Friday, 19 November 2021

1. (9.00 am)

PROFESSOR SUNG—SOO KIM (continued)

2. Cross-examination by MR PETROCHILOS (continued)

3. (Evidence given through an interpreter)

4. THE PRESIDENT: Good morning. It’s the fifth day of the hearing. Welcome to all.

5. Any issues to be raised in terms of housekeeping,

6. Mr Petrochilos?

7. MR PETROCHILOS: Thank you, Mr President. It’s not an issue of housekeeping, but it’s a related issue. It’s an issue about the integrity of the transcript. Yesterday Professor Kim said something which he then directed our interpreter, having regretted what he said, not to translate, as he said, so that it would not be in the transcript.

8. I now know what the witness said, it was a personal comment directed at me. So I will not insist on it being in the transcript. But it will be easier,

9. I respectfully suggest, sir, for all of us concerned if the witness be directed not to try to self-edit again and if our interpreters interpret what he says as literally as possible.

10. THE PRESIDENT: It is already on the record already, because the hearing is being recorded, as I understand it. That was at least what we indicated in POI. So it is on record.

11. MR PETROCHILOS: I’m grateful for that indication,

12. Mr President. I simply meant it as a way to move forward without any interruptions.

13. THE PRESIDENT: Understood. Maybe just by way of a reminder to everybody including Professor Kim that this hearing is being recorded, so whatever you say is part of the record. So when you yesterday tried to cancel what you had said, please note that it is anyway on record because of the recording. I understand it was interpreted simultaneously. Okay, very good.

14. Mr Turner, anything on the Respondent’s side?

15. MR TURNER: No housekeeping from us, sir.

16. MR PETROCHILOS: Thank you, Mr President.

17. Good morning, Professor Kim. Thank you for continuing to be with us. Let me ask, and I think I know the answer to this question, but it’s good to have it in the record: did you draft the expert reports yourself? I know they reflect your opinion, but my question is about whether others took the pen in drafting them or suggested wording to you.

18. A. No, not at all.

19. Q. Thank you, good to have that.

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20. Now, sir, was the threefold classification of State organs that you told the tribunal about yesterday a classification that was suggested to you by others and you were asked whether you could support it?

21. A. No, it’s fully my work.

22. Q. Thank you, sir. You testified that this threefold classification is supported by what you call a plain reading of the Constitution. But this plain reading that you told us about is not one that, for example, the Constitutional Court has ever set forth in a decision.

23. Am I right about that?

24. A. The Constitutional Court of Korea has never instructed on this threefold classification of government or State organs. That is the conclusion that I reached personally as a scholar based on Article 96 of the Constitution as well as the Government Organization Act that central administrative agencies that are established either by the Government Organization Act or other individual Acts form one of these threefold government -- State organs is, I believe, the inevitable conclusion to be reached based on the Korean Constitution as well as Korea’s positive law.

25. Q. Thank you. You referred yesterday, Professor, to public law professionals. Let us look at a document or a text which I think emanates from public law professionals,
Q. The administrative law is part of public law.
A. (In English) Public administration — association for public administration — not association for public law.
THE INTERPRETER: So to clarify, to correct the previous translation, what he said was that it appears to be an association — a society of public administration, not public administration law.

MR PETROCHILOS: Thank you. Now, this is the entry, Professor, which is titled the “Law of Administrative Organisation”. It starts in the first paragraph with these words:

"The law on administrative organisation refers to the totality of laws pertaining to the organisation of administrative entities. In other words, it refers to law that determines administrative [agencies’] establishment [abolition], composition, authorities, and relationships with other administrative [agencies]."

If we then come to the second paragraph:

"The law on administrative organisation may be divided by the scope of coverage into the law on administrative organisation in the broadly—defined version, the law on administrative organisation in the narrowly—defined version and the law on administrative organisation in the supra—narrowly—defined version."

Then it continues:

"The law on administrative organisation in the broadly—defined version includes laws regulating administrative agencies’ establishment, changes, abolition, composition, authorities, and relationships with other administrative agencies ..."

I pause here. Then we come to the third paragraph:

"The law on administrative organisation in the narrowly—defined version includes only the laws regulating the administrative entities and agencies as prescribed in the laws on national administrative organisation and the laws on autonomous administrative organisation."

Let me pause here and ask you a question.

Forgive me, madam. Mr President, perhaps as the Professor was looking at the authentic text on his screen, we don’t need to have all of this translated into the record.

THE PRESIDENT: Can you perhaps indicate the paragraphs that Dr Petrochilos read and he can read those on his own.

MR PETROCHILOS: Thank you, Professor.

