

OPUS2

Elliott Associates, L.P. v Republic of Korea

Day 4

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(8.00 am)

MR [REDACTED] (continued)

Cross-examination by MR PARTASIDES (continued)
(Evidence given through an interpreter)

THE PRESIDENT: Good morning, ladies and gentlemen. We are ready to start after a few technical issues.

Any case management issues that either side would like to raise?

MR PARTASIDES: Not on our side at this point, Mr President.

MR TURNER: Not on our side this morning, sir.

THE PRESIDENT: Very good. So we go on. Mr Partasides?

MR PARTASIDES: Thank you, Mr President.

Good morning, Mr [REDACTED].

A. Good morning.

Q. Let's pick things up where we left them yesterday. We were looking at the letter that you drafted for Chairman [REDACTED] of the Experts Voting Committee on 11 July, the day after the Investment Committee meeting, in which, amongst other things, a meeting of the Experts Voting Committee was to be convened on 14 July, the following Tuesday, after that Friday, 14 July 2015. Do you remember that?

THE INTERPRETER: Before I offer the translation, could I ask someone to log into Opus transcript for me,

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thank you.

A. Yes, I do remember.

MR PARTASIDES: Let's turn together to tab 18 of your bundle. This is {C/469/12}, please, in the English and in the Korean.

A. Which page was it, please?

Q. Page 12. Again, Mr [REDACTED], you will see if it helps the relevant page on the screen in front of you?

A. Yes, I'm looking at it, thank you.

Q. To remind ourselves, this is where you, in answer to the prosecutor's question, expressed your anger at the decision taken by the Investment Committee without the Experts Voting Committee on 10 July, and I want to focus on the second paragraph of your reported answer which you say that:

[REDACTED]

And you remember that we discussed that yesterday?

A. Yes, I do remember.

Q. Now, let's just all remind ourselves who Director [REDACTED] from the Ministry was.

Members of the tribunal, it may help at this point

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for you to be making use of the demonstrative that we provided you with. We will also provide one to the witness.

So that we are all clear, the Mr [REDACTED], I'm told it's pronounced, that we are discussing here, you see in the red box, the Ministry box, in the middle of our demonstrative, it is Mr [REDACTED], the Director of Pension Finance within the Department responsible for pensions within the Ministry of Health and Welfare. It is that Director [REDACTED] that we are discussing here.

Mr [REDACTED], could you confirm that the Director [REDACTED] that we are discussing here is the man whose photograph you see at the far right of our red box on the demonstrative?

A. I do remember Mr [REDACTED]'s name. I don't think the photo is an accurate representation of his face, but anyway, I remember his name.

Q. We are all used to using slightly older photos of ourselves, myself included, on the Three Crowns website. But I think we are talking about the right person.

Now, Director [REDACTED]'s outrageous behaviour before the meeting continued during your meeting on 14 July, didn't it, Mr [REDACTED]?

A. Can you put it to me again, please?

Q. Yes. Director [REDACTED]'s outrageous conduct before the

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meeting continued during your meeting on 14 July, didn't it, Mr [REDACTED]?

A. I could not say that all of his conduct and comments at that meeting of which he made many were outrageous. So if you could kindly point out for me which specific conduct you are referring to, I think I'll be able to offer an assessment on whether it was outrageous or not.

Q. I'm about to do that, but have I understood correctly that you considered some of his conduct at that meeting to be outrageous?

A. Yes, it is correct that that was my position regarding some of his conduct and comments made at that meeting.

Q. Indeed, if we look further down this same page of the meeting minutes -- sorry, of the statement that you made to the Special Prosecutor in December 2016 to your last answer on this page, Mr [REDACTED], we see that you said to the Prosecutor that he:

[REDACTED]

You remember saying that to the Prosecutor, Mr [REDACTED]?

A. Yes, that's correct.

Q. You expressed the same view in your first statement to the General Prosecutor as well; isn't that so?

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1 A. That's correct.
 2 Q. Let us turn to that first statement report. It's at
 3 tab 17, exhibit C-459, and I'll ask you to turn your
 4 attention to page 11 {C/459/11}.
 5 A. What was the page number again on tab 17?
 6 Q. Page 11.
 7 A. Yes, I'm on that page.
 8 Q. If I could ask you just to take a moment to familiarise
 9 yourself with the record of what you said to the General
 10 Prosecutor.
 11 A. Yes, I have read it.
 12 Q. And if I can summarise, we see that [REDACTED]
 13 [REDACTED] -- this is from the top of that page --
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] You record that [REDACTED]
 17 [REDACTED]
 18 [REDACTED] and you go
 19 on in your answer to the final question, which was: [REDACTED]
 20 [REDACTED] to say [REDACTED]
 21 [REDACTED] and if we read your final answer
 22 to the final question, you state again to the General
 23 Prosecutor that [REDACTED] and if we turn
 24 over the page to {C/459/12}, that [REDACTED]
 25

1 [REDACTED]
 2 So my question to you, Mr [REDACTED], is to confirm that
 3 Director [REDACTED] remained uncooperative throughout the
 4 meeting; yes?
 5 A. In terms of overall attitude, one could say that he was
 6 uncooperative.
 7 Q. Now, he was there ostensibly in the capacity of
 8 administrative secretary to the committee meeting, but
 9 the truth is that Director [REDACTED] was a senior official
 10 within the Ministry of Health and Welfare; yes?
 11 A. That is correct.
 12 Q. He was the director of the Ministry's Pension Finance
 13 department; yes?
 14 A. That is my understanding.
 15 Q. And you agree that that is not a junior position, is it?
 16 A. I am not in a position to make that kind of an
 17 assessment. However, at that meeting I did not treat
 18 him as a director of the Ministry of Health and Welfare,
 19 but rather my relationship with him at the meeting was
 20 with the administrative secretary to the Special
 21 Committee.
 22 Q. Do you know why [REDACTED] has not been offered as
 23 a witness in this case, Mr [REDACTED]?
 24 A. No, I do not know at all.
 25 Q. Let us continue with your answers to the General

1 Prosecutor on page 12 of exhibit C-459. {C/459/12} This
 2 is tab 17, the same exhibit. We see that the next
 3 question at the top of page 12 that you were asked by
 4 the Prosecutor is:
 5 [REDACTED]
 6 If I could ask you to familiarise yourself with the
 7 answer you gave to that question, and then I'll ask you
 8 some questions about it.
 9 A. Yes, I have read it.
 10 Q. We see in your answer, Mr [REDACTED], that you say -- this is
 11 on the fourth line in the English version:
 12 [REDACTED]
 13 [REDACTED]
 14 Do you see that?
 15 A. Yes, I see it.
 16 Q. Now, you told us yesterday that you were the lawyer on
 17 the committee and that Chairman [REDACTED] often asked you for
 18 legal advice. Am I to understand that you helped the
 19 committee reach the conclusion that the procedure was
 20 unlawful?
 21 A. My initial impression was that this procedure was
 22 unlawful and the term that I used in the notice to
 23 convene the meeting on July 14 was a 'violation of the
 24 regulations'. That was the expression I used in the
 25 notice.

1 So my thought from a legal standpoint was that there
 2 had been a violation of the regulation, but in the
 3 course of discussion at the committee, I changed my
 4 mind.
 5 Q. Yes. Well, let's take this change of mind step by step,
 6 Mr [REDACTED].
 7 If we continue on the fifth line of your answer to
 8 the Prosecutor, we see that [REDACTED]
 9 [REDACTED] we see
 10 that:
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 Let's pause there. Do you remember [REDACTED]
 15 persistently stopping you from inserting the word
 16 "unlawful" and saying that it would lead to serious
 17 consequences?
 18 A. Yes, I do remember.
 19 Q. With his references to "serious consequences", sir, what
 20 was he referring to? Serious consequences for who?
 21 A. I remember them making their appeal to us that if it is
 22 assessed as being 'unlawful', then as public servants
 23 they would be held legally responsible for the
 24 illegality.
 25 Q. Who would be held legally responsible, Mr [REDACTED]?

1 A. Well, there was no mention of the party that would be
 2 held liable and I recall it being a general expression
 3 that as public servants, they would be at risk.
 4 Q. Then you go on to say in the very next sentence:
 5 [REDACTED]
 6 [REDACTED]
 7 Am I to understand that you changed the outcome of
 8 your meeting as a consequence of the intervention of
 9 Director [REDACTED]?
 10 A. One might understand it that way, but in actuality there
 11 were some parts to what Mr [REDACTED] said that were
 12 reasonable and we believed that it was worth taking into
 13 consideration.
 14 In past committee meetings, we had never accepted
 15 making an unreasonable decision even when there was a
 16 request to do so. So in this decision as well there was
 17 an appeal and we found that there was a rational point
 18 or reasonable point that he was making that we came on
 19 to later on which we decided to accommodate.
 20 Q. So you are telling us that at the same time on the one
 21 hand he behaved so outrageously that you wished for him
 22 to be removed from the meeting, but at the same time he
 23 was making some reasonable points that persuaded you to
 24 change the outcome of the meeting; have I understood
 25 your evidence correctly?

1 A. Yes, among the various conducts of Mr [REDACTED], there were
 2 the unreasonable and outrageous aspects, but there were
 3 also in his opinions and position points that were
 4 reasonable.
 5 Q. Director [REDACTED] was worried that if you issued a statement
 6 saying that the Investment Committee's decision was
 7 unlawful, this might result in the reversing of the
 8 Investment Committee's decision; isn't that right?
 9 A. I have no way of knowing what Mr [REDACTED] thought
 10 internally.
 11 Q. The reason I said that, Mr [REDACTED], is if we turn back to
 12 page 11 {C/459/11} of the same minutes, we see that in
 13 your answer to the first question on that page asked by
 14 the General Prosecutor [REDACTED]
 15 [REDACTED] you appeared to be able to explain
 16 Director [REDACTED]'s motivation then by saying:
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 So it appears that you were able to anticipate his
 23 discomfort; yes?
 24 A. In terms of Mr [REDACTED]'s actions and words, he was opposed
 25 and concerned that if the Special Committee decided or

1 worked in a way to overturn the Investment Committee's
 2 decision, or issued a negative opinion of the Investment
 3 Committee's decision, that would be onerous. So that
 4 was the concern for — concern of Mr [REDACTED] as seen in his
 5 conduct and words according to my recollection and
 6 assessment.
 7 Other than that, I do not know his internal
 8 motivations or reasons.
 9 Q. What do you mean by "onerous", Mr [REDACTED], and for who?
 10 A. The first item on the agenda of the Special Committee
 11 meeting was whether to overturn the Investment
 12 Committee's decision. Chairman [REDACTED] as well, when we
 13 were working on sending out the notice to convene the
 14 Special Committee meeting, had asked me whether it was
 15 possible for us to overturn a decision of the Investment
 16 Committee in which it voted in favour of. When we were
 17 preparing the notice to convene the meeting of
 18 the Special Committee, we reviewed the relevant
 19 regulations and confirmed that there was no basis in the
 20 regulations for us to overturn the Investment
 21 Committee's decision, and to do so, to overturn the
 22 Investment Committee's decision, would be problematic
 23 from a legal procedural standpoint, and so I was opposed
 24 to this.
 25 So if you look at the agenda for the meeting as seen

1 in the notice of convocation of the Special Committee,
 2 the vote on the proposed Samsung—Cheil Industries merger
 3 is not on the agenda. Rather, the meeting is being
 4 convened to establish the Special Committee's position
 5 regarding the decision as of 14 July made by the NPSIM,
 6 the investment management.
 7 This is why the wording of the agenda is precisely
 8 crafted with caution. The meeting was being convened to
 9 establish the position of the Special Committee, not the
 10 Samsung C&T and Cheil Industries merger.
 11 Regarding the first item on the agenda of the
 12 meeting held on 14 July by the Special Committee, it
 13 was — regarding the topic of whether to overturn the
 14 decision made by the Investment Committee, and after
 15 a debate in the course of which I put forward my
 16 opinion, we came to the conclusion that there was no
 17 legal basis for us to overturn the decision, and it
 18 would not be possible for us to deliberate an item that
 19 had not been referred to us.
 20 So the merger vote itself was not a topic or subject
 21 of discussion at all at that meeting.
 22 Q. Let me return to my question, Mr [REDACTED], which you did not
 23 answer.
 24 You said in response to my prior question that if
 25 the Special Committee decided or worked in a way to

1 overturn the Investment Committee's decision or issued
 2 a negative opinion of the Investment Committee's
 3 decision, Director █████'s view is that that would be
 4 onerous. That was your evidence. And I asked you what
 5 do you mean by "onerous", Mr █████, and for who,
 6 and I repeat that question.
 7 A. When we were discussing the possibility of overturning
 8 the Investment Committee's decision, Mr █████'s position
 9 was that it could not be overturned, and so our decision
 10 was not reached because Mr █████ felt it would be onerous
 11 or burdensome, but rather we reached our decision
 12 because there was no relevant basis in the regulations.
 13 While it was of concern to Mr █████, we found there was
 14 basis in the regulations in █████'s concern that the
 15 Special Committee could not overturn the Investment
 16 Committee's decision.
 17 Q. Let's continue with your answers to the prosecutor's
 18 questions, Mr █████, because if we turn to your final
 19 answer to the final question on page 12 we see that █████
 20 █████
 21 █████ but you also
 22 tell us there that █████
 23 █████
 24 █████ do you see that?
 25 {C/459/12}

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1 A. Yes, I'm looking at it.
 2 Q. You decided to delay your statement until after the SC&T
 3 shareholder vote because you were concerned that it may
 4 have an impact on the outcome of that vote; isn't that
 5 so?
 6 A. That's correct.
 7 Q. And you did delay your statement until after the general
 8 shareholders' meeting took place on 17 July. That's
 9 right, isn't it?
 10 A. Among our conclusions there were points that were
 11 announced prior to the shareholders' meeting. There
 12 were points that were announced after the shareholders'
 13 meeting.
 14 What was announced prior to the general
 15 shareholders' meeting or prior to the shareholders'
 16 meeting was that the NPSIM had not requested that the
 17 Special Committee deliberate the proposed Samsung C&T
 18 merger and as a result the Special Committee was unable
 19 to deliberate or make a determination on this because it
 20 was never requested to do so.
 21 That was the conclusion that we announced before the
 22 shareholders' meeting. As for the procedural issue,
 23 which was the topic of a legal debate, and it was —
 24 there was a discussion or debate taking place regarding
 25 the vote itself, and announcing this at this date would

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1 have an influence one way or the other. So this is why
 2 this was announced after the shareholders' meeting.
 3 Q. When you say it would have an influence on the
 4 shareholder vote one way or another, it may have an
 5 impact on support for the merger; isn't that so?
 6 A. Whether it be in favour of or against, I believe there
 7 would have been an influence or impact, yes.
 8 Q. Mr █████, are you asking this tribunal to believe that
 9 your criticism of the procedure within the NPS
 10 decision—making would likely have led to greater support
 11 for the merger? Is that your evidence to this tribunal?
 12 A. When a shareholder decides whether to exercise a vote in
 13 favour of or against, there are many things to consider.
 14 Because we considered that the announcement of the
 15 Special Committee's position on the procedural issues
 16 was a factor that could impact the votes in any way,
 17 whether it be in favour or against, we did not consider
 18 whether it would lead to more in favour or more against.
 19 However, in any case, we were of the position that we
 20 should not exert undue influence at the shareholders'
 21 meeting. That is why we decided not to announce it
 22 before the shareholders' meeting.
 23 Q. Okay.
 24 A. And at the meeting itself it was never discussed whether
 25 our announcement would have an impact more on the vote

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1 vote in favour or or the vote against.
 2 Q. Did Director █████ encourage you to delay your press
 3 release of criticism of the decision within the NPS,
 4 Mr █████?
 5 A. That, I have no recollection of, but the members had
 6 a considerable discussion on how to make the
 7 announcement. As always, we decided on what to announce
 8 prior to the shareholders' meeting and what to announce
 9 after the shareholders' meeting by majority vote.
 10 Q. Let's turn to tab 20 in your bundle. This is exhibit
 11 C—486, {C/486/1}.
 12 A. Yes.
 13 Q. Now, we don't have the benefit of Mr █████ with us,
 14 Mr █████, but we do have the benefit of his statement
 15 report to the Korean Prosecutor that he gave in
 16 January 2017. This is a redacted version of that
 17 statement report that the Republic of Korea provided to
 18 us on order of the tribunal in document production in
 19 this case, simply to identify the document for you.
 20 So the individual, I represent to you, who is
 21 answering the question that we see on page 23 is indeed
 22 none other than Director █████ {C/486/3}. I'll ask you
 23 to take a moment to familiarise yourself with this
 24 document.
 25 A. Yes, this is the first time I am seeing this document.

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1 Q. You've described the intervention of Director █████ in
 2 your two witness statements in these proceedings at
 3 length, Mr █████, but you are telling us that you have
 4 never reviewed his evidence to the Korean Prosecutor in
 5 preparation of giving evidence in this case; is that
 6 right?
 7 A. This is a record from a criminal court case which I do
 8 not have access to and, furthermore, in the course of
 9 preparing to give evidence in this hearing, counsel did
 10 not show me this document.
 11 Q. Let me ask you one question about it and see whether you
 12 are able to answer that question, and if you are not,
 13 I would fully understand.
 14 A. Yes, please do.
 15 Q. We see that Director █████'s answer to the Prosecutor in
 16 January 2017 was as follows:
 17 ██
 18 ██
 19 ██
 20 ██
 21 ██
 22 ██
 23 ██
 24 My question is this for you, Mr █████. Can we agree
 25 that we wouldn't normally expect an administrative

1 secretary to intervene and change the outcome of
 2 a committee's deliberations?
 3 A. An administrative secretary does not have a voting
 4 right. However, I do believe that the administrative
 5 secretary can offer his or her opinion or information
 6 for the reference of the members of the committee in
 7 their decision-making process.
 8 Q. We've looked at the record of the statements that have
 9 been made, including two statements by you to the Korean
 10 Prosecutor, sir. Let's now compare those statements to
 11 the evidence that you have submitted to this tribunal.
 12 My first question for you is: I'm correct, aren't I,
 13 when I say that you didn't refer to your statement
 14 reports to the Korean Prosecutor at all in your first
 15 witness statement in this arbitration; isn't that right?
 16 A. Yes, that is because the first witness statement was
 17 prepared based on my recollection without having read
 18 the prosecutor's statement report.
 19 Q. We obtained those statement reports after your first
 20 witness statement was submitted and before our second
 21 round Reply, and then you filed a second witness
 22 statement in which you did address some of the
 23 statements we relied on in your statement report. Are
 24 you aware that you did seek to address these statement
 25 reports in your second witness statement, Mr █████?

1 A. Yes, while preparing my second witness statement I did
 2 look at the prosecutor's statement report.
 3 Q. Let's turn to your second statement and see what you say
 4 about it. Let's begin at paragraph 8. You will find it
 5 at tab 2 of your bundle, sir. {E/2/5}
 6 If we begin at paragraph 8 on page 3, let's walk
 7 through this section of your second witness statement
 8 together.
 9 A. Yes, I'm on it.
 10 Q. So here you tell us in paragraph 8 that you understand
 11 that the Claimant has relied on the record of your
 12 statements to the Prosecutor to say that Director █████
 13 obstructed discussions and censored public statement.
 14 Do you see that in the middle of your paragraph 8?
 15 A. Yes, I see it.
 16 Q. And if we move on to paragraph 9 you testify to this
 17 tribunal that you do not agree that Director █████
 18 attended the meeting in order to interfere; yes?
 19 A. Yes, that is because I have no way of knowing what their
 20 motivations or purpose in attending the meeting is. But
 21 I believe that as whereas sometimes the administrative
 22 secretaries participate in the meetings, sometimes they
 23 do not, but in any case it is within their authority to
 24 participate or attend the meeting of the committee.
 25 Q. When you say you do not agree that he was there to

1 interfere, you are telling us in effect that you do not
 2 agree with what you told the General and Special
 3 Prosecutor; isn't that right?
 4 A. I do acknowledge that Mr █████ participated and attempted
 5 to intervene in the proceedings, but I do not accept
 6 anyone who says that Mr █████ interfered with or had an
 7 impact on or controlled the proceedings of the Special
 8 Committee. That I cannot acknowledge. I believe that
 9 the Special Committee made its own decision in an
 10 independent and reasonable manner.
 11 Q. And in explaining why you do not agree with what it
 12 seems you told the prosecutor before, you rely and
 13 emphasise on Director █████'s capacity as an
 14 administrative secretary, gansa, in your paragraph 9;
 15 yes?
 16 A. That's correct.
 17 Q. And in your paragraph 10 you go on to describe the
 18 formal role of an administrative secretary under
 19 Article 6 of the operational guidelines. Is that
 20 another article that you were provided with selectively,
 21 Mr █████? {E/2/6}
 22 A. That's correct.
 23 Q. Let's move now to paragraph 11 and your first sentence.
 24 A. Yes, I have read it.
 25 Q. There you say:

1 "On reflection, I do not think Director [REDACTED]'s
 2 participation in the 14 July ... meeting went beyond the
 3 scope of administrative secretaries' duties."
 4 When you say "on reflection", Mr [REDACTED], what you are
 5 telling us is you are reconsidering your own very
 6 detailed description of Director [REDACTED]'s interventions to
 7 the Korean prosecutors; isn't that right?
 8 A. No, that is not it. I think there's a misunderstanding
 9 because a short sentence was all that was offered to
 10 describe what happened throughout the course of the
 11 entire six-hour meeting, -- just a term 'tried to
 12 interfere' was used in that short sentence. And
 13 I think we should distinguish between his participation
 14 or attendance in the meeting itself as opposed to the
 15 many comments he made and the conducts he showed at the
 16 meeting.
 17 Some of them were appropriate, some of them were
 18 inappropriate or overstepping the boundaries. But in
 19 any case the appropriateness and the inappropriateness
 20 were mixed together.
 21 So I don't think that his participation in itself
 22 was an obstruction or intervention. I do not find
 23 a problem with his participation itself. I think we
 24 need to be more detailed in distinguishing between his
 25 comments and conduct as opposed to his attendance at the

1 meeting. What was due or undue and what were the
 2 attempts to intervene need to be clearly distinguished
 3 and clarified.
 4 Q. Mr [REDACTED], would you accept that your description of the
 5 meeting to the Korean Prosecutor was very different from
 6 the way in which you have described that meeting as
 7 a witness for the Republic here to this tribunal?
 8 A. No, I do not accept. Because the prosecutor used just
 9 the one line to describe the whole six-hour meeting and
 10 in my second witness statement I offered my assessment
 11 on parts of the entire course of the day's meeting. So
 12 I believe that the contents of my second witness
 13 statement are more accurate.
 14 Q. Very well. Let's just conclude, Mr [REDACTED], with one final
 15 document. It's again your second statement to the
 16 Prosecutor, tab 18, {C/469/21}.
 17 A. What was the page number again, please?
 18 Q. It's the final page, page 21, just before your signature
 19 confirming the accuracy of the report on page 22
 20 {C/469/22}.
 21 A. Yes, I'm on it.
 22 Q. We see at the top of that page the Special Prosecutor
 23 asks you the following question: [REDACTED]
 24 [REDACTED]
 25 [REDACTED] Do you see that?

1 A. Yes, I see it.
 2 Q. And you give a long answer which we will come to, and in
 3 particular I want to turn your attention to your
 4 conclusion. In your final sentence you say:
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 Do you see that?
 10 A. Yes, I see it.
 11 Q. Now, in your lengthy answer, Mr [REDACTED], you are not
 12 reported as having disagreed with the Korean Prosecutor
 13 that these actions by the Ministry and the NPS were
 14 illegal, are you?
 15 A. I'm not in a position to either agree or disagree with
 16 a legal determination made by the prosecutor. The key
 17 point of my answer is in order for the Special Committee
 18 to make a fair decision in a rational manner by
 19 exercising its expertise, it should be independent from
 20 undue influence from the outside, whether it be Samsung
 21 or the State.
 22 To allow the members to make such a decision in
 23 a fair way would be to not damage the intent based upon
 24 which the system of the Special Committee was
 25 established, and the prosecutor's question itself is

1 leading in a way because I have no way of knowing the
 2 internal decision-making process of either the Ministry
 3 of Health and Welfare or the NPSIM.
 4 However, I do believe that it would be wrong if
 5 either Samsung or the State have worked to undermine the
 6 intent of the system of the Special Committee.
 7 MR PARTASIDES: Thank you, Mr [REDACTED].
 8 THE PRESIDENT: Any questions in redirect?
 9 MR TERCEÑO: Yes, Mr President, thank you. We do have
 10 a couple of questions on redirect that we hope to be
 11 able to get through fairly quickly.
 12 Re-examination by MR TERCEÑO
 13 MR TERCEÑO: Good morning, Mr [REDACTED]. You were asked yesterday
 14 if you were aware of the Fund Operation Committee that
 15 formally appoints members of the
 16 Experts Voting Committee and in response you said:
 17 "Answer: ... I believe there's something called the
 18 operational regulations of or for the Special Committee.
 19 If you could kindly show me that document, the
 20 operational regulations."
 21 Do you recall that testimony?
 22 A. Yes, I do recall.
 23 Q. So counsel opposite then said that he would take you to
 24 those guidelines and he took you to exhibit C-194 which
 25 are the National Pension Fund Operational Guidelines.

