was favourable to  
 19 [REDACTED] and Cheil and unfavourable to SC&T shareholders.  
 20 The ROK itself now spells this out in the PPO  
 21 indictment. In the ROK's words, as Mr Partasides took  
 22 you through this morning, and as you again see on  
 23 slide 151, the key to having control of Samsung Group  
 24 was to secure control of Samsung Electronics and to this  
 25 end it was essential to secure control of Samsung Life

1 and SC&T.  
 2 And simply we see on the next slide, 152, [REDACTED]  
 3 needed to strengthen his control of Samsung Electronics  
 4 by obtaining direct control over SC&T. And we see on  
 5 slide 153 that this is further confirmed by internal  
 6 Samsung documents that were quite recently disclosed by  
 7 the ROK.  
 8 In the excerpt from the PPO indictment that we see  
 9 on slide 154, we see the ROK going on to explain the  
 10 significance of the merger ratio to Samsung's scheme,  
 11 spelling out that a merger between Everland, which was  
 12 what Cheil was originally named, it was later renamed  
 13 Cheil, and SC&T, that that merger was "at the core of  
 14 the succession plan". So it was important to "create  
 15 a favourable merger ratio" for that merger.  
 16 In the balance of the PPO indictment, the ROK goes  
 17 on to detail, how that plan was put into action with the  
 18 active support of the NPS.  
 19 And evidence continues to come out from the PPO  
 20 investigation concerning the lengths to which Samsung  
 21 went to manage the two entities' share prices in order  
 22 to achieve the desired merger ratio.  
 23 By way of example, we see on slide 155 a document  
 24 from April 2015 that the PPO obtained from Samsung in  
 25 which Samsung candidly acknowledged share price

1 management required from now on until the general  
 2 meeting of shareholders, August 14, and during the  
 3 period of exercising appraisal rights. And it goes on  
 4 to detail steps that it would take to variously boost  
 5 and decrease share prices of Cheil and SC&T.  
 6 So in addition to the fact that as a matter of pure  
 7 chronology, the merger ratio was fixed before the  
 8 majority of the ROK's measures in relation to the merger  
 9 even occurred, the merger ratio was the key term of the  
 10 merger proposal on which the NPS subsequently voted.  
 11 And nor is there any basis on which the ROK could  
 12 plausibly claim not to have known that the merger ratio  
 13 would cause a loss to SC&T shareholders. The ROK not  
 14 only knew this, it understood that a merger ratio that  
 15 would cause a loss to SC&T shareholders was the gist of  
 16 the Samsung succession scheme. Indeed, among other  
 17 things, the NPS cooked up a fictitious synergy analysis  
 18 precisely to conceal the loss that was caused by the  
 19 unfair merger ratio. So the ROK not only went along  
 20 with the plan to cause a loss to SC&T shareholders like  
 21 the Claimant; it was an active participant in that plan.  
 22 In the interests of time, that's all I propose to  
 23 say on causation, and unless the tribunal has questions  
 24 on causation, I propose to move on now to the quantum of  
 25 damages.

1 In this case the Claimant claims damages in  
 2 a principal amount ranging between \$379 and  
 3 \$539 million. The Respondent not only asserts that the  
 4 Claimant suffered no harm at all; it advances wholly  
 5 speculative arguments about fantasy rates of return  
 6 designed to obscure the truly epic scale of its own  
 7 wrongdoing.  
 8 My aim in the balance of in time is to explain why  
 9 the Claimant is entitled to the damages it seeks and by  
 10 putting the ROK's misplaced speculations in their proper  
 11 context, to put them to rest.  
 12 By way of a roadmap to these submissions, after  
 13 briefly addressing the familiar framework for analysing  
 14 the quantum of damages, I plan to address the three main  
 15 topics on which the quantum experts differ.  
 16 First, what is the appropriate valuation  
 17 methodology; second, how should any so-called "Korea  
 18 discount" or "holding company discount" be taken into  
 19 account; and finally, what would the value of Claimant's  
 20 investment have been in the proper counterfactual  
 21 scenario and what is that scenario?  
 22 So turning to the legal framework, as I do not need  
 23 to remind the tribunal, but you can nevertheless see on  
 24 slide 158, the aim of compensation for breach of an  
 25 international obligation is in the classic formulation,

1 as far as possible, to wipe out all the consequences of  
 2 the illegal act and re-establish the situation which  
 3 would in all probability have existed if that act had  
 4 not been committed. It is equally well established that  
 5 such compensation is to include expectation damages  
 6 insofar as those are established in the language of  
 7 Article 36(2) of the ILC Articles on State  
 8 Responsibility.

9 That is full reparation pursuant to customary  
 10 international law and the Treaty that's at issue here  
 11 requires damages to be calculated on a basis that  
 12 includes gains that would have materialised but for the  
 13 breach.

14 The customary international law standard of full  
 15 reparation accordingly dictates consideration of  
 16 a counterfactual scenario — what would have happened  
 17 and specifically in this case what would the value of  
 18 the Claimant's investment in SC&T shares have been, if  
 19 the Treaty had not been breached.

20 Accordingly, the primary valuation analysis put  
 21 forward by Mr Boulton is the familiar but for analysis.  
 22 What would Claimant's SC&T shares have been worth if the  
 23 Treaty had not been breached? The difference between  
 24 that and what those shares actually were worth is the  
 25 quantum of damages.

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1 I can summarise Mr Boulton's answers to the three  
 2 key quantum questions I just set out as follows.

3 First, with respect to valuation methodology,  
 4 Mr Boulton contends that SC&T should be valued by the  
 5 sum of the parts methodology. He considers that one  
 6 must look beyond the price at which SC&T shares were  
 7 trading and determine the intrinsic value of SC&T, and  
 8 he considers that the appropriate methodology for doing  
 9 so values the component parts of SC&T and then combines  
 10 them, the well-established methodology.

11 Second, the value of Claimant's investment in SC&T,  
 12 he considers, should be subject to a holding company  
 13 discount of 5 to 15%, not the full 40% observed discount  
 14 to SC&T's sum of the parts value.