Now, my question. We just read the words “autonomous administrative organisation”. As you told us yesterday, the NPS is an autonomous administrative organisation; that’s correct, isn’t it?
1. organisation law.
2. A. What we need to be careful here is that in full context
3. the administrative organisation that is being referred
4. to here in this document that you have pointed me is
5. actually discussing administrative organisations in the
6. scope of the State, local governments and other
7. administrative organisations, whereas yesterday the
8. testimony I provided regarding State organs — yesterday
9. the testimony I provided regarding the government
10. organisation being threefold was limited to the state
11. administrative organisation that is based on Article 96
12. of the Constitution, the Government Organization Act and
13. other statutes.
14. Q. Thank you, Professor. Let us now turn to look at your
15. writings on the topic. Can I ask you to turn to the
16. document under tab 30, which I believe you will find in
17. volume 2. This is exhibit C-699. It’s a paper by
18. Professor Kim published in the Pusan National University
20. A. Yes.
21. Q. I’m just identifying it for the record, Professor. It
22. is entitled “Governance Democratic Legitimacy and
23. Administrative Accountability Under the Administrative
24. Organization Law”.
25. If we go to page 5, please, it’s page 5 of the

Korean text and the second page of the PDF on our screen
in the English translation. [C/699/2]
Professor, you may wish to refresh your memory as
I am reading this into the record. It says this:
“In general, administrative organisation law refers
to the legal establishment of the creation, abolition,
composition, and authority of entities that exercise
administrative authority (ie administrative
institutions) as well as the relations among
administrative institutions. Despite these abstract
definitions of the administrative organisation law,
because administrative organisations exist in various
forms, such as national administrative organisations,
local administrative organisations, public institutions,
etc, and each organisation's organisational and
operational principles differ significantly from one
another, providing a singular definition of the
administrative organisation law applicable to all these
organisations would be difficult.”

Now, let me establish one thing so that we're clear
between us. ‘Public institutions’ in this text includes
entities such as the NPS and KAMCO. That’s correct,
Isn’t it?
A. Correct.
Q. Secondly, you say in this paper that the law on
administrative organisation does encompass is
applicable to public institutions such as NPS and KAMCO.
That is correct, isn’t it?
A. (In English) Mr Georgios, Georgios, your name?
Q. That is correct.
A. Once again, as I have mentioned, the “administrative
organisations” in this paper is not referring to State
administrative organisations alone. As I mentioned,
here we’re dealing with the broad sense of
administrative organisations that encompass not only
State administrative organisations, but also local
governments, as well as public institutions, administrative organisation.

So public institutions, as I have mentioned, would
be part of the State organisation, but as an indirect
administration.
Q. Thank you. The words “indirect administrative
organisation” are not in your paper, are they?
A. It is. You mean this paper that we’re looking at?
Q. Yes.
A. No, not in this paper.
Q. And the threefold categorisation of State agencies is
not in this paper either, is it?
A. No. Not in this paper because this paper is actually an
analysis of a representative State organ which was the

water management committee — commission.
Q. Perhaps I have missed something in the title of the
paper. Perhaps we can turn to page 1 of the exhibit and
page 1 of the Korean text [C/699/1].
The paper refers to the Administrative Organization
Law which is the Act that you have been telling us about
yesterday as a very important statute in Korea.
A. You mean ——
Q. (In English) No, no, no, not at all.
Q. It is not at all very important as a statute in Korea or
is it not at all important in this paper? I’m trying to
understand your answer.
A. Well, this paper that we’re looking at has nothing to do
with the threefold government organisation structure
that we discussed yesterday or in this case. This paper
actually deals with National Water Management Commission
which is a type of representative government agency that
is governed under the Framework Act on National Water
Management.
Q. Thank you. We have your answer.
I’m still on the topic of that which you call in
this paper a singular definition.
Let us be clear on one point for the discussion
going forward. You told us yesterday that the concept
of State organ that international law has is not used in
Korean law. I believe this is at page 142, line 25 to page 143, line 1 of the transcript {Day4/142:25}.

So you believe are using the concept guk–ga–gi–gwan which has been rendered in the English version of your report sometimes as State organ and sometimes as governmental agency. I’m correct about that?

A. Is it correct that you’ve actually posed me two questions? The first one was that it is difficult to singularly define administrative organisation law, that was one question.

Q. That was not one question. That was not a question at all. My only question is whether I am right in understanding that you use in the English version of your reports the term “State organ” to refer to the concept in Korean law of guk–ga–gi–gwan. It’s a yes—or no question.

A. Would you mind showing me a part of my report where I use that term?

Q. Certainly. If we come to your first report, sir, which is SSK–1, in the record it is G2/1 page 21, for example. Paragraph 11 is a better paragraph. {G2/1/6} So this is in your binder, tab 1 in volume 1. You have your full report.