1 I would like to give you a copy of exhibit R-98 which
 2 are the regulations on the operation of the Special
 3 Committee on the exercise of voting rights. And we have
 4 some hard copies we'll hand out.
 5 A. Yes, I'm looking at it.
 6 Q. Now, these were not shown to you yesterday and they are
 7 not in the cross-examination bundle that you have in
 8 front of you, but is this the document you meant when
 9 you made reference to the operational regulations for
 10 the Special Committee? {R/98/1}
 11 A. That is correct. This regulation is the one that was
 12 distributed to the members of the committee at every
 13 meeting.
 14 Q. Thank you, a short time ago counsel opposite was asking
 15 you about paragraph 10 in your second witness statement
 16 which references Article 6 of the operational
 17 regulations and he asked if this was another article
 18 that had been "selectively provided" to you. Is the
 19 reference in your witness statement to Article 6 in
 20 these Special Committee operational guidelines at
 21 exhibit R-98?
 22 A. That is correct.
 23 Q. Thank you. Now, I would like to just take you back
 24 briefly to tab 15 in the cross-examination bundle. This
 25 is exhibit {C/427/1} which you have been shown?

1 A. Yes, I'm on it.
 2 Q. Counsel opposite read a paragraph near the bottom of
 3 this and after doing so noticed -- mentioned that we see
 4 a reference to the guidelines on the exercise of the
 5 National Pension Voting Rights of 2014. He did not read
 6 what that reference was. But you see near the bottom of
 7 this email that the reference is specifically to
 8 Article 8(2) in chapter 3 of those guidelines; do you
 9 see that?
 10 A. Yes, I see it.
 11 Q. Do you recall what Article 8(2) says?
 12 A. I recall having seen this often and I believe it is
 13 almost the same as Article 2 of the operational
 14 regulations.
 15 Q. Let's look at Article 8(2). It's exhibit R-57. It's
 16 tab 22 of the cross-examination binder. {R/57/1}. If
 17 you look at the second page of Article 8(2)?
 18 A. Yes, I'm on it.
 19 Q. You can just read the Korean along with me. It says:
 20 "For items which the committee finds difficult to
 21 choose between an affirmative and a negative vote, the
 22 NPSIM may request for a decision to be made by the
 23 Special Committee on the exercise of voting rights
 24 (hereinafter referred to as the 'Special Committee')."
 25 A. Yes, I'm reading it.

1 Q. Now, having taken a look at that, if I can direct you to
 2 tab 16 of the cross-examination binder, this is exhibit
 3 C-429 {C/429/1}. You were also shown this exhibit
 4 yesterday; do you recall?
 5 A. Yes, I am on that page.
 6 Q. First, if you turn to page 4, there are regulations
 7 attached to this letter {C/429/4}, and these are the
 8 Special Committee regulations that I just showed you at
 9 exhibit R-98; is that right?
 10 A. That is correct.
 11 Q. Turning back to the first page {C/429/1}, at the bottom
 12 you see that again this letter repeats the reference to
 13 Article 8(2) in chapter 3 of the method of exercise of
 14 the guidelines on the exercise of the National Pension
 15 Fund voting rights of 2014; do you see that?
 16 A. Yes, I see it.
 17 Q. If you look at this letter on the third page {C/429/3},
 18 you see in the second paragraph that the letter reads:
 19 "I have decided to convene of a meeting of the
 20 Experts Voting Committee as follows in accordance with
 21 the regulations on the operation of the
 22 Experts Voting Committee (Attachment 1) given that seven
 23 of our members have demanded an urgent convocation of
 24 the Committee under the shared recognition of the above
 25 circumstances, with which I, Chairperson of the

1 Committee, also agree."
 2 Can I ask you to turn to {C/429/5}. At the top we
 3 see -- and this is Article 5(2) of the Special Committee
 4 regulations. It reads:
 5 "A meeting of the Committee may be convened by the
 6 Chairperson under any of the following circumstances.
 7 "1. The Chairperson determines that a meeting is
 8 necessary;
 9 "2. Three or more Committee members demand
 10 a meeting ..."
 11 Mirroring the language used in the letter that seven
 12 had demanded the meeting.
 13 A. Yes, I'm on it.
 14 Q. Mr [REDACTED], my question for you is: having reviewed those
 15 letters and these guidelines, including this
 16 Article 5(2) of the Special Committee regulations, does
 17 this refresh your recollection as to the basis that was
 18 relied on in the relevant rules for calling the July 14
 19 meeting?
 20 A. Yes, I do.
 21 Q. And what was that basis?
 22 A. I believed at the time that in this instance two of the
 23 conditions under Article 5(2) had been met to invoke the
 24 chairman's right to convene a meeting, namely the
 25 chairman deemed that it was necessary and that three

1 members or more of the committee were requesting that
 2 a meeting be convened.
 3 So that is why in the letter of convocation we
 4 inserted the reference to the seven members requesting
 5 that the meeting be held, and also that the chairman was
 6 in concurrence with their opinion regarding the
 7 necessity of convening the meeting.
 8 So that is why we invoked the chairman’s right to
 9 convene the meeting as seen in the draft based on
 10 subparagraphs 1 and 2 of paragraph 2 of Article 5.
 11 Regarding the items on the agenda, we were unable to
 12 apply paragraph 4 of Article 2 which is the reference to
 13 the matters that it finds it difficult to determine.
 14 Rather, we relied on paragraph 6 which refers to the
 15 chairman’s recognition of the need to hold the meeting
 16 as well as the agenda item, and that was reflected in
 17 the notice of convocation of the meeting.
 18 So that is why we summarised that the agenda to
 19 deliberate was the Special Committee’s position on the
 20 NPSIM’s decision as of 10 July.
 21 MR TERCEÑO: Thank you, Mr [REDACTED].
 22 Mr President, we have no further questions.
 23 THE PRESIDENT: Thank you, Mr Terceño. There will be
 24 questions from the panel.
 25 Questions from THE TRIBUNAL

1 MR GARIBALDI: Mr [REDACTED], on re-direct examination you have
 2 been shown document R-98 by counsel to the Republic of
 3 Korea. These are the regulations on the operation of
 4 the Special Committee on the exercise of voting rights
 5 {R/98/1}. Do you still have that document?
 6 A. Yes, I do and I’m looking at it, sir.
 7 MR GARIBALDI: Thank you. Is it fair to say that the
 8 functions of the administrative secretaries are
 9 regulated by Article 6 of these regulations? Is that
 10 right?
 11 A. I’m afraid I fail to precisely understand the intent of
 12 the question, but I do understand the role of the
 13 administrative secretary is defined in Article 6.
 14 MR GARIBALDI: Well, that was my question.
 15 Now, I believe you testified on cross-examination
 16 that it was appropriate for the administrative
 17 secretary, in this particular case Mr [REDACTED], that it was
 18 appropriate to offer his opinions on matters before the
 19 Special Committee. Is that correct? You testified to
 20 that effect?
 21 A. Yes, I believe he can put forth his opinion.
 22 MR GARIBALDI: Would you please tell us on what provision of
 23 Article 6 do you base your opinion that the
 24 administrative secretary has the right or the power to
 25 express his opinions, especially on a matter when the

1 opinions are not requested or welcome?
 2 A. In all the deliberations of the voting right, the
 3 administrative secretaries are involved in the
 4 submission of the agenda. So in terms of the
 5 subparagraphs, I think subparagraph 1, 2, 4 and 4 apply.
 6 The first is regarding submission of the agenda items.
 7 The second is assistance in the operation of the
 8 committee. The fourth is the provision of the relevant
 9 documents and materials.
 10 There are other subparagraphs that qualify, but if
 11 information or opinion regarding a deliberation item is
 12 needed, then based on subparagraphs 1, 2, 4 and 6, or
 13 based upon request from the committee members, in other
 14 words the committee can ask the administrative secretary
 15 what his or her opinion is.
 16 So I think that multiple provisions or subparagraphs
 17 can qualify or apply in this example, and the
 18 administrative secretary has offered his or her
 19 statement or opinion or belief on the matters when asked
 20 to do so, and that is what actually happened at these
 21 meetings.
 22 So — and when they did so at these meetings there
 23 was never any objection regarding the role of the
 24 administrative secretaries, and when the necessary
 25 information or opinion was offered by them, the

1 committee did not raise any objections. Rather, they
 2 took into reference any points that they had that were
 3 reasonable and were acceptable.
 4 So the committee was selective in deciding which
 5 points or opinions offered by the administrative
 6 secretaries to accept.
 7 MR GARIBALDI: Thank you. No further questions.
 8 MR THOMAS: Just a follow on to the question from my
 9 colleague, Mr Garibaldi.
 10 Can you explain to us how the chairman ran this
 11 meeting? Did he sit there passively? How did he run
 12 the meeting?
 13 THE INTERPRETER: Before I translate your question,
 14 Mr Thomas, can I just point out that in the last
 15 response it was committee was "selective", not
 16 "selected". Now here goes the question.
 17 MR THOMAS: My question is simply this. To the best of your
 18 recollection, how did the chairman run the meeting that
 19 we’re concerned with?
 20 A. The chairman was also a member of the committee. So,
 21 regarding the agenda item, he made sure that we became
 22 sufficiently aware of all the necessary information. He
 23 allowed the members to put forth their opinions
 24 sufficiently, whether it be a differing opinion or
 25 a discussion.

1 Regarding the discussions, they lasted for a long
2 time and -- so in many instances the initial thoughts or
3 opinions of the members would change in the course of
4 the discussions and the position of the organisation
5 that was making the recommendation was taken into
6 consideration but it was not necessarily reflected.

7 I believe that the members of the committee
8 exercised their powers of reason and determination with
9 their respective expertise to freely and independently
10 make decisions that we believed served the best
11 reasonable interests of the NPS.

12 Many of the agenda items that we deliberated
13 involved serious interests. So if necessary, the
14 members would be subject to people's requests or
15 materials being provided or people trying to put in
16 a good word. But in actuality the members of the
17 committee, in spite of these various opinions and
18 perhaps pressure, did their best to exert efforts to
19 arrive at a reasonable and independent decision, and
20 that is what we did for the most part in reaching our
21 decisions, I believe.

22 MR THOMAS: Mr [REDACTED], it's my fault for the way in which
23 I phrased the question. What I was trying to understand
24 was this.

25 From reading your statement to the General

1 Prosecutor and the Special Prosecutor, you made comments
2 about Mr [REDACTED]'s intervening and you also of course made
3 the comment that the Special Committee members were very
4 angry at what had happened.

5 What I was trying to understand about this
6 particular meeting is how did the chairman control the
7 meeting? It's a specific question for this meeting.
8 How did the chairman control the meeting? For example,
9 did he tell Mr [REDACTED] to be quiet at any point or did he
10 let him speak freely and interrupt other members? How
11 was the meeting run, is what I'm trying to get at?

12 A. The meeting on 14 July went on for a long period of time
13 and Mr [REDACTED] did try to carry his opinion through.

14 However, the meeting was held although there had
15 been no cooperation in the hosting of the meeting. And
16 even regarding how the meeting was run and the
17 decision-making, Mr [REDACTED] did try to carry his intention
18 through but the decision was not made according to his
19 wishes. In fact, I think the committee members
20 collectively reached a reasonable decision that was made
21 independently without the influence of Mr [REDACTED]. There
22 was a free discussion and if it became excessive, there
23 may have been instances in which it was quieted down,
24 but all in all it was insufficient to obstruct
25 a reasonable decision-making process.

1 MR THOMAS: Thank you very much.

2 THE PRESIDENT: Thank you, Mr [REDACTED]. This concludes your
3 examination.

4 Let's break now for ten minutes. We will continue
5 at 9.55 and it will be Professor Lee. I understand he
6 will be making a presentation instead of a direct
7 examination, I understand. Thank you.

8 (9.42 am)

9 (A short break)

10 (9.55 am)

11 PROFESSOR CHOONG-KEE LEE (called)

12 THE PRESIDENT: We understand the parties have agreed that
13 the presentation of Professor Lee will be interpreted
14 simultaneously. Is that --

15 MR PETROCHILOS: For the presentation in lieu of
16 examination--in--chief, that's correct, Mr President.

17 THE PRESIDENT: And then the cross-examination will be
18 interpreted executively as before?

19 MR PETROCHILOS: That is my understanding and the same will
20 apply to Professor Kim who follows.

21 THE PRESIDENT: Very good. So we need the headsets then.

22 MR PETROCHILOS: Mr President, simply as a point of
23 formality, I believe there are no corrections that
24 Professor Lee intends to make to his reports which are
25 in front of him, of course, but whatever pleases the

1 tribunal, you may pose the question to him or I am happy
2 to do so.

3 THE PRESIDENT: I was still planning to because he will make
4 a presentation. So if he has corrections to make, he
5 can make the corrections as he makes his presentation.

6 Professor Lee, good morning. Maybe somebody could
7 help the Professor to find the right channel.

8 Good morning, Professor Lee. Do you hear me?

9 Sir, you have been called as an expert witness in
10 this hearing. So I would kindly ask you to read the
11 statement or declaration of an expert witness that you
12 should have in front of you also in Korean.

13 THE WITNESS: I solemnly declare upon my honour and
14 conscious that my statement will be in accordance with
15 my sincere belief.

16 THE PRESIDENT: Thank you very much.

17 Professor, you don't need to wear the face mask
18 unless you really want to. The rule only applies to
19 those who are not speaking.

20 We understand you are going to make a presentation
21 of your evidence instead of a direct examination. So,
22 Professor, please, go ahead.

23 Presentation by PROFESSOR CHOONG-KEE LEE

24 PROFESSOR CHOONG-KEE LEE: Thank you very much. As was
25 introduced, my name is Choong-Kee Lee and I have been

1 called as a Korean law expert. It's a great honour to
2 be here.

3 Next slide, please.

4 So if you look at this next slide, here you see my
5 photo and a brief CV of myself.

6 In 2002, I was a member of the Advisory Committee
7 for the enactment of the Indirect Investment Asset
8 Management Business Act of the Ministry of Labour. And
9 then the following year, under the Ministry of Labour,
10 I was also a member of the Advisory Committee of the
11 enactment of the Employment Retirement Benefit Security
12 Act.

13 I'm not able to hear the Korean interpretation.

14 And then in 2006 I was a member of the Internal
15 Evaluation Committee under the Financial Supervisory
16 Commission and then I was a member of the Special
17 Subcommittee for the Revision of the Trust Act under the
18 Ministry of Justice in 2009 to 2010. Also when the
19 Ministry of Justice was enacting the Enactment of Public
20 Trust Act, I was a member of that subcommittee, and also
21 currently I am a member of the Advisory Committee of the
22 Public Trust.

23 Also currently I am a member of the Future Forum for
24 the Fusion and Conglomeration of Autonomous Vehicles
25 under the Ministry of Land, Infrastructure and

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1 Transportation, as well as the Ministry of Information
2 and Technology.

3 Next slide, please.

4 So that was the brief introduction of my career and
5 background. And this slide introduces the table of
6 contents of my presentation.

7 I will first of all start with a summary of the
8 differences in the two approaches between myself and the
9 counterparties' expert.

10 My second item would be that the NPS is part of the
11 ROK's administrative organisation under Korean law.

12 The third is that the NPS exercises powers entrusted
13 to it by the State.

14 And the last point that I would like to make are the
15 irregularities that exist in the process leading up to
16 the NPS's vote on the merger at issue.

17 First of all, this table compares the different
18 approaches between myself and that of Professor Kim.
19 I have actually compared the two approaches along four
20 major points.

21 First, the question is whether the Korean law
22 defines the concept of a State organ. Professor Kim is
23 saying that a State organ is equivalent to the Korean
24 term "guk-ga-gi-gwan". He says that only those entities
25 defined in the Constitution and the Government

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1 Organization Act are these guk-ga-gi-gwan. However, my
2 thoughts are different. My thoughts is that there is no
3 express and determinative definition in Korean law that
4 is equivalent to a State Organ as defined in
5 international law.

6 According to my rough understanding of the
7 international law concept of State organ, I think
8 whether an entity in question performs State actions to
9 fulfil State objectives and exercises State authority
10 should be considered in determining whether an entity is
11 a State organ.

12 According to what I was told by the attorneys, the
13 concept of a State organ also includes organisations and
14 entities that are recognised as a State organ under
15 customary law. This actually spans a very wide scope of
16 organisations according to what I have been told. Also
17 whether it is expressly defined as a State organ or not
18 is not an important factor in determining whether an
19 entity is a State organ or not, is what I have been
20 told. Whether an entity has a legal personality or not,
21 I have also been told is not an important factor. And
22 therefore a central bank or a national oil company or
23 a social security entity may also become a State organ,
24 is what I have been told.

25 Now, regarding this concept of a State organ,

39

1 a recent arbitration tribunal determined that KAMCO of
2 Korea was a State organ, is what I have been told.

3 Now, according to Professor Kim's opinion, KAMCO
4 would not fall under a State organ per se.

5 Now, the second point that I would like to compare
6 is the scope of administrative organisations in Korea.

7 Now, central administrative agencies prescribed
8 under the Government Organization Act, these are the
9 only organisations that constitute state administrative
10 organisation, is the view of Professor Kim. I disagree
11 because not only central governments — central
12 administrative agencies, but also local governments and
13 public institutions would also form a part of the State,
14 is my opinion.

15 I think it's very clear that local governments are
16 part of the administrative organisation, but not only
17 local governments, but by law there are entities that
18 perform State affairs and exercise governmental powers
19 or State authorities, and these entities would all be
20 part or may be part of a state administrative
21 organisation. Local governments, public institutions,
22 have one thing in common, and that they have separate
23 legal personalities, and they actually perform public
24 actions.

25 The third point that I would like to compare is the

40

1 significance of the functions that an entity plays in
2 determining the status as a State organ. Professor Kim
3 is saying that the functions an entity performs is not
4 important. He ignores that.

5 I disagree. When determining whether an organ is
6 a State organ or not is, I believe, very important.

7 The fourth point is whether the exercise of voting
8 rights in respect to shares acquired by the fund.
9 Professor Kim's opinion is that because NPS has its own
10 legal personality, and this is NPS's act as a private
11 actor, exercise of voting rights would also be a private
12 act, and therefore the legal effects of that voting
13 would also be attributed to the NPS.

14 I disagree because this is in connection with the
15 State affairs of fund management, and therefore exercise
16 of entrusted fund managing affairs and authorities
17 conferred to the Ministry of Health and Welfare has been
18 entrusted in the NPS and NPS is exercising that vote
19 under the control of public laws, and therefore
20 I believe that it is under the control of public law.
21 Therefore, the legal effects of that voting would vest
22 in the State. The NPS itself has taken this position
23 according to my information.

24 Next slide, please.
25 As I just mentioned, there is the international law

1 concept of a State organ and I have heard that that is
2 described in Article 4 of the ILC articles and the
3 commentaries thereto. According to this, it is said that
4 whether an organ exercises legislative, executive,
5 judicial or other functions is not important. Also, it
6 is said that whether — what position it holds is not a
7 question that needs to be asked.

8 Also, it is said that whether it has that status in
9 accordance with internal laws, persons or entities would
10 also be included. So regardless of kind or
11 classifications, organs of government would fall under
12 this concept. So — and also it is said that the
13 internal law of a State may not classify which entities
14 have status of an organ.

15 So according to this international law concept of
16 a State organ, actually this concept under international
17 law does not exist under Korean law. The State organ
18 under such international law is not a Korean law
19 concept, and a direct analogy cannot be found in Korean
20 law.

21 Therefore, whether the NPS is a State organ or not
22 seems to be a question to be answered by the tribunal.

23 Next slide, please. So I would now like to turn to
24 Korean law and how Korean law defines or scopes these
25 administrative agencies.

1 The Korean law does not exhaustively list entities
2 that comprise part of the administrative branch of the
3 government. There are actually two prevailing theories
4 in Korean administrative law for defining what
5 constitutes the administrative branch of government, and
6 these two theories can be used to identify the scope,
7 the targets of administrative control, and also identify
8 what falls under the scope of various relief measures
9 against administrative actions.

10 One of these theories is the deduction theory.
11 According to the deduction theory, the administrative
12 branch is what is left after defining the other easier
13 to define governmental functions such as legislative and
14 judicial functions.

15 The other theory is referred to as an active or
16 result realisation theory. According to this theory,
17 this defines "administrative" as the active and
18 formative State activities that taken overall has
19 consistency and are performed for the active realisation
20 of a national objective.

21 Now, my approach is based on the foregoing
22 understanding of international law concept of a State
23 organ and also fundamentally is based in my
24 understanding of Korean administrative law theories.

25 There are various characteristics of the NPS that

1 need to be taken into account. One is that its basis of
2 establishment is provided for under statute.

3 Also, the functions of the NPS are either mandated
4 under statute or has been entrusted to the NPS by the
5 minister and other higher government entities pursuant
6 to that statute.

7 The governance structure of the NPS is also
8 prescribed by statute and the budget, in other words the
9 funding and the operation of the NPS is also prescribed
10 by statute and is to be performed accordingly.

11 So therefore the NPS is established based on
12 separate statutes and based on these separate statutes
13 perform government functions and the NPS also exercises
14 State authority and governmental powers.

15 When we consider these characteristics, I determine
16 that NPS is a part of the ROK's administrative
17 organisation.

18 Next slide, please.

19 This goes on to look into a bit more detail of why
20 NPS is part of the ROK's administrative organisation.
21 As I mentioned, NPS is a public institution established
22 by the State pursuant to a specific legislation. The
23 NPS's powers are based on the National Finance Act and
24 the National Pension Act as well as subordinate
25 regulations and the entrustment by the Minister of

1 Health and Welfare.
 2 The NPS also imposes mandatory pension contributions
 3 payable by Korean employees and employers. These
 4 pension contributions — the premiums are a quasi tax
 5 nature.
 6 Also, the Korean courts have determined that
 7 acquisition of securities through the NPS — the
 8 National Pension Fund itself is an acquisition by the
 9 State, and when the NPS transfers shares certificates,
 10 that constitutes a transfer of the share certificates by
 11 the State.
 12 Now, of course, the NPS manages and operates the
 13 National Pension Fund and that fund are the property of
 14 the State and therefore are not subject to corporate
 15 tax.
 16 Next slide, please.
 17 The NPS is part of the ROK’s administrative
 18 organisation under Korean law and this is once again
 19 shown by this diagram of how the Minister of Health and
 20 Welfare entrusts his powers and also maintains the right
 21 to — right of oversight and supervision.
 22 The minister has his own inherent national duty of
 23 managing and operating the National Pension Fund which
 24 has been entrusted to the NPS and as the party that
 25 places this State affair in trust of — to the NPS, the

1 minister continues that oversight over the NPS.
 2 Next slide, please.
 3 I will observe what duties the minister has under
 4 the National Pension Act, the NPA, and how he exercises
 5 his oversight powers.
 6 First of all, under the NPA the minister is in
 7 charge of the National Pension Service which is operated
 8 in order to satisfy the constitutional mandate of
 9 providing social security.
 10 So there is the Constitution that requires that the
 11 State provides social security and the minister has —
 12 is in charge of operating the National Pension Service
 13 as a way of implementing that constitutional mandate.
 14 Also, the minister oversees the operation of that fund
 15 which has been entrusted by — to the NPS.
 16 He exercises this oversight by appointing all of the
 17 directors of the NPS. He also recommends the NPS
 18 chairman which is appointed then by the President of
 19 Korea. He also appoints the NPS’s auditor and approves
 20 the accounting regulations of the NPS.
 21 Also, the minister approves or may even order
 22 amendments to the NPS’s articles of incorporation and
 23 also can take all measures that fall under his oversight
 24 powers. For example, he can order the NPS to submit
 25 reports to himself and he also has the power to inspect

1 the NPS’s services and property if he deems necessary.
 2 Next slide, please. Furthermore, there are some
 3 structures that are prescribed by the National Pension
 4 Act with regard to the operation of the fund. The NPS’s
 5 operational plan, the fund operational plan, must be
 6 approved by the operational committee under the
 7 Ministry, and also must be approved by the minister, and
 8 also the fund operational plan must receive the approval
 9 of the President.
 10 The Ministry’s Fund Operation Committee prescribes
 11 the NPS’s operational guidelines and determines the
 12 fund’s operation.
 13 The Fund Operation Committee is chaired by the
 14 Minister of Health and Welfare and also comprises of
 15 four vice ministers from other ministries. So the Fund
 16 Operation Committee is a public entity.
 17 Also, there are other characteristics that once
 18 again support the fact that the NPS is part of ROK’s
 19 administrative organisation under Korean law the.
 20 First of all, the NPS is a special statutory
 21 corporation that does not have capital. Therefore, the
 22 budget is fully borne by the national treasury.
 23 The fund that the NPS manages actually belongs to
 24 the State. It is State property. So in conclusion, as
 25 I will be explaining shortly, the NPS is part of the

1 State’s administrative organisation and performs State
 2 affairs, and is under the oversight and supervision of
 3 the minister for all of the State affairs it performs
 4 and the officials of the NPS are subject to the same
 5 restrictions as government officials in many aspects,
 6 including bribery and corruption.
 7 Now, I would like to turn to the topic of the fact
 8 that the NPS exercises powers entrusted to it by the
 9 State.
 10 The NPS exercises powers regarding the management
 11 and operation of the fund, and these powers were
 12 entrusted to the NPS by the minister. Therefore, the
 13 management and operation of the fund, which is a State
 14 affair, would clearly be a part of that entrusted State
 15 power, including the exercise of voting rights which is
 16 part of that management and operation of the fund.
 17 Therefore the effects of the NPS’s exercise of
 18 voting rights clearly is attributed to the State as is
 19 the wise finding of Korean courts.
 20 The NPS’s exercise of voting rights, whether that
 21 would be subject to administrative litigation or not
 22 I think is irrelevant from this question, given the fact
 23 that even central government agencies can be subject to
 24 civil litigations depending on the act in question.
 25 The NPS’s exercise of power, I believe, is different

1 from the actions of other ordinary private actors in the
 2 market in several aspects.
 3 First of all, the Fund Operational Guidelines
 4 actually set forth the types and the scope of assets
 5 that the NPS is allowed to purchase or ways that the NPS
 6 is able to exercise its operational powers.
 7 For example, regarding voting rights, there are
 8 detailed standards set forth in how that voting right
 9 may be exercised by the NPS, and these standards are not
 10 applicable to private actors in the private sector.
 11 Also, the Fund Operational Guidelines specifies who
 12 the parties that are authorised to exercise these
 13 powers, which member of which committee has the power to
 14 exercise has all been set forth in advance by the Fund
 15 Operational Guidelines and regulations, and also it says
 16 that when an item, matter is difficult, then in those
 17 cases the Experts Voting Committee should exercise that,
 18 is already set forth in advance in anticipation of
 19 difficult matters.
 20 Therefore, the NPS is also subject to oversight by
 21 not only the National Assembly, but the Board of Audit
 22 and Inspection, as well as the general public.
 23 Therefore, these are characteristics that separate
 24 the NPS from other private actors that manage assets.
 25 These are clear differences between a private actor and

1 NPS, even with regards to asset management.
 2 The management of State property by the NPS is not
 3 a private transaction, and that is supported by various
 4 details that I will be going through.
 5 First of all, when the NPS manages the fund, it is
 6 obligated to follow various principles, and these four
 7 principles that are set forth in the Fund Operational
 8 Guidelines is also supported by Article 64 of the
 9 National Finance Act which commands that such public
 10 funds be managed under these principles.
 11 First of all, there is the principle of
 12 profitability that is set forth by the Fund Operational
 13 Guidelines, and rather than just requiring the
 14 maximising of profits, this principle of profitability
 15 requires that the reason for it is to alleviate the
 16 burden on the insured person, especially the future
 17 generation. Given the fact that this is a reserve fund
 18 for pension benefits, this is obviously a necessary
 19 principle.
 20 There's also the principle of public benefit which
 21 requires that, given the fact that the accumulated
 22 amount of the fund constitutes such a significant
 23 overwhelming part of the national economy, it must be
 24 managed in consideration with a ripple effect that the
 25 fund will have on the national economy.