15 Mr Boulton considers that there is no "standard",  
 16 "Korea" or "holding company" discount, but instead this  
 17 must be analysed for each company by reference to its  
 18 individual circumstances. He considers that the  
 19 observed discount for — at which SC&T shares were  
 20 trading, which was approximately 40%, can be  
 21 disaggregated into two components, being a true holding  
 22 company discount and an excess discount. He considers  
 23 that the true holding company discount should be  
 24 subtracted from the sum of the parts value to arrive at  
 25 a valuation of Claimant's investment. He considers that

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1 the excess discount is specific to SC&T and can be  
 2 attributed to market expectations of a predatory  
 3 transaction such as the merger and to market  
 4 manipulation.

5 Finally, in the counterfactual scenario in which the  
 6 ROK does not breach the Treaty, and therefore the merger  
 7 is not approved, Mr Boulton considers that the excess  
 8 discount would promptly unwind, and SC&T's share price  
 9 would rise towards intrinsic value which he considers to  
 10 be the sum of the parts value minus the true holding  
 11 company discount of 5 to 15%.

12 Now, I will turn shortly to explaining the  
 13 Claimant's position in relation to each of those three  
 14 issues in some more detail, but to make the position  
 15 a little more concrete, Mr Boulton's quantification of  
 16 the principal amount of damages claimed at a rate of  
 17 possible discounts is depicted on slide 159.

18 You see the starting point is the value that  
 19 Claimant's SC&T shareholding would have if the merger  
 20 had been rejected, and that varies, as you see,  
 21 depending on the amount of the residual holding company  
 22 discount that is applied, which is a topic that is  
 23 disputed between the parties.

24 That's the first row.

25 From that one then subtracts what the Claimant

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1 actually received for its SC&T shares, that's the second  
 2 row. That doesn't change, and that is undisputed, and  
 3 the difference is the principal amount of damages  
 4 claimed which converted from dollars — converted to  
 5 dollars, as you see, ranges between 379 million and  
 6 539 million, depending on the amount of the discount  
 7 that is applied.

8 So that was a very fast gallop through. Let's turn  
 9 to those issues in a little bit more detail.

10 The primary question on which Mr Boulton and  
 11 Professor Dow differ concerns valuation methodology.

12 As I indicated, Mr Boulton's valuation was performed  
 13 according to sum of the parts methodology, which the  
 14 tribunal will recognise as a standard methodology for  
 15 valuing business groups like SC&T.

16 As we see on slide 161, Mr Boulton explained his  
 17 reasons for favouring this approach to valuation on the  
 18 basis that:

19 "In [his] experience market participants consider  
 20 the most appropriate method of valuation for an entity  
 21 like SC&T to be sum of the parts analysis, in which each  
 22 of the assets are summed to arrive at a valuation of the  
 23 company as a whole."

24 Professor Dow's critiques of Mr Boulton's sum of the  
 25 parts methodology are addressed in our written

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1 submissions and we will address them again with him on  
 2 examination to show that in fact Mr Boulton's sum of the  
 3 parts methodology is robust and reliable.  
 4 What I wanted to point out today only briefly was  
 5 that indeed this was a standard methodology, used by  
 6 market participants, including, as we see on slide 162,  
 7 investors like Elliott. We see the evidence of  
 8 Mr James Smith. We see on slide 163 evidence that  
 9 contemporaneous market analysts such as Credit Suisse  
 10 and UBS, and we see on slide 164 Samsung Securities  
 11 using sum of the parts valuations of SC&T.  
 12 Now, those market participants sometimes use the  
 13 terminology of net asset value or NAV to describe the  
 14 same bottom-up approach to valuation. As Professor Dow  
 15 explains, "NAV is often used as synonymous with sum of  
 16 the parts", and in his report he says he uses "NAV" to  
 17 mean a sum of the parts evaluation.  
 18 On that basis I understand it is common ground  
 19 between the quantum experts that "NAV" and "sum of the  
 20 parts" are broadly synonymous with each other, and  
 21 customary approaches to valuation used by market  
 22 participants.  
 23 For his part, Professor Dow does not offer an  
 24 alternative valuation of SC&T. He instead proceeds on  
 25 the basis that no valuation analysis is really necessary

1 here. The only value that is relevant is the price at  
 2 which SC&T shares were traded. He says in the excerpts  
 3 from his report on slide 165 when there is an active  
 4 market for an asset no formal theory of value is needed.  
 5 We can take the market's word for it. He says:  
 6 "If the market is efficient, the market price is the  
 7 fair market value."  
 8 And he then concludes:  
 9 "The market for SC&T shares is semi-strong  
 10 efficient."  
 11 So Professor Dow's basic argument is that for the  
 12 purpose of calculating damages, SC&T can only ever be  
 13 worth the value implied by what its shares trade at on  
 14 the Stock Exchange from time to time.  
 15 Professor Dow labels this argument the "fair market  
 16 value approach", no doubt in an effort to obscure the  
 17 fact that other valuation methods, whether called "NAV"  
 18 or "sum of the parts", are methods for determining fair  
 19 market value.  
 20 Our Reply and Mr Boulton's second report pointed out  
 21 three fatal flaws in Professor Dow's analysis.  
 22 The first fatal flaw is that it suffers from  
 23 circular logic.  
 24 The merger proceeding on a merger ratio that was  
 25 itself based on listed share prices that undervalued

1 SC&T and overvalued Cheil was the very means by which  
 2 the merger caused the loss that was suffered by Claimant  
 3 here. The mechanism that caused the loss, that being  
 4 deliberately distorted share prices, cannot logically be  
 5 the measure of that loss.  
 6 Professor Dow's argument therefore neatly, I say too  
 7 neatly, zeros out any loss claim arising out of an  
 8 argument that the share price used in the merger ratio  
 9 undervalued SC&T. Whether deliberately or not,  
 10 a fixation on share price obscures the very thing that  
 11 needs to be measured, and that simply can't be the right  
 12 methodology.  
 13 The second fatal flaw in Professor Dow's analysis is  
 14 that it is just factually untenable in the face of the  
 15 crescendo of evidence that SC&T's share price was the  
 16 subject of active manipulation over a long period of  
 17 time leading up to the merger for the very purpose of  
 18 undermining SC&T's share price at the time of the merger  
 19 in order to advantage the [REDACTED] family.  
 20 Indications that this was the case had already  
 21 surfaced by the time the Claimant filed its amended  
 22 Statement of Claim, and Mr Boulton's first expert  
 23 report.  
 24 The Claimant was able to be more concrete about  
 25 these allegations in the Reply and Mr Boulton's second

