Elliot Associates, L.P. v Republic of Korea

Day 1

November 15, 2021

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(9.00 am)

Housekeeping

THE PRESIDENT: Good morning all, ladies and gentlemen, welcome to the hearing, the main hearing in PCA case number 2018—51. It's very good and encouraging to see all of you in person in flesh and blood three—dimensionally. It's a pleasure.

We haven't met all of you before, so maybe we just start with introduction of the members of the tribunal. My name is Veijo Heiskanen, I have the privilege of chairing this hearing. On my right is Mr Thomas, on my left Mr Garibaldi.

There is a big crowd on both sides, but maybe I would ask still the counsel to introduce their teams. You can choose whether you only introduce the counsel team or everybody else in the room. I start with the Claimant. Mr Partasides.

MR PARTASIDES: Thank you, Mr Chairman, members of the tribunal. Let me echo your sentiments; it's nice to see you all in person. Given the amount of work that everyone in this room has done, I'll endeavour to introduce you to the cast of many. What I will do is read names and invite the relevant people to raise their hands so you can attach a name to a face, and I will do

it in order of significance.

Therefore beginning with our client representatives, Mr Richard Zabel, the general counsel of Elliott. We also have Ms Alice Best, who is in our break—out room listening to this hearing, from Elliott.

Let me introduce our co—counsel. We are co—counseling the two firms, members of the tribunal. The first is KL Partners. Let me introduce you to Young Suk Park and Ian Lee. We also have with us Byung Chul Kim and Ms Yujin Her.

We have attending remotely from Seoul Mr Beomsu Kim, partner of KL Partners.

Let me introduce you to our second co—counsel firm, the firm of Kobre & Kim. Firstly, Mr Michael Kim. He has with him Mr Andrew Stafford, Mr Robin Baik. Mr Kunhee Cho, Mr Nathan Park, Mr Michael Bahn, Ms Julia Lee, and Mr Ki—Baek Kim, some of whom are attending from our break—out room, I should say.

Let me also, if I may, introduce the team from Three Crowns, members of the tribunal, starting with Mr Anish Patel, who is behind me, Ms Kelly Renehan, Mr Zach Mollengarden, Ms Julia Sherman, Mr Yikang Zhang who is in our break—out room presently, Ms Nicola Peart, Mr Simon Consedine, and my partners, Ms Liz Snodgrass, Mr Georgios Petrochilos and I'm Constantine Partasides.

Thank you.

THE PRESIDENT: Mr Turner for Respondent's team?

MR TURNER: Thank you, sir. Now I know why we foresaw half an hour of housekeeping. I have rarely seen so many people in one room for a hearing.

Is that better? Sorry.

There's always a tradeoff between having the thing stuck in your head and actually it catching your voice. My apologies if it didn't before.

Sir, I shall with gratitude adopt my learned friend's way of introducing the team. Everybody has a namecard, I believe, as well as your being able to see them now.

I will begin as well by introducing the representatives of the Republic of Korea and first Mr Changwan Han, who is the director of the International Dispute Settlement Division of the Korean Ministry of Justice. He is here with his colleagues Ms Young Shin Um, Heejo Moon, Donggeon Lee, Jeemin Park and Damuen Lee.

Mr Han, Director Han, will be here for the first week. He will be following remotely for the second week of the hearing.

Alongside us we have from Lee & Ko our co—counsel from Seoul, Mr Moon Sung Lee, Mr Sanghoon Han,

Minjae Yoo, Joon Won Lee and Han—Earl Woo, together with Suejin Ahn and Yoo Lim Oh.

We have also with us today two representatives from our quantum experts, Brattle, Alexis Maniatis and Bin Zhou.

I don't —— Professor Bae is here, in Professor Kee—hong Bae, our expert on the Korean capital markets, is also present today and our other —— some of our other experts will be following remotely, Professor Dow is following us remotely today, and so I understand is Professor Sung—soo Kim.

Other than that, sir, you have the team from Freshfields, myself, the lone representative from Paris, but then I have no timezone difficulties, together with my partners in order, Nicholas Lingard and Jack Terceño, and then we have, and I cannot and see exactly the order in which people are sitting from here, Samantha Tan, Rohit Bhat, Nicholas Lee, and David Perrett all of them from Singapore.

I think that has covered everybody.

THE PRESIDENT: Thank you very much, Mr Turner, and welcome to all. Even if we are having an in person hearing, I remind all of you and all of us of the COVID protocol that has been agreed by the parties. We are grateful to the parties for the —— for an agreement on that point.

I don't think I need to remind what those rules are. They are in the protocol. Just more generally I ask people to respect the rules regarding wearing face masks with the exceptions that have been agreed, as well as to respect social distancing to the extent that we can, and perhaps in the hotel when you move around the hearing room, you should all wear face masks. We don't really hope and —— and hope we can avoid any incidents during this hearing that nobody needs to be quarantined or anything along those lines. It's a long hearing, so we need to be careful and we hope everyone will respect the rules that have been agreed.

Before I ask the parties to raise any housekeeping issues that you may have, perhaps this would be a good time to discuss the unfortunate power cut that we are going to have tomorrow morning, I understand from around 10.10, 10.15, to 10.30. It's 15 minutes only, but I understand that the technical people prefer to have a one hour's break, which would run from 9.50 to 10.50. Maybe we discuss this now rather than at the end of the day, so both parties know what the protocol will be tomorrow.

One option, and of course this is —— we defer to the parties, one option is simply to extend the day at the end of the day. We have a reasonably relaxed programme

except precisely tomorrow. The other option is to start a bit earlier in the morning, maybe if the parties have had a chance to consider this, maybe I ask the Respondent first because it will affect you more than the Claimant.

MR TURNER: Thank you, sir and indeed we have considered this, and those are the options. There is a natural break in our opening speeches after about an hour and a quarter. If one allows for time for tribunal questions, and with luck answers to those questions perhaps we should allow an hour and a half.

If we say that with a quarter of an hour's housekeeping, we would need to begin at 8 o'clock, I think, in order to get through with minimal risk that part of our opening, allow the break to take place, and we share the tribunal's understanding that it's an hour, about 9.45, to about 10.45.

The other option is that we begin at 11 o'clock and we run through.

In practice we think we would have to extend the day by an hour or so. I think we run into the law of diminishing returns if we sit too late. The second half of tomorrow is the cross—examination of Mr Smith, the witness for the Claimant, and I don't think it would be right to go on too late in the light of the work that

goes on in witness examinations.

So we thought perhaps a 6.15 or thereabouts stop for tomorrow, which should enable us to —— it will be Mr Lingard who will be talking to Mr Smith tomorrow. We believe that we will be able to keep to at most an hour's —— what is the English word, déplacement? —— for the rest of the timetable which will easily be absorbed as we go through.

So we are agnostic as to which of those two options we adopt, but we think if we do begin early, it must be 8 o'clock to allow the natural break in our opening tomorrow to be attained. Otherwise allowing for everyone to get back sitting down after the power cut tomorrow, 11 o'clock, and then sitting until 6.15.

THE PRESIDENT: Yes, thank you, Mr Turner. One reason why I understand we need an hour's break is precisely because the systems need to be rebooted. So it may well be more practical to start at 11 because then we would avoid any technical problems that may arise if rebooting doesn't work. But we are in the hands of the parties. Mr Partasides?

MR PARTASIDES: Thank you, Mr Chairman. We are in your hands if that's the tribunal's preference, we are happy to accede to it. It affects the Respondent more than it affects us. I understand they're willing to go either

way. So are we. But if that's the tribunal's preference, we're happy to accede to it, and I agree that we should set a guillotine at 6.15 tomorrow afternoon and I hope that that will be adequate.

THE PRESIDENT: Yes, and we are in a sense in the hands of the Respondent. You will be doing the cross—examination. So if the target is 6.15, we could then stop when you find a convenient time in the cross—examination.

But I also defer to my colleagues. There are lots of jetlagged people around here with some exceptions. So I don't know whether it would be better to start at 8.00 or at 11.00. That may depend on where you're coming from.

Okay. So we start at 11.00 tomorrow so we avoid any logistical issue. We start like as we started today.

Okay.

Any other issues we need to discuss now?

Mr Partasides?

MR PARTASIDES: On behalf of Claimants, none, sir, thank you.

THE PRESIDENT: Respondent?

MR TURNER: Nothing from our side, sir.

THE PRESIDENT: Thank you very much.

So then we go ahead with the programme. So today's

programme is the Claimant's opening statement. So the Claimant, you have the floor.

Opening submissions by MR PARTASIDES

MR PARTASIDES: Thank you, Mr Chairman, members of the tribunal. After presenting you with a lot of procedure over the last three years, we're very happy finally to speak to you about the merits of this dispute, and let me use this opportunity to invite my team to circulate to you if you don't already have it hard copies of the slide deck of the evidence in this case that we shall be referring to during our opening statement.

I should say at the outset that I will be sharing this opening statement with my partners Georgios Petrochilos and Liz Snodgrass in a manner that I shall explain at the appropriate time.

Members of the tribunal, as you know by now, this Treaty claim arises from the most infamous corporate and governmental corruption scandal to rock the Republic of Korea in decades. It has already led to the criminal prosecution, conviction and imprisonment of the Republic of Korea's former President, President [redacted], its former Minister of Health and Welfare, Minister [redacted], and various subordinates of the Ministry within Korea's National Pension Service, convictions for demanding and accepting bribes, for abuse of power, for misfeasance in

public office, all to enable a merger that would not have occurred without that criminal governmental intervention and that has damaged this Claimant by occurring. So this is a Treaty case, members of the tribunal, that involves facts of unusual gravity.

But it is not a case that rests on allegation. That is because the central facts that the Claimant relies on in bringing this claim have been alleged by Korea's own public prosecutor and have been accepted as proven by Korea's own courts.

Now, those convictions have given rise to findings of criminality that certainly extend beyond the scope of Elliott 's claims here, to encompass wrongdoing by senior members of Samsung's [redacted] family. But our case is founded on a subset of those findings that pertain specifically to governmental conduct, governmental conduct that resulted in support for the merger by Korea's National Pension Service that would not have existed but for that illegal governmental intervention, the passage of a merger that would not have taken place without the NPS's support, and the transfer of value from the shareholders of SC&T to the shareholders of Cheil that was not only the effect of the merger but its very purpose.

Let us be more specific. We now know as fact that

the merger was deliberately designed improperly to transfer value from Samsung C&T shareholders to Cheil's shareholders, most notably Samsung's [redacted] family.

We now know as fact that the [redacted] family's [redacted] conspired with the Government of Korea illegally to have it intervene in the merger. We know that intervention began at the very apex of the Korean Government in Korea's presidential Blue House with the President's order that the NPS should exercise its voting power to enable the merger to proceed.

We know that the Minister of Health and Welfare passed on that presidential instruction to the NPS and we also know that senior officials within Korea's National Pension Service implemented that governmental direction, and they did so by circumventing the NPS's usual procedural safeguards for the making of independent decisions relating to Korea's National Pension Fund. They did so by falsifying valuations of both Samsung, C&T and Cheil, and they did so by fabricating entirely a so−called synergy effect calculation that was criminally designed to conceal the significant loss to the NPS that would be inflicted on the National Pension Fund even on the basis of those fabricated valuations by allowing the merger to proceed.

We also know that without that intervention, the NPS

would not have supported the merger. Now, we will walk you through the key evidence that allows us to know all this as fact in sequence and in depth during the course of this opening submission. And you will see, as you begin to see on slide 2, that [redacted] indeed they were so aware of [redacted] that they considered it [redacted]

You will see, as we begin to see on slide 3, that [redacted]. And this awareness, members of the tribunal, existed long before this claimant even notified the possibility of a Treaty claim, indeed, long before this Claimant even knew of the concealed governmental conduct that we now complain of.

You will see, as you begin to see on slide 4, that this concealed subversion of the NPS's decision−making process culminated in a crude and now confessed to fraud. The words you see on the screen, members of the tribunal, are the words of the NPS official who was

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

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

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

national traitor.

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

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

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

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

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

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

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

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

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

hearing.

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

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

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

international legal consequences of Korea's own simultaneous positions and judicial decisions domestically.

So the claim before you is obviously not just a mere private shareholders' dispute. This is not just a question of a shareholder vote that this Claimant disagrees with. This claim is about an already established gross governmental illegality, and if that is not a breach of the minimum standard of treatment under international law, we respectfully submit that the minimum standard is no standard at all.

Now, during the course of our opening we will now address each of the subjects that you see on our roadmap slide, slide 11, from Korea's preliminary objections to the merits of our claims of breach and from the merits to the causation and quantification of the Claimant's resulting loss.

But we begin, members of the tribunal, where we must, with the pertinent facts. In recalling those facts, we begin with an introduction of the parties before you.

First, the Claimant. Elliott is a private equity investment fund group, founded in 1977, and so one of the oldest funds of its type. It invests on behalf of a range of stakeholders that include pension funds,

sovereign wealth funds, other funds, and Elliott's own employees, executives and owners, to all of whom it owes fiduciary duties.

It is headquartered in the United States and has offices in addition in London, Tokyo and, until earlier this year, in Hong Kong; with close to $50 billion US dollars under investment in various companies, in various sectors, in various markets around the world. And these include investments in companies as diverse as Pernod, AT&T, Waterstone Books and the Italian Serie A football team, AC Milan.