1 This public benefit principle is something that you
 2 will not find in the principles of operating private
 3 funds. The same goes for the principle of liquidity.
 4 The NPS, when it disposes of its assets, must be
 5 mindful of the impact that may have on the domestic
 6 financial market and must take measures in advance to
 7 minimise any impact on the domestic market.
 8 And lastly, all of these four principles are
 9 protected by the principle of management independence
 10 that requires that the fund be managed according to the
 11 principles and should not be undermined for other
 12 purposes such as political purposes and other agendas
 13 which I will go into detail later on.
 14 So my last point in my presentation is whether the
 15 NPS's vote on the merger in question had irregularities,
 16 which is my view, that the process had irregularities.
 17 As I have been just explaining, the Investment
 18 Committee must refer difficult matters to the
 19 Experts Voting Committee under the Ministry of Health
 20 and Welfare, and that is a requirement because, as the
 21 Fund Operation Committee has set forth, if there is
 22 a matter that the Investment Committee finds difficult
 23 to determine regarding votes, it must -- it's expressly
 24 stated that the Investment Committee must refer that to
 25 the Experts Voting Committee.

1 The Investment Committee -- no, I'll be talking
 2 about the Experts Voting Committee.
 3 The Experts Voting Committee actually serves the
 4 function of being an important check and balance device
 5 against the -- to the Investment Committee. This is in
 6 anticipation of the event where the State would attempt
 7 to unfairly intervene and obstruct the due process.
 8 I think this case highlights how the Expert Committee
 9 was intended to play that check and balance role.
 10 So considering that role and purpose of the Expert
 11 Committee of being that check and balance, and also
 12 considering the SK merger that pre-dated the Samsung C&T
 13 and Cheil merger and how the Investment Committee
 14 referred the SK merger to the Expert Committee and how
 15 the Expert Committee deliberated and decided on that
 16 difficult matter, the SK merger considering that
 17 precedent, together with that check and balance role of
 18 the Expert Committee, I think we are able to determine
 19 roughly what will fall under a matter that is so-called
 20 difficult.
 21 A difficult matter would be something that has
 22 controversial -- room for controversy and is
 23 a complex -- so the -- something that is difficult needs
 24 to be determined by considering the nature of the
 25 matter, the complexity of matter, as well as a public

1 opinion.

2 I think this is an objective criteria , whether
3 a matter is difficult or not is an objective standard.

4 So in the case of the Samsung C&T and Cheil merger,
5 I believe that that was a highly difficult matter
6 according to objective standards, and also, given the
7 fact that the Expert Committee took the decisions on the
8 SK merger, I believe that the Samsung C&T and Cheil
9 merger should have been considered to be equally
10 difficult matter.

11 However, as we all know, the Investment Committee
12 did not take that matter to the Expert Committee, and
13 after that the Expert Committee criticised the
14 Investment Committee's decision not to refer the matter,
15 and demanded that the Investment Committee refer the
16 matter to the Expert Committee.

17 And also, in the internal procedures and process
18 many people expressed their views that this definitely
19 qualifies as a difficult matter, and as I understand,
20 many people had strong opinions that this should be
21 referred to the Expert Committee, and there was unfair
22 pressure being -- until unfair pressure was exercised
23 through the Ministry of Health and Welfare.

24 Some time after the merger I have been told that the
25 Voting Guidelines were amended and the fact that the

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1 Voting Guidelines were amended reflects that the Voting
2 Guidelines use the language of discretion , saying it may
3 request, and this amendment was -- the purpose of this
4 amendment was to remove that discretionary language from
5 the Voting Guidelines.

6 Last slide , please.

7 As I mentioned during my presentation, regarding the
8 irregularities in the process leading up to the NPS's
9 vote, the principle of independence, I believe, is an
10 important principle to ensure the other principles that
11 govern the fund operation of NPS.

12 When managing the National Pension Fund,
13 independence is a requirement and in order to abide by
14 that principle of independence, there should not have
15 been any pressure from the Ministry of Health or the
16 Government.

17 Also, the CIO of the NPS, who is the person
18 responsible for managing the fund, should not have
19 ordered the creation of ungrounded synergies, so-called.

20 So once again, we see that members of the NPS have
21 not followed or abided by the legal requirements that
22 they are subject to and that alone also shows that there
23 were irregularities in the process of the NPS's vote
24 that violates and infringes upon the various
25 independence requirements that is provided by not only

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1 the National Pension Act, but also the National

2 Finance Act, and that completes my presentation. Thank
3 you.

4 THE PRESIDENT: Thank you very much, Professor Lee.

5 Will there be any follow-up questions on direct?

6 MR PETROCHILLOS: No, sir, thank you.

7 THE PRESIDENT: Thank you. Cross-examination, it will be
8 Mr Terceño. Please.

9 Cross-examination by MR TERCEÑO

10 MR TERCEÑO: Thank you, Mr President.

11 Good morning, Professor Lee. My name is

12 Joaquin Terceño, and I represent the Republic of Korea,

13 which I might refer to as the ROK sometimes, the

14 Respondent in this arbitration. I'll be asking some

15 questions to start this morning and I'll then be handing

16 over to my colleague, Sanghoon Han, who will have some

17 questions about various Korean statutes before you come

18 back to me later today.

19 You completed an LLM degree at Cambridge University

20 in 1991 and received a PhD in law at Sheffield

21 University in the United Kingdom in 1994; is that right?

22 A. Yes, correct.

23 Q. And those studies were conducted completely in English?

24 A. Correct.

25 Q. Now, I understand you have asked to testify in Korean

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1 today and that is of course your right. I would just

2 like to caution you that assuming you understand my

3 questions in English, please nevertheless wait for the

4 consecutive translation into Korean before providing

5 your answer, so that we can keep things running

6 smoothly.

7 A. Yes, I will make sure to do so. Even though I did study

8 in the UK, since returning to Korea I have not had much

9 chance to return, which also means I have not had much

10 chance to study English books. Most of my studies since

11 have been in Korean. So I believe it is best for me to

12 testify in Korean to communicate my views accurately

13 regarding the Korean law.

14 Q. And that's fine, of course, and thank you. We are

15 certainly not challenging your right to do that. I just

16 wanted to make the point about waiting for the

17 interpretation.

18 I also wanted to set out a few guidelines before

19 getting into the questioning. We have a lot of material

20 to cover in a short time today and so I would be

21 grateful if you could answer my questions directly.

22 I'll be doing my best to keep my questions brief and

23 easy to understand, but if you don't understand any

24 questions, please feel free to ask me to clarify them.

25 If you could keep your questions as concise as you

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1 need to, elaborating only as necessary, that would be
 2 appreciated.
 3 A. Yes.
 4 Q. Thank you, and we'll be going through various documents
 5 today. We're now handing out the cross bundles for you.
 6 This will be a binder that contains the documents we
 7 plan to ask you about.
 8 These documents will also be put up on the screen in
 9 front of you and the bundles that you're being given now
 10 have both copies of your two expert reports, and then
 11 copies of a selection of documents which I will be
 12 taking you to and the Korean versions of those documents
 13 are in those bundles as well. So of course look at the
 14 Korean versions and I'll do my best to direct you to the
 15 correct page on the Korean version.
 16 A. Yes, I have just mentioned I am more familiar -- I'm
 17 more accustomed to Korean language. So I would
 18 appreciate if any materials are put on the screen, that
 19 the Korean version be available on the screen.
 20 Q. And it will be. So you will be able to see the Korean
 21 version, and again the hard copies of the Korean are
 22 also in the binder that you can look through.
 23 So to begin, in your first report you deal with two
 24 questions, Professor. The first is the legal status of
 25 the NPS under Korean law and the second is the legality

1 of actions taken by the NPS in exercising the fund's
 2 vote in favour of the merger; correct? {F1/1/1}?
 3 A. Yes, correct.
 4 Q. And you're here as an expert witness in Korean
 5 administrative law; do I have that right?
 6 A. Yes, correct.
 7 Q. Now, I just wanted to discuss some other areas of
 8 expertise you appear to have. If we could turn to your
 9 key publications, and this is in Appendix 2 at page 61
 10 of your first report. {F1/1/63}. Let me know when
 11 you're there.
 12 A. Do you mind telling me which page that is in the Korean
 13 version?
 14 Q. I believe it's the same page. At the bottom of the page
 15 it should be page 61. It is your Appendix 3 in your own
 16 expert report -- sorry, Appendix 2.
 17 It may be 59 in the Korean, now that I'm looking at
 18 the Korean. But I do not read Korean, so you should be
 19 able to find it better than me.
 20 A. Yes.
 21 Q. And you call this key publications. When you put this
 22 list together, did you have in mind the subject on which
 23 you had been asked to give an opinion in this
 24 arbitration?
 25 A. No, I did not.

1 Q. So this is just a list of all your publications?
 2 A. No, it contains only my recent publications. And so --
 3 so you can see that it's mainly from the 2000s to
 4 recent. There are a few that date in the 1990s, but you
 5 will see that most of them are from recent, all the way
 6 back to around the 2000s.
 7 Q. Yes, I was a little confused when you said recent
 8 because there are some from 1997, but thank you for
 9 clarifying that.
 10 The first bullet is a publication about operating
 11 a transportation platform. Am I understanding correctly
 12 that the type of transportation platform there is an
 13 online application or a digital network that's used to
 14 connect passengers with drivers for providing rides? Is
 15 that the type of platform you mean there?
 16 A. Well, this is on top of my CV introduction, and so in
 17 terms of -- in order of introduction, when I was
 18 explaining my background I mentioned this last because
 19 it is most recent.
 20 To just give a bit more explanation of my expertise,
 21 previously I had invested quite a lot of time in areas
 22 such as financial regulation or pension regulation, but
 23 more recently, especially since Go player Se-dol Lee
 24 lost to an AI system, a series of Go matches, I have
 25 actually taken up a new field of work, and that regards

1 autonomous vehicles and AI.
 2 So I have been since then taking on a lot of work
 3 from the Ministry of Land, Infrastructure and Transport,
 4 as well as the Ministry of Science and ICT regarding
 5 that field of study, and so the specific project that
 6 the transportation platform that you've mentioned is
 7 actually a research that was commissioned related with
 8 creating a central data platform and the administrative
 9 regulations that should govern a central transportation
 10 data platform that is created by collecting
 11 transportation data from all parts of the region.
 12 Q. Thank you, Professor, for that explanation. It's
 13 interesting. I was just trying to understand, make sure
 14 I understood what the article was about, because
 15 obviously that topic is not of relevance to us here
 16 today.
 17 But as you say, your more recent expertise has been
 18 in that area, and we see that reflected at least in the
 19 headings of the first five publications on your list;
 20 correct? They all have to do with autonomous vehicles?
 21 A. Yes, correct.
 22 Q. So at the sixth bullet point on this page we see that
 23 you wrote about reforming the regulatory structure of
 24 public interest organisations, but you do not rely on
 25 that article for anything in your expert reports, do

1 you?
 2 A. No, I did not. That is because the questions that are
 3 at issue in this case, which is basically what is an
 4 administrative agency in Korea or what comprises an
 5 administrative organisation under Korean law, are
 6 questions that are assumed to be obviously be known or
 7 obviously known to anyone who specialises in Korean
 8 administrative law. And therefore I did not have the
 9 need to refer -- rely on the paper that you've just
 10 mentioned on reforming regulatory structure for public
 11 interest organisation for the purposes of preparing my
 12 expert report.
 13 Q. Professor, just on the comment you just made, you say
 14 that it would be obviously known to anyone who
 15 specialises in Korean administrative law what the --
 16 what comprises an administrative organisation. You
 17 have -- we can count the pages if we need to -- but you
 18 have written nearly 100 pages in two expert reports
 19 trying to explain this obvious point; is that right?
 20 A. Well, first of all, the reason I did not cite this paper
 21 that you mentioned on the reforming regulatory
 22 structures for a public interest organisations in
 23 preparing my expert report is because that topic is not
 24 related with the topic at issue or what I was asked to
 25 discuss.

1 I had thought that it was a relatively simple
 2 question of -- that based on the principles that -- of
 3 administrative law as I understand, that it was a fairly
 4 simple question to answer, that an administrative
 5 organisation would include not only the central
 6 administrative agencies, but also local governments, as
 7 well as public institutions. I had to write 50 pages,
 8 two expert reports, to explain the reason for that in
 9 detail.
 10 Q. Professor, I won't go through your entire list, but
 11 you've got various articles about asset pooling and
 12 Chinese walls and fiduciary duties, but let's look at
 13 your first report where you explain or summarise at
 14 least the topics from this list.
 15 This is paragraph 1 of your first expert report
 16 which is in one of the binders next to you and should
 17 also come up on the screen. {F1/1/4}.
 18 Do you see that?
 19 A. Yes, I am looking at it.
 20 Q. We can read together, you in the Korean, of course, but
 21 we see here you wrote:
 22 "... I have published extensively on topics relating
 23 to pension law and pension administration in Korea, the
 24 regulation of trusts, and the fiduciary duties of
 25 pension managers and trustees in Korea. In 2016

1 I published an article about the legal relationship
 2 between the NPS and the National Pension Fund ..."
 3 Which you call "the fund":
 4 "... focusing on the legal status of the NPS under
 5 Korean law."
 6 Now, that is the only of your articles that you have
 7 submitted with your reports; is that correct?
 8 A. Is the point of your question whether I have other
 9 papers regarding trust or pension laws that have not
 10 been submitted?
 11 Q. Professor, I would ask you not to worry about the point
 12 of my question, but simply focus on answering my
 13 question, and my question is simply: is this the only of
 14 your articles that you submitted with your reports?
 15 A. Probably there are more. My understanding is that
 16 I selected the papers to be submitted.
 17 Q. And this is the only one you selected; correct?
 18 A. Did you say only one paper?
 19 Q. Yes, this paper mentioned in this is the only one that
 20 you selected to submit with your expert report.
 21 A. Are you referring to papers that pertain to this topic
 22 of pensions?
 23 Q. Professor, let me be as clear as I possibly can. You
 24 reference one article. You describe it in paragraph 6.
 25 unless I missed something, this is the only one you have

1 submitted with your expert report, and I am simply
 2 asking you to confirm that.
 3 A. Yes, it is this one paper, but actually the National
 4 Pension -- the Fund and the National Pension Service is
 5 a very specialised field of study, and so I believe that
 6 my paper is probably the only paper that deals with the
 7 relationship between the pension service and the pension
 8 fund.
 9 Q. And interesting that you just mentioned that. You said
 10 a moment ago that the question of whether the NPS was
 11 part of the administrative branch of the Government was
 12 an obvious question. You then said it was a relatively
 13 simple question. But you wrote here, and you seem to
 14 have just testified again, that it is actually a complex
 15 and highly specialised question; is that right?
 16 A. Yes, and I would like to explain the reason why.
 17 When I say that the relationship between the
 18 National Pension Fund and the National Pension Service
 19 is complex, I mean that, first of all, one needs to have
 20 knowledge of financial institutions and the financial
 21 market to approach that topic.
 22 Because, first of all, in order to explore that
 23 question of the NPS and the National Pension Fund, one
 24 must first of all have an understanding knowledge of
 25 general asset management and fund creation and

1 operation.
 2 And one would not be capable of dealing with the
 3 question of the relationship between the NPS and the NPF
 4 without such expertise and knowledge regarding financial
 5 markets.
 6 And I myself, as a person who have studied trust
 7 laws and financial markets, have that expertise and
 8 knowledge. And so I was in the position to understand
 9 and explore relatively easy the laws pertaining the
 10 National Pension Fund and the pension operation compared
 11 to other people.
 12 On the other hand, the question of whether the NPS
 13 forms a part of the State organ or not, whether it's
 14 a part of the State organisation or not, is a fairly
 15 obvious, self-obvious question according to the
 16 administrative law theories such as the theory of
 17 deduction or active theory that I have just explained.
 18 I was — so I think that most professors of
 19 administrative law are not familiar with financial
 20 regulations, and so they would find it difficult to
 21 approach the topic of the relationship between the NPS
 22 and the NPF, the fund.
 23 However, I had the opportunity to study the
 24 financial big bang and funds in the UK, and therefore
 25 because of my expertise I was in the position to easily

1 approach that topic and was able to write this paper.
 2 I would assume that the other administrative law
 3 professors were not able to do so because they lacked
 4 the understanding of financial markets.
 5 Q. Professor, if I may, if I could again just remind you to
 6 limit your answers to the questions I ask, although I do
 7 recognise that sometimes you may want to elaborate
 8 a little bit and we will get to some of these points
 9 later on in the morning.
 10 So I'm clear then from the comments you made, you
 11 would say that you were an expert in financial
 12 institutions and the financial markets and asset
 13 management; is that right?
 14 A. Yes, correct. And pensions as an area, as a familiar
 15 area of expertise for me because it would be a part,
 16 a subset of asset management.
 17 To return to your previous question, I do realise
 18 now that in terms of papers submitted, that was the only
 19 paper, one paper submitted, but there's also a paper on
 20 retirement annuities that I cite as part of my report.
 21 Q. Thank you, Professor. If I could turn you to your
 22 second witness statement, which is in one of the bundles
 23 before you. I would like to turn you to paragraph 13 of
 24 your second witness statement. {F4/1/6}. If you're
 25 with me in the Korean, again, I'm looking at the

1 English, but you say in paragraph 13 that you understand
 2 the phrase "State organ" to be an international law
 3 concept; is that right?
 4 A. Yes, correct.
 5 Q. And you also say that you have been instructed that "an
 6 organ includes any person or entity which has that
 7 status in accordance with the internal law of the
 8 State". So you understand that the question before you
 9 is a question of Korean law; correct?
 10 A. Yes. I am not very familiar with international law and
 11 so as you've heard in my presentation, I have shared my
 12 understanding based on the brief information I have been
 13 provided on international law.
 14 Q. You do understand that you are not here as an expert on
 15 whether the NPS is a State organ under international
 16 law; correct?
 17 A. Yes, I came here as a Korean law expert, not as an
 18 expert on the topic of State organs under international
 19 law.
 20 Q. And if you look at paragraph —
 21 A. However, I'm mentioning the concept of State organ under
 22 international law briefly in my expert report for the
 23 sake of ease of explaining the concept under Korean law
 24 because, as I understood, the State organ concept under
 25 international law was not very different functionally

1 compared to the concepts under Korean administrative law
 2 theory.
 3 Q. That's interesting, Professor. If you look at
 4 paragraph 14, you say in paragraph 14 of your second
 5 witness statement that there is no direct analogy to the
 6 concept of "State organ" under Korean law. Am I now to
 7 understand that you are saying there is a direct
 8 analogy? {F4/1/7}
 9 A. Well, Counsel, I think you misunderstood my previous
 10 comment. When I said that the approach taken by
 11 international law, when it describes a State organ, is
 12 similar to the concept or approach under Korean law,
 13 it's the following.
 14 When I said that, I meant the following: that under
 15 Korean law administrative agencies are considered to
 16 consist of the State, local governments, and public
 17 institutions, and when determining whether public
 18 institution forms part of the State organisation or an
 19 administrative organisation, it looks at various
 20 criteria, including whether that public institution
 21 performs and exercises State powers that it is entrusted
 22 with by law.
 23 So in other words what I described as the being the
 24 concept of State organ under international law was that
 25 functionally it looks at whether an entity exercises

1 a State power that it is entrusted by law, whether that
2 entity established by grounds laid out in statute, and
3 also, as I have just mentioned, whether it performs
4 an action that is considered to be a part of the public
5 or State power.

6 That sounded very similar to the concept that we use
7 in Korean administrative law. So that is why I believed
8 that the concept of a State organ was very similar to
9 the approach that we take under Korean administrative
10 law.

11 Q. Professor, you said during your presentation that you
12 were told that legal personality — this is a separate
13 legal personality of an entity — that you were told
14 legal personality does not matter in determining this
15 issue. Am I right that you were then instructed as to
16 which factors you should consider and which you should
17 ignore in determining whether the NPS is a State organ
18 under Korean law?

19 A. No, I have not been instructed.

20 Q. So you misspoke during your presentation?

21 A. I don't think I have misspoke. I was provided with the
22 ILC regulations and I provided my opinion in my
23 presentation based on my rough understanding upon
24 reading the ILC regulation I was provided.

25 Q. And so again you seem to keep coming back to this. Your

1 opinion then is based on your understanding of
2 international law as it has been described to you?

3 A. Yes, that is correct. There is a chance that I may have
4 misconstrued, but my opinion is based on my
5 understanding of a State organ.

6 Q. You also noted during your presentation that you were
7 told — and correct me if I am wrong but I assume that
8 you mean by counsel for the Claimant — that an
9 international tribunal had determined that the Korean
10 entity KAMCO was a State organ and so is that something
11 you also took into consideration, believing that that
12 was properly a State organ?

13 A. Yes. I do not know the details regarding KAMCO. I was
14 provided with a rough briefing.

15 I also did hear and read news reports about that
16 matter in Korea. So there is a chance that my
17 understanding of that matter is not accurate or correct.

18 But then KAMCO is a quasi Government institution, an
19 agency, it's actually a fund managing type quasi
20 government agency, the same as NPS. And so I provided
21 my opinion based on that, that given that both are quasi
22 government agencies, fund managing type quasi government
23 agencies. I thought maybe similar legal principles
24 would apply to both agencies, and that was based on what
25 I was provided, what I heard.

1 Q. Just to be clear, as you explained that you don't know
2 the details, you don't know what legal principles were
3 applied in the KAMCO case, do you?

4 A. No, I do not.

5 Q. Thank you. If I can bring you back to your first
6 witness statement. I would like to look at
7 paragraph 24. This should be easy to find. It's the
8 colourful pyramid that you included in your witness
9 statement. {F1/1/11}.

10 Apologies, I referred to that as a witness
11 statement, but of course I meant expert report. It's
12 always nice when the grins on the other side of the room
13 tell me I have done something wrong.

14 Looking at your pyramid, what you do here is you
15 provide a classification of the hierarchy of the laws
16 and rules in the Korean system; is that right?

17 A. Yes.

18 Q. And you've got the Constitution at the top. You do not
19 note it in your discussion here, but the Constitution
20 creates such bodies as the National Assembly, the
21 President, the Prime Minister and the courts, and all of
22 those are State organs; correct?

23 A. Yes, this is a diagram that shows the hierarchy of
24 Korean law. It is not a diagram depicting State organs
25 of Korea, and that's why this diagram, as you mentioned,

1 starts with the Constitution on top, and I support that
2 with the description that based on the Constitution, the
3 legislative branch has the power to create laws and that
4 based on these laws, the President and other heads of
5 administrative agencies have the power to enact decrees.
6 And so this diagram explains the legal hierarchy and is
7 not a diagram intended to describe organisations
8 themselves.

9 Q. Thank you, Professor. I do feel it's necessary to
10 remind you that this will go much smoother for us all if
11 you simply answer the question that I asked, my next one
12 being: under the Constitution are what you call class II
13 legislative instruments which are statutes enacted by
14 the National Assembly; correct?

15 A. Correct.

16 Q. And, for example, the Government Organization Act would
17 fall into class II; correct?

18 A. Correct.

19 Q. Now, I'm not asking to you opine on it at this time, and
20 we understand you disagree, but you do know that
21 Professor Kim's position is that additional State organs
22 are created by the Government Organization Act. You
23 understand his position; correct?