1 report, including by reference to findings by the Seoul  
 2 High Court shown on slide 168 that the merger ratio had  
 3 been meticulously prepared, but now, given that the PPO  
 4 indictment which spells out the ROK's own case against  
 5 [REDACTED] specifically for market manipulation has now been  
 6 made public and put on the record of this arbitration by  
 7 the ROK itself, any further reliance on SC&T's listed  
 8 share price as reflective of the fair market value of  
 9 SC&T is, I submit, entirely unsustainable.  
 10 As was canvassed in Claimant's application for  
 11 adverse inferences and supplemental document production,  
 12 there is abundant evidence of Samsung's control and  
 13 manipulation of the share prices of SC&T and Cheil both  
 14 before and after the merger announcement.  
 15 In the indictment the ROK now details a scheme to  
 16 prepare Cheil and SC&T and actively to manage their  
 17 share prices to create a favourable merger ratio for the  
 18 planned merger stretching back to the year 2012.  
 19 The scheme involved numerous business decisions and  
 20 decisions about the release of price sensitive  
 21 information that were designed to and did flatter  
 22 Cheil's share price and depress SC&T share price in the  
 23 years and months leading up to the merger, including in  
 24 the period when the share prices that were the basis on  
 25 which the merger ratio was set were determined.

1 By way of example, we see on slide 169 indication  
 2 that the SC&T board deliberately suppressed news of  
 3 a major construction contract award in Qatar until after  
 4 the merger announcement in order to artificially  
 5 suppress the SC&T share price before the merger was  
 6 announced. Other actions we see on slide 170 were  
 7 designed to inflate Cheil's share price, such as  
 8 tactically announcing a plan to list the Bioepis  
 9 subsidiary on the NASDAQ exchange.

10 In the light of revelations like this,  
 11 Professor Dow's confident conclusion that SC&T's market  
 12 price is a more reliable indicator of its fair market  
 13 value, more reliable, he suggests, than the detailed  
 14 objective analysis of SC&T's underlying assets that's  
 15 put forward by Mr Boulton, just cannot be sustained.

16 By the time Professor Dow filed his second report,  
 17 it's apparent that at least the existence of the PPO  
 18 indictment, if not its full contents, had been brought  
 19 to his attention. He refers to it in a footnote as is  
 20 depicted on slide 171.

21 You see there he says:  
 22 "I am aware of the indictment."  
 23 He apparently has had instruction from counsel.  
 24 It's not, however, clear from the description in the  
 25 footnote that Professor Dow had himself yet had

1 an opportunity to study the PPO indictment.  
 2 Now, one can readily understand the value of an  
 3 instruction along the lines of what we see in this  
 4 footnote to Professor Dow in that it might enable him to  
 5 try to salvage some part of his effort to rely on SC&T's  
 6 market price as the Alpha and Omega of his valuation  
 7 analysis. Unfortunately for Professor Dow, to the  
 8 extent that he was instructed that the indictment  
 9 discloses impacts on SC&T's share price only after the  
 10 merger announcement, that's incorrect. As we just saw,  
 11 the evidence in the PPO indictment of impacts on SC&T  
 12 share price dates back months and years prior to the  
 13 merger announcement.

14 As Professor Dow himself expressly opined in his  
 15 first report action we see now on slide 172, "price may  
 16 not reflect value if material, relevant information is  
 17 withheld from the public or if the market itself is  
 18 being manipulated".

19 Given what we now know, according to the ROK itself  
 20 about the market in fact having been manipulated,  
 21 Professor Dow's theory that when it comes to valuing C&T  
 22 we can take the market's word for it simply no longer  
 23 tenable.

24 Finally for the same reasons, market efficiency, by  
 25 which Professor Dow sets so much store does not justify

1 using listed share price as a proxy for value either.

2 As Mr Boulton explains in the excerpt in the first  
 3 excerpt that's on slide 174, market efficiency tells you  
 4 only how effectively a given market incorporates  
 5 information. The academic sources on which  
 6 Professor Dow relies, which are the second excerpt on  
 7 the slide, are not to the contrary. They define  
 8 semi-strong efficiency only by reference to the  
 9 information that's known to the market, without any  
 10 guarantee that that information is accurate or complete.

11 So a determination of market efficiency therefore  
 12 simply cannot validate a market against — a market  
 13 price against a charge of manipulation.

14 So for all these reasons, as we summarise on  
 15 slide 175, in order to determine the value of the  
 16 Claimant's investment but for the ROK's Treaty breaches,  
 17 SC&T's listed price in the period leading up to the  
 18 merger is, in our submission, unreliable as a measure of  
 19 the value of the SC&T.

20 And Mr Boulton's sum of the parts valuation, which  
 21 relies on methodology that is widely used by market  
 22 participants is the proper methodology for valuing that  
 23 investment.

24 As a final aside on valuation methodology, I'll just  
 25 note that in what you have to take as an implied

1 endorsement of Mr Boulton's sum of the parts methodology  
 2 and an implied rebuke to Professor Dow's reliance on  
 3 share price, the ROK's other expert, Professor Bae,  
 4 offers his own revised sum of the parts analysis,  
 5 perhaps anticipating that the tribunal would find  
 6 Professor Dow's methodology untenable.

7 Now, we will explore in examination with  
 8 Professor Bae some obvious flaws in his analysis, but at  
 9 the level of basic methodology, Professor Bae's approach  
 10 contradicts Professor Dow's reflective reliance on share  
 11 prices as the indicator of value for SC&T, and this is  
 12 a further reason that the tribunal can have confidence  
 13 that sum of the parts is the appropriate methodology.

14 So that was the first disputed quantum issue.

15 The next question on which the quantum experts  
 16 differ relates to the so-called "Korea" or "holding  
 17 company discount".