Elliott's overall investment strategy is to identify situations in which the traded share price does not reflect the intrinsic value of the investment. To understand the reasons for that discount, and to evaluate the prospects for reducing or eliminating that discount. And this business model has given rise in recent decades to an entire investment industry whose existence is founded on that difference that can exist between traded prices and intrinsic value.

Now, that is neither a difficult nor obscure business model to understand and we have described in our writings examples of such investments that this Claimant has successfully made in a variety of different markets around the world, both before and after the

investment that is the subject of this arbitration.

Sometimes an analysis of a historic trading pattern might be sufficient to assess the delta, that difference, and that that difference would close within a reasonable timeline of its own accord.

On other occasions Elliott might assess that an asset is undervalued because of issues that are unlikely to be remedied without some form of active intervention. For example, because of poor corporate governance or the need to restructure.

In those circumstances Elliott's approach is actively to pursue initiatives that can be expected to address those problems, for example by taking steps designed to improve corporate governance of the investment that it has made.

Now, we've given you some examples of this active approach of Elliott in our statement of Reply, and James Smith, one of the Claimant's witnesses in this case, has given a number more.

Let me just offer you one briefly for present purposes. In June 2015, at precisely the same time as the events before you occurred, Elliott also invested in Citrix Systems. That will be familiar to all of us who use Citrix remote access computer systems. And in making its investment, Elliott proposed to Citrix

management a plan to improve its cost structure and to restructure underperforming brands. In that case Citrix management agreed to implement Elliott's restructuring plan and appointed an Elliott representative to its board.

As a result of the plan being implemented, the company's shares which had traded at $66 per share in June 2015 at the time of the acquisition came to exceed $150 per share by April 2020, when Elliott's appointed director stepped down from his position on the board.

That investment was made in June 2015. Elliott remains a shareholder in Citrix more than six years after making its initial investment.

Now, that is one example of many that we've given you, an example of Elliott actively involving itself in the business of its investment, developing a sophisticated corporate plan to unlock intrinsic value, proceeding with those plans consensually with its other stakeholders and realising that unlocked value both for its and other stakeholders' advantage.

Elliott developed a similar concrete plan, members of the tribunal, for the restructuring of the Samsung Group, to be put to Samsung's management, in particular the [redacted] family, in the same way as it had done and has since done successfully elsewhere.

What you see on the next slide is not a slide, members of the tribunal, we prepared for this arbitration. Instead, it is part of a presentation that Elliott prepared for Samsung back in May 2015 by which it proposed its restructuring plan to the [redacted] family.

You will see a detailed explanation of that restructuring plan and of Elliott's attempts at a consensual process with Samsung described in the second witness statement of James Smith at paragraphs 52 to 63. That is a plan that would have seen the Claimant remain an investor in Samsung C&T at least into 2016 and perhaps beyond, as with others of its similar investments, both before and since.

Let me be clear that equity investments such as this investment before you are quite different from those instances in which Elliott has purchased distressed debt or sovereign bonds, which are more likely to involve litigation. While the Respondent has tried hard to brand Elliott as an organisation whose business model is founded on litigation, the verifiable truth, members of the tribunal, as Mr Smith has testified on this point without contradiction, is that those cases represent only a small part of Elliott's business, and are obviously distinguishable from the investment at issue before you here.

That is our Claimant. Let's move on now to discuss briefly the other participant in this arbitration, the Respondent.

Now, the Korean Government's executive is headed by the presidency, which is referred to, as you will know by now, by the name of the President's official residence, the Blue House. The Blue House therefore sits at the apex of the Government's different ministries. The ministry that is most relevant to this dispute, members of the tribunal, is the Ministry of Health and Welfare which is responsible for governmental pension policy and managing the Korean National Pension Fund from which the Government will pay pensions to the Korean public.

You see on slide 14 an abbreviated organigram of the Ministry of Health and Welfare found on its own website. You will see that it divides the Ministry's various areas of responsibility into different policy bureaus.

We shall focus on the Ministerial Bureau of Pension Policy which you see encircled at the bottom of your slide. This bureau within the Ministry has a Division of National Pension Finance which in turn oversees Korea's National Pension Fund. And Korea's National Pension Service, and you will hear more about this, exercises the governmental function of managing and

operating the National Pension Fund.

As we can see on the next slide, slide 15, it is the Minister of Health and Welfare that has the authority to manage and operate the National Pension Fund. As we can also see, he delegates that governmental authority to the National Pension Service pursuant to the National Pension Act.

Of critical importance to the events that concern us here, as you see on the next slide, are the principles pursuant to which it is the NPS's legal duty to manage the National Pension Fund.

These principles, members of the tribunal, are set out in the Fund Operational Guidelines. They bind the NPS as a matter of Korean administrative law and as you also see on your slide, those obligatory investment principles include, firstly, the principle of profitability. Pensioners across Korea rely on the adequacy of the National Pension Fund to finance their pensions, and so the value of the fund must be maximised in the interests of the Korean pensioners.

Now, you also see the principles of stability, liquidity, and public benefit mentioned. The latter of those reflects the public purpose of the National Pension Fund and distinguishes the NPS from other shareholders.

But let us be clear. The public benefit will ordinarily require the NPS to maximise the overall profitability of the fund. Indeed, it is difficult to imagine what public purpose would be served by impairing the value of the fund.

Finally, in subsection 5 at the bottom of your slide, we see the principle of management independence which the guidelines explain to mean that the fund must be managed in accordance with the above principles, and these principles should not be undermined for "other purposes".

So what is meant by "other purposes"? Well, Korea's courts have made that clear, members of the tribunal, in one of the criminal cases resulting from the subject matter of this dispute. You see that at the top of your slide 17, the fund which the NPS manages "must not be used to promote political agenda or serve certain interest groups in a way contrary to the interests of pensioners".

As the court went on to hold in the same judgment, which you see at the bottom of the same slide, the NPS, which by the way is referred to as the "AM" in the sanitised version of the judgment, is a custodian of the retirement assets of the people of the Republic, and therefore has the duty to observe the principle of

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

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

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

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

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

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

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

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

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

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

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

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

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

By early 2015, against the backdrop of a struggling

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

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

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

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

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

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

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

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

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

So what is the Respondent's response to this

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

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

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

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

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

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

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

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

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

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

economics of the merger for SC&T shareholders, members of the tribunal, a vote by any shareholder in favour of this merger must also be viewed with a certain scepticism. Let me again explain why, and let me again rely on Korea's own public prosecutor in doing.

So as you see on the top of the next slide, slide 25, within these proceedings the Respondent has not been able entirely to ignore the existence of a confidential dialogue that took place between Samsung and many of those other shareholders, which in its words, was aimed at persuading them of the merits of the merger. That's an extract from the Respondent's statement of defence in these proceedings at the top of the slide.

Outside of these proceedings, as you see at the bottom of the slide, Korea's prosecutor has gone much further. Korea's prosecutor has described this so-called dialogue of persuasion as involving the dissemination of false information by Samsung to major foreign institutional investors.

In fact, outside of these proceedings, as we see on the next slide, slide 26, Korea's public prosecutor has gone further still. As you see on the top of this slide, the public prosecutor has recognised that while almost all foreign institutional shareholders in SC&T

viewed the merger as unfavourable to SC&T shareholders when the merger was announced, that this change for some shareholders not only because false information was disseminated, but because Samsung made efforts to buy off some major shareholders. Again, not my words, the words of Korea's public prosecutor as you see at the bottom of your slide.

So we see Korea's prosecutor, members of the tribunal, outside of these proceedings, in its second indictment of [redacted], submitting that BlackRock's approval of the merger was solicited by the dissemination of false information. That's the top extract. That the approval of the Saudi Arabian Monetary Agency and the Abu Dhabi Investment Authority was also solicited by the sharing of false information. That's the middle extract. And even worse, that an attempt was made to solicit Ilsung Pharmaceuticals' approval by the Samsung offer of constructing a new company building for free. That's the bottom extract.

This is all according to Korea's own public prosecutor.

Now, again, you may recall that a member of Korea's public prosecutor's office attended one of our pre-hearing conferences as a Respondent party representative. We note that they are not amongst the

Respondent's party representatives at this hearing and no doubt for good reason.

You will also note that the Respondent has fought tooth and nail not to disclose the evidence on which its public prosecutor's statement is based. But disclose they recently had to, when you, members of the tribunal, ordered them to and so let us look at some of that recent evidence on the next slide, slide 28.

This is evidence that we obtained from the Respondent just a few weeks ago in October 2021. It includes internal Samsung documents that confirm that [redacted].

So we say, members of the tribunal, there is now manifestly more than enough before you to ensure that your decision about the conduct of this Respondent, which we shall come to, is not affected one way or the other by the voting decisions of other shareholders. And it doesn't need to be because despite decisions made by others who may or may not have been privately misled or improperly induced to support Samsung's merger proposal, the merger would not have proceeded without the support of the NPS as a matter of arithmetical fact,

as we shall shortly come to see.

It is also a fact that had the NPS not supported the merger, and therefore had the merger not gone through, the consequence would have been to immediately and dramatically increase the SC&T share price to the benefit of the NPS and the National Pension Fund and this Claimant, and that is not our speculation now, members of the tribunal; that is the NPS's own evaluation at the time.

Let's look at slide 29. As you see on the top of this next slide, the member of the NPS research team responsible for the SC&T valuation himself testified in the Korean criminal proceedings that [redacted].

What you see at the bottom of the same slide is that on instruction of his superiors, this emphatic conclusion was diluted in the final report presented to the NPS Investment Committee to state only that the price would rise.

Now, notwithstanding the attempt to downplay the dramatically positive impact of a merger rejection, the NPS's internal report still recognised that the SC&T share price would increase to the benefit of the National Pension Fund if the merger was not approved.

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

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

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

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

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

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

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

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

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

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

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

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

Arithmetic fact, in the words of Samsung, [redacted].

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

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

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

itself, including prosecutions of some of its most senior Government officials.

Now, this included Korea's own former President, President [redacted], who was impeached and removed from office, members of the tribunal, by Korea's Constitutional Court in March 2017, some two years effectively after the merger took place, who was then, after impeachment, convicted by the Seoul Central District Court of criminal charges, including bribery, abuse of power, coercion, and sentenced to over 20 years in prison; and whose sentence, as we see on slide 35, was subsequently increased to 25 years by the Seoul High Court on appeal, with the High Court determining, as you see on this slide, determining in terms that the President had accepted bribes in exchange for assisting [redacted]'s succession of the Samsung Group, drawing an explicit connection between the Samsung succession plan and her receipt of personal favours.

Now, we say that it is odd indeed for Korea here before you to suggest that this finding was somehow undermined by the Korean Supreme Court that remanded the case to the Seoul High Court because, as it well knows, that case was remanded to the High Court only on a narrow technical ground relating to sentencing, which resulted only in a reduction of former President [redacted]'s

sentence back down to 20 years which she's now currently serving, but without disturbing any of the prior factual findings.

We say it is particularly odd because, as we have seen, Korea's prosecutors outside of these proceedings have again recently alleged the existence precisely of a corrupt presidential quid pro quo specifically in relation to this merger in its latest indictment of [redacted] that was issued at the same time as the Respondent was preparing its Rejoinder in these proceedings, contending the opposite to you.

That's former President [redacted].

Korea's own prosecutions have also extended to its own former Minister of Health and Welfare, Minister [redacted]. As you see on the next slide, 36, he was also prosecuted and convicted by the Seoul Central District Court of an abuse of power, specifically, as we can see, by infringing upon the statutory independence of the NPS and by exerting improper pressure towards an unjustified outcome.

Again, whose conviction was upheld by the Seoul High Court, that also found him guilty of abuse of authority.

While it is true, members of the tribunal, that the High Court decision is presently on appeal to the

Supreme Court, the appeal is again limited to a narrow question of law which is why Minister [redacted] is presently behind bars.

We submit that there is no prospect, unsurprisingly, of overturning existing findings of fact unless new evidence of fact emerges that indicates that there has been a grave mistake of fact. And not only has no such new evidence ever been presented, now many years after the conviction, but the only additional evidence that has emerged since has led Korea's public prosecutor to make new indictments and further allegations of Samsung and governmental illegality. That is former Minister [redacted].

In the same way, Korea's own prosecutions have also extended to the National Pension Service's Chief Investment Officer, Mr [redacted]. As you see on the next slide, he was also convicted by the Seoul Central District Court for the crimes of misfeasance in public office, by causing the NPS to suffer losses, and by directing the head of the NPS research team, Mr [redacted], as we shall soon see, to manipulate valuations and whose conviction was once again upheld by the Seoul High Court. That's former Chief Investment Officer [redacted].

So what is Korea's response to this weight of

judicial decision by its own judicial emanations? Well, here you see on the next slide, slide 38, that response at paragraph 163 of Korea's Rejoinder.

Now, you can set to one side immediately the conspicuously vague reference at the end to these decisions being nonfinal. As I have described, the appeals are on narrow points of law, the individuals are presently serving their sentences in jail. That has never been contested and there is no indication that after all these years, remarkable new fact evidence will emerge to disturb existing judicial findings of fact. To the contrary, the only new evidence that has emerged has led Korea's public prosecutor to indict [redacted] a second time because of further evidence on his part of price market manipulation.

Nevertheless, they say that your findings can differ from Korean criminal court findings where the evidence before you compels a different finding. But there is a problem here for Korea because it asks you to depart from findings of its own courts arrived at by application of a criminal standard of proof, a higher standard that applies before you, members of the tribunal, but without presenting you with any new evidence that would support, let alone compel, that departure.