24 A. Yes, I understand Professor Kim's position.

25 Q. Can I ask you, Professor, before I go on, can a State

1 organ sue another State organ for damages in Korea? So,
 2 for example, could the National Assembly sue the
 3 executive branch for damages, for example arising from
 4 a tort?
 5 A. My understanding is that it does not.
 6 MR TERCEÑO: So let me take a look at this article that you
 7 published.
 8 For the President, just to foreshadow, I'm going to
 9 look at this one more document and then it might be time
 10 for a natural break, if that's okay?
 11 THE PRESIDENT: Yes, exactly. I was going to suggest that
 12 we break around 11.30 for, say, ten minutes, and then we
 13 can go on until 1 pm and break for lunch.
 14 MR TERCEÑO: That should be perfect depending on the length
 15 of the answers, but I just have two or three questions
 16 on one document.
 17 Professor, if we could look at this article you
 18 published, it's exhibit C-264. It should be in tab 6 of
 19 the large bundle in front of you {C/264/1}.
 20 Do you have the article in front of you, Professor?
 21 A. Yes, I do see that my paper has been put up on the
 22 screen. So I will try to answer your question by
 23 referring to the screen.
 24 Q. The title of your paper is again "The Legal Nature of
 25 the National Pension Service and the National Pension

1 Fund and the Compensation System", and I would like to
 2 ask you to turn to internal page 20 of this document
 3 {C/264/15}. In the bottom right-hand corner where you
 4 see the large bold numbering, it should be {C/264K/15}.
 5 THE INTERPRETER: Counsel, the documents in the binder do
 6 not have the bold numbers. So -- and actually there are
 7 no page numbers in this copy either. So ...
 8 MR TERCEÑO: Yes, the Korean copy unfortunately does not
 9 have page numbering. But if you look on the screen, you
 10 should be able to see where I'm pointing to. Do you
 11 have the Korean version on the screen?
 12 A. Yes. Yes, I have it on the screen.
 13 Q. Okay. Thank you. If you do want to find the hard copy,
 14 it should be about five pages in from the back, but you
 15 may be happy with just looking at the screen.
 16 I'm looking at heading number 3 on this page, it is
 17 entitled "Civil liability of the NPS and its employees
 18 for shortfalls due to unlawful performance of duties".
 19 Simple question is: did I read that correctly?
 20 A. Yes, correct.
 21 Q. And under sub-heading 1 it's called the "NPS's civil
 22 liability to the State". Do you see where I am?
 23 A. Yes, correct.
 24 Q. And in that paragraph you explain, do you not, that the
 25 NPS can be held liable to the State of Korea for the

1 acts of its employees because its employees are its
 2 agents; is that correct?
 3 A. Yes, correct.
 4 Q. And I'm going to read a sentence a little more than
 5 halfway through that paragraph. You wrote in your
 6 article :
 7 "Therefore, based on the agency relationship, the
 8 State may claim for damages against the NPS for
 9 non-performance of delegated duties."
 10 Did I read that correctly?
 11 A. Yes, that is what it says.
 12 MR TERCEÑO: Thank you, Professor.
 13 President, this may be time to take a short break.
 14 When we come back, my colleague Mr Sanghoon Han will be
 15 asking some questions. So it gives us an opportunity to
 16 switch.
 17 MR GARIBALDI: I have a question on this.
 18 Professor Lee, regarding the question that counsel
 19 has just asked, if the NPS is liable to the State as
 20 responsible for the unlawful act of an NPS employee,
 21 isn't the State who owns the assets of the NPS being
 22 compensated if successful out of its own funds? Does it
 23 follow then?
 24 A. This part of my paper, now that you have posed me that
 25 question, I realise was not correct. I think I did not

1 have the full insight into the situation when I wrote
 2 this paper because the NPS, as I have mentioned, is
 3 a special statutory corporation that has no assets
 4 capital of its own. And therefore even if it is held
 5 liable, it would have no property to pay that liability
 6 because, as you know, all of the -- the fund itself is
 7 State property and the operational expenses of the NPS
 8 are covered by the Treasury.
 9 So the NPS itself would have no property to fulfil
 10 any liabilities if there is such -- if it is found
 11 liable to the State, and so I think that when writing
 12 this paper I did not have the full insight.
 13 MR GARIBALDI: Thank you.
 14 THE PRESIDENT: Okay. We break for lunch(sic) until 11.45,
 15 and Professor Lee, I should remind you that you cannot
 16 speak to anyone about your testimony during the case.
 17 You're free to go, move around, have a cup of coffee or
 18 tea.
 19 (11.32 am)
 20 (A short break)
 21 (11.45 am)
 22 THE PRESIDENT: Let's resume. It looks like I misspoke
 23 a while ago. For the avoidance of doubt, that was not
 24 the lunch break. It will come a bit later, around
 25 1 o'clock. So if you felt a bit rushed with your

1 sandwich, you will have a bit more time in an hour.
 2 Just to understand, it will be Mr Han examining, and
 3 it will be consecutive?
 4 MR HAN: Yes, Mr President.
 5 THE PRESIDENT: And you will put your questions in Korean,
 6 I understand.
 7 MR HAN: Correct.
 8 Cross—examination by MR HAN
 9 MR HAN: Professor Lee, I will be making comments, but
 10 please understand that even if you understand what
 11 I have said in Korean, you need to wait until that has
 12 been translated into English before providing an answer.
 13 A. Yes, I will do so.
 14 Q. Thank you, Professor, for coming. I have a few comments
 15 to make before I start. We are actually quite behind
 16 schedule, so I would appreciate if you could provide
 17 short answers, such as "yes" and "no", if it's possible.
 18 If you feel the need to add, I would also like to let
 19 you know that there is a separate time set aside for the
 20 Claimants to provide you that opportunity.
 21 A. Yes, I will try to do so.
 22 Q. Now, to go back to the question we were discussing
 23 before the break, is it correct that you said that
 24 because the NPS is a special statutory corporation that
 25 does not have any capital, even if it loses in

1 litigation, it would not have its own property to use
 2 for that liability?
 3 A. Yes, the NPS is, as we have been saying, a special
 4 statutory corporation without capital, which is the same
 5 status as the Bank of Korea or the Financial Supervisory
 6 Service.
 7 The National Pension Act only stipulates that the
 8 NPS is merely a corporation, but in fact it is a special
 9 corporation that does not have any capital of its own.
 10 Q. So even if it were to lose in civil litigation, it would
 11 not be able to perform; correct?
 12 A. Would it be possible, counsel, to specify your scenario
 13 of what kind of civil — who the counterparty is in that
 14 alleged civil litigation that NPS hypothetically is
 15 losing. Can you specify your hypothetical in terms of
 16 who are the plaintiffs and the defendant in terms of
 17 a civil litigation?
 18 Q. Well, the scenario I have in mind is where the NPS is
 19 a defendant in a civil litigation and my understanding
 20 is that whether NPS is able to perform or not would not
 21 change depending on who the plaintiff is. Am I not
 22 correct?
 23 A. Well, to return to my paper, the premise of my paper was
 24 the damages, compensation when the public — a citizen
 25 of Korea happens to incur losses or damages caused by

1 the actions of an employee of the NPS, such actions
 2 being taken in the course of the NPS performing State
 3 affairs as a way of performing State actions. That was
 4 the premise of my paper, and that is what my paper
 5 mainly deals with.
 6 My opinion was that because NPS is part of the
 7 State's administrative organisation, if any damages were
 8 imposed as part of NPS's action, the State would have to
 9 ultimately provide that damage compensation.
 10 But your question seems to imply NPS being a party
 11 to a civil litigation and that is why I wanted you to
 12 clarify the plaintiff and the defendant in this
 13 hypothetical civil litigation you were asking me about.
 14 Q. Well, please once again listen carefully to my question
 15 and try to answer the question that I have asked you.
 16 My question was not about your paper. Actually it
 17 was about a simple example. For example, let me give
 18 you an example. I myself personally incurred
 19 damage/loss due to, for example, tort committed by
 20 an NPS employee and I filed a civil litigation against
 21 NPS because of that damage I incurred, and NPS lost in
 22 that civil litigation.
 23 In such a case would NPS bear liability?
 24 A. Well, according to my theory, in that case I believe
 25 that the State would have to provide the damage

1 compensation because NPS and its employee was acting as
 2 part of performing State duties that it was delegated
 3 with. Of course this question has not been actually
 4 tested, but my opinion is that because the NPS and the
 5 NPS employee was performing a State power, State
 6 authority that it was delegated with, if damages have
 7 occurred in the course of performing such State powers,
 8 the State, as the principal that delegated its power,
 9 commissioned its power to the NPS, would be the party
 10 that is liable to provide compensation under the State
 11 Compensation Act.
 12 Q. Please turn to tab number 1 in your second binder.
 13 Please turn to paragraph 67. RER—2. Operator, we are
 14 not seeing the screen. Tab 1 in volume 2.
 15 Page 28, sir.
 16 THE INTERPRETER: So that's page 28 in the Korean version?
 17 MR HAN: Yes, correct.
 18 I have only one question and, please, I would
 19 appreciate if you could answer "yes" or "no".
 20 In this table there's actually two civil litigations
 21 cases brought against the NPS.
 22 Now, if NPS had lost in these civil litigations, who
 23 would be liable? Would it be the NPS or would it be the
 24 State that's liable and not the defendant?
 25 A. Regarding the first of the two cases, my opinion is that

1 the State would be liable for providing damage
 2 compensation under the State Compensation Act. That is
 3 because the damages appears to have arose in the course
 4 of performing State action by the State. Is the second
 5 case the one in the second row; is that correct,
 6 counsel?
 7 Q. Well, Professor, I have actually asked my question to
 8 both of these civil litigation cases in this table, and
 9 to ask my question again, my question is if NPS, the
 10 defendant, loses in these cases, who would bear the
 11 liability? Would it be NPS, the defendant, or the
 12 State, who is not a defendant, a party to the
 13 litigation?
 14 A. If these cases had been conducted in the form of civil
 15 litigation, then upon losing the case, the defendant
 16 would have to bear that liability. However --
 17 Q. Well, I would just once again remind you that we are
 18 quite behind schedule and once again would like to ask
 19 you to answer "yes" or "no" to questions that can be
 20 answered "yes" or "no" and then to use the Claimant's
 21 time if you have anything to add.
 22 MR GARIBALDI: Excuse me, but I do need to have the answer
 23 to that question. The complete answer to that question.
 24 It is the same question I asked before in the context of
 25 a State -- of a State claim. So the NPS is found liable

1 in a lawsuit by a private individual in this case. Who
 2 pays for the damage?
 3 As I understand it, the NPS has no assets. So who
 4 ends up paying for the damage? That's the question.
 5 A. My opinion is that the State would bear liability for
 6 damage compensation. If a party would attempt to file
 7 such a civil litigation against the NPS, my opinion is
 8 that the court would have to find by rejecting the case
 9 on grounds of being unlawful and instruct the plaintiff
 10 to file the case as a case under the State Compensation
 11 Act.
 12 THE PRESIDENT: Just to follow up on that, Professor Lee,
 13 would you know whether NPS has in its budget a budget
 14 line for contingent liabilities, legal liabilities or
 15 anything like that?
 16 A. According to -- my understanding is that it does not
 17 have such a line item. The properties that do show up
 18 under the name of the NPS actually is State property and
 19 the NPS's expenses are covered entirely by the State
 20 treasury, and the NPS itself does not have other sources
 21 of income.
 22 THE PRESIDENT: I understand that the fund is considered
 23 State property and the budget funds are provided by the
 24 State. I was more interested in whether you were aware
 25 whether the budget that the State approves for the

1 use -- for the use by the NPS includes a budget line for
 2 these kinds of liabilities, contingent or legal
 3 liabilities. But I understand you are not aware of
 4 that?
 5 A. Yes, I do not know the details of that, but my opinion
 6 is based on the material that I have seen before about
 7 the NPS accounting. According to what I saw previously
 8 before, NPS does have an account to its name, but almost
 9 all of the assets included in that account are tied to
 10 the fund itself and compared to the scale of its
 11 operation, the -- any amounts that are NPS's own that
 12 are in that account were very negligible. And NPS does
 13 not have its own income.
 14 MR HAN: President, if you do not have any question, I'm
 15 going to move on.
 16 I will move on, but just for your information, the
 17 two civil cases that we've been just seeing, none of
 18 them were rejected by the court and actually NPS lost in
 19 one of those civil litigations.
 20 A. Actually, that was the point I wanted to make. Even
 21 though until now the issue is being dealt with in the
 22 form of civil litigation against the NPS for damages, my
 23 opinion is that it can be addressed as an issue of the
 24 State Compensation Act.
 25 Q. So I would like to then ask you questions regarding your

1 second expert report that is tab 2 in your first binder.
 2 That would be CER-4. {F4/1/1}
 3 THE INTERPRETER: Counsel, is there a specific part of this
 4 part that you would like me to look at?
 5 Q. Paragraph 13.
 6 THE INTERPRETER: He's asked whether the counsel is
 7 referring to his first expert report. It's his second
 8 expert report. So it's the second expert report,
 9 paragraph 13.
 10 A. Yes, I have found it.
 11 THE INTERPRETER: Counsel, do you mind repeating your
 12 question?
 13 MR HAN: Yes.
 14 So here you are saying that a State organ is
 15 a concept that does not exist under Korean law and you
 16 examine the status of the NPS under Korean law as well
 17 as the -- its position within the overall Korean
 18 Government organisation; correct?
 19 A. Well, here I do reference the State organ concept, but
 20 in the parts where I describe Korean law I am only
 21 basing my opinion on Korean legal theory.
 22 Q. Would you like to turn to tab 32 which is {C/532/1},
 23 tab 37.
 24 Is it correct that you explain that there are two
 25 theories, you present two theories that you say are

1 relevant in determining whether an entity belongs to the
 2 administrative branch or not, those two theories being
 3 the deduction theory or the active theory?
 4 A. Yes, that is what I am explaining.
 5 Q. Operator, can you turn to page 2 {C/532/2}.
 6 Let me just read out the point that is titled
 7 number 2. Here it says that there are different
 8 contending views on how to define the concept of
 9 administration in practical terms. Am I reading it
 10 correctly?
 11 THE INTERPRETER: He's just said that the question asked in
 12 Korean does not match the translation provided into
 13 English.
 14 MR HAN: I have actually just read off of the material,
 15 Professor, that you have submitted. Let me just try to
 16 read that again.
 17 Is it correct that it says that there are many
 18 different contending views on how to define the concept
 19 of administration in practical terms?
 20 A. Yes, that's what it says.
 21 Q. And actually if you look at this paper, there are four
 22 theories that are introduced, including the passive
 23 theory, the active theory, the descriptive theory, and
 24 then the negative theory or the type of institution
 25 theory; is that correct?

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1 A. Yes, correct.
 2 Q. And is it correct that you only introduced two out of
 3 these four theories and have submitted translations only
 4 for those two?
 5 A. Yes, but I do believe that even under these other
 6 theories, the same conclusion, a similar conclusion
 7 would be reached. The reason why I introduced only two
 8 was because I believed that those two were the more
 9 representative theories and thought that it would be too
 10 complicated to introduce four dogmatic theories.
 11 Q. Operator, can you pull up the transcript for the first
 12 day page at 105 and line from 19 {Day1/105:19}.
 13 Actually the Claimant last Monday had made an
 14 introduction on the so-called composition of State
 15 organs and I would like to share what the Claimant had
 16 said on that day.
 17 "A government agency has to be either of the one
 18 type, a central agency or the other type, a public
 19 institution."
 20 Do you agree with this?
 21 A. Well, I do not believe that all public institutions form
 22 part of the State organ or the State organisation.
 23 First of all, public institutions actually span a very
 24 wide spectrum. I think that the statement made here
 25 would be correct in the case of certain public

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1 institutions, for example a fund management type public
 2 institutions that are highly similar to a government
 3 organisation, actually have almost all of the
 4 characteristics of a government organisation and perform
 5 a public function.
 6 But I also say that not all public institutions
 7 would be included in there.
 8 Q. I would like just to pose the question again, Professor,
 9 and I would appreciate a "yes" or a "no". Do you agree
 10 with what I have just read?
 11 A. I would like to read through that passage in detail
 12 before providing my answer. So that is from line 20 of
 13 the transcript on the screen. (Pause)
 14 I can understand this statement, but I would say
 15 that it's a bit too rigid to define it as either one or
 16 the other, that it's either one or the other is a bit
 17 too rigid a definition.
 18 Q. Professor, is it correct that the administrative
 19 organisation legalism refers to the fact that
 20 administrative organisations must be set forth by law?
 21 A. Yes, I'm familiar with that concept.
 22 Q. I would like to take you again briefly to your second
 23 statement which is tab 2 of volume 1 {F4/1/1}?
 24 A. Is it my expert report?
 25 Q. Yes, correct. Yes, and I'm showing it to you on your

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1 screen.
 2 THE INTERPRETER: Counsel, do you mind out pointing out
 3 where you're reading off of? I'm not able to pinpoint
 4 that on the screen.
 5 Q. It's the last paragraph of paragraph 12:
 6 "Is it correct that you here say that in order to
 7 determine whether any entity is part of the
 8 administrative branch of the Korean State, it is thus
 9 necessary to determine whether the characteristics of
 10 the entity suggest that it forms part of the
 11 administrative branch, in particular, by determining
 12 whether it performs a State function."
 13 {F4/1/6}
 14 A. Yes.
 15 Q. So therefore is it correct that whether an entity is
 16 part of the administrative branch is not a fact that is
 17 preset, is predetermined, and could actually differ in
 18 each case, case by case, depending on the function it
 19 performs?
 20 A. Well, as you mentioned, according to the concept of
 21 administrative organisation legalism, it would be great
 22 if whether an entity is part of the administrative
 23 organisation or not is apparent by law.
 24 However, that would not be the case of all
 25 administrative organisations or entities that are part

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1 of the administrative organisation, especially in the
 2 case of the modern State where it is inevitable for the
 3 State to, for example, delegate or commission certain
 4 State functions to organisation that not all of the
 5 entities that play the role of an administrative agency
 6 or — agency would be provided grounds by law.
 7 So in these cases, whether that entity is — forms
 8 part of the state administrative organisation would have
 9 to be determined case by case by looking at factors such
 10 as whether that entity exercises State functions,
 11 whether it exercises State power, and whether it is
 12 entrusted such State power by law. In determining
 13 whether that entity forms part of the State
 14 organisation, especially in the case of entities that
 15 are not specified by law explicitly as being part of the
 16 State organisation or as being a part of the
 17 administrative organisation.
 18 Q. Exhibit C—278, volume 2 in tab 11. {C/278/1}.
 19 Operator, can you turn some page down, like four,
 20 five down. {C/278/4} One more down, please. {C/278/5}
 21 Yes, there, please.
 22 If you look at the screen, is it correct that it
 23 shows the designation of public institutions for 2018?
 24 A. Yes, correct.
 25 Q. So according to your view, Professor, of the public

1 institution listed here, some may be part of the
 2 government organisations whereas others would not be,
 3 depending on the performance of State function.
 4 A. Yes. Here largely they are classified into public
 5 corporations and quasi government institutions, and
 6 under the public corporations —
 7 Q. Well, I was about to ask you about that, so I would
 8 appreciate if you will listen to my questions and answer
 9 my questions.
 10 So if you look here, as of 2018, there were 338
 11 public institutions designated as public institutions ;
 12 correct?
 13 A. Yes.
 14 Q. Would you like to go about two pages into the document
 15 {C/278/6}. Here it lists the current status of these
 16 338 institutions ; correct?
 17 A. Yes.
 18 Q. So this 338 institutions would be actually a commingle
 19 of institutions that may be part of the government
 20 organisation and those that would not be part of the
 21 government organisation, depending on whether State
 22 functions are performed; correct?
 23 A. Yes, correct, but the chances of that is low as you
 24 approach the top of the list and the chances of that
 25 increases to quite a high significant level as you

1 approach the bottom of that list.
 2 Q. So then let's go down to the bottom side of the list
 3 which, according to you, would be institutions that have
 4 a higher possibility of being part of government
 5 organisations. Would you like to go around two pages
 6 down. {C/278/8} One more, please. {C/278/9} Yes,
 7 there.
 8 So as you've said, we're now at the bottom side of
 9 the list out of these 338 institutions ; correct?
 10 A. Well, actually when I said "bottom", I actually meant
 11 that the previous page that we were on, the bottom of
 12 that previous page shows you the 16 public institutions
 13 that are the fund managing type quasi government
 14 agencies that I believe have a very high probability of
 15 being considered to be part of the state administrative
 16 organ. The page you're actually seeing is not.
 17 Q. Can you go up one page, please. {C/278/10}?
 18 MR YOUNG SUK PARK: Sorry, his answer needs to be
 19 translated.
 20 A. If we look at the page that I was referring to
 21 previously, here it's the NPS, you will find the NPS
 22 listed here, and also KAMCO.
 23 Q. Can you go one page up that was shown before? Well,
 24 here I would actually like to take you back to the
 25 latter part of that table that we were looking at. Do

1 you see on the bottom side of this page an institution
 2 named Public Home Shopping?
 3 A. Well, there's just too many institutions in this list .
 4 I'm not able to easily identify the one you have just
 5 said. At least regarding these public institutions that
 6 we're seeing on this page, I do not consider them to
 7 form part of the government organisation.
 8 Q. Professor, you just previously said that whether
 9 a public institution forms part of the government
 10 organisation is determined based on its functions, but
 11 are you saying that just based on this table, it's
 12 difficult to determine that?
 13 A. Actually I have mentioned several factors.
 14 Well, I actually mentioned several other factors
 15 that should be considered in determining whether
 16 a public institution forms part of the government
 17 organisation such as whether it has been empowered —
 18 whether it has been delegated or entrusted with
 19 authority and powers by law, whether that entity
 20 performs a public function, and whether that entity
 21 exercises State power.
 22 These several factors should be taken into
 23 consideration in making that determination.
 24 The National Finance Act requires that funds be
 25 managed by the fund managing entity autonomously, but

1 there is an exception under the National Finance Act in
 2 the case of the National Pension Fund.
 3 Regarding the National Pension Fund, the National
 4 Finance Act requires that actually the fund managing
 5 entity establishes a separate corporation, a legal
 6 entity, and to entrust the separate legal entity,
 7 a legal person with the management of the fund.
 8 The reason why, unlike other funds that are to be
 9 managed by heads of, for example, government ministries
 10 and departments, the National Finance Act requires that
 11 the NPS be established as a separate legal entity and to
 12 be delegated, entrusted with the powers to manage and
 13 operate the fund is because the National Pension Fund
 14 requires a far higher level of expertise and
 15 professional skills in managing that fund compared to
 16 other government funds.
 17 That is why a separate legal entity, a corporation,
 18 is to be established and be entrusted with the duties of
 19 managing the National Pension Fund, and also that is the
 20 reason why the National Pension Service is required to
 21 hire the executive director of fund, a professional, to
 22 oversee that activity.
 23 That is -- so that is the reason why the NPS is
 24 required to be established separately from a government
 25 department to manage the fund and not because what

1 function the NPS performs is not a government function.
 2 Q. I would like to ask one last question on this table.
 3 Would you like to go two pages up. One more,
 4 please. {C/278/6} Yes, there.
 5 Is it correct that you said that if you go towards
 6 the top of the list, the probability of becoming
 7 a government organisation increases?
 8 A. No, I said the opposite. I said that the probability or
 9 the possibility increases on the bottom side.
 10 Q. You recall that one of the entities that were on the
 11 bottom of the list was the Public Home Shopping.
 12 A. Is there a Public Home Shopping on this page that I'm
 13 seeing right now on the screen?
 14 Q. That was on the bottom of the table that I have
 15 previously shown you.
 16 A. Well, I do not see that home shopping company in the
 17 bottom of the table I see on the screen right now.
 18 Q. Professor, is it correct that you just agreed with me in
 19 terms of the legalism of administrative organisations
 20 which requires that administrative organisations be
 21 established by law?
 22 A. Yes, I am aware of that concept of administrative
 23 organisation legalism.
 24 Q. Would you like to turn to the first page of the C-278
 25 {C/278/1} that we're looking at. Is it correct that it

1 says that the Ministry of Economy and Finance held the
 2 Public Institution Management Committee and designated
 3 or revoked the public institutions designation?
 4 A. The legalism of administrative agencies, organisations,
 5 is a very useful concept, and I do agree that it would
 6 be a perfect world if all administrative agencies can be
 7 set forth by law according to -- as according to that
 8 concept.
 9 However, in reality it is impossible to list all
 10 administrative agencies in law and that is why, for
 11 example, as we see here, the State will go about
 12 designating or releasing designation of public
 13 institutions from time to time, as different entities
 14 come to perform public functions or exercise State
 15 powers.
 16 So from time to time the State would designate
 17 entities as public institutions in order to either
 18 exercise supervision over these entities that are
 19 performing public functions and exercising State powers,
 20 or actually providing these institutions with autonomy,
 21 and giving it more room to become more professional, and
 22 I think that would actually be the intention of this Act
 23 on Public Institutions.
 24 Just because the Act on Public Institutions allows
 25 for this designation or release of entities as

1 administrative agency, I do not believe that the Act on
 2 Public Institutions are in violation of this legalism
 3 concept or is at odds with the concept of legalism.
 4 THE PRESIDENT: Professor, if I may, what are the legal
 5 consequences of a designation of an institution as
 6 a public institution? You mentioned that there would be
 7 State supervision. Are there any sort of concrete legal
 8 consequences for instance in terms of funding that if
 9 a -- if a public institution is -- or an institution is
 10 designated as a public institution, it is entitled to
 11 receive funding from a State budget or anything like
 12 that? Does it have any legal relevance or is it just
 13 a classification?
 14 A. Well, first of all, if an entity is designated as
 15 a public institution, it would then at that moment
 16 become subject to various other individual laws, that
 17 actually is applicable to public institutions.
 18 An example would be how an entity that is designated
 19 as a public institution would become subject to
 20 administrative litigation or administrative appeal as
 21 part of Korea's administrative relief acts.
 22 An entity that is designated as a public institution
 23 would naturally become subject to the Act on the
 24 Inspection and Investigation of State Affairs.
 25 These are examples of a large number of individual

1 laws that actually is applicable to any entity that is
 2 designated as a public institution .
 3 I have in my report provided a detailed description
 4 of these individual laws that would apply to an entity
 5 that has been designated as a public institution . Also,
 6 the Act on Public Institution itself provides an
 7 autonomy, a scope of autonomy for public institutions
 8 that have been designated as a public institution , but
 9 at the same time that autonomy, that concept of
 10 self –control, is accompanied by supervision. That is
 11 also provided under the same Act on Public Institutions.
 12 For example, under the Act on Public Institutions,
 13 the Public Institutions Management Committee is to
 14 conduct a review of the performance of that public
 15 institution on an annual basis which will be part of
 16 a strong financial oversight.
 17 THE PRESIDENT: So just to understand, these institutions
 18 that may or may not be designated as public institutions
 19 may simply be previously a government office or
 20 a municipality office which have no autonomy, but once
 21 they are designated as public institutions , they gain
 22 more autonomy, they can decide on their own functions
 23 independently from the State; is that the only benefit
 24 or do they only — also — are there any financial
 25 consequences for these institutions in terms of how they

1 are financed?
 2 A. Well, my understanding, sir, is that when an entity is
 3 designated as a public institution , it is then subject
 4 to even a higher degree of regulation. The reason I say
 5 so is, for example, because I'm aware of the example of
 6 the Financial Supervisory Service. There has been
 7 attempts to designate the Financial Supervisory Service,
 8 the FSS, as a public institution .
 9 The FSS is actually under the auspices of the
 10 Financial Services Commission, the FSC, already, which
 11 is in turn under the control of the Ministry of Finance.
 12 Even though there have been attempts to designate
 13 the FSS as a public institution , my understanding is
 14 that the FSS has been strongly resisting that
 15 designation because it does not want to become under
 16 further regulation that it would face by becoming
 17 a public institution .
 18 So there are certain public institutions that are
 19 already performing the role of the government, even
 20 before it is designated as a public institution . It is
 21 already performing such functions under the laws that
 22 provide grounds for its establishment.
 23 So that shows that whether an entity is designated
 24 as a public institution or not is not necessarily the
 25 event that confirms whether an entity is part of the

1 government or not because there are cases such as the
 2 FSS where it is already a part of the government entity
 3 based on the laws that provides for its establishment,
 4 but then there are other cases where an entity by
 5 becoming designated as a public institution would then
 6 become part of the government organisation or
 7 administrative organisation, and when these
 8 organisations are designated as a public institution , it
 9 would then be subject to a higher degree of regulation
 10 than what is provided by the laws that provides the
 11 grounds for its establishment.
 12 So because that entity by becoming designated as
 13 a public institution would become subject to the Act on
 14 Public Institutions , as well as, as I have just
 15 described, the whole set of other administrative laws
 16 and regulations that are applicable to entities
 17 designated as a public institution , and once again an
 18 example would be the FSS, which has very strongly
 19 resisted the attempts to designate it as a public
 20 institution . I'm assuming it is because the FSS would
 21 like to bear the regulations that it — it would not —
 22 it does not want to bear any additional regulations than
 23 what is already dealing with as being under the FSC.
 24 THE PRESIDENT: Thank you, Professor.
 25 MR HAN: Thank you, Mr President.