18 The basic debate is this: Professor Dow argues that  
 19 the approximately 40% discount to the sum of the parts  
 20 value at which he accepts that SC&T shares were trading  
 21 in the period prior to the merger should be considered  
 22 a standard feature of Korean companies and/or of holding  
 23 companies in Korea and that it should be expected to  
 24 persist unchanged for any such company, including SC&T,  
 25 in perpetuity.

1 Now, the consequence of this argument, not  
 2 accidentally, one suspects, is that again the value of  
 3 SC&T is limited to the observed market price and the  
 4 Claimant would be entitled to no damages.  
 5 So a large fixed discount is just another route to  
 6 the same market price equals zero damages destination  
 7 for Professor Dow.  
 8 Mr Boulton for his part shows that Professor Dow's  
 9 analysis is too simplistic, and that it materially  
 10 overstates both how large this discount was likely to be  
 11 and how it was likely to manifest in relation to SC&T in  
 12 the appropriate counterfactual scenario.  
 13 So based on a thorough analysis of the 40% discount,  
 14 which he calls the observed discount, in relation to  
 15 SC&T, Mr Boulton concludes first that there is no  
 16 standard "Korea discount" or "holding company discount"  
 17 that applies to every holding company in Korea. Indeed,  
 18 he observes that some Korean holding companies,  
 19 sometimes trade at an observed premium to their sum of  
 20 the parts value. Cheil was a primary example of this  
 21 during the period under study, and in fact SC&T has also  
 22 traded at a premium to its sum of the parts value at  
 23 different points in the past.  
 24 So the implication that Mr Boulton draws from this  
 25 is that it is necessary to analyse what is driving any

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1 observed discount or premium for a given company at any  
 2 given time, and Mr Boulton conducts this analysis while  
 3 Professor Dow does not.  
 4 Second, and we see on slide 177, Mr Boulton -- based  
 5 on that analysis, Mr Boulton concludes that the observed  
 6 discount for SC&T of approximately 40% can be separated  
 7 into two distinct components. He concludes that one  
 8 part of the observed discount can be attributed to  
 9 general market concerns about predatory conduct by the  
 10 [REDACTED] family such as the merger that would result in  
 11 a loss of value to SC&T shareholders and/or that it can  
 12 be attributed to market manipulation by Samsung. This  
 13 he identifies as SC&T's excess discount. The remainder  
 14 of the observed discount Mr Boulton identifies as SC&T's  
 15 holding company discount.  
 16 Third, Mr Boulton is able to calculate how much of  
 17 the observed discount is excess discount and how much is  
 18 holding company discount by conducting a targeted piece  
 19 of analysis which he refers to in his second report as  
 20 the merged entity analysis.  
 21 Now, an overview of this analysis is on slide 178.  
 22 Be assured you will have a detailed explanation of it  
 23 from Mr Boulton later in the hearing who will no doubt  
 24 do a better job of it than I am about to do. I want to  
 25 briefly explain the key insight now.

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1 That is that any discount observed in respect of the  
 2 merged entity logically must reflect only the residual  
 3 holding company discount. And that's because the Cheil  
 4 component of the merged entity, which is a composite of  
 5 Cheil and SC&T, would reflect an excess premium that  
 6 would offset any excess discount that affected the SC&T  
 7 component of the merged entity.  
 8 That is because the Cheil share price will have been  
 9 inflated by an expectation of benefiting from the very  
 10 same value transfer that would have depressed SC&T share  
 11 price due to a corresponding expectation that SC&T would  
 12 be the victim in a tunneling transaction. So the value  
 13 that was going to be transferred from SC&T will have  
 14 been assigned by the market to Cheil as a premium.  
 15 Accordingly, by calculating the discount between X,  
 16 what's depicted as X on the slide there, the sum of the  
 17 parts value of the merged entity, and Y, the actual  
 18 listed value of the merged entity at two relevant dates,  
 19 Mr Boulton is able to determine that the true holding  
 20 company discount is 5%, not 40%.  
 21 To be conservative, he then performed an additional  
 22 calculation at dates that were chosen to reflect the  
 23 largest implied holding company discount, and on that  
 24 basis calculated a maximum holding company discount of  
 25 15%, and the remainder of the 40% observed discount

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1 outside of that 5 to 15% range he identified as excess  
 2 discount.  
 3 So on the basis of this analysis, as is summarised  
 4 on slide 179, Mr Boulton determined that SC&T's true  
 5 holding company discount, as distinct from its excess  
 6 discount, ranges from 5 to 15% of the 40% observed  
 7 discount, with the correct number likely to be towards  
 8 the lower end of this range, and he concluded that 25  
 9 to 35% of the observed 40% discount consists of excess  
 10 discount that was attributable to market expectations of  
 11 predatory conduct by Samsung and/or to market  
 12 manipulation.  
 13 So that brings me to the final disputed quantum  
 14 issue that I wanted to talk through in these opening  
 15 submissions. What would the value of Claimant's SC&T  
 16 shares have been in the proper counterfactual scenario  
 17 and what is that scenario?  
 18 So having disaggregated the observed discount into  
 19 two components, pursuant to the framework laid down by  
 20 Chorzów Factory, Mr Boulton analyses what would happen  
 21 to each of those components in the counterfactual  
 22 scenario in which the Treaty was not breached by the  
 23 NPS, it voting in favour of the merger, and accordingly  
 24 the merger was not approved.  
 25 Mr Boulton opines that in that counterfactual

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1 scenario, conservatively, the true holding company  
2 discount, the 5 to 15%, might be expected to persist,  
3 but the excess discount would be likely to disappear  
4 when the merger was defeated.

5 He explains in the excerpt on slide 181 that in that  
6 scenario market concerns regarding the transfer of value  
7 to ██████ that would result in a loss of value to SC&T  
8 shareholders would have been substantially reduced or  
9 extinguished. This is because the rejection of the  
10 merger would have signalled to the market that SC&T was  
11 controlled by a rational shareholder group that was  
12 interested in maximising value for the benefit of all  
13 shareholders rather than for the benefit of the ██████  
14 family or other minority group.

15 Indeed, as we see on slide 182, the NPS research  
16 team itself predicted that ██████  
17 ██████, although  
18 of course this view, as we saw earlier, ██████  
19 ██████.