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

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

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

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

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

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

On the Korean Government's side, and again before the [redacted] visit to the Government on 15 September 2014, in the summer of 2014, following [redacted]'s, the family's patriach's, heart attack, a contemporaneous memo was produced within Korea's Blue House which we now see on slide 40 that noted that [redacted], that [redacted], that [redacted]y [redacted].

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

solicited the payment of financial inducements for some favoured personal projects in exchange for Government support to the [redacted] family to achieve its succession planning by supporting the merger.

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

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

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

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

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

THE PRESIDENT: Okay. Thank you very much.

We break for 15 minutes and continue at 10.40. Thank you very much.

(10.25 am)

(A short break)

(10.42 am)

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

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

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

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

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

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

[redacted], as we see on slide 43, [redacted]. Here we are looking at the statement made by one of those presidential secretaries that received that presidential direction.

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

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

So one of those presidential secretaries, Secretary [redacted], instructed senior executive officials from within the Blue House that [redacted].

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

Here on the next slide, slide 44, you see answers given by a presidential secretary on questioning from Korea's prosecutor that confirmed that [redacted]

[redacted]".

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

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

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

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

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

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

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

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

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

You see this transcript record that, at the beginning of July 2015, the NPS's head of responsible investment division, Mr [redacted], telephoned the Ministry's deputy director general of pension policy, this is Director General [redacted]'s deputy, Deputy Director [redacted], again expressing the view that [redacted].

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

But in the face of that repeated NPS push-back, as you see on slide 51, [redacted]. Again, we are looking at the testimony of the Ministry's Director General [redacted] who was involved in these interactions to the

Korean courts, accepted as fact by those Korean courts.

The Ministry's Director General [redacted], who has testified that [redacted], Director General [redacted] once again. And in the face of the NPS's attempt yet again to persuade the Ministry to have the independent Experts Voting Committee decide the merger vote, the director general responded: [redacted].

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

So once again, all of this evidence shows us that

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

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

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

decide in favour of the merger.

It's important to note in this regard, given the ink that the Respondent has spilt in these proceedings on suggesting that it was somehow consistent with the NPS's normal procedures for the internal Investment Committee to make this decision, that our complaint, members of the tribunal, is not only about the fact that it was not the independent Experts Voting Committee that took this decision, because as we shall see, the Investment Committee itself would have voted against the merger but for the further improper intervention that perverted its decision-making process that I am about to describe.

So we come to the work of the NPS's research team because it was told that its task was to find a justification to support Samsung's damaging merger ratio. So let us look together at how it went about its task.

Let's turn to its first valuation. You see it on slide 54 that took place on 30 June 2015 and resulted in the conclusion that [redacted]. Now, to arrive at this valuation, members of the tribunal, you see the ratio there, 1 to 0.64, the NPS research team [redacted]. The result was a valuation of

SC&T that left no doubt that the proposed Samsung merger ratio of 1 SC&T share to 0.35 Cheil shares would be hugely damaging to the NPS. To be clear, on the NPS's own initial valuation that we are seeing here, the merger ratio that the Samsung was proposing would result in the SC&T shareholders receiving only 26% of the merged entity rather than the 39% that they would have been entitled to pursuant to the NPS's initial valuation. That would equate to depriving the SC&T shareholders of about a third of the value of their equity stake in SC&T, according to the NPS's research team itself.

That was -- let's note the date -- on 30 June 2015. What's interesting is what happened next. Because in the face of this initial valuation, as we see on slide 55, Chief Investment Officer [redacted], with the governmental instruction in his ear, himself instructed the head of the NPS research team, Mr [redacted], to "[redacted]".

Now, we are looking at an extract from the NPS's Mr [redacted]'s statement to the Korean public prosecutor, and what did Mr [redacted] understand by this? Well, as we can see, in his statement to the prosecutor, he has stated that [redacted]

[redacted].

So issued with this instruction to try harder and steer the merger ratio in a way that favoured the merger, Mr [redacted] and his team proceeded within days to do just that and to dramatically revise their initial valuation.

So, as we see on slide 56, on 9 July 2015, so just over a week after its first valuation, the day before the internal Investment Committee was due to decide on the merger, the research team pulled a dramatically revised valuation out of the hat that now suggested that [redacted], which they now achieved by applying within days of their prior valuation, now an astonishing [redacted] to SC&T's listed assets.

It was this new valuation, dramatically different from the earlier valuation of just some days earlier, that was presented to the internal Investment Committee the following day.

But what is really interesting about this revised valuation with all of its anomalies, members of the tribunal, is that the valuation manipulations did not stop here. There was worse to come, and this brings us to the total fabrication of a so-called synergy effect

to offset the still remaining losses that the NPS would suffer, because this rushed revised valuation that we are looking at was still not enough to offset entirely the loss that would result to the NPS from the merger proceeding at Samsung's proposed merger ratio. Proceeding with the merger at that ratio would still result, according to the NPS's revised valuation, in a loss to the NPS from the merger of no less than 138.8 billion Korean Won, just over 120 million US dollars. So there's still a hole and it's still a big hole, and so the head of the NPS's research team, Mr [redacted], as you see on slide 57, advised Chief Investment Officer [redacted] that a [redacted].

The problem was that time was now very short. The Investment Committee was due to meet the very next day, on 10 July 2015. So Mr [redacted] delegated the task of coming up with a rough calculation of a synergy effect to a member of his team, Mr [redacted], with very specific instructions: to come up with an overall synergy effect of 2 trillion Korean Won which was precisely the amount needed, precisely to offset the 138.8 billion loss to the NPS from its shareholding that would still result from the merger even according to its revised valuation.

Now, the selection of Mr [redacted] to undertake this calculation was interesting because, as we see on the next slide, [redacted] and had already been identified by Samsung in its internal documentation as [redacted], given his role in undertaking analyses within the NPS's economic decision-making process. What we're looking at here, members of the tribunal, is an internal Samsung document that is being relied on by Korea's public prosecutor in its second indictment of [redacted] that was produced to us pursuant to your order only a few weeks ago in October of this year.

So we can perhaps understand why Mr [redacted] was chosen, and I want us to look closely at Mr [redacted]'s own words of what he did in the face of his rushed instruction because we have the benefit of Mr [redacted]'s own statement to the Korean prosecutor, and because, as we're about to see, members of the tribunal, paraphrasing really won't do it justice.

So let's take it slowly, and let's begin with the beginning of his statement to the Korean prosecutor. You see this beginning on slide 59.

At the beginning of his statement to the prosecutor, we see Mr [redacted] identifying that [redacted]

[redacted].

That was his instruction and he confirms it in his statement to the prosecutor. Yes, definitely.

Let's move to slide 60. Mr [redacted] moves on to telling the prosecutor that [redacted]. He states that [redacted]

[redacted].

As we see on the next slide, members of the tribunal, slide 61, following his orders, Mr [redacted] came up with a calculation that he himself considered to be [redacted]

[redacted]. [redacted] -- his words, members of the tribunal, not ours -- [redacted]. Again, his words, not ours.

And it was this synergy effect calculation that was presented to the NPS's Investment Committee on 10 July 2015.

Members of the tribunal, in a word, the synergy effect calculation was a swindle, a swindle that has been confessed to by the swindlers themselves.

Now, it is rare indeed, I submit, that one sees evidence of criminality that is so clear in international arbitration. So what, you might ask, has been the Republic of Korea's response in these proceedings? Let's turn to slide 62.

Well, first, members of the tribunal, it defends itself by saying: but this confession isn't testimony, merely statements from interviews. Well, I have to say, members of the tribunal, that to this lawyer that defence is almost as astonishing as the confession itself because let's recall that these are statements that were self-incriminating statements, and so there is no reason to doubt them.

Let's recall that these are statements that were made to Korea's public prosecutor on interview, and the giving of false statements to a prosecutor is surely not to be suggested lightly.

Let's recall that those statements were then relied on by Korea's own prosecutor and then accepted by

Korea's own courts. And the reason you haven't been presented with the evidence that contradicts Mr [redacted]'s own statement is that no such evidence exists. In fact, the closest that the Republic of Korea comes to addressing it later on in these proceedings -- you see on slide 63, paragraph 236 of its Rejoinder -- is in one paragraph in which it simply denies that the manner in which the calculation arrived at amounted to a fabrication, a bare denial.

Well, we will let you decide what Mr [redacted]'s own confession at exhibit C477 reveals. We ask you to read that one document from beginning to end. We say that it is black and white evidence of a deliberately fabricated synergy effect calculation that stands unrebutted in these proceedings.

We also now know that this fabrication proved to be decisive in the Investment Committee's deliberations.

So let us turn to that point of decisiveness, because on that point of decisiveness, as you see on slide 64, the Republic contends that a mere synergy calculation is of its essence, of course, speculative, and therefore it could not possibly have been decisive in the Investment Committee members' decisions. That's its real way of addressing this confession of criminal fabrication.

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

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

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

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

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

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

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

Bearing in mind that a majority was needed, so more

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

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

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

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

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

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

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

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

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

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

And that allows us to say that the debate before you

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

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

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

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

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

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

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

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

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

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

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

see the word "or".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Opening submissions by MR PETROCHILOS

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

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

MR PETROCHILOS: If I find how to do it, I will gladly do so. Is that better?

So I will address two matters this morning which are identified as numbers 2 it and 3 on the slide before you, slide 77, over the course of an hour or so.

This will require us to go a bit after the lunch break and I will identify what I will consider to be a natural break point, but if the tribunal identifies ——

MR GARIBALDI: I'm sorry, it may be the placement of the microphone, but I cannot hear you very well.

MR PETROCHILOS: Maybe I need to approach the microphone. Is that better, sir?

I have it as close to my mouth as I can, and I will try to speak up. But my voice doesn't naturally carry very much, I'm afraid.

MR GARIBALDI: I have the same problem, I'm very sympathetic.

MR PETROCHILOS: We will both make an effort in different directions then.

So the two matters I'll be addressing, the first is Korea's objection that a key part of the conduct of which Elliott complains, that is to say the actions and omissions of the Blue House and the Ministry of Health and Welfare, do not constitute measures within the meaning of the Treaty.

So in other words, Korea says that the tribunal may not even scrutinise under the legal standards of the Treaty the conduct of the numerous government officials involved all the way from President [redacted] down the chain of command. Why? Because as Korea would have it, you must axiomatically a priori characterise everything that these officials did and said as an expression of preference or an attempt to exert persuasion about the merger. These are the terms used by Korea.

And that kind of conduct, Korea says to you, is not a measure that can generate international responsibility at all.

Let me be very plain about this. Ignore, Korea says, the record which you considered with Mr Partasides, which shows that the Blue House and the Ministry of Health and Welfare gave orders and instructions which were indeed understood and implemented as orders and instructions. Ignore that reality, Korea tells you, which of course Korea's own courts and prosecutors have acknowledged, and call these orders and edicts just an expression of private wishes by Korea's President, Minister of Health and Welfare, and their respective staffs.

That is Korea's submission to you, members of the tribunal. Close your eyes to the record: presidential

edicts and ministerial orders, if given orally, are private wishes, not measures to which the Treaty applies.

It does help to be plain about what Korea submits to you.

The second matter I will be addressing you on concerns the conduct of Korea's National Pension Service, or NPS for short. Korea urges you to ignore that conduct as well, but the reason it gives here is a different one. Korea accepts, as of course it must, that the NPS is a type of administrative agency. And it also accepts that the NPS performs a core state function, namely the administration of the State pensions programme.

Korea also accepts that the assets of the National Pension Fund which is managed by the Minister of Health and Welfare and the NPS —— there is a concurrent competence, as we will come to see —— are a state property. They are not owned by the NPS, these assets. And Korea also accepts that the management of the fund's assets by the NPS is tightly and exhaustively regulated by law.

Now, these concessions notwithstanding, Korea says that the NPS's conduct here is not attributable to the State. I will come later this morning to discuss the

two main reasons given for this argument, but in a word, they rest on technical points of Korean administrative law which are important for you to understand, but with respect, distinctions without a difference for the purposes of attribution.

Now, I am mindful, members of the tribunal, that I will not be addressing you this morning on a further third objection that Korea has articulated, namely that Elliott's claims fail for want of demonstrating the exercise of what Korea calls, and I quote, "sovereign power in approving the merger". We have dealt with this point in the written pleadings and respectfully, we believe you will not need help through oral submissions. But having said that, I am naturally at your disposal to answer questions either now, or in closing, or whenever convenient for the tribunal.

So let me start with the objection by Korea which is founded on the notion of measures which is in Article 11.1, paragraph 1 of the Treaty, which is now slide 78 on your screens.

You see here that the key Treaty terms are measures adopted or maintained by a party and relating to covered investors, investments, etc.

You will recall in Mr Partasides' opening that Elliott's case rests upon a series of actions and

omissions which form a composite act. Both the objective and the actual result of that composite act were to subvert NPS's decision-making process.

Now, these actions and omissions are summarised -- and I'm conscious that they are summarised in bare terms which don't even begin to give the colour of their egregiousness -- on your screens on slide 79.

They emanated from the top of the executive branch of Korea's Government, the Blue House, and they were implemented through the administrative hierarchy chain all the way down to the relevant committee of the NPS.