1 Would you like to turn to your first expert report
 2 {F1/1/1}. It's paragraph 77 {F1/1/40}, last sentence.
 3 Is it correct that here you're saying:
 4 "Since the minister's affairs ..."
 5 That's Minister of Health and Welfare, his affairs .
 6 "... are State affairs , any duties delegated to the
 7 NPS by the minister are therefore also State affairs ."
 8 A. Yes.
 9 Q. So according to that, entities that are entrusted with
 10 State affairs and perform State affairs would naturally
 11 be State organs; correct?
 12 A. Yes, I would assume that would be so in most cases.
 13 Even in the case of a private person, an individual , if
 14 an individual is entrusted with State affairs , then for
 15 purposes of administrative relief , that individual
 16 entrusted with State affairs would be considered to be
 17 a State agency and one can seek relief via
 18 Administrative Appeals Act or the Administrative
 19 Litigation Act.
 20 Q. Would you like to turn to footnote 52 of your report.
 21 It's page 17, I believe {F1/1/17}. It's 18 in the
 22 English version {F1/1/18}.
 23 Is it correct that here you're introducing the
 24 National Pension Act and its Enforcement Decree?
 25 A. Yes.

1 Q. Is it correct that Article 76 of the Enforcement Decree
 2 of the National Pension Act stipulates that the Minister
 3 of Health and Welfare shall entrust the following
 4 affairs of the State to the NPS, and therefore it lists
 5 the State affairs to be entrusted by the minister?
 6 A. Yes. The way I read it, I would say reading it from the
 7 National Pension Act, Article 102 of paragraph 5 says
 8 that the minister may entrust certain services or
 9 affairs related with the management and operation of the
 10 fund.
 11 So this, I believe, is declaring that the management
 12 of the fund is a duty that is proprietary to the
 13 minister, but may be entrusted. Certain parts of that
 14 may be entrusted.
 15 As a way of detailing that entrustment, Article 76
 16 of the Enforcement Decree to the National Pension Act as
 17 you mentioned provides certain — certain affairs that
 18 may be entrusted such as, as you see here, the
 19 management and operation of the fund, actuarial
 20 accounting and matters regarding the property.
 21 Q. And is it correct that if we go back to Article 76 of
 22 the Enforcement Decree, that it lists under
 23 subparagraph 2 the accounting of the fund as one of the
 24 affairs that can be entrusted?
 25 A. Yes, I'm looking at that part.

1 Q. And the meaning of this accounting would be to calculate
 2 and also to account for the numbers; correct?
 3 A. Well, the word here, the Korean word being "gye-ri" is
 4 not a word that I'm familiar with, but I'll take your
 5 word for it.
 6 Q. So if we assume that an entity that is not the NPS is
 7 then entrusted with the work of calculating and
 8 taking — and keeping the accounts, then that entity
 9 that is not the NPS would be a government — a part of
 10 the government — would be a government agency because
 11 it is performing this affair?
 12 A. Well, I would say that if it, for example, was a regular
 13 private company that was entrusting or outsourcing its
 14 accounting or calculation work to, for example, an
 15 accounting firm, that would not constitute the
 16 performance of State affairs or State duties even if it
 17 is the delegation or entrustment of accounting and
 18 calculation that is stated here.
 19 That is because it is the principle that is
 20 entrusting that is a private company, a — a private
 21 party that is entrusting that accounting service for its
 22 own benefit.
 23 That would not be the case here. The NPS is
 24 entrusted with a duty, the State duty of managing the
 25 State's funds. The State funds specifically set aside

1 as reserve funds for future generations.
 2 And the NPS is entrusted with the duty of operating
 3 and managing that fund and together with that
 4 entrustment the NPS is also required, as you see here,
 5 to conduct accurate accounting calculations of how it is
 6 managing that fund.
 7 So I would say that there is the purpose attached to
 8 is different between the entrustment of accounting
 9 affairs by a private company versus the entrustment of
 10 accounting services in the course of performing the
 11 State's purpose.
 12 I provided the expression "purpose attached to is
 13 different" because I think that's an expression that
 14 I used in my doctorate dissertation.
 15 So I would say because the purpose attached is
 16 different between a private company entrusting actuarial
 17 or accounting duties versus the NPS, I think that the
 18 two would be found different.
 19 MR HAN: Mr President, I'm conscious of time. If I may,
 20 I can make one last point and finish. Thank you.
 21 Would you like to turn to paragraph 74 of the same
 22 report {F1/1/39}. Is it correct that here you say in
 23 the last sentence:
 24 "In this respect, therefore, the NPS is treated as
 25 equivalent to a State agency, which is a broad term not

1 exhaustively defined in Korean law."
 2 A. Yes.
 3 Q. Would you like to turn to {C/157/1}, which is tab 15 in
 4 volume 2. {C/157/2}
 5 Is it correct that the part of the report that we
 6 just saw, you said that the term "State agency" is
 7 a broad term which is not exhaustively defined in Korean
 8 law?
 9 THE INTERPRETER: As the interpreter, I may need to point
 10 out a slight discrepancy between the Korean and the
 11 English that we've been reading.
 12 In the English version the expression "exhaustively
 13 defined" is used. In the Korean I'm finding the word
 14 "broadly". So that is for note.
 15 To the question, the Professor provides the
 16 following answer:
 17 A. What I meant here by broadly is that actually the term
 18 State organ is used together with various other
 19 terminology such as administrative agencies, public
 20 organisations, or other names. That is the point that
 21 I wanted to express here.
 22 Now, regarding to the Petition Act that you've just
 23 turned me to, if you look at the Petition Act it sets
 24 forth that a petition accepting agencies are,
 25 subparagraph 1, State agencies; number 2, local State —

1 second -- subparagraph 2, local governments; and third,
2 those that have received a delegation or entrustment of
3 a power, legal entities that have been received -- that
4 have been delegated or entrusted.

5 So my opinion is that the NPS would fall under the
6 subparagraph 3 of the Petition Act that we're looking
7 at.

8 Q. Well, actually, Professor, my question was not
9 pertaining to the NPS. This is the last question.
10 I would like you to listen carefully and answer the
11 question.

12 Article 3 of the Petition Act does set forth the
13 petition accepting institutions and subparagraph 1 of
14 that is a State agency; correct?

15 A. Yes.

16 Q. So according to you, Professor, you are saying that the
17 term "State agency" is a broad term which is not clearly
18 defined in Korean law.

19 So if we read the two together, it would be unclear
20 as to what would be the entities that would have to
21 receive petitions under the Petition Act by being
22 a State agency.

23 A. Well, this would be a case when this Administrative
24 Agency legalism comes in very useful because the
25 State -- because the Government Organization Act

1 actually lists the entities that are central
2 administrative agencies, and even though the central
3 administrative agencies and other agencies listed in the
4 Government Organization Act are not exhaustive, it does
5 describe most of the administrative agencies that the
6 general public would come into contact with.

7 So because that is set forth there in that law, I do
8 not believe that what we see in the Petition Act would
9 give rise to any difficulties.

10 MR HAN: Mr President, we have no further questions for now.

11 THE PRESIDENT: But you are not done yet? You will continue
12 after?

13 MR HAN: We will discuss during the lunch break.

14 THE PRESIDENT: Very good.

15 Professor, it would be very helpful if you listen
16 very carefully to the questions and only answer the
17 question. It would be faster and easier for all of us.

18 We break now for lunch for an hour. We will
19 continue at 2.20. The same guidance, Professor. If you
20 could avoid speaking to anyone about your testimony
21 during the break. Thank you.

22 (1.19 pm)

23 (The short adjournment)

24 (2.20 pm)

25 THE PRESIDENT: Okay. Can we resume? It will be Mr Han.

1 MR HAN: Yes, thank you, Mr President.

2 Professor Lee will finish after a couple more
3 questions.

4 Operator, can you show R-175. {R/175/1}.

5 A. Yes.

6 Q. Do you see on the upper right-hand of that page it says
7 National Pension Service?

8 A. Yes.

9 THE INTERPRETER: Oh, it's not included in the binder.

10 Q. Do you see that on the top middle it says -- it says on
11 top middle, it says "Corporate Tax Information"?

12 A. Yes.

13 Q. So this is a document that shows that NPS paid corporate
14 taxes in its name; correct?

15 A. Yes, this appears to be corporate tax information of
16 NPS, but I do notice that the amount is very small.

17 Q. Next I would like to show you C-77. It's tab 9 in
18 volume 2. {C/77/1}

19 I would like you to turn to Article 43, which
20 I think is page 17 of the English version {C/77/17}. So
21 that was Article 43 that I would like to ask you to
22 turn.

23 Operator, could you turn a few pages up for the
24 Korean version so that you can show 43. Page number 9
25 for Korean translation. {C/77K/9} (Pause)

1 Professor, I'll actually read the Korean Article 43.
2 Can you just check whether the contents are correct?

3 A. Yes.

4 Q. "Article 43, Revenues and Expenditures of the Service."

5 "The revenues of the Service shall consist of money
6 transferred from the National Pension Fund, government
7 subsidies, loans and other income, and its expenditures
8 shall consist of various kinds of benefits under this
9 Act, reserves, returned money, repayment of borrowed
10 funds and interest accrued therefrom, and other expenses
11 incurred from the operations and services of the
12 Service."

13 Professor Lee, have I read that correctly?

14 A. Yes.

15 Q. Now can you turn to Article 46, paragraph 1.

16 Is it correct that here under Article 46,
17 paragraph 1, it stipulates that the service may conduct
18 the following welfare services to promote the welfare of
19 currently and former insured persons and beneficiaries?

20 A. Yes.

21 Q. And subparagraph 1 is loan services; correct?

22 A. Yes.

23 Q. So if loans are provided, there would be interest income
24 from that loan; correct?

25 A. Yes.

1 Yes, that is what it says, and that interest would
2 be accrued, but I think the acts or the activities
3 provided under Article 46 would be attributed to the
4 account of the fund, the National Pension Fund, whereas
5 Article 43 that we saw describes the income, the
6 revenues of the NPS that comes from, for example, the
7 transfers from the Treasury, government subsidies, and
8 other sources, and its expenditure.

9 So looking at the two articles, I would believe that
10 the two activities would be accounted to different
11 accounts.

12 So my understanding is that activities of the fund,
13 of a national fund, that is provided under Article 46,
14 are not subject to corporate tax impositions.

15 Q. But is it correct that Article 46 actually describes
16 other activities other than the operation and management
17 of the fund?

18 A. Yes, correct. But the funds behind that activity are
19 the funds belonging to the National Pension Fund.

20 Q. Could you turn to Article 44.

21 A. Yes.

22 Q. {C/77/17}

23 Article 44, paragraph 1, says that:

24 "The Service may, when it has a shortfall of funds,
25 borrow a temporary loan from the National Pension Fund

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1 each fiscal year."

2 Correct?

3 A. Yes.

4 Q. And if the revenues that come from the operation and
5 management of the fund and the revenues generated from
6 other activities were accounted to the same account, it
7 would not be possible to borrow temporarily loans;
8 correct?

9 A. Would you like to repeat that question?

10 Q. My question once again is: if the revenues, the income
11 generated from the management and operation of the fund,
12 were to be attributed to the same account as the revenue
13 generated from other activities and businesses, it would
14 be then impossible to temporarily borrow funds from the
15 National Pension Fund; correct?

16 A. I think your question is structured incorrectly because
17 whether it is -- whether it is the operation and
18 management of the fund or loans that are provided, both
19 of them are just different items. But are based on the
20 National Pension Fund.

21 But the borrowing by the National Pension Service is
22 done with the NPS's account, which is separate from the
23 Fund's account. And that is why it would be possible for
24 the NPS to borrow from the Fund.

25 MR HAN: President, I don't have any further questions and

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1 I'll pass it to my colleague, Mr Terceño. Thank you.

2 Further cross-examination by MR TERCEÑO

3 MR TERCEÑO: Hello again, Professor. I hope you had a good
4 lunch. Thank you for rejoining us and we appreciate
5 your continued patience. With your cooperation we
6 should be able to get through the rest of our questions
7 shortly.

8 If any of my questions are structurally mistaken,
9 then please just bear with me and do what you can to
10 answer them.

11 Now, we've dealt so far with your opinion on whether
12 the NPS is a State organ, but your report does not stop
13 there. You also go on to opine on the legality of the
14 NPS's actions in relation to the merger. So it is that
15 part of your report that I would like to ask you a few
16 questions on.

17 But before I do, you're aware, Professor, that
18 various Korean courts have considered the legality of
19 certain conduct taken by the NPS officials in relation
20 to the Samsung C&T--Cheil merger, are you not?

21 A. Well, as we all know, the Samsung C&T and Cheil merger
22 created quite a lot of controversy socially and became
23 a social issue. Large number of litigations were filed,
24 including some filed by Elliott. And so I have read
25 some material, including the court decision, the

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1 criminal court decision, regarding the [REDACTED] and [REDACTED]
2 case, but because there were so many litigation cases
3 that unfolded from that, I wouldn't say that I have read
4 all of them. But I do believe that I have read up at
5 least the parts that are necessary to provide my expert
6 report.

7 Q. And of course, Professor, and I'm going to ask for your
8 cooperation again, I didn't ask if you had read all of
9 them. I didn't ask about any Elliott litigation.

10 I simply asked if you knew that certain conduct from NPS
11 officials had been considered by the Korean courts and
12 I understand from your answer that you have.

13 So my next question is: is it your testimony that
14 any of those court decisions were wrongly decided?

15 A. I do not think I'm in a position to say that the
16 decision of the criminal court for the purposes of
17 fact-finding was incorrect. However, in making its
18 decision with respect to the crime of abuse of
19 authority, I think the criminal court actually had too
20 easy a hand on the point that the Fund Operational
21 Guidelines were not complied with by the administrative
22 agency, and thus did not address that point properly.

23 Q. So, Professor, just so I'm clear, is it then your
24 testimony that if this tribunal is concerned with
25 whether certain acts of the NPS were illegal, it should

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1 ignore the findings of the Korean courts and instead
 2 rely on you?
 3 A. To clarify, that is not what I mean. First of all, the
 4 question that you posed, that would be fully up to the
 5 tribunal to determine.
 6 What I was opining was that as an expert in pension
 7 operation and management, I feel that the criminal court
 8 had neglected the aspect of administrative regulation
 9 and law violations that occurred in that case. The
 10 criminal court dealt with the issue of abuse of public
 11 office and they did examine certain aspects of the legal
 12 violations that occurred.
 13 For example, what occurred -- the violations that
 14 occurred with regard to the Investment Committee.
 15 When I say that the criminal court neglected other
 16 aspects, I mean that the criminal court, as far as
 17 I know, did not take into consideration what did not
 18 occur on the Expert Committee side. That despite the
 19 demands by the chair of the Expert Committee,
 20 Mr [REDACTED], that the matter be referred to the
 21 Expert Committee, that that was not the case.
 22 As far as I know, the criminal court did not take
 23 that into consideration or did not examine that, and
 24 that is why I'm saying that there may have been
 25 a neglect on the part of the criminal court.

1 Q. Thank you, Professor. It's interesting that you started
 2 there opining on facts.
 3 If I can turn you to paragraph 105 of your first
 4 expert report?
 5 MR GARIBALDI: Excuse me. Before we change the subject,
 6 I have a general question.
 7 In Korea, in a criminal case, the standards applied
 8 to convict someone, to evaluate the evidence to convict
 9 someone, what is it? Is it preponderance of the
 10 evidence? Clear and convincing? Beyond the reasonable
 11 doubt or anything else?
 12 A. (In English) It's beyond a reasonable doubt.
 13 MR GARIBALDI: Thank you very much.
 14 THE INTERPRETER: Should I translate that into Korean for
 15 the record, sir? I am not sure about the procedures
 16 that are happening.
 17 A. (In English) Sorry, that's very easy English, so
 18 I responded instinctively.
 19 MR TERCEÑO: I'll try to keep my English easier, if that's
 20 helpful.
 21 Again, paragraph 105, let me know when you've got
 22 that in front of you {F1/1/53}.
 23 THE INTERPRETER: Counsel, was that his first expert report?
 24 MR TERCEÑO: Yes, his first expert report, paragraph 105. It
 25 should be page 50 on the Korean version, I think.

1 {F1/1K/50}
 2 A. Yes, I have that.
 3 Q. Now, starting at the very end of the third line here,
 4 you write:
 5 "For the purposes of my opinion, I have been
 6 instructed to assume that the Claimant's factual case as
 7 pleaded is correct ..."
 8 So the factual statements you just made, you're
 9 taking that from the assumption that the -- what the
 10 Claimant told you is correct; am I right?
 11 A. (In English) Yes.
 12 Q. Maybe we can get through quickly.
 13 THE INTERPRETER: He's asked for that to be translated just
 14 in case.
 15 A. Well, yes, I have been told certain representations of
 16 the facts by the Claimant, but also I have read the
 17 decision, the court decision, and so the opinion that
 18 I offered is based on the court decision that I read as
 19 well. And I was able to read through the decision
 20 because it does not take so much time for me to read
 21 through a Korean text.
 22 MR TERCEÑO: Thank you. Now, one of the issues that you
 23 address in your report is the fact that the NPS
 24 Investment Committee instead of the Special Committee
 25 deliberated and decided on the Samsung C&T--Cheil merger

1 vote, and we can look at paragraph 86 of your first
 2 report where you say that there are three circumstances
 3 where the Special Committee should decide on an NPS
 4 shareholder vote. {F1/11/44}. The first of those
 5 circumstances is when the Investment Committee finds the
 6 voting decision to be difficult. Correct?
 7 A. I do not agree.
 8 Q. I'm sorry, Professor. I'm simply reading your report,
 9 paragraph 86. You say:
 10 "... there are three circumstances where the
 11 decision is instead made by the
 12 Experts Voting Committee..."
 13 As I said, the first of those circumstances is where
 14 the Investment Committee finds the voting decision
 15 difficult. Is that what you disagree with, your own
 16 report?
 17 A. Well, it seems like it's the reason why I'm saying that
 18 I don't agree to what you have just read -- is -- it
 19 seems that that has the nuance of assuming that it is
 20 the Investment Committee that determines whether
 21 a matter is difficult or not, which, if it is read -- if
 22 it appears to be read that way to you, would be
 23 a violation of the Fund Operational Guidelines. And if
 24 I have caused you to read it that way, then the
 25 expression here in this parenthesis (i) would not be

1 correct.

2 To explain that, do you mind putting up on the
3 screen the Fund Operational Guidelines?

4 Q. I will get to those in due time, Professor, but first
5 I just want to make sure I understand because you seem
6 to be going actually beyond my question.

7 All I'm asking is that if this -- (i) -- does say
8 that one of the ways in which an item can be referred to
9 the Special Committee is when the Investment Committee
10 finds the voting decision difficult, now are you
11 testifying now that if the Investment Committee finds
12 the voting decision difficult, that is not one of the
13 ways that an item can be referred to the Special
14 Committee?

15 A. My previous answer may not have been correct, but in any
16 case, I have found on the following page, on at least 39
17 of the Korean, an excerpt of the Fund Operational
18 Guidelines. {F1/1/45}.

19 So if you turn to the excerpt of that fund
20 operational guideline, so this is Article 5,
21 paragraph 5, under there is 4, and here it also says
22 when "it is difficult to determine", and so the way
23 I understand the guideline is that that difficulty is
24 not when it is difficult to decide by vote, but when the
25 matter itself is difficult to determine. {C/77/4}.

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1 Q. Thank you for your interpretation of the language,
2 Professor, but that wasn't at all my question,
3 and I believe if you look at Article 5(5),
4 subparagraph 4, it says pretty much the same thing as
5 (i) in paragraph 86 which was your paraphrasing of that
6 article. So I hope we can move on and I can point you
7 to paragraph 88, subparagraph 1 of your second expert
8 report, which is just below that excerpt. {F1/1/45}.

9 This paragraph is talking about the SK merger that
10 occurred about a month before the Samsung C&T and Cheil
11 merger?

12 THE PRESIDENT: You mean the first report, not the second?

13 MR TERCEÑO: I'm sorry?

14 THE PRESIDENT: You mean the first report and not the
15 second.

16 MR TERCEÑO: I'm sorry, I thought I said the first report.

17 It's the same report we've been in, it's just the next
18 paragraph.

19 Apologies, thank you for the correction,
20 Mr President.

21 So this paragraph is talking about the SK merger
22 we've discussed in these proceedings, and again, at
23 least when you drafted this report, you seemed to be
24 happy enough with this language because reading in the
25 middle of this paragraph, you say about that merger:

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1 "The Investment Committee referred the matter to the
2 Experts Voting Committee because it found it 'difficult'
3 to vote for or against the proposed SK merger."

4 That is what you said in your first report; correct?

5 A. Well, the intention that I am expressing here is the
6 same as I explained previously. It was referred to the
7 Expert Committee because the matter itself was difficult
8 to decide, not because it found that it was difficult to
9 decide the matter by vote.

10 Q. Professor, did I read something wrong in that paragraph?
11 Because your expert report expressly says that the
12 Voting Committee, the Experts Voting Committee, it was
13 referred to the Experts Voting Committee because the
14 Investment Committee "found it difficult to vote for or
15 against the proposed SK merger". These are your words;
16 correct?

17 A. Which part of my report have you referred to in your
18 immediate -- in your question?

19 Q. It is the same sentence that I read in the question
20 before that which you took issue with. It is in
21 paragraph 88, subparagraph 1. I will read the
22 question -- the sentence again, your words:

23 "The Investment Committee referred the matter to the
24 Experts Voting Committee because it found it 'difficult'
25 to vote for or against the proposed SK merger."

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1 Have you found where that is in your expert report,
2 Professor?

3 A. I don't think it is a very -- I don't think it's a very
4 critical matter but the reason why I repeated what I had
5 said previously again is because at least in the Korean
6 version that I wrote, it does not say because the matter
7 was difficult to decide by vote. And so I needed to
8 clarify that again.

9 Q. Thank you, Professor. In the English version it also
10 does not say "by vote". It says it was "difficult
11 to..." -- it "found it difficult to vote for or
12 against". But we can leave it at that. I am losing my
13 optimism that we will be able to finish quickly if you
14 keep contesting your own report, but we will see where
15 we get to. If you could turn to paragraph 88, the same
16 paragraph, but now subparagraph (ii).
17 {F1/1/46}.