20 Mr Boulton also noted that a further tightening of  
21 the holding company discount towards SC&T's undiscounted  
22 full intrinsic or sum of the parts value might be  
23 expected to result from the Claimant engaging further  
24 with Samsung around efforts to restructure SC&T on fair  
25 terms, although he acknowledged that it is difficult to

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1 quantify the effect of that shareholder activism with  
2 any precision.

3 So Mr Boulton's opinion about the likely effect of  
4 defeating the merger on the SC&T share price's increase  
5 in the SC&T price after defeat of the merger is  
6 supported by Professor Milhaupt's opinion, and we see on  
7 slide 183 Professor Milhaupt's opinion that this  
8 therapeutic effect on the share price would be  
9 a by-product of shareholder activism of the type  
10 represented by Elliott. It would mitigate the observed  
11 discount SC&T shares, and he says effective opposition  
12 to the merger could be expected to have therapeutic  
13 effect to the benefits of all unaffiliated shareholders  
14 in SC&T because of its potential to mitigate the agency  
15 conflict between family controllers and minority  
16 investors.

17 Now, these somewhat dry academic terms should not  
18 obscure the reality that defeat of the merger due to  
19 a no vote by the NPS would have been, to use  
20 a non-technical term, a big deal. The NPS is arguably  
21 the most important shareholder in the Korean stock  
22 exchange because it holds a significant stake in all  
23 major Korean Chaebol.

24 Given the very high stakes for the ██████ family and  
25 Samsung, Korea's biggest and most powerful Chaebol, the

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1 NPS aligning with other minority shareholders in SC&T in  
2 order to stand up for shareholder value would have  
3 represented, if not a seismic shift, then a clear signal  
4 to the market that the investors in SC&T that were not  
5 affiliated with the ██████ family or Samsung had sufficient  
6 voting power to defeat a value destructive tunneling  
7 transaction, and that would have had a springboard  
8 therapeutic effect on SC&T share price.

9 Notably, as we see on slide 184, the ROK's own  
10 expert, Professor Bae, broadly agrees with  
11 Professor Milhaupt. Professor Bae cites  
12 Professor Milhaupt's opinions concerning the therapeutic  
13 effect of defeating the merger and indicates that he  
14 generally agrees with them.

15 Professor Bae limits his discussion in counterpoint  
16 to Professor Milhaupt only to the narrow issue of the  
17 so-called wedge which is the disparity between the  
18 control rights enjoyed by the family controlling  
19 a Chaebol and the actual economic stake the family has  
20 in the group.

21 Now, we will explore with Professor Bae the extent  
22 to which that narrow analysis does or does not respond  
23 to Professor Milhaupt's analysis during the course of  
24 this hearing.

25 Mr Boulton's quantification of the effect of

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1 unwinding the excess discount and a range of possible  
2 residual holding company discounts in the counterfactual  
3 scenario is depicted on the table which you've seen  
4 before. Again, we see the starting point, the value of  
5 the SC&T shareholding and the residual figures on the  
6 net loss to EALP.

7 With respect to the likely time frame for this  
8 discount to tighten and the value of Claimant's  
9 shareholding in SC&T to reflect the positive impact of  
10 an NPS no vote on the merger, we see on slide 186 that  
11 based on Professor Dow's own opinion regarding market  
12 efficiency and the rapidity with which information will  
13 be incorporated into prices, elimination of the excess  
14 discount should be expected to occur promptly upon the  
15 NPS voting against the merger, or, as Professor Dow  
16 himself stated, given that the market for SC&T shares is  
17 "semi-strong efficient", it incorporates news — this is  
18 a quote:

19 "... instantaneously ... The share price's response  
20 to an important corporate event does not materialise  
21 gradually over time, or at some specific date after the  
22 event. Rather, the response is essentially immediate."

23 Although he disagrees about what the impact of the  
24 merger's rejection on SC&T share price would have been,  
25 we see on slide 187 that Professor Bae agrees that the

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1 implication of the market being semi—strong efficient is  
2 that there would have been instantaneous incorporation  
3 of the information arising from the merger being  
4 rejected into Samsung C&T's stock price.

5 So on the basis of these insights about market  
6 efficiency and his opinion about the effect of a no vote  
7 on unwinding the excess discount, Mr Boulton's bottom  
8 line is that in the absence of the ROK's breach of the  
9 Treaty, that is in a scenario in which the NPS voted  
10 against the merger and the merger did not occur, the  
11 excess discount which accounts for up to 35% of the  
12 total 40% observed discount to share prices would  
13 promptly, if not instantaneously, unwind.

14 So in response, in his second report, Professor Dow  
15 does not retract or change his opinion that the market  
16 for SC&T shares was semi—strong efficient,  
17 notwithstanding that the obvious implication of this is  
18 that the market would rapidly assimilate the information  
19 that the NPS had joined with other minority shareholders  
20 to oppose the merger and stand up to Samsung and the ■  
21 family to protect shareholder rights and the  
22 consequential impact on SC&T's share price accordingly.

23 Instead it has to be said that Professor Dow rather  
24 ties himself in knots to avoid that logical conclusion.

25 He first disputes that the proper but for or

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1 counterfactual scenario is that the NPS would have voted  
2 against the merger and that the vote would therefore not  
3 have carried. He argues instead that the counterfactual  
4 scenario would somehow be uncertainty over whether the  
5 merger would be approved and he affects agnosticism  
6 about whether the SC&T share price would have risen or  
7 fallen.

8 Now, Mr Partasides dealt earlier with reasons why  
9 the submission that the merger might nevertheless  
10 proceed if the NPS had voted against it is factually  
11 unconvincing.

12 For my part, the submission is that, with all due  
13 respect, in circumstances where the breach alleged  
14 includes the NPS casting vote on the merger, it's not  
15 really open to Professor Dow to confine his analysis to  
16 a counterfactual scenario that does not address the  
17 breach alleged in order to avoid dealing with the  
18 consequences of his own opinion on market efficiency.

19 Professor Dow's second gambit on market efficiency  
20 and the likely impact of an NPS no vote is to offer some  
21 15 paragraphs of argument about factual evidence and  
22 what it shows or does not show together with a critique  
23 of expert evidence in areas, including about Chaebol and  
24 Korean corporate governance, as to which he does not  
25 claim expertise.