So in this case, as in an ordinary Treaty case, the Claimant's factual allegations invite two enquiries by the tribunal: a factual enquiry as to what Korean officials and bodies did or failed to do as a matter of fact, and a legal enquiry as to whether or not these actions and omissions are in breach of the Treaty as we submit they are.

Now, our friends opposite say that there is a third enquiry. They say that the tribunal may only consider a narrow category of acts, I quote from paragraph 20 of Korea's Rejoinder, " legislative , regulatory and administrative rule-making or action".

As I mentioned, Korea's argument is that in ordering that the merger be approved, ordering that this result

be attained, by the NPS, Korea's President and other officials were engaged in conduct which falls short of being a measure in that narrow sense which Korea proposes to you.

Now, the brief point, members of the tribunal, is that Korea's conduct here does come within its own definition for your purposes. To quote again the decision of the Seoul District Court, which you saw on slide 36 earlier , and we don't need to go back to it, but I will quote it:

"Minister [redacted], through the Ministry officials, made detailed instructions to intervene in a matter that should be independently decided by the NPS through its voting process."

Exhibit C-69, page 59.

The President and the Minister's edicts were conveyed. You heard earlier, were understood, again, you heard earlier , and they were implemented as orders. If they had been put on paper, the paper would have been titled "Order". And an order is an order is an order, no matter what forum or medium it takes.

But there is a broader and purely legal ground as well on which Korea's objection fails . Korea is wrong to suggest that the Treaty does not concern itself with protection from material acts of the host State. We

submit that Korea's suggestion is self-serving, or to put it in more measured terms, it is wrong in principle and wrong in law.

It is wrong in principle , because it cannot be the case that certain conduct of the state which violates its obligations under the Treaty, may nevertheless escape censure on grounds that it is not a measure.

If the conduct is attributable and substantively inconsistent with the Treaty, then by definition it engages international responsibility and must perforce be a measure.

Let me illustrate this . If an investor claims that public statements by, say, the President of a country inciting people openly to destroy foreign property or to expel foreign managers led to, say, an expropriation of property or violated the guarantee of full protection and security, then if that is the pleaded case, it will be for a tribunal to assess these statements as part of the investors ' pleaded cause of action.

The Treaty -- no Treaty excludes such claims on an a priori basis .

Indeed, our Treaty here provides an example of purely material acts that can generate international responsibility . Article 11.5 in paragraph 5 of the Treaty, which is now on your screens, slide 80, covers

requisitions at times of war, revolt , etc .

So this is the kind of action that can be taken by the State's forces on the ground. It is the fact of requisitioning that the Treaty protects against . It 's a purely material act .

I now come to why Korea's position is also wrong in law. The term "measures" in this Treaty, as in other treaties and general international law, is intentionally broad. Korea has come to accept that this is the case. A little grudgingly, in the Rejoinder, accepting that is , that the ICJ's holding to that effect in the Fisheries case applies here too.

Although Korea has made that welcome concession, although a little late in the day, it maintains as a separate but related argument that the conduct of President [redacted] and her subordinates did not relate to Elliott 's investment, but it related to something else.

Now, you will recall that the terms 'relating to' are part of the wording of Article 11.1, paragraph 1, which is now again on slide 81 on your screen.

We do not expect you will have a difficulty with this argument, gentlemen, with respect, it is not a serious one.

The parties are ad idem on the relevant law. We accept adopting the test set out in the Methanex case,

an extract of which is also abstracted on the same slide, 81, that Korea's conduct must have a legally significant connection with Elliott's investment.

Now, is this a very stringent or exacting test? It is not. As both Methanex and a subsequent NAFTA case called Resolute Forest Products make clear, when a claim concerns measures of general application, then the investor needs to demonstrate more than just some collateral effect on its investment. But the investor is not required to demonstrate that such measures of general application were exclusively or individually targeted at its investment or at the investor itself. The Resolute Forest case is exhibit RLA—86, and the relevant paragraph is 242.

But the key point for the present case —— and this is the short point, members of the tribunal —— is that the Methanex test is by definition satisfied when the acts complained of were in fact targeted, and the present case is not about measures of general application, but rather about one specific transaction, the merger.

Korea's conduct was of course related to the merger, and it was related to the shareholders of the two companies involved in the merger: The pension fund. That is to say the State acting through the NPS was

a major shareholder of these companies.

Indeed, Samsung and Elliott was also a major shareholder. And as you have heard from Mr Partasides earlier, the very design behind Korea's conduct to induce the NPS to vote in favour of the merger was from the outset to overcome Elliott's open and reasoned opposition to the merger. So Korea subverted the NPS's decision—making process in connection with the position that Elliott had taken in respect of that proposed merger.

So the State, as you heard, made sure that the NPS would approve the merger.

Now, in short, members of the tribunal, it is difficult to conceive of a case other than the present case that is more investor or investment specific. The Methanex test is very comfortably satisfied.

So having put that to one side, I now turn, if I may, to issue number 3, which concerns the three alternative legal bases upon which NPS's conduct here is, in our submission, attributable to the Republic of Korea.

I propose to take these bases in turn, starting with NPS's status as an organ of Korea. Then to turn to NPS's governmental functions in connection with managing the pension fund, and finally to conclude with the

direction and control that the government exercised on the NPS in securing the approval of the merger.

Now, in dealing with attribution, let me stress a point that I'm sure the tribunal already has. If you are satisfied that as a matter of fact, law and causation, Elliott's claim succeeds because of the numerous ways in which the Blue House and the Ministry of Health and Welfare interfered with and subverted the NPS's decision—making process, then it will be unnecessary for you to deal with Korea's objections regarding attribution.

Why? Because Korea's objections to attribution concern only the conduct within and by the NPS which was orchestrated, as you heard by its Chief Investment Officer, conduct which Mr Partasides described earlier at step 3, and he illustrated through slides 54 to 68.

So if you consider as Korea's own courts have considered that what the NPS did was a foreordained result, given the President's and the minister's clear orders, that the merger must be approved by the NPS, then you needn't focus on NPS's actions as an international delict in themselves. They are just a foreordained consequence, as I say, of an international delict which was committed upstream in the hierarchy chain, namely at the Blue House and the

Ministry of Health and Welfare.

But if in the tribunal's judgment it is necessary to capture the NPS's conduct in order to establish Korea's international responsibility, then attribution does become relevant.

Before we turn to consider attribution under international law, let me briefly recall what the NPS is and what it does so far as relevant to all of the possible bases of attribution so we have it all in mind when we come to look at the rules.

Now, the main legal sources are now on your screen as slide 83, and one can see schematically the chain of delegation of public law duties in the legal text that are applicable.

One starts at the top from the constitution which in Article 34 sets out a duty for the state to promote social security and welfare and this is exclusively a state duty. Private actors do not have any such duty.

Now, this duty is implemented chiefly through Article 38 of the Government Organization Act, which you see one layer below and Article 2 of the National Pension Act which you also see at the same level of the hierarchy of norms.

These statutes delegate the constitution mission which one finds in Article 34 of the Constitution to the

Ministry of Health and Welfare to discharge.

These acts explicitly mandate the Ministry to collect pension contributions from the population and, as you will hear from Professor CK Lee, this is effectively a form of tax. And they also mandate the ministry to provide State pensions and to fund these pensions through investments.

So the Ministry must invest in assets which are acquired through the mandatory contributions of the population and then the Ministry must manage these assets in order to be able to fund the State pensions.

This, as you can see, is a core State function.

Now, the State's responsibility to manage these assets in the National Pension Fund is then delegated -- you see one level down in the hierarchy of norms -- is delegated to the NPS. And it is delegated pursuant to an authorisation which is to be found in Articles 24 and 102 of the National Pension Act and an implementing Presidential Decree, which you see also one further down, one level down, forgive me.

Now, the NPS has its own legal personality and it is designated in Korean law as a quasi-government public institution of the fund management type. I will come to say a few more things about this later on.

So this is the NPS.

The National Pension Fund does not have legal personality and it falls under the responsibility, as I mentioned earlier, of the Minister of Health and Welfare and the NPS.

We will have an opportunity to see in this hearing and it is a point of some importance, I submit, that the minister remains responsible for managing the pension fund, notwithstanding the delegation of duties to the NPS. It's a concurrent responsibility.

So in a word, the NPS's existence and mandate flow directly from the National Pension Act and that Act in turn implements the Constitution which sets out a core State duty.

Now, all I have just said is of course common ground. The salient characteristics of the NPS which are, we submit, relevant for your purposes in terms of attribution are also common ground, and these are summarised on slide 84 which you now have on your screen.

A number of things to note. The first thing to note is that although the NPS has legal personality, when it comes to acquire assets or later to dispose of assets of the pension fund, the NPS's legal personality disappears in the sense that, legally speaking, the relevant rights accrue directly to the State. And so the NPS is in this

respect a mere conduit to the State. It is not the subject of rights of ownership. It is at most you would say a nominal holder of the rights. It is not the real holder of the rights and we will come to look at the evidence with the Korean law experts on this point which, as I say, isn't controverted.

The second thing is that the fund's main resource is mandatory contributions by Korea's population, as I mentioned earlier, and the tribunal will recognise that the power to levy taxes and social security contributions is of course a quintessential State power.

The third thing is that the NPS's operating expenses are a line item in the national State budget which is of course approved in Parliament, and this is illustrated on this diagram which we have on slide 85 and on this diagram which was issued by the Ministry of Finance, you will see that NPS's budget comes under the expenses of the Central Government. And what does this tell us, members of the tribunal? It tells us that practically the NPS has no operating revenue of its own, and therefore practically no economic activity that it pursues for its own ends.

What does this tell us for attribution purposes? It tells us that the NPS is a full-time provider of public service.

If we go back to slide 84 and pick it up again on the fourth point, here one sees that the NPS officers, and these include of course the CEO and the CIO, the Chief Investment Officer, are appointed and supervised by the Minister of Health. And in some respects the officers of the NPS are -- what is called in Korean law -- deemed public servants. That is to say they are subject to the same duties as public servants.

The fifth point or the fifth characteristic that is important, we submit, is that when the NPS comes to make decisions about the State property that are the assets of the pension fund, and of course the merger was one such decision, the NPS is tightly constrained by principles which are set out first in the national Finance Act and then in implementing guidelines which are issued by the Ministry of Health and Welfare.

You will come to hear Professor CK Lee in detail on those and other implications so I mustn't steal his thunder. But the crucial point for present purposes is that these principles are exhaustive. The NPS has no discretion to apply different principles. It must apply only these principles. It has no choice, for example, to pursue a very short-term profit deal. It is not consistent with its principles.

And it is also the case that these principles are

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

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

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

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

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

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

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

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

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

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

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

hierarchy".

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

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

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

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

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

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

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

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

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

the judgment:

"States cannot escape liability by pleading the internal distribution of powers and responsibilities as between the bodies which exist within their national legal order."

C-127, paragraph 31.

Now, the point that emerges from all this, members of the tribunal, is actually a broader one and it's reflected in paragraph 2 of ILC Article 4. We are not looking to domestic law to decide for us whether State A or B is a unitary legal person and which departments or officials belong within that unitary legal person. And indeed, if each State were a unitary legal person on the domestic law plane, then there would be no need for rules of attribution in the first place because each State would have to be only what is contained within a unitary legal person on the domestic law plane.

But international law doesn't tell States that they should be unitary legal persons, and one knows of no State which is just one unitary legal person. States consist of a number of organisations and entities which form a structure and that is the structure that ILC Article 4 calls upon you to recognise and give effect to.

So we have rules of attribution precisely because

each State organising itself differently from the next, and the task of an international tribunal is to assess whether a given entity, whatever its legal classification and internal law or practice, and whatever its level in the hierarchy within the State, is or is not in fact part of the structure that a given state has chosen to adopt.

Members of the tribunal, that seems to me to be a natural break point for me, but I'm entirely in your hands. It's 12.10.

THE PRESIDENT: Thank you very much, Mr Petrochilos. Let's break for an hour and we will resume at 1.10.

(12.10 pm)

(The short adjournment)

(1.10 pm)

THE PRESIDENT: Let's resume. Mr Petrochilos, Dr Petrochilos.

MR PETROCHILOS: If our court reporters are ready, I'm ready, Mr President.

Now, before the break we looked together at a number of background points in respect of the analysis and legal test under ILC Article 4 which, as I said, ought to be uncontroversial which served as background before I would introduce the points of disagreement between the parties and I would address them.

Let me describe for the tribunal what the parties' disagreement is in respect of attribution as organ in connection with the NPS.

This focuses on two matters which are separate but closely interrelated.

The first matter is whether international law precludes the characterisation of State organ when the relevant entity has its own legal personality. We say international law does not preclude characterisation as organ; Korea says that it does.

The second disagreement turns on whether it is relevant or not that the NPS has been established and classified within the Korean legal order as a quasi-government public institution, that is the technical designation, under the Ministry of Health and Welfare rather than as a Central Government agency directly under Korea's President or Prime Minister, and you will hear about this granular issue from our two Korean law experts, Professor CK Lee and Professor Kim.

We say it is not relevant. It is a distinction of internal law without a difference for purposes of attribution because, as I mentioned earlier, as the ILC official commentary makes plain, the precise classification and position in the hierarchy that an entity has on the domestic legal plane is immaterial for

purposes of attribution.