18 A. Yes.

19 Q. Here you describe another agenda item that the
20 Investment Committee, you say, "considered the decision
21 to be difficult" about. This is relating to the
22 Mando Corporation. That agenda item was also referred
23 to the Special Committee, and you say at the bottom of
24 the partial paragraph on this page, you say:

25 "I understand from my report on the NPS prepared for

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1 the Claimant in April 2015 that the Investment Committee
2 had concluded that it would be 'difficult' to make
3 a decision on this Mando Corporation issue."

4 Do you see that, Professor?

5 A. Yes, correct.

6 Q. Now, I want to take a look at the Voting Guidelines.

7 This is exhibit R-57. It should be tab 27 in your
8 second volume there. {R/57/1}.

9 I want to look at Article 8(2), which is on the
10 second page. {R/57/2}. Article 8(2) says that for
11 items which the committee, and this is the
12 Investment Committee:

13 "For items which the committee finds difficult to
14 choose between an affirmative and a negative vote, the
15 NPSIM may request for a decision to be made by the
16 Special Committee on the exercise of voting rights
17 (hereinafter referred to as the 'Special Committee')."

18 Now, if I'm not mistaken, the Claimant put in
19 a slightly different translation of this, but it does
20 not change the language of "may request".

21 A. Yes, the Voting Guidelines does say "may request", but
22 also on the other hand the Fund Operational Guidelines
23 says "request" as a mandatory statement.

24 So while the operation guideline is a mandatory
25 provision -- has mandatory language, the Voting

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1 Guidelines has a discretionary language. And therefore
2 the 8(2) -- Article 8(2) of the Voting Guidelines would
3 be in violation of the operation guidelines.

4 Q. And you actually said this morning that those Voting
5 Guidelines were amended a few years later to remove the
6 discretionary language that said "the
7 Investment Committee may request"; correct?

8 A. Yes. That is what I had said in the presentation and
9 during the presentation I intended to explain that it
10 was revised from this 'discretionary' form to
11 a 'mandatory' form.

12 Q. And I understand that, Professor. Your only concern or
13 your only dispute with these -- the language of these
14 articles is whether it says "may request" or "request",
15 but both of them include as a first step that the
16 Investment Committee must find the issue to be
17 'difficult'; correct?

18 A. Well, I actually think that this language stipulates
19 a mandatory -- that regarding the finding that it is
20 mandatory, and I don't think this is only my own view.
21 For example, during the SK case, it appears that the
22 Investment Committee also felt that this was a mandatory
23 requirement. So it appears that other people also felt
24 the same way.

25 And so when the superior norm, the superior statute

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1 or provision says "decide" which in Korean language is
2 synonymous to "shall decide", whereas the subordinate
3 provision provides differently, that would be
4 a violation of the senior or the superior provision by
5 the subordinate provision, and violation of
6 a subordinate provision would in turn constitute
7 a violation of the superior provision.

8 Q. Thank you, Professor, but that was not at all my
9 question, which I think the tribunal heard, which was
10 simply that the first step is that they have find it is
11 'difficult', and then we may have a dispute as to
12 whether it is 'mandatory' as to what they do after they
13 find it is 'difficult'. But given the time left,
14 I would like to move on from this, and talk about the
15 second way you discuss in which an item might come
16 before the Special Committee, and this is in
17 paragraph 86 again of your first report, (ii), and
18 hopefully we won't have a big dispute about this, but
19 you say a second way is that the chairperson can request
20 that it be referred to the committee. Do I have that
21 correct?

22 A. Yes, correct. Upon the request by the chair of the
23 Expert Committee, the Investment Committee must refer to
24 the Expert Committee without fail.

25 Q. Thank you for the flourish you have added to that which

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1 was not actually in paragraph 86, but we understand that
2 all of this 'mandatory' and 'must' language is your
3 opinion.

4 If I can ask -- sorry, go ahead.

5 If we can actually turn to the Fund Operational
6 Guidelines, this is exhibit C-194. It is tab 25 in
7 volume 2 in front of you. {C/194/1}.

8 MR PETROCHILOS: Forgive me, it's not clear to me that the
9 Professor understands that when there is
10 a characterisation by counsel, for example this
11 "flourish", he has an opportunity to react.

12 MR TERCEÑO: Mr President, I don't think that this witness
13 has shown any hesitancy in saying whatever he wishes to
14 say.

15 THE PRESIDENT: That was more of a comment to the tribunal.
16 I don't think -- there was no question to the witness or
17 to the expert. Let's leave it at that.

18 I would just encourage the Professor to listen very
19 carefully to the question and then answer the question
20 if you can, it would be helpful.

21 A. Yes, I will do so.

22 THE PRESIDENT: Dr Petrochilos' comments is also well taken.
23 You can make comments on the expert's evidence, but then
24 you should give him a chance to respond. The tribunal
25 can listen and take note of the evidence that is being

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1 provided.
 2 MR TERCEÑO: Certainly. Thank you, Mr President. I will
 3 try to keep my own comments to a minimum, so we can wrap
 4 this up.
 5 So looking at exhibit C/194, this is where we have
 6 the language, some of the language, 'mandatory'
 7 language, that you were just talking about. Looking at
 8 article 5 -- so Article 5(5)(6) which is on page 4, at
 9 least in the English. {C/194/8}
 10 This is the article that says that the
 11 Special Committee, and again we have a discrepancy in
 12 the translations, but we will use the Claimant's
 13 translation for these purposes, which is that it "shall
 14 review and decide" on the other matters, and number 6
 15 says:
 16 "Other matters that the Experts Voting Committee
 17 Chairperson deem necessary."
 18 This is the basis for you saying that if the
 19 chairperson deems a matter is necessary to come before
 20 the Special Committee, it must come before the
 21 Special Committee; correct?
 22 A. Yes, it is Article 5, paragraph 5, subparagraph 6, but
 23 there's also one more. But for the time being, yes,
 24 correct.
 25 Q. Okay. I would think that one 'mandatory' provision is

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1 enough, but if you want to comment on that, I'm
 2 certainly happy for you to.
 3 A. No, I'm fine.
 4 Q. If we look at the chapeau of this Article 5(5), the
 5 introductory language, it says that these other matters
 6 that we see in subparagraph 6 are matters regarding the
 7 exercise of voting rights for stocks held by the
 8 National Pension Fund. So do I understand your position
 9 to be that for any matter regarding the exercise of
 10 voting rights for stocks held by the National Pension
 11 Fund, the Special Committee chairman can require that it
 12 be decided by his committee?
 13 A. Well, actually if you read the entire paragraph 5, so
 14 that is not only the subparagraph 6 that you've just
 15 referred to, but also subparagraphs 1 through 5, you
 16 will see that paragraph 5 actually sets forth the scope
 17 of duties of the Expert/Special Committee.
 18 So what is set forth, at least in subparagraphs 1
 19 through 5, are duties -- are matters that the Expert
 20 Committee must do as its obligation -- or mandatorily
 21 must do.
 22 As part of that definition, of listing of the scope
 23 of duties of the Expert Committee, there is the
 24 subparagraph 6 which says:
 25 "Other matters that the expert ... committee chair

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1 finds necessary."
 2 And so, if you look at, for example, subparagraph 1,
 3 it says:
 4 "General principles/details ... for the exercise of
 5 voting rights."
 6 Which is something that the Expert Committee must
 7 review and decide. Likewise for the history of voting
 8 rights exercise by the NPS Investment Management
 9 Division, as well as number 3:
 10 "Matters requested by the Fund Operation Committee
 11 Chairperson."
 12 Number 4:
 13 "Matters that the NPSIM request decision for as it
 14 finds them difficult to decide whether to approve or
 15 disapprove."
 16 And 5:
 17 "Matters to guarantee effectiveness of voting rights
 18 exercise regarding dividends."
 19 So Article 5 itself lays out the scope of duties and
 20 paragraph 5 lays out the duties that are mandatorily
 21 required by the Expert Committee.
 22 So the way I read subparagraph 6 is that even though
 23 the chair of the Expert Committee 'may' decide to -- may
 24 decide to -- decide regarding the exercise of voting
 25 rights, he may decide to, he may decide not to, but once

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1 that decision is made, then we go back to paragraph 5,
 2 where it says that that matter 'shall' be reviewed and
 3 decided by the Expert Committee.
 4 Q. Thank you, Professor. You have strayed very far afield
 5 from my question once again. So please let me just put
 6 it simply.
 7 Subparagraph 6 says that the Special Committee
 8 chairman can request and if he does make the request,
 9 and I know that you say it is mandatory, that his
 10 request must be honoured, that other matters be referred
 11 to his committee, and my question is simply: do we
 12 understand "other matters" to mean other matters
 13 regarding the exercise of voting rights for stocks held
 14 by the National Pension Fund as the article says at the
 15 beginning?
 16 A. Yes.
 17 Q. Thank you. I only have two more points I want to ask
 18 about, about this, and then we will be done. So let's
 19 see if we can wrap things up.
 20 Article 5(3)(2) in these same guidelines gives the
 21 Minister of Health and Welfare authority over
 22 "preparation of strategic asset allocation plans". Do
 23 you agree with me that "strategic asset allocation
 24 plans" could regard the exercise of voting rights?
 25 A. Asset allocation is not the same matter as exercise of

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1 rights — voting rights that come as part of the shares
 2 owned by the fund. I would consider those two to be
 3 separate issues .
 4 So what we've read here under subparagraph 2 in
 5 terms of "asset allocation", I would consider would be
 6 separate from the exercise of voting rights that come
 7 with the shares owned by the fund.
 8 The exercise of voting rights for the shares owned
 9 by the fund would be governed, for example, by the
 10 principles set forth by the National Finance Act such as
 11 the principles of profitability , public benefit, and
 12 stability , and would be different. Therefore, I believe
 13 the exercise of voting rights relates to the aspect of
 14 asset management, rather than asset allocation. I would
 15 consider, to be — would be separate or different from
 16 the matters of asset allocation .
 17 Q. I do understand the difference between exercising voting
 18 rights and providing or preparing a strategic asset
 19 allocation plan, but just so that I am certain on your
 20 allegation , is it that you say it 's impossible for
 21 a strategic asset allocation plan to have any connection
 22 to the exercise of voting rights?
 23 A. Not being a finance expert myself, I do not know if
 24 there are any ways, and if so, how exercising a voting
 25 right may be or could be connected to strategic asset

1 allocation . But at least from a legal perspective,
 2 I would think that both asset allocation of the fund
 3 that we see here, as well as the exercise of voting
 4 rights , would fall under public authority or public
 5 power, and that it appears here that asset allocation
 6 authority is specifically prescribed to the Minister of
 7 Health and Welfare. The exercise of voting rights ,
 8 I would think, would be subject to the National
 9 Finance Act which governs all government funds.
 10 But still , to answer your question, not being
 11 a finance expert myself, I do not know exactly if there
 12 is any way how to connect exercise of voting rights to
 13 strategic asset allocation .
 14 Q. Let's try one last question, Professor.
 15 If we look at exhibit C—109, this is the enforcement
 16 rules of the National Pension Fund operational
 17 regulations. It is tab 30 in the second volume.
 18 {C/109/1}.
 19 Article 40 subparagraph 1, reads:
 20 "Regarding equities held under the fund's name ..."
 21 And that is The National Pension Fund it is
 22 discussing —
 23 THE INTERPRETER: Counsel, could you wait. The screen
 24 hasn't caught up and we haven't been able to find that.
 25 Q. Sorry, just let me know when you're ready, I apologise.

1 {C/109/11}
 2 I'm just looking at Article 40, paragraph 1.
 3 "Regarding equities held under the fund's name,
 4 excluding any of the following circumstances", and if
 5 you see those circumstances under subparagraphs 1 and 2,
 6 they're just about the percentage being held by the
 7 fund. But excluding those circumstances, "voting rights
 8 shall be exercised through the deliberation and
 9 resolution of the Investment Committee".
 10 I just want to ask you, Professor, is it your
 11 testimony that Article 5(5)(6) of the Fund Operational
 12 Guidelines, that allows the Special Committee chairman
 13 to call items to its own committee for decision
 14 overrules these enforcement rules of the National
 15 Pension Fund and allows him to take that authority for
 16 him despite these enforcement rules?
 17 A. Yes, basically the Fund Operational Guidelines are
 18 grounded in the law. The grounds of the fund operation
 19 guideline are provided in the law and then the Voting
 20 Guidelines are then grounded off of the operation
 21 guidelines .
 22 Now, what we are looking here is the operational
 23 regulation of the National Pension Fund. I would like
 24 to look at Article 1 of that.
 25 If you turn to Article 1 of the operation regulation

1 of the National Pension Fund that we're looking at, it
 2 appears that these are provisions that have been
 3 established by the NPS itself as rules governing its
 4 operation. And so when there is a conflict between the
 5 operation regulation and the operational guidelines or
 6 that is based on a legal delegation or the Voting
 7 Guidelines which is based on the operational guidelines ,
 8 I would say that the latter , the guidelines , would have
 9 precedence over the regulation that we are seeing here.
 10 That is one way of my interpretation. The other
 11 interpretation that I may provide is the fact that the
 12 issue at hand in this case was a case when the matter
 13 was difficult whereas the provision that you just took
 14 me in the enforcement rules of the operational
 15 regulations addresses regular situations that are not
 16 difficult and addressing how in such normal, ordinary
 17 situations , the work would be divided.
 18 Q. If I can, Professor, we've seen in paragraph 86 and
 19 paragraph 88 subparagraph 1 and paragraph 88,
 20 subparagraph 2, and in at least two excerpts from
 21 regulations governing the activity of the fund, that it
 22 is up to the Investment Committee to first find a matter
 23 difficult ; correct?
 24 A. By paragraph 86 and 88 are you referring to my first
 25 expert report?

1 Q. I am, Professor. I'm referring to the paragraphs that
 2 we have looked at in some detail within the last half
 3 hour.
 4 A. I would truly appreciate if you could repeat your
 5 question.
 6 Q. I'm tempted to let your expert report speaks for itself,
 7 but I will repeat the question for you.
 8 In those paragraphs you say at least three times,
 9 and also in paragraph 87 you have an excerpt from
 10 regulations, all of which say that the
 11 Investment Committee has to find a matter to be
 12 difficult. Is that what is written there?
 13 A. Yes, in principle that is correct.
 14 MR TERCEÑO: Thank you, Professor, very much for your
 15 patience with me.
 16 Mr President, I have no further questions.
 17 I apologise, we have gone about 25 minutes over the
 18 allotted time.
 19 THE PRESIDENT: Thank you very much, Mr Terceño.
 20 Dr Petrochilos, any questions in redirect?
 21 MR PETROCHILLOS: Will you indulge for 30 seconds, sir?
 22 I need to consult with my colleagues. (Pause).
 23 Mr President, we're happy to move on. No
 24 re-examination.
 25 THE PRESIDENT: No questions? Any questions from my

1 colleagues?
 2 Questions from THE TRIBUNAL
 3 MR GARIBALDI: Professor Lee, I don't want to lengthen this
 4 too much, but we have, among the issues before us, is
 5 how to interpret these regulations in three different
 6 documents which talk about the circumstances in which
 7 a question 'may' or 'must' be referred to the Experts
 8 Committee.
 9 All this is a preface for my question. The preface
 10 continues.
 11 I understand your position, Professor Lee, to be
 12 that the difficulty of a matter is an objective
 13 criterion which somehow informs the way that these rules
 14 operate.
 15 I understand the Respondent's position to be that
 16 these -- the difficulty is something that results from
 17 the voting process, in this case, in the
 18 Investment Committee, and it is difficult if the
 19 decision cannot be reached and it is not difficult
 20 otherwise.
 21 Now, this is -- the way I understand this exchange
 22 at the moment, my question is this. If you turn to the
 23 document on tab 30, the enforcement rules, page 42,
 24 Article 40, and I'm going to use that as an example
 25 because all three rules that we have looked at are

1 similar in structure. {C/109/11}
 2 Are you ready for the question?
 3 All right.
 4 If you read this provision, Article 40,
 5 paragraph (2), literally, if you read it literally, it
 6 says that:
 7 "Notwithstanding Paragraph 1, if the
 8 Investment Committee ..."
 9 I skip the others:
 10 "... finds it difficult to decide whether to vote
 11 in favour or against a matter, they shall report this to
 12 the CEO, and the CEO shall request the National Pension
 13 Fund management committee ... to decide on such matter."
 14 Now, it seems to me that if you apply this
 15 literally, the only situation in which this can happen
 16 is that the Investment Committee takes a vote but fails
 17 to obtain a majority in favour of one position or the
 18 other.
 19 Do I understand this correctly? Is this the way it
 20 works if you interpret this literally?
 21 A. I do not think so, sir; because this language does not
 22 say that the Investment Committee is to find a matter
 23 difficult to decide "by vote". It does not say in the
 24 language that the process by which the
 25 Investment Committee determines a matter to be difficult

1 is by vote.
 2 It is -- once again my understanding is that it's an
 3 issue of whether the matter itself is difficult to
 4 decide or not rather than it being -- have to be reached
 5 by a vote.
 6 One of the language that supports my reading is the
 7 fact that in addition to the Investment Committee, if
 8 you read further, there is the relevant department head
 9 which would be an individual. That is also a party that
 10 can make that decision, and so because it's a single
 11 person that department head is expected to then
 12 determine whether a matter is difficult or not, and if
 13 he finds the matter is difficult, then he is expected to
 14 report that to the CEO, naturally, and then the CEO
 15 shall request that to the operational or the management
 16 committee.
 17 MR GARIBALDI: Okay. Thank you. I think that clarifies the
 18 matter.
 19 So I was wrong. It is not necessary for the
 20 committee to vote on the matter and fail to achieve
 21 a decision for the matter to be considered difficult.
 22 The difficulty I still have is that the committee acts
 23 collectively. So in some way the committee has to
 24 decide that the matter is difficult according to the
 25 literal interpretation.

1 How does the committee decide, without voting,
 2 without making a decision, that the decision is
 3 difficult , that voting on that decision would be
 4 difficult ?
 5 A. It is in anticipation of such cases that an Expert
 6 Committee has been provided. Because, if a member or
 7 members of the Investment Committee feel that a matter
 8 is difficult intuitively , then they may feel that it is
 9 difficult and therefore may decide that through vote.
 10 However, if it attempts to reach a decision by vote,
 11 there would also be issues such as what method of vote
 12 would be fair, so there will be issues of different ways
 13 of voting and which would be fair versus not. This is
 14 inherent because the Investment Committee is
 15 a committee. It is a collective body of people
 16 exchanging opinions, and because of that, the Expert
 17 Committee, I believe, has been provided for to deal with
 18 such cases that are intuitively considered difficult
 19 by -- difficult, which is illustrated in the case at
 20 hand. It was an issue that was considered controversial
 21 and I would believe that that is the example of issues
 22 that are difficult that should be referred to and
 23 decided by the Expert Committee. I believe that the
 24 Expert Committee is provided to resolve such situations.
 25 I believe that the reason for existence of the Expert

1 Committee is to resolve such cases.
 2 MR GARIBALDI: Thank you.
 3 THE PRESIDENT: Professor, I'm afraid there will be a couple
 4 of more questions.
 5 In both of your reports you are discussing the
 6 exercise of governmental powers. In your first report
 7 there is the section dealing with the exercise of
 8 governmental powers and you say that the NPS --
 9 exercises delegated governmental powers, and there is
 10 a similar section in the second report.
 11 So my question is: is "powers" a term of art --
 12 a defined -- a legal term with a defined meaning,
 13 clearly defined meaning under Korean law?
 14 A. Yes, I consider it to be so.
 15 THE PRESIDENT: What does it mean?
 16 A. When an institution is established , the law would set
 17 forth the scope, the boundaries of that institution 's
 18 ability and authority and rights.
 19 THE INTERPRETER: I'll correct that upon the Professor's
 20 instruction .
 21 A. So the law would set forth the boundary or the scope of
 22 that institution 's capacity.
 23 And usually the law would set forth that as part of
 24 that capacity the institution in question may do these
 25 actions and usually the institution would be allowed to

1 perform only within that.
 2 So the law that provides the legal basis for
 3 establishing an institution would set forth in the
 4 previous -- the described manner -- the capacities, the
 5 authorities that that institution is allowed to exercise
 6 or is entitled to, and I believe that that is how the
 7 rights that are entrusted to the State are defined. In
 8 other words, by laws that are enacted by the legislative
 9 body.
 10 And an example of these rights that are entrusted by
 11 the State would include, for example, the right to -- or
 12 the authority to issue dispositions to the public or the
 13 people.
 14 So an example in the case of the NPS would be that
 15 NPS is provided with the power or the authority to
 16 determine who becomes a subscriber to the pension
 17 programme and also the NPS is given the power to impose
 18 the pension -- the pension contributions or the pension
 19 premiums that do have the characteristics of a quasi tax
 20 or a semi tax.
 21 THE PRESIDENT: I give you four examples. Would you agree
 22 that all of these are forms of exercise of power. Tax
 23 decision , a tax authority imposes a tax; a police
 24 arrests a person; NPS buys shares; and NPS or any other
 25 authority provides a payment, pension payment or another

1 form of payment to a citizen.
 2 Are all of these forms of exercise of governmental
 3 power in Korean law?
 4 A. Yes. I believe that all four are forms of government
 5 power exercised in Korean law. The first two of your
 6 four examples, I believe , would constitute dispositions
 7 that may be imposed against the will of a citizen ,
 8 whereas the third example, the NPS buying shares, would
 9 actually be conducted as part of the mandate provided
 10 under the Constitution to provide social welfare and
 11 also to secure the stable financial resources to provide
 12 the social welfare benefits .
 13 And therefore in buying shares the share purchase
 14 would have to be done under the four principles that are
 15 set forth in relation to that, and so it would not be
 16 just any share purchase, but would have to follow the
 17 guidelines that are set forth in the related regulations
 18 and statutes. Likewise would be exercise of voting
 19 rights by the NPS on those shares. Those would also
 20 have to follow the same statutory guidelines that are
 21 provided.
 22 The fourth example of the payment of pension
 23 benefits and other benefits, that would also fall under
 24 the category of power exercise, but that would actually
 25 be part of the laws that govern overall government

1 funds, because as I previously mentioned, other
 2 government departments and offices also manage funds and
 3 there are specific and separate regulations in law
 4 regarding the management of those funds, including who
 5 to pay those pension benefits.
 6 So even though these four examples that you have
 7 given me may be further subdivided into whether they
 8 constitute a disposition or not, I do consider that all
 9 four would constitute an action or exercise of a State
 10 power.
 11 THE PRESIDENT: Thank you very much, Professor. That was
 12 very helpful.
 13 There are no further questions from the tribunal.
 14 So this concludes your examination, Professor Lee.
 15 Thank you very much.
 16 THE WITNESS: (In English) Thank you very much.
 17 THE PRESIDENT: This might be a good time to break for
 18 a coffee or tea and we resume in 15 minutes,
 19 4.20. I believe it will be Professor Kim then. We will
 20 start with his presentation. Thank you very much.
 21 (4.07 pm)
 22 (A short break)
 23 (4.24 pm)
 24 PROFESSOR SUNG—SOO KIM (called)
 25 (Evidence given through an interpreter)

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1 THE PRESIDENT: Good afternoon, Professor Kim. You have
 2 been called as an expert witness in this hearing and, as
 3 you confirmed in your two expert reports, you will be
 4 now required to confirm that the evidence that you will
 5 be giving will be in accordance with your sincere
 6 belief. So for that purpose would you please read the
 7 statement that you have in front of you or should have
 8 in front of you on the desk.
 9 THE WITNESS: I solemnly declare upon my honour and
 10 conscience that my statement will be in accordance with
 11 my sincere belief.
 12 THE PRESIDENT: Thank you very much, Professor.
 13 I understand you will be making a presentation instead
 14 of a direct examination. So the floor is yours.
 15 Presentation by PROFESSOR SUNG—SOO KIM
 16 PROFESSOR SUNG—SOO KIM: I will begin.
 17 Good afternoon, members of the tribunal. I am
 18 Respondent's legal expert, Sung—soo Kim. I'm
 19 a Professor at Yonsei Law School, located in Seoul,
 20 Korea. My main research field is Korean administrative
 21 law.
 22 I have submitted two expert reports as an
 23 independent expert in these proceedings. Below I will
 24 summarise the contents of my report and provide some
 25 explanations.

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1 Next slide, please.
 2 I deal with the following two main issues in my
 3 expert report.
 4 First, I will review whether the NPS is considered
 5 a State organ under Korean law. In conclusion, to
 6 provide my conclusion first, it is that Korean law
 7 exhaustively lists entities that make up the government
 8 organisation.
 9 I would also like to state that my opinion here is
 10 not a discussion of international law. Although the
 11 term "State organ" is not used under Korean law, I have
 12 no doubt that the National Pension Service does not form
 13 part of the Korean government organisation.
 14 Second, I will review whether the NPS's exercise of
 15 voting rights pursuant to its investments constitutes an
 16 exercise of government power.
 17 I want to clearly state that although NPS has been
 18 entrusted with the management and operation of the
 19 National Pension Fund by the Minister of Health and
 20 Welfare, the exercise of voting rights on NPS fund
 21 management is not an exercise of governmental power.
 22 Third slide.
 23 Let me briefly explain the most important laws and
 24 acts in examining the two issues mentioned.
 25 The first is the Constitution of the Republic of

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1 Korea. The Constitution directly establishes State
 2 organs called constitutional institutions and requires
 3 the organisational structure of these institutions to be
 4 determined by law.
 5 The second is the Government Organization Act. The
 6 Government Organization Act was enacted in accordance
 7 with Article 96 of the Constitution. Its purpose is to
 8 ensure that the establishment, organisation and function
 9 of each executive Ministry shall be by law and that
 10 national administrative affairs be carried out
 11 systematically and efficiently.
 12 As I have stated, the National Pension Service is
 13 not regulated by the Government Organization Act.
 14 Third is the Act on the Management of Public
 15 Institutions. The Management of Public Institutions
 16 Act, although it has nothing to do with the
 17 classification of State organs, because it was discussed
 18 in his — in Professor Choong—kee Lee's expert report
 19 several times, I'll touch upon it.
 20 The Act of the Management of Public Institutions was
 21 enacted to determine basic matters related to the
 22 operation of public institutions and to rationalise the
 23 management and enhance transparency of these
 24 institutions as entities independent from the national
 25 administrative organisation.