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1 The main thrust of the argument is that since SC&T,  
2 he says, would still be "controlled by the ■  
3 family" — that's a quote — the risk of predatory  
4 conduct and manipulation that had previously depressed  
5 the SC&T share price, and with it the excess discount,  
6 would persist.

7 Now, of course it is for the tribunal and not for  
8 Professor Dow to weigh the evidence and determine what  
9 would be likely to happen in the counterfactual  
10 scenario. And in my submission the evidence shows  
11 precisely the opposite.

12 The evidence clearly shows that the whole point of  
13 this sorry episode was for the ■ family to secure  
14 control of SC&T that it did not already have. Moreover,  
15 if a majority of the nonaligned SC&T shareholders had  
16 rebuffed the unfair merger proposal, this would not have  
17 conveyed to the market that the ■ family controlled  
18 SC&T. It would have conveyed precisely the opposite.

19 As Professor Milhaupt and Mr Boulton opine, the  
20 message to the market would have been that SC&T was  
21 under the control of a rational shareholder group,  
22 including the NPS, and that that group was not going to  
23 stand for the kind of self—dealing that had  
24 characterised business as usual in the past. Defeat of  
25 the merger would have been a watershed moment. It would

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1 have shifted the paradigm.

2 Samsung and the ■ family certainly understood that  
3 this was what was at stake in their battle with Elliott  
4 and other rational opponents of the merger, and the ROK  
5 understood this too.

6 In the light of that, it is simply implausible for  
7 Professor Dow to maintain that the NPS voting the merger  
8 down would have been a non—event. Literally no one  
9 involved in this whole episode approached the NPS vote  
10 on the merger with such casual indifference.

11 Ultimately, I submit that Professor Dow has no  
12 convincing answer to the analysis put forward by  
13 Mr Boulton and endorsed by Professor Milhaupt, and as to  
14 the timing of the impact, even endorsed by the ROK's  
15 Professor Bae, concerning the likely impact on the SC&T  
16 share price of an NPS no vote on the merger, and that is  
17 why Claimant submits that in the counterfactual scenario  
18 in which the merger did not proceed, the tribunal should  
19 find that the excess discount to SC&T's market price  
20 would have promptly, if not indeed instantaneously,  
21 unwound.

22 I turn now to the final point I want to address  
23 briefly on the quantum of damages which is the  
24 irrelevance to the tribunal's analysis of the ROK's and  
25 Professor Dow's frankly wild calculations of the

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1 Claimant's putative return on investment.  
 2 Now, Professor Dow devotes a significant portion of  
 3 his second report to critiquing the Claimant's trading  
 4 plans and, misleadingly, to inferring from them beliefs  
 5 on the part of the Claimant about issues addressed in  
 6 Mr Boulton's opinions.  
 7 One particular error that Professor Dow makes in  
 8 respect of trading plans is to purport to infer from  
 9 them an expected rate of return on the investment in  
 10 SC&T shares. He transparently does this so that he may  
 11 then play around with various numerators and  
 12 denominators to cast the Claimant's claim for admittedly  
 13 substantial damages as improperly seeking some kind of  
 14 windfall.  
 15 Now, there is much that is wrong with these  
 16 arguments, including that in a rush to put thoughts in  
 17 James Smith's head, Professor Dow ignores the evidence  
 18 that Mr Smith has already given about the limited  
 19 relevance of the trading plans to guiding an exit from  
 20 an investment. Perhaps, given his academic experience,  
 21 Professor Dow simply does not understand the actual role  
 22 and use of a trading plan in managing an investment such  
 23 as the Claimant's investment in SC&T.  
 24 But more fundamentally, Professor Dow's focus on the  
 25 trading plans overlooks the nature and the scale of the

1 threat to Claimant's interests that the merger proposal  
 2 represented.  
 3 Once that proposal was on the table, the question of  
 4 what rules of thumb should we follow for making  
 5 purchases of SC&T shares, which is the question that the  
 6 trading plans principally answered, was displaced by the  
 7 more exigent: what loss are we facing and what can we do  
 8 to avoid it? Those are obviously different questions,  
 9 and the question of what rate of return might guide  
 10 purchasing in circumstances where the ROK did not breach  
 11 the Treaty is frankly just irrelevant to the question of  
 12 what compensatory damages are awarded once it did.  
 13 Unfortunately, due to the ROK's breaches of the  
 14 Treaty, the Claimant was not able to protect its  
 15 investment of several hundreds of millions of dollars  
 16 from the huge losses that it and everybody else who was  
 17 paying attention, including the ROK, knew would be  
 18 inflicted on SC&T shareholders if the merger were  
 19 approved.  
 20 The scale of the losses here is undeniably  
 21 significant. But the suggestion that this in some way  
 22 reflects negatively on the Claimant, who is the victim  
 23 here, is actually pretty remarkable, albeit it is of  
 24 a piece with the hostility that the ROK has shown to  
 25 Elliott throughout this episode.

1 The magnitude of the damages claimed here reflects  
 2 no more, but no less, than the epic and criminal scale  
 3 of the corruption, collusion, circumvention,  
 4 intervention, manipulation, and fabrication that the ROK  
 5 government at all levels engaged in, together with  
 6 ██████████ and his confederates, to achieve Samsung's huge  
 7 but illicit ambitions in respect of SC&T and Cheil, what  
 8 Mr Partasides fairly described this morning as facts of  
 9 unusual gravity.  
 10 The stakes for Samsung and the ██████████ family's hold on  
 11 it were existential. What was at stake was nothing less  
 12 than a generational transfer of power and avoidance of  
 13 potentially ruinous inheritance tax. And in ██████████'s  
 14 own words, which we now see on slide 189, ██████████  
 15 ██████████.  
 16 At the very meeting where the NPS CIO ██████████ pressed  
 17 Samsung to improve the merger ratio, according to the  
 18 NPS's own notes of that meeting, ██████████ explained:  
 19 "██████████  
 20 ██████████  
 21 ██████████  
 22 ██████████"  
 23 And the domestic political and legal costs have  
 24 already been monumental. The President of the Republic  
 25 of Korea was impeached over her role in the scandal.