Now, in respect of both of these points of disagreement, I should say, members of the tribunal, there is a decided case that would have been particularly helpful to you, but which Korea has very studiously kept from you. That is the award in the Dayyani case against Korea which concerned a transaction with an entity similar to the NPS, called KAMCO. KAMCO is an acronym for the Korean Asset Management Company which is set up by statute to acquire and to administer certain underperforming assets for the sake of the country's financial stability.

The dispute in the Dayyani case concerned a decision by KAMCO related to a contract that KAMCO had with the claimants in that case which concerned an investment by the Claimants in the Daewoo group.

Now, KAMCO, just like the NPS, is designated as a quasi-governmental institution with its own legal personality in the form of a corporation, and you find that in exhibit C-278 at page 6.

Also like the NPS in its role as the manager of the pension fund, KAMCO acquires and then manages assets in the public interest, supervised by other State organs, and in a manner that is set out in law and regulations, and you find the primary source for that at exhibit

C113, Article 1.

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

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

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

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

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

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

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

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

So often separate legal personality is in fact to facilitate accountability and independent decision—making.

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

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

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

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

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

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

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

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

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

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

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

a limited one.

It is a limited disagreement because for one thing the parties and their experts agree that the NPS is an administrative agency of the Republic of Korea. They also agree that there are a number of other characteristics of the NPS which we submit are relevant for purposes of attribution and which I have outlined earlier on slide 84.

So there is a considerable ground of agreement between the parties and their respective experts.

The disagreement of the parties centres on a classification between government bodies under Korean public law. Some entities are classified as central administrative agencies and do not have legal personality. Other entities, which do have legal personality, are classified as public institutions, and some of those, including the NPS and KAMCO, but by no means all of them, are further classified as quasi-governmental public institutions.

There is no third type of public authorities. A Government agency has to be either of the one type, a central agency, or the other type, a public institution, and each type of agency has to be created pursuant to a statutory framework and an individual statutory authorisation authorising its creation.

This is called the principle of administrative legalism and there is nothing remarkable in that respect.

So far as the present case is concerned, the only difference of any note between central agencies and public institutions is that a central agency is subject not only to ministerial control, but also presidential control, whereas a public institution is subject to ministerial control and so the minister can revoke or cancel acts of the institution which appear to the minister to be unjust or unlawful, and then the minister's decisions are of course themselves subject to presidential control because the minister is a Central Government agency.

That is the situation on the internal legal plane in Korean law, but none of this matters for purposes of attribution of course. Why? Because, as we saw, the precise placement of an entity within the State hierarchy is immaterial as a matter of international law.

So in our respectful submission, the task for the tribunal is to form a sound understanding of the structure of Korea's administration, but again respectfully not to let fine distinctions of internal law obscure the broad target that ILC Article 4 sets forth.

So to conclude on this, for the purposes of ILC Article 4, and Article 11.1, paragraph 3 of the Treaty, what matters here is that the NPS performs a quintessential State function, exercising a public law mandate that descends to it from the Constitution and the National Pensions Act, to be the custodian of monies collected from Korea's population, and then the NPS uses these resources to acquire and then to manage assets that do not belong to it, but belong to the state, and about which assets the NPS cannot make decisions as an ordinary asset manager, but exclusively pursuant to principles enshrined in law and regulations.

So unless there are questions from the tribunal at this stage, I now move to the Claimant's second and alternative basis of attribution on which I can be briefer.

THE PRESIDENT: Yes, please go ahead.

MR PETROCHILOS: Thank you.

Now, that alternative basis proceeds from the Treaty and general international law again, and again the parties agree that you are to read these two together, the Treaty and customary international law, and you have the relevant provisions of the Treaty and the ILC articles on slide 88 now on your screen.

We say that in approving the merger, the NPS acted in the capacity of an entity that was entrusted with elements of the governmental authority within the meaning of ILC Article 5, and what was that governmental authority? Again, the custody of State property because the funds' assets are State property, the pension fund's assets are State property, and following principles that are set out in regulations and in the law, and which fully determine the NPS's decision-making.

Now, these principles are to be found first in the National Finance Act. This is the Act under which the national State budget is managed. This is exhibit C-211. And then they are further particularised in regulations, the chief among them being the Fund Operational Guidelines which you find at exhibit C194.

Now, Professor CK Lee is a notable authority on these matters, and the tribunal will have an opportunity to hear him.

But in short, consistent with the principle of legality of administration, in deciding on the merger, the NPS was exercising a function specifically entrusted to it by law and decree to manage State property, and in so doing, the NPS was not acting as an ordinary commercial party with full discretion. Rather, as the custodian of assets owned by the State, the NPS was

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

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

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

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

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

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

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

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

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

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

The second purpose is to capture entities that

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

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

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

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

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

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

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

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

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

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

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

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

from the context in which the powers were exercised.

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

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

If that is agreeable, Mr President --

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

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

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

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

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

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

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

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

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

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

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

where a negotiating history was not available to the tribunal.

Having put this point to one side, let us now look at Korea's defences in respect of direction and control.

Two defences are advanced and I will take each in turn.

The first defence is what I call the triumph of form over substance -- or how to craft a defence out of one's own wrongdoing.

Let me explain. Elliott's case is that NPS's decision-making was subverted by numerous Government officials acting in concert. These acts of subversion contravene Korean law as the Korean courts have held, as they also contravene the Treaty, but Korea seeks to use this to its advantage, arguing that the notions of direction and control require legally binding instructions to be given.

Of course Korea says this knowing full well that no such formal instructions could have been given for the simple reasons that they were illegal under Korean law.

To paraphrase Director General [redacted] of the Ministry of Health and Welfare, "[redacted]".

Members of the tribunal, if Korea's argument were right, then all sorts of illegalities would not be

attributable. A requisitioning of property -- I'm taking an example that we looked at earlier today, an example from the Treaty. So a requisitioning by paramilitary forces not based on a written order from an official commander would escape scrutiny on the pretence that no legally binding direction was given. Now, that can't be right, and of course it isn't right.

Again ILC Article 8, which is still on your screen, refers explicitly to the fact of instructions, direction or control and that is the end of that matter.

Mr Partasides took you through the salient facts earlier today, but let me recall briefly what kind of direction and instruction descended to the NPS, so you can place Korea's argument in its proper context and see it for what it is.

You have a summary on your screen on this slide 93. And there will be occasions in the course of this hearing, one hopes, to look at the written record which is rich and we will do so in detail.

But for attribution purposes, there are three points which the evidence establishes. It establishes, first, that the instructions were as specific and granular as they needed to be at each level of the administrative hierarchy in order to achieve the merger. And so the President directs that the merger be passed -- in French

you might say an obligation de résultat, an obligation to achieve a certain result: do what you must, she says, just get it done. This is indeed what you would expect a person in the position of the President of the country to say.

But within the NPS more granular directions were required to be given from time to time, and that includes directions by the Director General of the Ministry, Mr [redacted], to the Chief Investment Officer of the NPS, Mr [redacted], to handle, these were the words, the merger vote within the Investment Committee which Mr [redacted] controlled.

The references to the record are under item 4 of the list on your slide, but you also have the Seoul High Court decision at C-79 at page 18.

The second point that emerges and is relevant for attribution purposes in terms of direction and control, and I mentioned it from the outset, is that directions and instructions were intended, understood and implemented as compulsory orders. This starts from the very top, the presidential Blue House, and you have the main references under item 1 on this slide 93.

The third point is of course that the directions were complied with all the way down the hierarchy chain, and the NPS did approve the merger.

Now, this leads me to Korea's second defence in respect of direction and control. Korea argues that Elliott must establish both general State control over the NPS and indeed individual members of the Investment Committee and that Elliott must also establish specific control over each individual vote that they cast.

Now, in our submission this argument is misplaced because it is borrowed from areas of the law with heightened evidential demand, notably armed conflict and international criminal responsibility, but I need not take the tribunal's time on this today. It has been dealt with in the written pleadings. Because this, members of the tribunal, is the rare case in which there is direct evidence of specific control.

An aspect of it is on your screen as slide 94. To quote Korea's High Court judgment, which is what you have on your screen, in respect of the indictment of President [redacted], she and her staff caused the NPS to cast a favourable vote, and as the most recent prosecutorial documents encouraged, you have an extract on slide 52, it was the instructions of President [redacted], conveyed through Minister [redacted], that caused the NPS's Chief Investment Officer to procure a favourable vote by the Investment Committee which was, I quote, under his influence.

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

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

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

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

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

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

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

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

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

Further submissions by MR PARTASIDES

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

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

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

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

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

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

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

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

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

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

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

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

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

First, the Claimant didn't substitute swaps for

shares to obtain Treaty protection at all. It had no reason to do so because derivatives are also stated expressly in the Treaty as a protected investment.

Second, we say, for the increase in a pre-existing shareholding to be an abuse at all, the Respondent would need to demonstrate that there were no other legitimate commercial purposes to be served by the acquisition of the shares that were acquired other than to gain investment Treaty protection that a Claimant didn't otherwise have. This is the test, as you see on slide 97, that was proposed in Phoenix Action, a case chaired by Brigitte Stern which the respondents appear to like but which doesn't help them, we submit, at all.

I say it doesn't help them at all because, as James Smith has explained and as you see on the next slide, slide 98, the Claimant purchased more voting shares, members of the tribunal, in Samsung C&T for the entirely legitimate commercial reason of increasing its chances of resisting a merger should it be put to a vote.

That isn't abusive. That is self-protective commercial activity that has nothing whatever to do with investment Treaty protection. So we are far away from those circumstances in which a Claimant has moved its place of incorporation uniquely to gain Treaty

protection that it did not already have.

Third, and this is why we submit that this objection is, with respect, utterly misguided. Abuse, members of the tribunal, would require the Respondent to show that Treaty protection was gained at a time when the specific dispute now before you was foreseeable and that manifestly was not the case because the claim before you is not directed at the commercial risk of the possibility of a merger taking place. So the mere foreseeability of that commercial risk is not relevant to an enquiry of abuse. Rather, this claim is about the arbitrary and discriminatory governmental intervention, fuelled as we now know by criminal corruption, that allowed this merger to take place. That is the specific dispute now before you, to use the language of Phillip Morris.

That conduct, members of the tribunal, certainly could not have reasonably been foreseen at the time that Elliott was purchasing its shares in SC&T because, as we've seen together, it was deliberately concealed from Elliott, as it was from every other shareholder of SC&T other than the government's own NPS.

What is the Respondent's factual basis for claiming otherwise? As you see on the next slide, 99, here it tells us -- it's paragraph 374 of its statement of

defence -- that because the ROK itself was certainly anticipating future Treaty claims, then the Claimant must have been as well.

Well, as we've seen, members of the tribunal, the Respondent itself certainly was anticipating the risk of Treaty claims when it was improperly intervening in the merger behind closed doors, but there is no evidence whatever that Elliott was, and how could it, given the very conduct complained of was concealed?

The two public letters to the NPS that the Respondent cites in this one paragraph in its statement of defence are, we submit, a very good example of the care with which you must treat the Respondent's use of evidence in this arbitration because we will invite you to read those two letters cited and footnoted in this paragraph from beginning to end and you will see that they show nothing of the sort, certainly nothing to suggest the anticipation of an investment Treaty claim in respect of conduct that only became clear more than a year after the merger took place when the criminal investigations began.

That first of the two letters that is relied on by the Respondent was dated 9 July 2015. And to be clear, that was after the Claimant finished acquiring its shares, and it was the day before the NPS's internal

Investment Committee meeting that you heard me describing earlier.

That letter makes no reference to litigation at all, much less any reference to a Treaty claim. Instead, it simply states that the merger would cause significant losses to all SC&T shareholders, and to the NPS's own pension stakeholders as well, as indeed it did.

The second letter that was referred to here was dated 24 July 2015. So this one was not only after the Claimant had stopped acquiring shares, but it was also after the SC&T vote approving the merger on 17 July 2015 and again, you will find no reference in it to a Treaty claim.

Indeed, how could there be because it was long after the vote and long after these letters, indeed not only the following year in 2016 that Korea's own public prosecutors began to reveal the facts of the concealed illegal government intervention that forms the basis of the specific dispute before you.

In short, members of the tribunal, we need not have a doctrinal debate here. We are a very long way from the circumstances that would justify the exceptional remedy of rejecting a claim on grounds of abuse of process.

That is the first of the two bases on which the

Respondent asserts an abuse of process.

The second basis contends that an abuse exists because of the existence of a separate action taken by Elliott which it took against Samsung in Korea that resulted in a Settlement Agreement with Samsung in 2016. So, the Respondent argues, that this international cause of action against the Republic of Korea could not be brought because the Claimant pursued and settled a different claim against a different Respondent in relation to a national, domestic and different cause of action.

Now, to recall, members of the tribunal, as we have ourselves described to you in our pleadings, the Claimant did indeed pursue a Korean statutory remedy that it had against Samsung itself. That local cause of action arose from the statutory right of any opponent to a merger to have its shares repurchased if they were owned prior to the announcement of the merger itself. And that repurchase would take place at a price that, like the statutory merger ratio itself, arises from another statutory formula, that is also based on the short-term traded share prices of the applicant's shares instead of it being based on a one-month average, which is the merger ratio, it's based on a two-month traded price average.

And so that limited remedy suffers from many of the same shortcomings as the statutory merger ratio itself, and it couldn't possibly compensate the Claimant fully for the harm that we claim here.