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1 Currently the Act on the Management of Public
 2 Institutions applies on general and simple matters, over
 3 300 public institutions .
 4 Public institutions including NPS, however, are not
 5 State organs. So it is my opinion that these
 6 institutions , public institutions , designated under this
 7 law are not State organs.
 8 Finally , there is the National Pension Act. The
 9 National Pension Act established the NPS as a public
 10 institution . The Minister of Health and Welfare
 11 entrusts NPS, National Pension Service, with matters
 12 related to the management and operation of the fund.
 13 Slide 4.
 14 I would like to talk about the classification of
 15 State organs in Korean law. In order to understand the
 16 structure of government in Korea, it is important to
 17 look at the basis of State organ classification under
 18 Korean law.
 19 As I have stated, Article 96 of the Constitution
 20 stipulates that the establishment, organisation and
 21 function of each administrative Ministry shall be
 22 determined by law, which contains the principle of
 23 administrative organisation legalism.
 24 Administrative organisation legalism , according to
 25 Article 96 of the Constitution, is not just a legal

1 concept but a constitutional principle . Administrative
 2 organisation legalism is a principle of Korean law that
 3 the establishment and powers of government organs shall
 4 be prescribed by law and it is one of the most important
 5 principles .
 6 The law mentioned in Article 96 of the Constitution
 7 is the Government Organization Act. The Government
 8 Organization Act stipulates in a very narrow sense, and
 9 also exhaustively lists , the power and function of
 10 government bodies.
 11 Slide 5.
 12 According to the Korean legal system, according to
 13 the Constitution and the Government Organization Act,
 14 the classification of State organs can be classified
 15 into three forms. So there are three forms of State
 16 organs under Korean law.
 17 First , State organs that are constitutional
 18 institutions . The second category is the State organs
 19 established under the Government Organization Act and
 20 other Acts enacted pursuant to the Constitution.
 21 Third is a State organ established as a central
 22 administrative agency under other individual acts
 23 pursuant to Article 2 of the Government Organization
 24 Act.
 25 Slide 6.

1 So first on constitutional institutions .
 2 In the morning session we had discussions on
 3 constitutional institutions but I don't think we had an
 4 in-depth discussion.
 5 As I said, constitutional institutions are State
 6 organs directly established under the Constitution.
 7 State organs, which are constitutional institutions , are
 8 directly established according to the Constitution, and
 9 as you can see here, the Constitution directly
 10 establishes the National Assembly, the Prime Minister,
 11 the Constitutional Court, and the National Election
 12 Commission, etc.
 13 Slide 7.
 14 The second is government organisation — State
 15 organs established according to Government Organization
 16 Act.
 17 So the second category is State organs established
 18 under the Government Organization Act and other Acts
 19 enacted under the Korean Constitution.
 20 Under the Government Organization Act, national
 21 administrative agencies, including central
 22 administrative agencies, special regional administrative
 23 agencies, affiliated agencies and representative
 24 administrative agencies will be established in
 25 accordance with the law.

1 Among them major institutions established under the
 2 Government Organization Act, including individual
 3 ministries , are referred to as central administrative
 4 agencies.
 5 And the central administrative agencies are again
 6 divided into three categories: Bu, Cheo and Cheong.
 7 Bu is a Ministry affiliated to the President.
 8 Article 26 of the Government Organization Act requires
 9 the establishment of 17 "Bu"s. Cheo is a Ministry
 10 affiliated to the Prime Minister. Five Cheos are
 11 established under the Prime Minister.
 12 Cheong is an agency that is established under Bu.
 13 Let me explain. The central administrative agencies
 14 mentioned earlier, Bu, Cheo and Cheong. Article 26 of
 15 the Government Organization Act establishes the Ministry
 16 of Health and Welfare which is the Ministry at issue in
 17 this case under the control of the President.
 18 Article 23.1 of the Act explicitly establishes the
 19 Ministry of Government Legislation under the
 20 Prime Minister.
 21 In addition, in accordance with article 38,
 22 paragraph 2, the Korea Disease Control and Prevention
 23 Agency was recently established under the Minister of
 24 Health and Welfare and this was only possible because
 25 there was a revision to the Government Organization Act.

1 Slide 9. As such, State organs are exhaustively
2 listed as I have stated numerous times under Korean law
3 in accordance with administrative organisation legalism.

4 Furthermore, amendments have been recently made to
5 Article 2, paragraph 2, of the Government Organization
6 Act, and this clearly demonstrates that Korean
7 administrative organs are listed in an exhaustive way,
8 and this provides us with better understanding.

9 For example, as of September 12, 2020, Article 2,
10 paragraph 2 of the Government Organization Act was
11 amended. The amendment states that central
12 administrative agencies cannot be established except as
13 prescribed by this Act, and the Acts set forth in the
14 following subparagraphs.

15 So without being prescribed by this Act, central
16 administrative agencies cannot be established, and this
17 is clearly stated in the amendment. In this way the
18 amendment re-affirms the principle that central
19 administrative agencies must be established pursuant to
20 laws enacted by the National Assembly and concurrently
21 that they be prescribed in Article 2, paragraph 2 of the
22 Government Organization Act, and this is in accordance
23 with the government -- this is in line with the
24 Article 96 of the Constitution.

25 In the same way, in the same vein, the 2014 Ministry

1 of Safety and Public Administration press release
2 mentioned in my report explains that the purpose of the
3 amendment is to ensure conformity in managing government
4 organisation and to facilitate understanding of the
5 composition of the executive branch for the people of
6 Korea.

7 So the most important purpose of the amendment is to
8 provide clarification on the central administrative
9 agencies so that the citizens of Korea can understand
10 which government organisation bodies they need to be
11 connected to in cases that are relevant to them.

12 Slide 10.

13 Korean law stipulates in great detail and
14 systematically the way State organs are to be
15 established and removed.

16 Under Korean law, if a legislator intends to
17 establish an institution as a State organ, it must be
18 established as a central administrative agency through
19 the enactment of individual laws and there must be
20 amendments to Article 2, paragraph 2 of the Government
21 Organization Act. So it has to explicitly be written
22 down in Article 2, paragraph 2, of the Government
23 Organization Act in order to establish a new central
24 administrative agency.

25 In contrast, the NPS is designated as a public

1 institution under the Act on the Management of Public
2 Institutions. So it is not an administrative agency,
3 nor a central administrative agency, according to the
4 Government Organization Act.

5 The NPS was not established as a central
6 administrative agency even under the National Pension
7 Act. So there are eight central administrative agencies
8 listed in each subparagraph of Article 2, paragraph 2 of
9 the Government Organization Act and NPS is not included
10 in one of the eight agencies listed in the Act.

11 In addition, NPS was not established as an
12 administrative organisation under the Ministry of Health
13 and Welfare similar to the Korea Disease Control and
14 Prevention Agency.

15 What does this mean? This shows that NPS, which is
16 a public institution, was not established as part of the
17 Government Organization Act and this expresses the
18 legislator's intent of not establishing NPS as part of
19 the Korean Government organisation.

20 Therefore, organisations exercising some public
21 functions or government functions, and all of these
22 organisations that exercise some public functions or
23 government functions, form part of the Korean Government
24 Organization Act was Professor Choong-kee Lee's approach
25 and argument, and this is not aligned with Korean

1 administrative law professionals and Korean Constitution
2 professionals.

3 This has never been heard of.

4 Professor Choong-kee Lee's functional approach is
5 not aligned with Korean law, the Korean Constitution,
6 and the Korean Government Organization Act. It may be
7 a discussion on international law.

8 Thus the argument that the NPS is a State organ
9 because it exercises public or governmental functions,
10 if this argument is heard by my colleagues in the field
11 of Korean law, Constitution and administrative law,
12 would not be something that these professionals can
13 agree to.

14 Slide 11.

15 The last classification is State organs that are
16 specifically established by other individual statutes as
17 a central administrative agency under the
18 Organization Act.

19 So these agencies are established by individual
20 statutes and not by the Government Organization Act.
21 And as I have stated earlier, in the past in individual
22 Acts they would establish central administrative
23 agencies, but in 2020 there was an amendment to the
24 Government Organization Act, and with the amendment
25 these agencies must be listed. They have to be relisted

1 and reconfirmed as central administrative agencies in
2 Article 2, paragraph 2 of the Government Organization
3 Act.

4 For example, Article 3 of the Financial Services
5 Commission Establishment Act establishes the Financial
6 Services Commission under the jurisdiction of the
7 Prime Minister and it is stipulated that it is a central
8 administrative agency and this is prescribed in
9 Article 2, paragraph 2, of the Government Organization
10 Act.

11 Slide 12.

12 It is important that a distinction be drawn between
13 administrative agencies and central administrative
14 agencies. Central administrative agencies, as I have
15 stated numerous times, they have to be established
16 according to the Government Organization Act and other
17 individual Acts, and these central administrative
18 agencies are direct administrative agencies that are
19 established as part of the State administrative
20 structure alongside constitutional institutions, they
21 are set up under the Government Organization Act as
22 a central administrative agency.

23 On the other hand, the concept of an administrative
24 agency, an administrative agency, this is a unique
25 definition in the Administrative Litigation Act and the

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1 Administrative Appeals Act.

2 If certain administrative tasks are performed by an
3 administrative agency, if it performs certain
4 administrative tasks, private organisations or private
5 individuals such as private social welfare corporations
6 can be regarded as administrative agencies to which the
7 Administrative Litigation Act and the Administrative
8 Appeals Act applies.

9 Slide 13.

10 Therefore the central administrative agency is
11 a State organ. So the two are equivalent, a central
12 administrative agency is obviously a State organ.

13 However, administrative agencies, just because they
14 are an administrative agency, does not mean they are
15 State organs.

16 As I said, the NPS is a public institution under the
17 Public Institutions Act and does not fall under any of
18 the State organ categories, the three State organ
19 categories that I have explained.

20 This is because the National Pension Service is
21 a so-called indirect administrative agency established
22 as an independent legal entity to perform certain
23 administrative tasks of the State independently with
24 political neutrality and it should autonomously and
25 professionally carry out these administrative tasks with

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1 its own legal personality.

2 So the National Pension Service is an indirect
3 administrative method. Therefore the NPS exists outside
4 of the State administrative structure.

5 Slide 14.

6 Now, let's look at the Act on the Management of
7 Public Institutions.

8 Professor Choong—kee Lee says that the fact that NPS
9 was classified as a fund management type quasi
10 government institution among public institutions is
11 evidence that the NPS is a State organ. That was his
12 argument and logic.

13 However, the classification of public institutions
14 and the concept of State organs are irrelevant. Those
15 who have studied Korean law for a long time will accept
16 this as obvious.

17 As I have said, the Ministry of Economy and Finance
18 determines and categorises public institutions based on
19 the size of their assets and whether they generate
20 revenue on their own.

21 As you can see, according to Article 1 of the Act,
22 the legislative purpose of the Public Institutions Act
23 is the establishment of self-controlling and accountable
24 management system of institutions performing, in part,
25 tasks with public nature.

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1 In the Public Institutions Act, because of this,
2 they carry out stringent management performance
3 evaluation of public institutions.

4 And this is because public institutions are
5 performing public tasks and they receive financial
6 support through tax revenue, and that is why there has
7 to be check and balance and transparency required from
8 these institutions and there has to be review from the
9 National Assembly.

10 Currently in Korea there are more than 300 public
11 institutions and the Public Institutions Act regulates
12 based on principle uniformly all of these public
13 institutions. Again, the fact that an organisation has
14 been designated as a public institution under the Public
15 Institutions Act does not mean that it is a State organ
16 under Korean law. This argument does not stand.

17 Slide 15.

18 As shown on this slide, if you see Article 4 of the
19 Act on the Management of Public Institutions,
20 Professor Choong—kee Lee's argument that the State and
21 local governments are of course public institutions do
22 not make sense because, according to this provision, the
23 public institutions cannot be State or local
24 governments.

25 Legal entities, organisations or institutions other

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1 than the State or a local government may be designated
2 as a public institution .

3 So non—State or local governments can only be
4 designated as public institutions .

5 That is why public institutions have been separated
6 from the State administrative organization and they are
7 given separate legal personality . And it is important
8 that they have accountability, political neutrality and
9 independence.

10 And that is why they have been established to have
11 independent legal personality from the State and local
12 governments.

13 Slide 16.

14 Now I would like to discuss the National Pension
15 Act.

16 First I would like to point out some key provisions
17 that demonstrate the nature of NPS in the National
18 Pension Act.

19 First , Article 26 of the Act shows that NPS has
20 a separate legal personality . According to Article 30,
21 the NPS has executives such as directors and auditors,
22 and article 38 indicates that the board of directors
23 deliberate and resolve important matters of NPS.

24 Article 101 of the Act stipulates the establishment
25 of the National Pension Fund and the Minister of Health

1 and Welfare entrusts the management and operation of the
2 fund to NPS pursuant to article 102, paragraph 5 of the
3 Act.

4 More importantly, however, Article 102, paragraph 2
5 of the Act and Article 4 of the Fund Management
6 Guidelines — this is the Article 4 that was mentioned
7 numerous times during evidence of Professor Lee — and
8 that this Article 4 of the Fund Management Guidelines
9 stipulate profitability and stability as the fund's
10 operating principles .

11 So the fund has to be managed in an efficient way to
12 maximise profitability , and in Article 102, paragraph 2,
13 that is the intent of this article .

14 This tells us that the NPS' exercise of voting
15 rights pursuant to operation of the Fund is not
16 essentially different from the operation of funds by
17 general corporations.

18 NPS, as it operates and manages its fund, conducts a
19 private legal activity , a commercial activity, and it is
20 not an exercise of government power.

21 Now let me turn to the status of the NPS in
22 accordance with other Acts. Slide 17.

23 Professor Lee strongly stresses that the NPS can be
24 subject to an administrative litigation as an
25 administrative agency. However, as explained earlier ,

1 this is because the NPS is a public institution that can
2 exercise some administrative authority in , for example,
3 collection of pension premiums, determination and
4 disbursement of benefits, etc.

5 So these are some administrative authority, and this
6 is in fact the question given by the tribunal. What is
7 the power? Within the power there's administrative
8 power, but then there's also the commercial power and
9 then there's also the transactional power in the sense
10 of the private law nature.

11 And the — all the institutions that have
12 administrative authority can be subject to a petition .
13 Therefore, the fact that the NPS is a petition accepting
14 institution under the Petition Act, and Professor Lee
15 stated something about this. If you ask me a question
16 on this one, I will be happy to give you an answer.

17 And Professor Lee went on to say that the NPS is
18 subject to the National Assembly audit of the State
19 administration because it is a State organ. But private
20 organisations that are clearly not State organs... The
21 Yonsei University that I work in, this is a private
22 university , but this is in fact also governed by the Act
23 in question because it does receive some funding from
24 the State, and then it also receives the National
25 Assembly audit. Does that mean that the

1 Yonsei University is a State organ? It is not the case.

2 Slide 18, please.

3 Professor Lee is saying that the NPS employees are
4 governed by the State Public Officials Act, but then
5 I don't agree with this point. I actually have
6 presented a 2020 Korean Supreme Court Decision in my
7 report, then moving on to slide 19, this is on whether
8 the NPS is exercising governmental power.

9 The NPS is entrusted its power by the Minister of
10 Health and Welfare. This is correct . But the NPS's
11 exercise of its voting rights , under Korean law, is not
12 the exercise of governmental power at all. Of course,
13 NPS is performing some administrative functions, but not
14 all of its functions are administrative.

15 For example, as the NPS manages and operates the
16 Fund, it performs activities such as lending or
17 purchasing shares, and these activities , according to
18 the Korean Supreme Court, are merely commercial
19 activities that it performs as a private economic
20 entity .

21 In German terms, it's "fiskus". It's the — I would
22 say the vault of the country.

23 So this is subject to the domain of private law,
24 even though this is a State's financial activity . And
25 it also has the freedom as well. So the National

1 Pension Service exercises autonomy in managing the fund.
 2 The State Property Act classifies the
 3 National Pension Fund as general property within the
 4 category state property and the general property is
 5 managed according to the principle of private autonomy,
 6 and its management has a private law nature, as held
 7 firmly by the Korean Supreme Court multiple times.
 8 This naturally leads to the conclusion that the
 9 exercise of a shareholder vote in managing and operating
 10 the fund has thus a private law nature.
 11 So this is not the exercise of the public power.
 12 This is a commercial activity and this is -- this has
 13 the private law nature, private law nature.
 14 So all these points that I have highlighted so far
 15 are in line with the fact that the legal action arising
 16 from the NPS's management and operation of the fund is
 17 to be dealt as a matter of civil , not administrative
 18 litigation .
 19 You actually asked the question in the morning.
 20 Are the NPS employees, when they are, for example,
 21 committing the illegality , when they are working, who
 22 bears the liability ? That was the question there.
 23 According to the State Compensation Act, the NPS
 24 definitely has to bear the civil liability , and the
 25 country does not bear any responsibility because the

1 country's State Compensation Act only recognizes state
 2 or local government officials, or a person entrusted
 3 with public duties, as the subject of state
 4 compensation.
 5 The legal entities and the employees that are
 6 independent entities, if their action is incurring
 7 damages, they should be governed by the civil law.
 8 Let me move on to my conclusion.
 9 To summarise, on the first issue, the NPS is not
 10 a State organ under Korean law.
 11 The Korean law exhaustively classifies State organs
 12 in three categories in accordance with the Constitution
 13 and the Government Organization Act, and a functionalist
 14 approach is not an appropriate means to understand such
 15 governmental structure.
 16 Only an entity that is designated as a State organ
 17 by legislature and fits within the three-fold
 18 classification can form part of the executive branch.
 19 According to this principle, therefore the NPS does
 20 not form part of the Korean Government.
 21 The Act on the Management of Public Institutions is
 22 irrelevant to whether an entity is a State organ. The
 23 NPS exists outside of the State administrative
 24 structure. It's in German [German spoken]. Indirect
 25 State administrative agency.

1 So the Korean administrative law is affected by the
 2 German influence. That is why that is quite commonly
 3 understood by the Korean professional who are acting in
 4 the field of Korean administrative law.
 5 The Act on the Management of Public Institutions is
 6 irrelevant to whether an entity is a State organ. The
 7 NPS, as I have said, is an institution that belongs to
 8 indirect state administration. The NPS is an
 9 administrative agency, but that does not mean that that
 10 is a State organ and the Board of Audit and Inspection
 11 Act and the Petition Act are totally irrelevant to the
 12 subject. And of course once again the NPS employees
 13 aren't public officials under the State Public Officials
 14 Act, and Professor Lee didn't in fact offer his opinion
 15 on this matter.
 16 Last slide. Then on the second point, second issue,
 17 my conclusion is that the NPS's exercise of voting
 18 rights is not an exercise of governmental power.
 19 First of all, the NPS performs some administrative
 20 functions, but the exercise of a shareholder vote is not
 21 an administrative act. Entrustment or delegation of
 22 power does not automatically result in the power
 23 entrusted as being governmental. This is too naive, and
 24 this is in fact too unidimensional.
 25 What is important here is that what exactly is the

1 nature of how this power is being exercised. So the
 2 exercise of a shareholder vote is a commercial act.
 3 Second, the NPS is autonomous in its management and
 4 operation of the fund. And that is why we call it
 5 a public institution that has a separate legal entity,
 6 a personality.
 7 And Professor Lee actually didn't offer his opinion
 8 on this, but then the National Pension Fund actually is
 9 covered by the Korean law as a general property to which
 10 the principle of private autonomy applies. This is in
 11 fact not an administrative property. This is a general
 12 property. And ministerial oversight over the NPS is
 13 there, but only conducted in an indirect and macro
 14 manner. And also purchase of shares and exercise of
 15 voting rights are commercial acts.
 16 When NPS does not exercise its administrative
 17 powers, in other words, when damages are incurred as a
 18 result of managing and operating the Fund, the damages
 19 claims are to be governed by the civil law, as I have
 20 said. This cannot be State compensation litigation at
 21 all. This is pursuant to the Korean Constitution and
 22 State Compensation Act; and Professor Lee does not offer
 23 his opinion on this. I was not able to confirm his
 24 clear opinion on this aspect.
 25 Thank you very much for your attention.

1 THE PRESIDENT: Thank you very much, Professor. Are there
 2 going to be any supplementary questions on direct?
 3 Examination in-chief by MR BHAT
 4 MR BHAT: Thank you, Mr President. I understand that
 5 Professor Kim has a few corrections to make to his
 6 report, if I can just take him through those
 7 corrections. Thank you.
 8 THE PRESIDENT: Please.
 9 MR BHAT: Good afternoon, Professor Kim. If I can take you
 10 to footnote number 16 of your first report which is at
 11 page 18. You say there that the Act on Public and
 12 Private Partnerships and Infrastructure is SSK-15. Do
 13 you have a correction to make there, Professor Kim?
 14 THE INTERPRETER: Can the operator put up the footnote in
 15 question? Page 18, footnote 16.
 16 Could you also tell the Professor the page number in
 17 the Korean version, perhaps?
 18 MR BHAT: I understand it's the same page number.
 19 A. So it's footnote 60, not 16. {G2/1/20}.
 20 Yes, I see that. I would like to change the SSK-15
 21 to SSK-14.
 22 Q. Thank you, Professor Kim. If I can now take you to
 23 page 23, footnote 80. {G2/1/23}. You have there SSK-14
 24 as the State Property Act. Would you like to make
 25 a correction to SSK-14?

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1 A. Yes, I would like to correct that to SSK-15.
 2 Q. Thank you, Professor Kim. Finally, if I can take you to
 3 page 26 of your first report, footnote 93, where it
 4 says, again, State Property Act as SSK-14. Would you
 5 like to carry out a correction to footnote 93?
 6 A. Yes, I would like to correct SSK-14 to SSK-15.
 7 MR BHAT: Thank you, Professor Kim. We have nothing
 8 further, Mr President.
 9 THE PRESIDENT: Thank you, Mr Bhat. I understand it will be
 10 Dr Petrochilos.
 11 Cross-examination by MR PETROCHILOS
 12 MR PETROCHILOS: Thank you, Mr President. Good evening,
 13 Professor Kim. Thank you for joining us today and being
 14 with us. I'm Georgios Petrochilos for the Claimant.
 15 I'll be asking you questions on matters arising from
 16 your expert testimony which, sir, we have had the
 17 benefit of in written detailed form and we have listened
 18 carefully to your presentation today. So I hope our
 19 discussion today can be focused. I will try to put my
 20 questions to you as shortly and as clearly as possible,
 21 and I would ask in turn that you respond in the same
 22 way, as shortly and as clearly as you can. Is that
 23 agreeable to you, sir?
 24 A. Yes.
 25 Q. Thank you. I'm grateful for that.

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1 I will simply say for the record, Mr President, that
 2 the materials that have been handed over across to our
 3 colleagues and of course to the Professor and up to the
 4 tribunal are identical save that materials which are in
 5 their authentic version in the Korean language are the
 6 materials that have been included in Professor Kim's
 7 binders. There are two volumes and I will try to
 8 identify which volume you would be looking at.
 9 And I should also say I'm addressing myself mostly
 10 to the tribunal, my colleague Mr Young Park will be
 11 monitoring the translations -- interpretation, I should
 12 say, so that there will be no misunderstanding between
 13 me and our expert. In case he identifies something that
 14 may have gone astray, although our interpreters have
 15 been nothing less than stellar, he may have to intervene
 16 with the indulgence of the tribunal.
 17 THE PRESIDENT: Indirect monitoring.
 18 MR PETROCHILOS: Professor, you have disclosed --
 19 A. Indirect, sorry. Because I have studied in Germany,
 20 it's always a bit confusing.
 21 Q. Professor, you have disclosed very properly various
 22 public positions you hold in the Republic of Korea. We
 23 have read about them this paragraph 1 of your first
 24 report and in Annex B of that report, including roles
 25 that you have at various ministries and at the Supreme

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1 Prosecutor's office.
 2 Let me ask you: have you been retained by Korea as
 3 a legal expert in any other international arbitration?
 4 A. No.
 5 Q. Now, were you involved in any way as legal expert or
 6 otherwise in an earlier international arbitration we
 7 heard about brought by a group of investors called
 8 Dayyani?
 9 A. No.
 10 Q. The existence of that case, Professor, is in the public
 11 domain. Are you aware of it?
 12 A. I have heard through the media.
 13 Q. Right. Did counsel for Korea or anyone else bring any
 14 other information to your attention, for example were
 15 you given a copy of the award?
 16 A. I have not seen that.
 17 Q. Was the substance of the award conveyed to you by
 18 anyone?
 19 A. I have not been told. I have not heard.
 20 Q. Were you given a copy of any expert testimony on Korean
 21 law that either Korea or the Dayyani claimants adduced
 22 in that arbitration?
 23 A. Was it written by a Korean?
 24 Q. I do not know. I'm asking whether the Professor
 25 received any such report.