1 Domestic criminal proceedings have rendered judgments  
 2 and serious penal sentences for her and for ██████████, and  
 3 for several other government and Samsung individuals  
 4 involved in the wrongdoing.  
 5 But it is in this forum, and this forum alone, that  
 6 the Claimant is able to seek redress from the ROK for  
 7 its part in the criminal scheme that inflicted these  
 8 substantial losses.  
 9 In conclusion, the Claimant submits that by  
 10 reference to well established principles of customary  
 11 international law, the tribunal should award damages  
 12 reflecting the value of Claimant's investment in SC&T  
 13 shares, including the gain the Claimant would have made  
 14 if the ROK had not breached the Treaty. Measured in  
 15 this customary way, the tribunal should award the  
 16 Claimant damages in the range of between 486,314,418 and  
 17 379 million 270 — I can't even say it — 379 million in  
 18 round figures, plus interest. The top end of the range  
 19 reflects a 5% holding company discount while the bottom  
 20 end of the range reflects a 15% holding company  
 21 discount.  
 22 This quantum of damages is fully justified because  
 23 Mr Boulton's sum of the parts analysis of the value of  
 24 Claimant's shareholding in SC&T is objective and robust.  
 25 His calculation of the likely value of that shareholding

1 in a counterfactual scenario in which the merger was not  
 2 approved by the NPS in breach of the Treaty is based on  
 3 reliable and straightforward calculations, real world  
 4 figures and a methodology that is widely adopted by  
 5 market participants. It is wholly consistent with  
 6 arguments as to market efficiency put forward by  
 7 Professor Dow himself and endorsed by Professors  
 8 Milhaupt and Bae. A successful shareholder revolt  
 9 against the merger would have been important news priced  
 10 into the stock instantaneously.  
 11 By contrast, the ROK's suggestion that market prices  
 12 should be the yardstick or really the straitjacket for  
 13 Claimant's claims should be rejected because it offends  
 14 common sense to suggest that share values in  
 15 a manipulated market provide a rational or useful  
 16 measure of loss and, put simply, to use manipulated  
 17 share prices would not cure the damage; it would  
 18 perpetuate it.  
 19 Faced with a choice between a manipulated damages of  
 20 zero and a real world measure of between \$379 million  
 21 and \$486 million, it is submitted that this tribunal  
 22 should find little difficulty in rejecting the former.  
 23 On this record, the only judgment the tribunal needs to  
 24 make is where within the range it should award damages.  
 25 Thank you, and now subject to any questions you may

1 have, I'll hand back over to Mr Partasides.  
 2 MR GARIBALDI: Ms Snodgrass, I have a couple of questions,  
 3 one on causation in fact and one on damages.  
 4 Let me start with the one on damages because this is  
 5 what we have been talking about.  
 6 I don't recall hearing, and if I did hear it my  
 7 apologies for having missed it, but I would like to know  
 8 your answer to an argument that is made by the Republic  
 9 of Korea which goes more or less like this: that the sum  
 10 of the parts valuation does not work among other things  
 11 because sum of the parts are non-tradeable. They are  
 12 assets held for purpose of control and the only way to  
 13 realise the value of those assets is to liquidate them,  
 14 but liquidation is not a realistic option.  
 15 What is your answer to that point?  
 16 MS SNODGRASS: The answer to that point, I think, is that  
 17 sum of the parts is nevertheless a valid valuation  
 18 methodology in that it takes the assets and -- I'll let  
 19 Mr Boulton explain this better, but it looks at the  
 20 underlying assets and is a methodology for determining  
 21 the composite value of SC&T. It is -- nevertheless,  
 22 notwithstanding the concerns about liquidation, it is  
 23 a methodology that is widely used, was widely used by  
 24 market participants to value entities like SC&T, and  
 25 I think for purposes of Claimant realising the value of

1 its investment in SC&T, any concern about a control  
 2 premium or whatever is taken into account in the  
 3 methodology.  
 4 MR GARIBALDI: Okay. All right, let me go to the other  
 5 question.  
 6 The other question has to do with causation in fact.  
 7 I think I understand your argument and so my question is  
 8 for purpose of clarification to make sure that I have  
 9 the structure correct.  
 10 The structure of your argument on causation in fact  
 11 is A is a sufficient condition for B, which is  
 12 a sufficient condition for C, which is a sufficient  
 13 condition for D, whatever links -- the number of links  
 14 doesn't matter for my purposes.  
 15 That is all that you need to show. There may be  
 16 some issues about the degree of probability that the  
 17 sufficiency of the condition will be realised or not,  
 18 but that is another matter. That's not my point.  
 19 My point is: is it correct that in your analysis of  
 20 causation in fact, you are only looking at sufficient  
 21 conditions, a chain of sufficient conditions; is that  
 22 correct?  
 23 MS SNODGRASS: Yes.  
 24 MR GARIBALDI: Thank you very much. I thought I understood  
 25 it.

1 THE PRESIDENT: Thank you very much. That brings us to the  
 2 end of the first day.  
 3 MR PARTASIDES: Not quite.  
 4 THE PRESIDENT: I understand you still have closing remarks,  
 5 apologies.  
 6 MR PARTASIDES: Some very brief closing remarks,  
 7 Mr President. Apologies. I was waiting to see whether  
 8 you had any further questions, members of the tribunal.  
 9 I'm conscious that you've heard a great deal from us  
 10 today, so these closing remarks will be very brief,  
 11 I promise.  
 12 I think we can all agree --  
 13 THE PRESIDENT: That was not the intention to make you any  
 14 shorter.  
 15 MR PARTASIDES: And it was intended to be short in any  
 16 event. So you haven't changed that intention, thank  
 17 you.  
 18 Further submissions by MR PARTASIDES  
 19 MR PARTASIDES: I was saying that I think, Mr President,  
 20 members of the tribunal, we can all agree on at least  
 21 one thing here in this room, and that is that the facts  
 22 and evidence on which the claim before you is based is  
 23 uncommon. It involves a level of governmental  
 24 misconduct that has been revealed by evidence that could  
 25 not have been obtained other than through the powers of