Now, we have also described, members of the tribunal, how that different cause of action against a different party, Samsung, did result in a settlement, and that settlement saw some payment back to the Claimant for Samsung as reacquisition of those appraisal shares.

All of those amounts, and this is important for you to understand, received from Samsung by the Claimant have been properly taken into account and fully deducted from the damages calculation that we have presented to you here.

So there could be no double recovery in relation to amounts already received by Elliott. The claim we make here is already net of amounts received from Samsung for the repurchase of some of the Claimant's shares.

Now, we also accept, I should say, that under the Settlement Agreement with Samsung there is a right to further payment in future from Samsung if other shareholders should receive a higher price than that at which the Claimant settled. But, as things stand, members of the tribunal, those other shareholder cases

which progress have now been pending for more than five years and although those other shareholders have been awarded a higher price, that decision has remained on appeal since 2016 with no sign of progress towards a final outcome.

So the Claimant has received no further payment over many years. It is not clear that it ever will, and its entitlement to any future payment by Samsung, if any, will arise long after this tribunal has completed its mandate.

If such a right did arise subsequently, it would then fall to Samsung to contest that right to further compensation on the basis that the Claimant has already been compensated through these proceedings.

In other words, members of the tribunal, any possible future risk of double recovery would not be for this tribunal to grapple with, but rather for any future Korean court convened to determine any future further compensation due to the Claimant from Samsung.

In other words, any possible future risk of double recovery is not for this tribunal to take into account at all.

But in any event, as this discussion has revealed, I hope, this, members of the tribunal, is not an issue of admissibility of this claim. Rather, it would amount

to a question as to the quantum of the claim which cannot possibly limit or inhibit in any other way the admissibility of this claim against a different party on the basis of a different cause of action in respect of harm that has not been compensated for.

Members of the tribunal, with those words on an alleged abuse of process, I believe we have said enough about the Respondent's panoply of preliminary objections and so now we turn to the merits of the claims properly before you.

Now, it becomes clear why the Respondent has attempted to assemble so many barriers, members of the tribunal, to you reaching the merits of this dispute as soon as we do reach the merits of this dispute, because just as so many of the factual foundations of our claims are indisputable, so the legal consequences, we submit, are unavoidable.

Now, as you know, as you see on slide 101, we submit that the Respondent has violated its investment protection obligations in two ways and today in the interests of time we shall focus on only the first of those breaches: the Respondent's failure to accord the Claimant the minimum standard of treatment under Article 11.5 of the Treaty. Our submissions on the failure to accord us national treatment stand and we're

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That is not our position. But, as you know, it is a statement of elementary international law that the acts of a court are attributable to a State. That is precisely why a judicial act or omission is itself capable of constituting an internationally wrongful act.

It follows from that elementary principle that while this tribunal is not bound by the decisions of Korea's domestic courts, the Republic of Korea cannot take a position before this tribunal that disavows or is inconsistent with the findings of its own courts.

Now, this elementary proposition was confirmed unanimously in authoritative terms by the eminent tribunal in the case of Chevron v Ecuador II. That case featured a tribunal in which Professor Vaughan Lowe was appointed by Ecuador and the late Johnny Veeder presided. As many of us know, the Veeder tribunal, both for jurisdiction and the merits, had reason to study closely the decisions of the Ecuadorian courts that were relevant to the international law claim before it.

On an issue of temporal jurisdiction, the details of which are not relevant for our present purposes, it was in Ecuador's interests in the Treaty case to attempt to contradict a factual finding of its own courts.

In the face of that attempt at contradiction, the Veeder tribunal found that Ecuador could not do so.

Let's look closely at how it arrived at that finding on the slide you see before you, slide 108. First, the Veeder tribunal's point of departure, quoting various well-known sources, the Veeder tribunal held that parties who have concluded a Treaty have brought themselves into a relationship of good faith. You see that extracted at paragraph 7.84 of the award at the top of the slide.

According to the Veeder tribunal, the duty of good faith precludes clearly inconsistent statements by a state that a State in its words cannot blow hot and cold. You see that explained at paragraph 7.88, 7.91 and 7.106 in different formulations.

Let's move on to the next slide. In determining inconsistency, the Veeder tribunal found that so far as a State is concerned, its relevant statements include the pronouncements of its judicial organs. That's paragraph 7.109. This is notwithstanding the fact that, as a matter of law, the courts enjoyed judicial independence, and that is because, as I said earlier, international law makes no distinction between executive, legislative or judicial organs.

On this basis, the Veeder tribunal found that as a matter of law, Ecuador could not disavow the findings of its own courts. That's paragraph 7.111.

So here in precisely the same way, we say, it is not open to this Respondent State to disavow the factual findings of its own courts to a criminal standard of proof on the basis of evidence presented by its own prosecutor. So let us take stock, members of the tribunal. We have identified our uncontroversial legal minimum standard, our agreed minimum standard. We have explained why it is not open to the Respondent to contest the findings of fact arrived at by its own courts as a matter of law. So now let us apply those incontrovertible facts to our agreed standard.

To recap, as you see on the next slide, 110, this is the specific governmental conduct that we complain of. We've described those facts in detail already. So what I propose to do now is simply to organise them under three headings that are relevant certainly individually, and undoubtedly together, to proving breach of the standard.

You see those three headings on the next slide, 111. Our starting point is that the NPS's decision to support the merger was in a word at least irrational. How else could we reasonably describe a decision to support a merger that impaired on its own internal calculations the value of the National Pension Fund itself? That impairment is not just subjective opinion on our part,

members of the tribunal, as we see on slide 112; it is objective fact that has been confirmed more than once, as you see on this slide, by Korea's own courts.

Now, let's compare what the Korean courts have found outside of these proceedings with what the Respondent is suggesting to you within these proceedings.

Here on the next slide you see another extract from Korea's Rejoinder in which it suggests that there may have been a difference between the NPS's short-term interests and its longer term interests, and we also see it suggests that what was good for the Samsung Group was good for the Korean economy.

As you consider those attempts to explain away the damage that was inflicted on Korea's National Pension Fund, let's recall that we haven't ever seen the Korean courts observing that the merger might have been in the fund's long-term interests when it convicted its Minister [redacted] and Chief Investment Officer [redacted]. We also haven't seen any reference to this being good for the Korean economy because it was good to the Samsung Group when the courts convicted Minister [redacted] and President [redacted] for, amongst other things, abuse of power.

To the contrary, members of the tribunal, [redacted] is being indicted again by Korea's prosecutor, as we speak,

precisely because the criminal scheme that he participated in was conceived to serve the interests of the [redacted] family, not the Samsung Group as a whole.

Very simply, the NPS's decision to support the merger has already been judicially recognised domestically as an objectively damaging decision for the National Pension Fund, that the NPS was charged with managing.

So it was entirely at odds with the NPS's own investment principle of profitability which you see on the next slide, and which the NPS was statutorily obliged to comply with under the National Pension Act.

So certainly irrational. But the conduct that led to that decision was more than just irrational because it also involved a wilful disregard of due process.

Now, as we've already seen, members of the tribunal, the irrational decision that we've just walked through was ordered from on high. That is evidence that has come from those who received the Presidential order and it has been confirmed by the Korean courts repeatedly.

That was a governmental order, as we see on slide 117, that once again violated the investment principles, in particular the principle of independence, according to which investment decisions in respect of the National Pension Fund were to be made. So the

Presidential order to support the merger, which was then followed by a ministerial order, whatever its motivation, and we will come to the motivation, was itself a departure from due process.

To follow that order, further departures from due process were committed.

So, as we've seen already, Korea's courts have found that the Ministry also ordered the NPS to circumvent the structural mechanism for independent decision-making that was the Experts Voting Committee. This again diverged from the NPS's due process.

Now, in its final pre-hearing submission the Respondent has argued, and you see it on slide 119, or at least we'll address it in slide 119, the Respondent has argued that for a decision to be difficult such as to justify a reference to the independent Experts Voting Committee, the Investment Committee must itself choose to find the decision difficult, and it didn't. So according to the Respondent, there couldn't have been a departure here from the NPS's due process.

But what the Respondent never deals with, as you can see on this slide 119, is item 6 of Article 5 of the Fund Operational Guidelines. Because item 6 provides a separate right for the chairman of the Experts Voting Committee to require a reference of a decision to the

Experts Committee even if the Investment Committee itself decides that independent input is not needed.

Now, that is precisely, members of the tribunal, the kind of safety valve that is an entirely typical process safeguard and for obvious reasons. Let us please think about this. If Chief Investment Officer [redacted]'s Investment Committee alone controls whether an independent mechanism can be bypassed, then it may be bypassed precisely when it is needed most, as was the case here. As we can see on the next slide, 120, the chairman of the Experts Committee did make clear here his explicit demand that the decision be referred to his independent committee. At the top of the slide you see his email very early in the morning of 10 July 2015, at 12.30 am, the day of the Investment Committee meeting itself, [redacted], and at the bottom of the slide you see his letter written on 11 July 2015, the day after the Investment Committee's meeting, which expressed his view once he was told that the decision had already been taken by the internal Investment Committee, his view that it was extremely inappropriate that this occurred, extremely inappropriate that the reference wasn't made to his committee.

As I told you earlier, members of the tribunal, in

truth you don't even need to agree with the unequivocal view of the chairman of the independent Experts Voting Committee himself because, as we've already seen, you just need to accept the contemporaneous evidence of the NPS's own internal view at the time because, as we recall again on slide 121, whatever the Respondent now says, the documents at the time leave no doubt that [redacted].

What's more, the NPS and those who were directing it themselves anticipated that bypassing that mechanism was the kind of procedural misstep that might lead to a Treaty claim.

Now, let us think about this last point, and let us look one final time at the extract on slide 122. Because it really is remarkable that before this Claimant even notified a Treaty claim, indeed long before this Claimant even knew of the facts that we now complain of, the Blue House, the Ministry and the NPS themselves were already concerned that [redacted].

So we have an irrational decision. We have a wilful disregard of due process that led those within government to anticipate Treaty claims, but the conduct here goes beyond that. It goes beyond even a wilful

disregard of due process, and so we come finally to the evidence of Government criminality that you are now familiar with.

That criminality started at the very top with the former Head of State, sitting in jail as we speak, because the evidence has already established to a criminal standard of proof that she solicited a bribe advantage in exchange for abusing her governmental powers to support the [redacted] family's succession plans.

We've seen the finding of a corrupt quid pro quo in the conviction of President [redacted] before. Here it is again on slide 124. The Respondents can't deny that. So instead they point to the contrary finding that was arrived at in the conviction of [redacted] that there was insufficient evidence of a quid pro quo at the time of his conviction. You see that alternative finding at slide 125.

But the terms of the [redacted] conviction, members of the tribunal, don't alter the finding against the President. And the evidence of her corrupt quid pro quo has not diminished over time. Rather it appears to be growing, and so outside of these proceedings Korea's prosecutor continues to pursue a further prosecution alleging again that the former President received financial inducements in exchange for supporting the [redacted]

family's succession plans.

We've seen the key extracts from that latest indictment before. We don't need to spend time on it again. It's at slide 126. But I invite you to keep it firmly in mind as you consider Korea's latest simultaneous denials of that very same fact within these proceedings.

We say that the existing conviction of President [redacted], together with Korea's latest additional ongoing indictment of [redacted], that further alleges a quid pro quo to assist in the merger, is more than enough.

But in any event, let us repeat, we don't need to prove criminality to succeed on our Treaty claim. All we need to do is demonstrate that the governmental order, whatever motivates it, involved an abuse of government power.

Any doubt that it did, were it still to exist, is removed by the fact that the intervention was knowingly and carefully concealed by those involved in it. Here on the next slide, one last time, we see the exhortation from the Ministry's Director General of Pension Policy, Mr [redacted], laced with heavy sarcasm, to the effect that [redacted]

[redacted].

We agree. Anyone, even a child, would understand that this was improper and that is why it was deliberately concealed.

So we come finally to how this improper governmental intervention, whatever its motivation, was implemented by those further down the chain of command. We've already described the NPS research group's valuations and revised valuations of the SC&T in order to get closer to justifying this value transferring ratio. I'm not going to repeat that. So let me repeat only the final step in this sordid chain because despite all else that had been done, this governmental intervention would not have achieved its aim without the fabrication of the so-called "synergy effect". So the final word really does belong to the man who pulled that calculation out of a hat, Mr [redacted].

Mr [redacted], who came up with a calculation that he has himself described as [redacted], members of the tribunal, in the language of ELSI, that he has confessed himself [redacted] and that [redacted]

[redacted].

So what you have clearly before you, members of the tribunal, is gross illegality, motivated by corruption,

and implemented by fraud, supported by a weight of evidence, the like of which we will likely not see again soon in investment Treaty arbitration, and so there is no risk of floodgates opening in finding breach here.

To the contrary, if this kind of conduct is not a violation of the minimum standard of treatment, then we submit, with respect, that standard is no standard at all because we submit that this conduct does or at least should shock any reasonable sense of juridical propriety.

With that, members of the tribunal, we turn to matters of causation and quantum. And if this is an appropriate time, as that will be the last segment of our opening submission, perhaps this is a good time for us to take a break.

THE PRESIDENT: Thank you very much. Let's break now for 15 minutes. We will continue or resume at 2.45.

(2.31 pm)

(A short break)

(2.46 pm)

THE PRESIDENT: Okay. Let's resume. Claimant. It will be Ms Snodgrass.