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1 A. No, I have just seen it in the news reports.
 2 Q. All right. Were you told perhaps the substance of any
 3 such testimony by anyone you have been working with in
 4 the present case?
 5 A. Are we still talking about the same case?
 6 Q. Yes.
 7 A. No.
 8 Q. Okay. The reason I ask, sir, is because that case, the
 9 Dayyani case, as you will know from the reports that you
 10 read, involved a contract with an entity called KAMCO.
 11 KAMCO is the Korean Asset Management Company which is
 12 a quasi government public institution of the fund
 13 management type, just like the NPS.
 14 Are you aware of KAMCO as an organisation?
 15 A. Yes, of course I have heard of it.
 16 Q. There is no discussion about KAMCO in your expert
 17 reports, is there?
 18 A. I don't think I have written about it.
 19 Q. I would agree. You were in the room on Tuesday, last
 20 Tuesday, when my friends opposite, counsel for Korea,
 21 said that the tribunal in the Dayyani case considered it
 22 important that KAMCO had claimed before foreign courts
 23 that it was a State organ. Did you hear that?
 24 A. Are you saying that somebody from this side had told you
 25 that?

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1 Q. Someone from that side indeed, sir, said that, and this
 2 is Day 2 of the transcript at page 104, lines 2 to 11
 3 {Day2/104:2-11}. So did you hear that or do you need me
 4 to remind you now?
 5 A. Well, I have not heard of KAMCO here in this room. Back
 6 home I have heard of KAMCO, of course, several times in
 7 the news. I think I have been told by someone that it
 8 was similar with this case, but I don't recall hearing
 9 of KAMCO in this room.
 10 Q. Can I ask you to clarify what you mean by saying "it was
 11 similar with this case"?
 12 A. So that was with the Korean Government and with which
 13 party opposite? Dayyani, did you say? What I say by
 14 similar -- what I mean by similar is that I heard some
 15 people talk about going to that arbitration between the
 16 Korean Government and Dayyani.
 17 Q. I see. Professor, let me move on to something slightly
 18 different but still on the same topic.
 19 Have you read the pleadings in the present case, by
 20 which I mean the submissions of the parties, not the
 21 expert reports?
 22 A. By the pleadings, which do you mean?
 23 Q. I just said the submissions of the parties, not just the
 24 expert reports, by which I mean the Statement of Claim,
 25 the Statement of Defence and so on.

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1 Have you read those?
 2 A. I have to apologise. I was so busy when I was in Korea,
 3 I have since getting on the plane continuously been
 4 reading my first and second expert reports together with
 5 Professor Lee's first and second reports.
 6 Q. No apology needed. I just wanted to establish the fact,
 7 thank you.
 8 Now, do you agree as a public law expert that if the
 9 NPS is entitled to be treated in the courts of a foreign
 10 state as part of the State of Korea, the Republic of
 11 Korea, or as an arm of the Republic of Korea, that would
 12 be a relevant factor, perhaps a highly relevant factor,
 13 in assessing whether it is an organ of the State? Do
 14 you agree with that proposition, sir?
 15 A. Well, I have been studying Korean public law for over
 16 30 years. I have also had the chance of studying law in
 17 Germany for ten years, and I'm in acquaintance with many
 18 German colleagues, but frankly speaking, I'm not
 19 familiar with the laws of the United States.
 20 Q. That was not my question. I will read the same question
 21 from the transcript and if you have any difficulty
 22 understanding my question, please let me know and I will
 23 clarify it for you.
 24 A. I apologise.
 25 Q. Not at all. We will figure it out.

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1 Now, do you agree that if the NPS is entitled to be
 2 treated in foreign courts as a part of the Republic of
 3 Korea or as an arm, an emanation of the Republic of
 4 Korea, then that would be a relevant factor, potentially
 5 a very relevant factor, in assessing whether it is an
 6 organ of the Republic of Korea? My question is as to
 7 the concept, sir, not as to any foreign law in
 8 particular. Is it clear to you now?
 9 A. I understand fully the point of your question.
 10 The statement that you have just provided is a very
 11 general statement, and as a legal scholar, I feel the
 12 need to ask for details of the case itself, of the
 13 jurisdiction at issue, and also what laws are applicable
 14 in that case that you are asking of, because for me your
 15 question --
 16 THE INTERPRETER: He has asked to not have that last comment
 17 translated.
 18 Q. I would still like to have it, please.
 19 THE INTERPRETER: He does not see the need to.
 20 Q. It's already been spoken, Professor. If it highly
 21 embarrasses you, I'm happy not to have it, but my
 22 colleague will convey it to me anyway. So we might as
 23 well have it in the record.
 24 A. I would prefer not to have that mentioned and read
 25 into the statement because I am aware that this is an

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1 official procedure, the records of which will be kept.
 2 And I would like to have that comment not put on the
 3 record.
 4 Q. All right. We'll see how we handle that.
 5 Now, let me explain my question to you again.
 6 Imagine I am KAMCO. In the courts of a foreign
 7 State I say I am an emanation of the Republic of Korea.
 8 A. Then that claim itself would be incorrect.
 9 Q. I see. You have a very clear view on that. That KAMCO
 10 could not make that claim?
 11 A. Correct.
 12 Q. Thank you. We have your view on that.
 13 But let me continue with my question. My question
 14 was: if you are claiming in a foreign court that you are
 15 an emanation of a State, then it must be -- well, it
 16 doesn't really mean you, it means if one is claiming, if
 17 an entity is claiming that it is an entity of a State in
 18 the courts of a foreign State, there must be legal
 19 reasons within its own legal system of its own State
 20 which justify that. And so with this in mind I asked
 21 you: is it not relevant to ask the question whether the
 22 NPS is entitled to claim immunity from jurisdiction?
 23 A. Well, that is a very difficult question.
 24 THE INTERPRETER: He's just asked whether -- I think that
 25 was the question posed to me, the interpreter, whether

1 I understood, and he would like to have the question
 2 repeated if possible, one more time.
 3 Q. All I can do is read out what I said before.
 4 If an entity is claiming in a foreign court that it
 5 is an emanation of a State, then there must be legal
 6 reasons within that entity's legal system which justify
 7 that claim.
 8 So with this in mind I asked you: is it not relevant
 9 to ask the question whether the NPS is entitled to claim
 10 immunity from jurisdiction outside the Republic of
 11 Korea.
 12 A. Maybe. Also, you are assuming a case where NPS would go
 13 to a foreign court and claim State immunity; is that
 14 correct?
 15 Q. That's correct.
 16 A. NPS would not be able to do so because it is not a State
 17 organ. NPS would not -- as I mentioned, NPS is an
 18 indirect administrative body that lies outside the
 19 boundaries of a State organ, and therefore it would not
 20 be able to claim that it is -- claim a State immunity in
 21 foreign courts. That would be absurd.
 22 MR GARIBALDI: Excuse me. I don't think we're getting
 23 anywhere.
 24 I'm interested in the answer to this question but
 25 not exactly to the question that counsel posed, but to

1 a more abstract question.
 2 So I'm going to ask a similar question, but more
 3 abstract.
 4 So suppose that --
 5 THE INTERPRETER: He would prefer a more specific question
 6 rather than an abstract.
 7 MR GARIBALDI: I'm asking the questions and you,
 8 Professor Kim, are an expert and as an expert you are
 9 obligated to answer hypothetical questions. So I'm
 10 going to put to you a hypothetical question.
 11 The question is this: suppose that KAMCO goes to
 12 a foreign court and says we, KAMCO, are an agency or
 13 emanation or instrumentality of the Korean State. The
 14 question is: the reasons invoke -- the reasons of Korean
 15 law and the connection with the Korean State invoked by
 16 KAMCO in that case are relevant to the questions that
 17 are posed before us, which is what are the criteria that
 18 are relevant for the question of the State organ under
 19 Korean law; yes or no?
 20 A. I would like to first add the caveat that I have no
 21 choice but to provide my answer without knowing the
 22 details of that KAMCO case.
 23 Not knowing the details of that KAMCO case, I would
 24 only be able to guess -- speculate that in that case
 25 KAMCO claimed State immunity based on the argument that

1 it was part of the State. That would be my guess, given
 2 the fact that your question was also a very speculative
 3 question.
 4 Now, your question was whether that would also be
 5 the case of the NPS, and my answer would be that would
 6 absolutely not be the case for the NPS.
 7 MR GARIBALDI: That was not my question. That was not my
 8 question.
 9 A. So would you mind clarifying your question again, sir?
 10 MR GARIBALDI: You may have answered my question. My
 11 question has to be with KAMCO goes to court and says:
 12 I'm an agency or instrumentality of the Korean State.
 13 The reason why KAMCO is saying that, are they relevant
 14 or not to the issues in this case?
 15 A. Well, it may be relevant or it may not be relevant.
 16 Even though I am not familiar with the details of the
 17 KAMCO case, if KAMCO claimed State immunity by arguing
 18 that it was the extended arm or an agent of the Korean
 19 Government, that may be the case.
 20 However, my position would be that it would be
 21 incorrect for NPS to claim likewise that it is part of
 22 the Korean State or an extended arm of the Government of
 23 Korea.
 24 MR GARIBALDI: Thank you.
 25 MR PETROCHILOS: Professor, given that it may or may not be

1 relevant, as you said, did you ask whether the NPS in
 2 fact, whether rightly or wrongly, has claimed sovereign
 3 immunity in foreign courts? We know your professional
 4 view, that it couldn't. That's not my question. I want
 5 you to be clear on my question.
 6 My question is: did you ask whether the NPS has in
 7 fact claimed sovereign immunity in any foreign courts?
 8 A. Are you saying that the NPS has done so?
 9 Q. No. We have asked -- we don't know -- and my question
 10 to you was: have you asked?
 11 A. No.
 12 Q. He hasn't asked.
 13 Mr President, we're coming to 10 to and I do not
 14 wish to overstep my --
 15 THE PRESIDENT: Whenever is a convenient time.
 16 MR PETROCHILOS: -- boundaries.
 17 THE PRESIDENT: We can go on for another 10 minutes if and
 18 when you find a convenient time to break.
 19 MR PETROCHILOS: This point lends itself to a break.
 20 Mr Partasides has a housekeeping point to address.
 21 Before he does so, I need to say something to the
 22 witness which is this.
 23 Professor, you told us you are not involved as an
 24 expert tendered by the Republic of Korea in any other
 25 international arbitration. The information we have, and

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1 it's information in the public domain, seems to suggest
 2 otherwise.
 3 I do not want to have to make submissions about this
 4 without giving you an opportunity to refresh your memory
 5 about this. So can I ask you to refresh your memory and
 6 tell us: are you an expert proffered by the Republic of
 7 Korea in another international arbitration and the case
 8 I have in mind is called Mason Capital v Korea?
 9 A. Yes, of course. Aren't the two the same cases? I think
 10 you've asked about previous cases which I have not been
 11 involved in as experts, but that case of course I am.
 12 MR PETROCHILOS: We have it now. I'm happy to pause here,
 13 but as I say, Mr Partasides wishes to address the
 14 tribunal.
 15 THE PRESIDENT: Yes, Mr Partasides?
 16 Housekeeping
 17 MR PARTASIDES: Thank you, Mr President, members of the
 18 tribunal. I'm a little further away from you, but can
 19 you hear me?
 20 THE PRESIDENT: We can hear and see you both.
 21 MR PARTASIDES: Very well. I just wanted to give the
 22 tribunal an update on the procedural issue that has
 23 arisen before this week.
 24 I should tell you that as promised the Claimant has
 25 collated the underlying trade confirmations that were

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1 identified in the spreadsheet that we provided to the
 2 Respondent very early on Monday morning. I should also
 3 tell you that those have been provided to the Respondent
 4 earlier this afternoon just after 3 o'clock, and as
 5 there was some question as to whether the Respondent
 6 would put those documents on the record, we have
 7 proposed that we put those documents on the record, and
 8 that they be added to the record as exhibit C-750 to
 9 C-758.
 10 Unless there's any objection, I propose that that be
 11 confirmed now.
 12 I should also say, Mr President, that in addition,
 13 having heard the tribunal's interest in this issue, we
 14 have asked Mr Smith whether he could return to answer
 15 any questions that either our friends opposite or the
 16 tribunal may have for him about that additional
 17 documentation. He has since left Geneva, given his
 18 professional commitments, but he has offered to return
 19 and would be available to give evidence on Monday of
 20 next week if that would be of assistance to the tribunal
 21 or to our friends opposite.
 22 If it would also be of assistance, we would be
 23 willing to submit a brief supplemental witness statement
 24 from him simply and exclusively on the subject of these
 25 additional documents, and you've heard me say this

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1 before. These are simply additional documents in
 2 addition to those similar documents that were produced
 3 to the Respondent in the spring of 2020, but for
 4 a shorter period of time.
 5 So we make that offer. We are keen to ensure that
 6 we can do what we can to answer any questions the
 7 tribunal may have about this additional documentation,
 8 and so we wish to raise this at the earliest possible
 9 opportunity.
 10 THE PRESIDENT: Thank you very much. Respondent?
 11 MR TURNER: Thank you very much, sir. I confirm that we
 12 have received some documents from the other side. There
 13 are, I believe, eight pdf documents, but they each
 14 contain a large number of underlying documents. I'm
 15 told there are 269 pages of documents. We will all see
 16 that no doubt later today.
 17 We -- as I explained on Tuesday, and it was very
 18 early on Tuesday morning that we had the communication
 19 from the Claimant -- we do not oppose these documents
 20 being put into evidence. I'm assuming that my learned
 21 friend's spreadsheet will also be put into evidence by
 22 the Claimant. If not, then we will ask for that to be
 23 put into evidence.
 24 That is represented to be, and I'm sure is,
 25 a summary of the transactions that these new documents

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1 document, as it were.
 2 So that would complete the position.
 3 So far as an offer of Mr Smith's presence is
 4 concerned, we do not yet know -- we haven't looked at
 5 these documents, or at least not in enough detail and
 6 certainly Mr Lingard and I have not had a chance to
 7 consider their content enough to know whether we have
 8 questions for Mr Smith.
 9 If Mr Smith is to tender a new witness statement,
 10 limited as my learned friend has said to the new
 11 documents, then that needs to -- and if he is available
 12 to give evidence on Monday, we will need that witness
 13 statement by midday tomorrow in practice to allow us to
 14 take cognisance of it and the underlying documents,
 15 decide what, if any, questions we have for Mr Smith.
 16 If, though, and again subject to the overriding
 17 control of the proceedings by the arbitral tribunal, if
 18 my learned friend does not have questions in chief for
 19 Mr Smith, in other words if he simply is tendered for
 20 questioning by us, if we have questions and by the
 21 arbitrators, if you have questions for him, then I do
 22 not think a new witness statement is needed. But if my
 23 learned friend were to have as part of the way of
 24 introducing these documents the idea that he would ask
 25 questions of Mr Smith in chief to explain the documents

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1 in the way that perhaps he has in mind, then we would
 2 insist on such a witness statement and we would insist
 3 on it being provided as early as possible, and we
 4 suggest midday tomorrow.
 5 I think that's a fair summary of our position.
 6 Thank you, sir.
 7 THE PRESIDENT: Would it not be helpful for the Respondent
 8 to have a brief witness statement introducing the
 9 documents to allow you to prepare for any
 10 cross-examination of Mr Smith that you may want to
 11 conduct?
 12 MR TURNER: It's very hard for me to say because I don't
 13 even know if we would have any questions. We have
 14 reserved our right. We have not yet looked at the
 15 documents. It is at least possible, sir, that the only
 16 questions that there would be would be if there were
 17 a discrepancy between the spreadsheet and the underlying
 18 documentation.
 19 I'm sure that won't be the case. I have every
 20 confidence that the Claimant's record-keeping is
 21 adequate and therefore what they tendered to us as
 22 representing the transactions has been fully documented.
 23 I simply don't know whether that would be necessary
 24 or helpful. What we say is twofold. One, if there is
 25 to be a statement, we need it in good time, and our

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1 suggestion is midday tomorrow.
 2 If there is not -- if there is no statement, then
 3 there can be no examination-in-chief of Mr Smith on
 4 these matters.
 5 THE PRESIDENT: We have only spoken very briefly about this
 6 among the tribunal members. Our preliminary view was
 7 that it would be helpful to have a short witness
 8 statement introducing the documents along the lines that
 9 was explained by counsel on Tuesday. That would be
 10 helpful and that would then of course -- wouldn't
 11 prejudge the Respondent's decision as to whether or not
 12 you wish to put any questions to Mr Smith.
 13 But at least if the witness statement is now made
 14 and produced, that option would still remain open and
 15 the tribunal senses that it would be helpful to explain
 16 along the lines that you stated earlier this week, that
 17 we would have that explanation on record and not simply
 18 as a statement by counsel.
 19 The question then becomes whether tomorrow noon
 20 would be realistic. You would expect to have it by noon
 21 tomorrow in order to be able to put any questions to
 22 Mr Smith on Monday, but if Mr Smith is produced for
 23 questioning later in the week, presumably you wouldn't
 24 need the statement by noon tomorrow.
 25 MR TURNER: Correct, sir.

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1 I think the timing of Mr Smith's evidence is
 2 relevant to the experts' evidence.
 3 THE PRESIDENT: So it should be before the experts -- it
 4 should be produced before the experts are introduced for
 5 examination.
 6 MR TURNER: I think Mr Smith's evidence, both in writing and
 7 potentially orally, would be important when we come to
 8 talk to the experts and there are two ways of ensuring
 9 that.
 10 One is Mr Smith gives evidence again either only in
 11 terms of questioning from the tribunal or questioning
 12 from the tribunal and cross-examination from us before
 13 the experts are currently -- which is Tuesday and
 14 Wednesday, sir, of next week -- give evidence
 15 themselves, the quantum experts, I should say, because
 16 we have an expert in the room today, and it's only
 17 experts from now until the end of the proceedings indeed
 18 apart from Mr Smith, if he comes back. Or if he
 19 can't -- if physically we can't get a sensible witness
 20 statement a sensible amount of time before Mr Smith can
 21 give evidence before Tuesday, then if he were to give
 22 evidence on Tuesday or Wednesday, the experts would,
 23 I think, have to be slotted in afterwards. I'm not sure
 24 what the flexibility in their availabilities is. We
 25 clearly, as a gathering here, have a bit of flexibility

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1 towards the end of next week.
 2 THE PRESIDENT: I'll give a chance to Mr Partasides to
 3 comment in a second. There are slots and there is some
 4 flexibility in the timetable next week, for instance
 5 Monday we are supposed to finish around 4 o'clock. So
 6 there would be a slot after that to question Mr Smith.
 7 Or then Tuesday morning, because again we are supposed
 8 to start at 10 o'clock and finish already at 4.30. So
 9 those two options would seem to exist. But
 10 Mr Partasides --
 11 MR PARTASIDES: Thank you, Mr President. Our idea for
 12 proposing the witness statement would be indeed to
 13 facilitate any questions that were to come either from
 14 our friends opposite or from the tribunal. If we didn't
 15 produce a witness statement, then we would need to
 16 introduce that same evidence somehow orally, which
 17 I think would be suboptimal for everyone, which is why
 18 we propose a witness statement. I understand that that
 19 is the growing consensus.
 20 I cannot imagine that this would be a witness
 21 statement that would be longer than three or four pages
 22 in length; perhaps even shorter, who knows.
 23 We do have one constraint, and that is Mr Smith is
 24 no longer at Elliott, as you heard. He has his own
 25 professional commitments. He will not return and be

1 available to us until the weekend.
 2 Now, we can work quickly as soon as he is available
 3 to us. I understand he's returning to Geneva on
 4 Saturday for us. And then I could undertake that early
 5 on Sunday a witness statement would be ready for
 6 submission. As it would be a witness statement simply
 7 describing the documents that have already been provided
 8 and would be of that length, I would hope that that
 9 would give those who need it a reasonable period of time
 10 should they choose to, to ask any questions late on
 11 Monday.
 12 I should say that he's confirmed that he can make
 13 himself available for Monday. We have not asked him and
 14 so I do not know whether he would be available later
 15 next week, even if that were practicable, given the
 16 other commitments.
 17 THE PRESIDENT: Mr Turner?
 18 MR TURNER: Sir, my immediate reaction is a hedged concern.
 19 I use the word "hedged" advisedly as we may be hearing
 20 it again over the course of the next days.
 21 It is this. If my learned friend is talking about
 22 a witness statement that says on 3 July entity X bought
 23 Y number of swaps in company Z, and that is all, then it
 24 may well be that as early as possible on Sunday will
 25 I be back from church or not, you know, the great

1 excitement of coming back on Sunday morning, may be
 2 fine.
 3 If the witness statement that is contemplated, and
 4 it may very well be that this is not something that my
 5 learned friend has yet thought about himself, and that
 6 would be absolutely understandable, but if it is more --
 7 if it is explaining the nature of the transactions, if
 8 it's explaining the nature of a trading plan, you can
 9 see that that becomes more complicated, sir, if we are
 10 then to decide whether to and prepare to talk to
 11 Mr Smith on Monday after we have spoken to the Korean
 12 capital market experts.
 13 I fully understand that at the moment we don't know
 14 whether Mr Smith would be available on the Tuesday
 15 morning, and I agree with you, sir, that those are the
 16 two obvious slots: the second half of Monday afternoon
 17 or early on Tuesday.
 18 But you see -- so it is a concern. We would much
 19 rather have it earlier. It would be much less of
 20 a concern if we knew it was simply putting the documents
 21 into evidence -- I don't mean I hereby -- I am shown and
 22 hereby confirm the contents of a bundle of documents
 23 paginated 11 to 269, but to explain what the documents
 24 represent and where they fit into the spreadsheet, that
 25 would be mechanical.

1 An explanation which Mr Smith began to give in
 2 answer to questions from the tribunal the other day
 3 about how this fitted into the overall plan, that might
 4 be a little harder for us to get ready for if he were
 5 then to be on, on the Monday afternoon.
 6 I'm sorry I can't be any more precise than that,
 7 but --
 8 THE PRESIDENT: We understood. Can we do the following: the
 9 witness statement is produced by -- on Sunday morning by
 10 noon at the latest, and if you could then let the
 11 tribunal and the Claimant know by -- there is no close
 12 of business on Sunday, but let's say by Sunday evening
 13 whether you are prepared to examine or put questions to
 14 Mr Smith already on Monday evening after the completion
 15 of the examination of experts that are scheduled to
 16 appear on Monday, or whether you prefer to do it later
 17 in the week, and then we discuss -- make a ruling either
 18 on Sunday evening or first thing Monday morning as to
 19 the next steps.
 20 But I think the map is there now. We know where the
 21 issues are, and the Claimant -- you may wish to consider
 22 how much and what kind of introduction of the
 23 documentation Mr Smith will do in his witness statement.
 24 MR PARTASIDES: Thank you, Mr President. That is all noted
 25 and we will work to that plan with our friends opposite.

1 We're also conscious that it seemed to us that the
 2 tribunal had some questions about this and so we would
 3 want both the scope of the witness statement and any
 4 appearance on Monday by Mr Smith to be the opportunity
 5 to address those questions. But I don't know whether
 6 the tribunal is already in a position to tell us whether
 7 there's something that they would look to see in that
 8 witness statement one way or the other.
 9 THE PRESIDENT: There will probably be questions from the
 10 tribunal as to the purpose of the transactions.
 11 MR PARTASIDES: That's what we thought, and that then can be
 12 included in the witness statement.
 13 I should say that reference was made to trading
 14 plans and maybe it was a broad reference to trading
 15 plans. Our understanding is that we will not be going
 16 over any of the ground that Mr Smith has already been
 17 examined on. We will simply be limiting this to the new
 18 documents that have been produced this week. I hope
 19 that understanding is shared by all in this room.
 20 THE PRESIDENT: That is the understanding -- I mean,
 21 Mr Smith has been examined and he's been released, and
 22 that was the understanding when his examination was
 23 completed. It's only about the new documents that have
 24 now been produced.
 25 MR TURNER: That is very much our understanding, sir.

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1 Naturally, if Mr Smith were to explain that these
 2 transactions -- and this is what we'd understood from my
 3 learned friend on Tuesday morning -- were in some way
 4 connected to the purchases of shares in SC&T, then to
 5 that degree we might need to talk to him about how the
 6 two fitted together. But I do not see it as being any
 7 more connected than that.
 8 THE PRESIDENT: Very good. So that is the plan. Just to
 9 confirm for the record, there will be a witness
 10 statement produced by Mr Smith by -- on Sunday morning
 11 at the latest by noon Sunday. The Respondent will
 12 confirm by Sunday evening and that can be defined by the
 13 Respondent what that means as to whether or not you are
 14 prepared to cross-examine Mr Smith on Monday evening or
 15 whether you prefer to do it later in the week and then
 16 we see where we are on Monday morning. The Respondent
 17 says you don't need to examine Mr Smith, but in any
 18 event, you will --
 19 MR TURNER: We'd understood, sir, we will tell you what our
 20 position is --
 21 THE PRESIDENT: Whatever that is.
 22 MR TURNER: -- on Sunday evening.
 23 THE PRESIDENT: Okay. Very good.
 24 MR PETROCHILLOS: Mr President, I'm sure the expert knows
 25 this, but perhaps it would be good to recall.

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1 THE PRESIDENT: Indeed.
 2 Mr Kim, thank you very much. I should remind you
 3 that you should not speak with anybody about your
 4 testimony today or the questioning that is still to come
 5 tomorrow morning. So it will be a solitary evening,
 6 more quarantines, but we are getting used to it. Thank
 7 you very much.
 8 (6.10 pm)
 9 (The hearing adjourned until Friday, 19 November 2021 at
 10 9.30 am)
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