If you turn to page 4 at paragraph 11 which is now on your screen, you will see it says: “State organs under the Korean legal system are classified into three categories ...” This was your threefold categorisation yesterday. And it says state organs in sub–paragraphs (a), (b) and (c) and what I wanted to be clear on is that here the authentic text in Korean uses the term “guk–ga–gi–gwan”?

A. Correct.

Q. Thank you. Now, correct me if I am wrong, Professor, this is the term, guk–ga–gi–gwan, that consists of two words. It’s a composite word. And so “guk–ga” means state or nation, as I understand it, and “gi–gwan” means agency. That’s correct, isn’t it?

A. The latter part of that word of course may mean an agency, but I would say that the word “organ” would actually refer to a larger scope because the word “agency” would correspond more towards the administrative agency in the sense of a haeng jeong, which is the other Korean word we’ve been discussing, whereas organ would actually be a broader concept that would include the agency.

Q. Thank you. So the term “guk–ga–gi–gwan” is also used in Article 26 of the Constitution; that’s correct, isn’t it? The right of petition?

A. Even though, yes, I do remember our Constitution, do you mind showing that on the screen just for accuracy’s sake?

Q. No difficulty at all. It’s tab 12 in volume 1, exhibit {C/88/6} we are looking at page 6 in the exhibit. I believe in the Korean version it’s page 3. {C/88K/3} So article 26, paragraph 1, as we have it in the English translation in the official compilation, is in paragraph 1 saying this:

“All citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by Act.”

And so the —— forgive me, madam —— and so the word “agency” here in the authentic Korean text is guk–ga–gi–gwan; that’s correct, isn’t it?

A. So yes, it does say here “guk–ga–gi–gwan” in the Korean version of Korea’s Constitution.

To comment on this shared official English version that the parties have been using, even though, as you have just told me, it says “governmental agencies”, my personal opinion would be perhaps ‘governmental organs’ would have been a better wording of that English version.

If I may add my opinion regarding this article and your suggestion, even though, yes, it says “guk–ga–gi–gwan” in the Korean version of Constitution Article 26, paragraph 1 which you say reads “government agencies”, the Article 26, paragraph 1 says that any national has the right to submit a petition in writing to this governmental agency as stipulated in law, and the law that is mentioned here takes form in the Petition Act of Korea.

So if you go to the Petition Act of Korea, it actually specifies a very wide scope of agencies or bodies that are —— that receive or must receive or can submit petitions to, including the State, local autonomous government, as well as organisations, legal corporations, the subordinate institutions under these legal corporations, as well as private parties, private persons that have either been commissioned, entrusted or delegated power by State or local government agencies.

So I would suggest that the best way of understanding the accurate meaning of guk–ga–gi–gwan or governmental agency/organ mentioned in Article 26, paragraph 1 of the Korean Constitution, would be to carefully examine not only the constitutional article itself, but also the Petition Act that practice —— that is based on that constitutional article. And the Petition Act actually prescribes a very wide scope of bodies and institutions that are subject to this...
petition and I would like to add a few more comments.

Q. Professor, we will come to look at the Petition Act; later, I hope. So my question was a little more
limited. I’m grateful for your answer.

Can we please turn to Article 111, which is page 23,
24 of the pdf in the English text, and 11 in the Korean
text {C/88/24}.

THE INTERPRETER: Are we still on the Constitution?

MR PETROCHILOS: Yes, madam.

Q. Is that the Constitutional Court section?

A. Indeed. Professor, can I direct your attention to
Article 111 paragraph 1:

“The Constitutional Court shall have jurisdiction
over the following matters.”

And then paragraph 4:

“Competence disputes between ...”

I pause here. I don’t want to say the English term
“Competence disputes between ...”

And then paragraph 4:

Q. Is that the Constitutional Court section?

A. Yes, it does say between guk—ga—gi—gwan; is that correct?

Q. Thank you. Can I ask that we turn now to page 17 of the
document which is 18 of the English pdf {C/88/18}.

A. Yes. It will, it says here that it is to be stipulated by
law, “law” here referring to the Government Organization
Act. The Government Organization Act then prescribes
that the Ministry or the organisations are Bu under the
President, Cheo under the Prime Minister, and then
a Cheong under each ministers.

Q. My question was a slightly different one. My question
was: this Article 96 does not provide for Cheo; that is
correct, isn’t it?