Opening submissions by MS SNODGRASS

MS SNODGRASS: Thank you, Mr President. Members of the tribunal, today I'm going to address you on causation to

loss and the quantum of damages.

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

So first causation in fact.

The Claimant has outlined a straightforward chain of causation which you see depicted on side 132. Link number 1, the ROK's breaches of the Treaty caused the NPS to vote in favour of the merger.

Link number 2, the NPS vote for the merger caused the merger to be approved at the extraordinary general meeting of SC&T shareholders, and link number 3, the merger caused the loss to the Claimant by transferring

value from SC&T shareholders such as the Claimant to Cheil shareholders such as [redacted].

Now, in their submissions that you heard earlier today, Mr Partasides and Dr Petrochilos identified the measures that amount to breaches of the Treaty.

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

Namely, as a result of a corrupt bargain with [redacted], [redacted].

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

So the slide and the evidence that it summarises

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

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

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

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

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

Of course, certainty is not the relevant standard

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

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

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

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

As the tribunal will recall from our pleadings,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I wanted to turn now to slide 138 and link 2. Earlier today Mr Partasides set out the ample evidence and indeed the simple math that confirm that the NPS vote for the merger caused the merger to be approved at the extraordinary general meeting of shareholders which I don't intend to repeat. I wanted only to briefly reprise a selection of the evidence that we've already taken you through to show that it is not merely the Claimant's view that the NPS had the casting vote on the merger. Rather, as the evidence on slide 139 shows,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[redacted]

.

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

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

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

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

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

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

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

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

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

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

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

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

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

to evidence that we just discussed that NPS CIO [redacted] specifically asked Samsung to adjust the merger ratio because of the loss it would inflict on SC&T shareholders, although in the event no such adjustment was forthcoming.

Moreover, as we've explained in detail in pleadings on proximate causation, causing a loss to SC&T shareholders by consummating the merger at a merger ratio that undervalued SC&T and overvalued Cheil was not just the incidental effect of mechanically applying a statutory formula here, it was not just an unintended consequence —— it was the whole point of the merger scheme.

The merger would have done nothing to address the [redacted] family's succession issue if it didn't assist [redacted] to increase and consolidate his hold on the crown jewel Samsung Electronics, and the merger would only do that if it was concluded on a ratio that was favourable to [redacted] and Cheil and unfavourable to SC&T shareholders.

The ROK itself now spells this out in the PPO indictment. In the ROK's words, as Mr Partasides took you through this morning, and as you again see on slide 151, the key to having control of Samsung Group was to secure control of Samsung Electronics and to this end it was essential to secure control of Samsung Life

and SC&T.

And simply we see on the next slide, 152, [redacted] needed to strengthen his control of Samsung Electronics by obtaining direct control over SC&T. And we see on slide 153 that this is further confirmed by internal Samsung documents that were quite recently disclosed by the ROK.

In the excerpt from the PPO indictment that we see on slide 154, we see the ROK going on to explain the significance of the merger ratio to Samsung's scheme, spelling out that a merger between Everland, which was what Cheil was originally named, it was later renamed Cheil, and SC&T, that that merger was "at the core of the succession plan". So it was important to "create a favourable merger ratio" for that merger.

In the balance of the PPO indictment, the ROK goes on to detail, how that plan was put into action with the active support of the NPS.

And evidence continues to come out from the PPO investigation concerning the lengths to which Samsung went to manage the two entities' share prices in order to achieve the desired merger ratio.

By way of example, we see on slide 155 a document from April 2015 that the PPO obtained from Samsung in which Samsung candidly acknowledged share price

management required from now on until the general meeting of shareholders, August 14, and during the period of exercising appraisal rights. And it goes on to detail steps that it would take to variously boost and decrease share prices of Cheil and SC&T.

So in addition to the fact that as a matter of pure chronology, the merger ratio was fixed before the majority of the ROK's measures in relation to the merger even occurred, the merger ratio was the key term of the merger proposal on which the NPS subsequently voted.

And nor is there any basis on which the ROK could plausibly claim not to have known that the merger ratio would cause a loss to SC&T shareholders. The ROK not only knew this, it understood that a merger ratio that would cause a loss to SC&T shareholders was the gist of the Samsung succession scheme. Indeed, among other things, the NPS cooked up a fictitious synergy analysis precisely to conceal the loss that was caused by the unfair merger ratio. So the ROK not only went along with the plan to cause a loss to SC&T shareholders like the Claimant; it was an active participant in that plan.

In the interests of time, that's all I propose to say on causation, and unless the tribunal has questions on causation, I propose to move on now to the quantum of damages.

In this case the Claimant claims damages in a principal amount ranging between $379 and $539 million. The Respondent not only asserts that the Claimant suffered no harm at all; it advances wholly speculative arguments about fantasy rates of return designed to obscure the truly epic scale of its own wrongdoing.

My aim in the balance of in time is to explain why the Claimant is entitled to the damages it seeks and by putting the ROK's misplaced speculations in their proper context, to put them to rest.

By way of a roadmap to these submissions, after briefly addressing the familiar framework for analysing the quantum of damages, I plan to address the three main topics on which the quantum experts differ.

First, what is the appropriate valuation methodology; second, how should any so—called "Korea discount" or "holding company discount" be taken into account; and finally, what would the value of Claimant's investment have been in the proper counterfactual scenario and what is that scenario?

So turning to the legal framework, as I do not need to remind the tribunal, but you can nevertheless see on slide 158, the aim of compensation for breach of an international obligation is in the classic formulation,

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

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

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

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

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

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

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

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

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

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

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

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

That's the first row.

From that one then subtracts what the Claimant

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

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

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

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

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

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

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

submissions and we will address them again with him on examination to show that in fact Mr Boulton's sum of the parts methodology is robust and reliable.

What I wanted to point out today only briefly was that indeed this was a standard methodology, used by market participants, including, as we see on slide 162, investors like Elliott. We see the evidence of Mr James Smith. We see on slide 163 evidence that contemporaneous market analysts such as Credit Suisse and UBS, and we see on slide 164 Samsung Securities using sum of the parts valuations of SC&T.

Now, those market participants sometimes use the terminology of net asset value or NAV to describe the same bottom-up approach to valuation. As Professor Dow explains, "NAV is often used as synonymous with sum of the parts", and in his report he says he uses "NAV" to mean a sum of the parts evaluation.

On that basis I understand it is common ground between the quantum experts that "NAV" and "sum of the parts" are broadly synonymous with each other, and customary approaches to valuation used by market participants.

For his part, Professor Dow does not offer an alternative valuation of SC&T. He instead proceeds on the basis that no valuation analysis is really necessary

here. The only value that is relevant is the price at which SC&T shares were traded. He says in the excerpts from his report on slide 165 when there is an active market for an asset no formal theory of value is needed. We can take the market's word for it. He says:

"If the market is efficient, the market price is the fair market value."

And he then concludes:

"The market for SC&T shares is semi-strong efficient."

So Professor Dow's basic argument is that for the purpose of calculating damages, SC&T can only ever be worth the value implied by what its shares trade at on the Stock Exchange from time to time.

Professor Dow labels this argument the "fair market value approach", no doubt in an effort to obscure the fact that other valuation methods, whether called "NAV" or "sum of the parts", are methods for determining fair market value.

Our Reply and Mr Boulton's second report pointed out three fatal flaws in Professor Dow's analysis.

The first fatal flaw is that it suffers from circular logic.

The merger proceeding on a merger ratio that was itself based on listed share prices that undervalued

SC&T and overvalued Cheil was the very means by which the merger caused the loss that was suffered by Claimant here. The mechanism that caused the loss, that being deliberately distorted share prices, cannot logically be the measure of that loss.

Professor Dow's argument therefore neatly, I say too neatly, zeros out any loss claim arising out of an argument that the share price used in the merger ratio undervalued SC&T. Whether deliberately or not, a fixation on share price obscures the very thing that needs to be measured, and that simply can't be the right methodology.

The second fatal flaw in Professor Dow's analysis is that it is just factually untenable in the face of the crescendo of evidence that SC&T's share price was the subject of active manipulation over a long period of time leading up to the merger for the very purpose of undermining SC&T's share price at the time of the merger in order to advantage the [redacted] family.

Indications that this was the case had already surfaced by the time the Claimant filed its amended Statement of Claim, and Mr Boulton's first expert report.

The Claimant was able to be more concrete about these allegations in the Reply and Mr Boulton's second

report, including by reference to findings by the Seoul High Court shown on slide 168 that the merger ratio had been meticulously prepared, but now, given that the PPO indictment which spells out the ROK's own case against [redacted] specifically for market manipulation has now been made public and put on the record of this arbitration by the ROK itself, any further reliance on SC&T's listed share price as reflective of the fair market value of SC&T is, I submit, entirely unsustainable.

As was canvassed in Claimant's application for adverse inferences and supplemental document production, there is abundant evidence of Samsung's control and manipulation of the share prices of SC&T and Cheil both before and after the merger announcement.

In the indictment the ROK now details a scheme to prepare Cheil and SC&T and actively to manage their share prices to create a favourable merger ratio for the planned merger stretching back to the year 2012.

The scheme involved numerous business decisions and decisions about the release of price sensitive information that were designed to and did flatter Cheil's share price and depress SC&T share price in the years and months leading up to the merger, including in the period when the share prices that were the basis on which the merger ratio was set were determined.

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

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

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

You see there he says:

"I am aware of the indictment."

He apparently has had instruction from counsel. It's not, however, clear from the description in the footnote that Professor Dow had himself yet had

an opportunity to study the PPO indictment.

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

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

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

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

using listed share price as a proxy for value either.

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

So a determination of market efficiency therefore simply cannot validate a market against -- a market price against a charge of manipulation.

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

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

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

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

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

So that was the first disputed quantum issue.

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

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

Now, the consequence of this argument, not accidentally, one suspects, is that again the value of SC&T is limited to the observed market price and the Claimant would be entitled to no damages.

So a large fixed discount is just another route to the same market price equals zero damages destination for Professor Dow.

Mr Boulton for his part shows that Professor Dow's analysis is too simplistic, and that it materially overstates both how large this discount was likely to be and how it was likely to manifest in relation to SC&T in the appropriate counterfactual scenario.

So based on a thorough analysis of the 40% discount, which he calls the observed discount, in relation to SC&T, Mr Boulton concludes first that there is no standard "Korea discount" or "holding company discount" that applies to every holding company in Korea. Indeed, he observes that some Korean holding companies, sometimes trade at an observed premium to their sum of the parts value. Cheil was a primary example of this during the period under study, and in fact SC&T has also traded at a premium to its sum of the parts value at different points in the past.

So the implication that Mr Boulton draws from this is that it is necessary to analyse what is driving any

observed discount or premium for a given company at any given time, and Mr Boulton conducts this analysis while Professor Dow does not.

Second, and we see on slide 177, Mr Boulton -- based on that analysis, Mr Boulton concludes that the observed discount for SC&T of approximately 40% can be separated into two distinct components. He concludes that one part of the observed discount can be attributed to general market concerns about predatory conduct by the [redacted] family such as the merger that would result in a loss of value to SC&T shareholders and/or that it can be attributed to market manipulation by Samsung. This he identifies as SC&T's excess discount. The remainder of the observed discount Mr Boulton identifies as SC&T's holding company discount.

Third, Mr Boulton is able to calculate how much of the observed discount is excess discount and how much is holding company discount by conducting a targeted piece of analysis which he refers to in his second report as the merged entity analysis.

Now, an overview of this analysis is on slide 178. Be assured you will have a detailed explanation of it from Mr Boulton later in the hearing who will no doubt do a better job of it than I am about to do. I want to briefly explain the key insight now.

That is that any discount observed in respect of the merged entity logically must reflect only the residual holding company discount. And that's because the Cheil component of the merged entity, which is a composite of Chiel and SC&T, would reflect an excess premium that would offset any excess discount that affected the SC&T component of the merged entity.

That is because the Cheil share price will have been inflated by an expectation of benefiting from the very same value transfer that would have depressed SC&T share price due to a corresponding expectation that SC&T would be the victim in a tunneling transaction. So the value that was going to be transferred from SC&T will have been assigned by the market to Cheil as a premium.

Accordingly, by calculating the discount between X, what's depicted as X on the slide there, the sum of the parts value of the merged entity, and Y, the actual listed value of the merged entity at two relevant dates, Mr Boulton is able to determine that the true holding company discount is 5%, not 40%.

To be conservative, he then performed an additional calculation at dates that were chosen to reflect the largest implied holding company discount, and on that basis calculated a maximum holding company discount of 15%, and the remainder of the 40% observed discount

outside of that 5 to 15% range he identified as excess discount.

So on the basis of this analysis, as is summarised on slide 179, Mr Boulton determined that SC&T's true holding company discount, as distinct from its excess discount, ranges from 5 to 15% of the 40% observed discount, with the correct number likely to be towards the lower end of this range, and he concluded that 25 to 35% of the observed 40% discount consists of excess discount that was attributable to market expectations of predatory conduct by Samsung and/or to market manipulation.

So that brings me to the final disputed quantum issue that I wanted to talk through in these opening submissions. What would the value of Claimant's SC&T shares have been in the proper counterfactual scenario and what is that scenario?

So having disaggregated the observed discount into two components, pursuant to the framework laid down by Chorzów Factory, Mr Boulton analyses what would happen to each of those components in the counterfactual scenario in which the Treaty was not breached by the NPS, it voting in favour of the merger, and accordingly the merger was not approved.