1 compulsion that come through domestic criminal  
 2 proceedings.  
 3 So we say finally to you it is not surprising at all  
 4 that those facts have led to more than one Treaty claim  
 5 against the Republic of Korea.  
 6 And so we've come finally to the end of our opening  
 7 submission and let me leave you at this end of our  
 8 closing submission with the following proposition. As  
 9 you hear the Respondent's response to the evidence that  
 10 we've presented against it tomorrow, we ask you to take  
 11 note of whether you hear answers to the following  
 12 fundamental questions.  
 13 Why did the NPS itself again and again communicate  
 14 to the ministry that the independent Experts Voting  
 15 Committee should decide on its merger vote?  
 16 Why did the Experts Voting Committee itself again  
 17 and again express exactly the same view that it should  
 18 decide on a merger vote?  
 19 Why did the ministry instruct the NPS, despite the  
 20 NPS's protest, that the decision nevertheless had to be  
 21 taken by the internal Investment Committee and that  
 22 decision must be supportive of the merger that the [REDACTED]  
 23 family wanted?  
 24 Why did the ministry further instruct the NPS that  
 25 it should not disclose this governmental intervention?

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1 Why did the NPS revise more than once its valuation  
 2 of SC&T in an attempt somehow to support the merger  
 3 ratio that Samsung was proposing?  
 4 Why did Mr [REDACTED] describe his own synergy effect  
 5 calculation as arbitrary, made up of numbers that made  
 6 no sense to anyone, in order to fill the gap in value  
 7 that was still left after those valuations to justify  
 8 the Samsung merger ratio?  
 9 As a result, why has Korea's own prosecutor  
 10 prosecuted successfully various government officials,  
 11 including the President, if this episode did not involve  
 12 governmental misconduct?  
 13 And finally, why is Korea's prosecutor now  
 14 prosecuting Samsung's [REDACTED] for a second time for  
 15 successfully manipulating the market share price of SC&T  
 16 if that share price is a reliable indicator of the value  
 17 of SC&T for the purposes of the damages claim that we  
 18 make here?  
 19 We, like you, members of the tribunal, look forward  
 20 to answers to these questions tomorrow and we are very  
 21 grateful for your patience and your attendance today.  
 22 Thank you, Mr President.  
 23 THE PRESIDENT: Thank you. Any further questions, comments  
 24 from my colleagues?  
 25 So that does bring us to an end of the first day of

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1 the hearing a bit ahead of time.  
 2 Before we adjourn, maybe just to check the programme  
 3 for tomorrow morning because we will start a bit later.  
 4 The plan was to run anyway from 11 until 1 o'clock  
 5 and the lunch break is scheduled for 1 o'clock. Just to  
 6 confirm that that's still the plan because otherwise we  
 7 would have to make arrangements for a lunch break at  
 8 a different time if that is agreeable.  
 9 MR TURNER: Sir, if I can come back to what I said what  
 10 seems like and indeed is a very long time ago this  
 11 morning, that we have a natural break after about  
 12 an hour and a quarter. Call that an hour and a half.  
 13 We therefore think that we should all plan, with the  
 14 leave of my learned friend, for lunch at 12.30 rather  
 15 than 1 o'clock. But otherwise no change save the later  
 16 ending time tomorrow evening.  
 17 THE PRESIDENT: Okay. Just to make sure that there are  
 18 arrangements made with the hotel that the lunch break is  
 19 going to take half an hour earlier for all of us.  
 20 So that will mean basically an hour and a half  
 21 before the lunch break of your time, and the — because  
 22 I understand the Respondent wishes to spend some three  
 23 and a half hours for the opening statement, you would  
 24 still have two hours after the lunch break?  
 25 MR TURNER: I haven't done the arithmetic, sir, but that

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1 sounds about —  
 2 THE PRESIDENT: I'm trying to do it on the fly.  
 3 MR TURNER: That sounds about right, yes. If we've done  
 4 an hour and a half, and if we take three and a half  
 5 hours, then I agree with the conclusion that the sum of  
 6 the parts would be two hours left.  
 7 THE PRESIDENT: It's an SOTP calculation.  
 8 MR TURNER: SOTP, which I'm happy to adopt only for the  
 9 purposes of calculating the bits of my opening speech,  
 10 if that's just clear for the tribunal.  
 11 THE PRESIDENT: So that would then mean that I would think  
 12 that you prefer to do the two hours after the lunch  
 13 break in one go.  
 14 MR TURNER: I would have thought so, but that is with the  
 15 indulgence of the court reporters. I won't be able to  
 16 see them and nor will my learned friend Mr Lingard, but  
 17 they will shout to you and you will tell us if they need  
 18 a break before the end of the two hours and then we'll  
 19 find a convenient moment.  
 20 THE PRESIDENT: The original plan was to have —  
 21 Respondent's second part of the opening statement would  
 22 have been from 11 until 1 o'clock. So it would have  
 23 been two hours anyway.  
 24 MR TURNER: I think, sir, it will be fine. If we come back  
 25 at 1.30, we can break an hour and a quarter, an hour and

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1 a half after that, and then finish everything after  
 2 a quarter of an hour's coffee break that we will all be  
 3 no doubt very grateful for.  
 4 THE PRESIDENT: Okay. So let's aim for an hour and a half.  
 5 If you haven't finished, we continue after the second  
 6 break.  
 7 MR TURNER: Very good.  
 8 THE PRESIDENT: So then we will continue until 6.15 with the  
 9 examination of Mr Smith, which means that we should be  
 10 able to catch up an hour of the two-hour loss in the  
 11 morning, and by the end of the third day, by Wednesday,  
 12 I suspect we would be able to then -- we would be back  
 13 to schedule. We understand that the parties have agreed  
 14 to be flexible. The tribunal is also flexible, but just  
 15 to have some visibility beyond tomorrow.  
 16 Mr Partasides?  
 17 MR PARTASIDES: That sounds very agreeable to us. Thank  
 18 you, Mr President.  
 19 THE PRESIDENT: Very good. On that understanding, we'll  
 20 close for today and we'll resume tomorrow morning at  
 21 11 o'clock. Thank you very much.  
 22 (4.11 pm)  
 23 (The hearing adjourned until Tuesday, 16 November 2021 at  
 24 11.00 am)  
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