Mr Boulton opines that in that counterfactual

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

He explains in the excerpt on slide 181 that in that scenario market concerns regarding the transfer of value to [redacted] that would result in a loss of value to SC&T shareholders would have been substantially reduced or extinguished. This is because the rejection of the merger would have signalled to the market that SC&T was controlled by a rational shareholder group that was interested in maximising value for the benefit of all shareholders rather than for the benefit of the [redacted] family or other minority group.

Indeed, as we see on slide 182, the NPS research team itself predicted that [redacted], although of course this view, as we saw earlier, [redacted].

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

quantify the effect of that shareholder activism with any precision.

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

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

Given the very high stakes for the [redacted] family and Samsung, Korea's biggest and most powerful Chaebol, the

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

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

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

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

Mr Boulton's quantification of the effect of

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

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

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

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

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

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

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

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

He first disputes that the proper but for or

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

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

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

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

The main thrust of the argument is that since SC&T, he says, would still be "controlled by the [redacted] family" −− that's a quote −− the risk of predatory conduct and manipulation that had previously depressed the SC&T share price, and with it the excess discount, would persist.

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

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

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

have shifted the paradigm.

Samsung and the [redacted] family certainly understood that this was what was at stake in their battle with Elliott and other rational opponents of the merger, and the ROK understood this too.

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

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

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

Claimant's putative return on investment.

Now, Professor Dow devotes a significant portion of his second report to critiquing the Claimant's trading plans and, misleadingly, to inferring from them beliefs on the part of the Claimant about issues addressed in Mr Boulton's opinions.

One particular error that Professor Dow makes in respect of trading plans is to purport to infer from them an expected rate of return on the investment in SC&T shares. He transparently does this so that he may then play around with various numerators and denominators to cast the Claimant's claim for admittedly substantial damages as improperly seeking some kind of windfall.

Now, there is much that is wrong with these arguments, including that in a rush to put thoughts in James Smith's head, Professor Dow ignores the evidence that Mr Smith has already given about the limited relevance of the trading plans to guiding an exit from an investment. Perhaps, given his academic experience, Professor Dow simply does not understand the actual role and use of a trading plan in managing an investment such as the Claimant's investment in SC&T.

But more fundamentally, Professor Dow's focus on the trading plans overlooks the nature and the scale of the

threat to Claimant's interests that the merger proposal represented.

Once that proposal was on the table, the question of what rules of thumb should we follow for making purchases of SC&T shares, which is the question that the trading plans principally answered, was displaced by the more exigent: what loss are we facing and what can we do to avoid it? Those are obviously different questions, and the question of what rate of return might guide purchasing in circumstances where the ROK did not breach the Treaty is frankly just irrelevant to the question of what compensatory damages are awarded once it did.

Unfortunately, due to the ROK's breaches of the Treaty, the Claimant was not able to protect its investment of several hundreds of millions of dollars from the huge losses that it and everybody else who was paying attention, including the ROK, knew would be inflicted on SC&T shareholders if the merger were approved.

The scale of the losses here is undeniably significant. But the suggestion that this in some way reflects negatively on the Claimant, who is the victim here, is actually pretty remarkable, albeit it is of a piece with the hostility that the ROK has shown to Elliott throughout this episode.

The magnitude of the damages claimed here reflects no more, but no less, than the epic and criminal scale of the corruption, collusion, circumvention, intervention, manipulation, and fabrication that the ROK government at all levels engaged in, together with [redacted] and his confederates, to achieve Samsung's huge but illicit ambitions in respect of SC&T and Cheil, what Mr Partasides fairly described this morning as facts of unusual gravity.

The stakes for Samsung and the [redacted] family's hold on it were existential. What was at stake was nothing less than a generational transfer of power and avoidance of potentially ruinous inheritance tax. And in [redacted]'s own words, which we now see on slide 189, [redacted]

[redacted].

At the very meeting where the NPS CIO [redacted] pressed Samsung to improve the merger ratio, according to the NPS's own notes of that meeting, [redacted] explained:

"[redacted]

[redacted]"

And the domestic political and legal costs have already been monumental. The President of the Republic of Korea was impeached over her role in the scandal.

Domestic criminal proceedings have rendered judgments and serious penal sentences for her and for [redacted], and for several other government and Samsung individuals involved in the wrongdoing.

But it is in this forum, and this forum alone, that the Claimant is able to seek redress from the ROK for its part in the criminal scheme that inflicted these substantial losses.

In conclusion, the Claimant submits that by reference to well established principles of customary international law, the tribunal should award damages reflecting the value of Claimant's investment in SC&T shares, including the gain the Claimant would have made if the ROK had not breached the Treaty. Measured in this customary way, the tribunal should award the Claimant damages in the range of between 486,314,418 and 379 million 270 —— I can't even say it —— 379 million in round figures, plus interest. The top end of the range reflects a 5% holding company discount while the bottom end of the range reflects a 15% holding company discount.

This quantum of damages is fully justified because Mr Boulton's sum of the parts analysis of the value of Claimant's shareholding in SC&T is objective and robust. His calculation of the likely value of that shareholding

in a counterfactual scenario in which the merger was not approved by the NPS in breach of the Treaty is based on reliable and straightforward calculations, real world figures and a methodology that is widely adopted by market participants. It is wholly consistent with arguments as to market efficiency put forward by Professor Dow himself and endorsed by Professors Milhaupt and Bae. A successful shareholder revolt against the merger would have been important news priced into the stock instantaneously.

By contrast, the ROK's suggestion that market prices should be the yardstick or really the straitjacket for Claimant's claims should be rejected because it offends common sense to suggest that share values in a manipulated market provide a rational or useful measure of loss and, put simply, to use manipulated share prices would not cure the damage; it would perpetuate it.

Faced with a choice between a manipulated damages of zero and a real world measure of between $379 million and $486 million, it is submitted that this tribunal should find little difficulty in rejecting the former. On this record, the only judgment the tribunal needs to make is where within the range it should award damages.

Thank you, and now subject to any questions you may

have, I'll hand back over to Mr Partasides.

MR GARIBALDI: Ms Snodgrass, I have a couple of questions, one on causation in fact and one on damages.

Let me start with the one on damages because this is what we have been talking about.

I don't recall hearing, and if I did hear it my apologies for having missed it, but I would like to know your answer to an argument that is made by the Republic of Korea which goes more or less like this: that the sum of the parts valuation does not work among other things because sum of the parts are non-tradeable. They are assets held for purpose of control and the only way to realise the value of those assets is to liquidate them, but liquidation is not a realistic option.

What is your answer to that point?

MS SNODGRASS: The answer to that point, I think, is that sum of the parts is nevertheless a valid valuation methodology in that it takes the assets and -- I'll let Mr Boulton explain this better, but it looks at the underlying assets and is a methodology for determining the composite value of SC&T. It is -- nevertheless, notwithstanding the concerns about liquidation, it is a methodology that is widely used, was widely used by market participants to value entities like SC&T, and I think for purposes of Claimant realising the value of

its investment in SC&T, any concern about a control premium or whatever is taken into account in the methodology.

MR GARIBALDI: Okay. All right, let me go to the other question.

The other question has to do with causation in fact. I think I understand your argument and so my question is for purpose of clarification to make sure that I have the structure correct.

The structure of your argument on causation in fact is A is a sufficient condition for B, which is a sufficient condition for C, which is a sufficient condition for D, whatever links -- the number of links doesn't matter for my purposes.

That is all that you need to show. There may be some issues about the degree of probability that the sufficiency of the condition will be realised or not, but that is another matter. That's not my point.

My point is: is it correct that in your analysis of causation in fact, you are only looking at sufficient conditions, a chain of sufficient conditions; is that correct?

MS SNODGRASS: Yes.

MR GARIBALDI: Thank you very much. I thought I understood it.

THE PRESIDENT: Thank you very much. That brings us to the end of the first day.

MR PARTASIDES: Not quite.

THE PRESIDENT: I understand you still have closing remarks, apologies.

MR PARTASIDES: Some very brief closing remarks, Mr President. Apologies. I was waiting to see whether you had any further questions, members of the tribunal. I'm conscious that you've heard a great deal from us today, so these closing remarks will be very brief, I promise.

I think we can all agree --

THE PRESIDENT: That was not the intention to make you any shorter.

MR PARTASIDES: And it was intended to be short in any event. So you haven't changed that intention, thank you.

Further submissions by MR PARTASIDES

MR PARTASIDES: I was saying that I think, Mr President, members of the tribunal, we can all agree on at least one thing here in this room, and that is that the facts and evidence on which the claim before you is based is uncommon. It involves a level of governmental misconduct that has been revealed by evidence that could not have been obtained other than through the powers of

compulsion that come through domestic criminal proceedings.

So we say finally to you it is not surprising at all that those facts have led to more than one Treaty claim against the Republic of Korea.

And so we've come finally to the end of our opening submission and let me leave you at this end of our closing submission with the following proposition. As you hear the Respondent's response to the evidence that we've presented against it tomorrow, we ask you to take note of whether you hear answers to the following fundamental questions.

Why did the NPS itself again and again communicate to the ministry that the independent Experts Voting Committee should decide on its merger vote?

Why did the Experts Voting Committee itself again and again express exactly the same view that it should decide on a merger vote?

Why did the ministry instruct the NPS, despite the NPS's protest, that the decision nevertheless had to be taken by the internal Investment Committee and that decision must be supportive of the merger that the [redacted] family wanted?

Why did the ministry further instruct the NPS that it should not disclose this governmental intervention?

Why did the NPS revise more than once its valuation of SC&T in an attempt somehow to support the merger ratio that Samsung was proposing?

Why did Mr [redacted] describe his own synergy effect calculation as arbitrary, made up of numbers that made no sense to anyone, in order to fill the gap in value that was still left after those valuations to justify the Samsung merger ratio?

As a result, why has Korea's own prosecutor prosecuted successfully various government officials, including the President, if this episode did not involve governmental misconduct?

And finally, why is Korea's prosecutor now prosecuting Samsung's [redacted] for a second time for successfully manipulating the market share price of SC&T if that share price is a reliable indicator of the value of SC&T for the purposes of the damages claim that we make here?

We, like you, members of the tribunal, look forward to answers to these questions tomorrow and we are very grateful for your patience and your attendance today.

Thank you, Mr President.

THE PRESIDENT: Thank you. Any further questions, comments from my colleagues?

So that does bring us to an end of the first day of

the hearing a bit ahead of time.

Before we adjourn, maybe just to check the programme for tomorrow morning because we will start a bit later.

The plan was to run anyway from 11 until 1 o'clock and the lunch break is scheduled for 1 o'clock. Just to confirm that that's still the plan because otherwise we would have to make arrangements for a lunch break at a different time if that is agreeable.

MR TURNER: Sir, if I can come back to what I said what seems like and indeed is a very long time ago this morning, that we have a natural break after about an hour and a quarter. Call that an hour and a half. We therefore think that we should all plan, with the leave of my learned friend, for lunch at 12.30 rather than 1 o'clock. But otherwise no change save the later ending time tomorrow evening.

THE PRESIDENT: Okay. Just to make sure that there are arrangements made with the hotel that the lunch break is going to take half an hour earlier for all of us.

So that will mean basically an hour and a half before the lunch break of your time, and the -- because I understand the Respondent wishes to spend some three and a half hours for the opening statement, you would still have two hours after the lunch break?

MR TURNER: I haven't done the arithmetic, sir, but that

sounds about --

THE PRESIDENT: I'm trying to do it on the fly.

MR TURNER: That sounds about right, yes. If we've done an hour and a half, and if we take three and a half hours, then I agree with the conclusion that the sum of the parts would be two hours left.

THE PRESIDENT: It's an SOTP calculation.

MR TURNER: SOTP, which I'm happy to adopt only for the purposes of calculating the bits of my opening speech, if that's just clear for the tribunal.

THE PRESIDENT: So that would then mean that I would think that you prefer to do the two hours after the lunch break in one go.

MR TURNER: I would have thought so, but that is with the indulgence of the court reporters. I won't be able to see them and nor will my learned friend Mr Lingard, but they will shout to you and you will tell us if they need a break before the end of the two hours and then we'll find a convenient moment.

THE PRESIDENT: The original plan was to have -- Respondent's second part of the opening statement would have been from 11 until 1 o'clock. So it would have been two hours anyway.

MR TURNER: I think, sir, it will be fine. If we come back at 1.30, we can break an hour and a quarter, an hour and

a half after that, and then finish everything after a quarter of an hour's coffee break that we will all be no doubt very grateful for.

THE PRESIDENT: Okay. So let's aim for an hour and a half. If you haven't finished, we continue after the second break.

MR TURNER: Very good.

THE PRESIDENT: So then we will continue until 6.15 with the examination of Mr Smith, which means that we should be able to catch up an hour of the two—hour loss in the morning, and by the end of the third day, by Wednesday, I suspect we would be able to then —— we would be back to schedule. We understand that the parties have agreed to be flexible. The tribunal is also flexible, but just to have some visibility beyond tomorrow.

Mr Partasides?

MR PARTASIDES: That sounds very agreeable to us. Thank you, Mr President.

THE PRESIDENT: Very good. On that understanding, we'll close for today and we'll resume tomorrow morning at 11 o'clock. Thank you very much.

(4.11 pm)

(The hearing adjourned until Tuesday, 16 November 2021 at 11.00 am)

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