A. Well, that is what the language says.

Q. And so the legal foundation for Cheo is in an Act; that’s
correct, isn’t it?


Q. That was not my question, sir. The legal foundation for
Cheo is an Act of the State; yes or no?

A. Yes.

Q. Professor, paragraph 2 of Article 86 says this:

“The Prime Minister shall assist the President and
shall direct the Executive Ministries under order of the
President.”

Do you see that?

A. Yes.

Q. Can we please turn to page 21 of the English pdf,
page 20 of the document, Article 96 {C/88/21}.

So in Article 96 it reads:

“The establishment, organisation and function of
each executive ministry shall be determined by Act.”

A. Yes.

Q. This executive ministry that we read in English in
Korean it is Bu; is that correct?

A. Yes, it says "Haengjeong gak Bu".
And then for the sake of the people, because the people need to know what the central administrative agencies do, how they operate, given the fact that it is operated with their tax money, the other procedure that has to be taken is that it is necessary for the Government Organization Act Article 2, paragraph 2, subparagraphs at least to be amended so that this newly created central administrative agency be reflected into the subparagraphs under Article 2, paragraph 2, of the Government Organization Act. Currently there are eight subparagraphs and a central administrative agency that is newly created by the National Assembly based on a specific law would have to be added in there to complete the process.

So if your question is whether a central administrative agency can be established by other laws, that is true, but those processes that I have just described would have to be followed.

Q. Thank you. Since we have the Constitution before us, can we look at Article 97, please. It's still on your screen. I hope it's still on your screen in the Korean version as well.

A. Yes, Article 97.

Q. Thank you. And you testify in your reports that the NPS is subject to the jurisdiction of the Board of Audit and Inspection?

A. Yes, correct, he confirms.

The term “executive agencies” here, Professor, reads haeng jeong gi; is that correct?

Yes, correct, he confirms.

Q. Thank you. And you testify in your reports that the NPS is subject to the jurisdiction of the Board of Audit and Inspection?

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A. Yes, correct, he confirms.
Q. I'm starting at paragraph 2:

"The State shall have the duty to endeavour to promote social security and welfare."

If we turn to the next page, please (C/88/9), paragraph 5:

"Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act."

Now, Professor, let me ask you, this is an important question, and it's a question of public law. The State funds the national pension programme through the pension fund, as you know, which is administered by the NPS.

If the NPS manages the fund poorly and the fund doesn't have the necessary resources to pay out the pensions that it needs to pay, can the State say these were all decisions taken by the NPS? We don't have money to pay out pensions this year. Some people will not be paid.

Can the State say that or is it a duty of the State to fund the pension system?

A. Well, of course such a situation should not occur preferably, but since, as you have posed me a hypothetical, if that does occur, primarily it would lie with the NPS and the NPF which are the entities identified under the National Pension Act to provide the finances for the national pension programme to be liable for that situation.

I do understand that you have pointed me to Article 34, paragraph 2 of the Constitution, which says that the State has the obligation to -- -- I would like to emphasise the word "endeavour" to provide for social security and welfare, and there is this word expression "endeavour" used with -- -- so the expression "endeavour" is used.

So the State's obligation regarding paragraph 5 is a monthly basis. We don't have money to pay out pensions this year. Some people will not be paid.

A. I would not say it would have absolutely no liability, but I also think the premise of your question is incorrect.

Well, the reason why I said the premise of your question is incorrect is because if you do read paragraph 5 that you have pointed me to, it says that the State should protect the citizens that have -- -- that are not able to provide their own -- -- provide for their own livelihood due to disability, disease, old age and other various reasons which has actually nothing to do with the National Pension Programme, the National Pension Programme which would be closer to paragraph 2 of Article 34 of the Constitution, there's actually a benefit that is paid to subscribers to the National Pension Programme, that have paid their contributions on a monthly basis.

So the State's obligation regarding paragraph 5 is actually supported by other bodies of law such as the elderly protection law, the child protection law, as well as the basic livelihood protection laws of Korea. So under those laws, if a Korean citizen finds him or herself unable to provide his or her own livelihood, under these laws the State would provide protection, but that would be separate from the National Pension Programme.
Q. Thank you, Professor. Moving on to something slightly different, let us look now at the case of the Bank of Korea. You have considered the Bank of Korea in your reports.

A. Do you mind showing the part of my report that I deal with?

Q. We will do all of that in order. Let us turn to the Act on the Bank of Korea. It’s exhibit C–534, volume 2 of the binder, at tab 29 {C/534/1}.

A. I’m looking at it.

Q. So this is the Bank of Korea Act. Let me ask you to turn to the first page of the Act in the English text (C/534/2). Thank you.

A. I start with Article 2, juristic personality. I’ll read it out, Professor, in English, and you may wish to read the authentic Korean text:

“The Bank of Korea shall be a special juristic person without capital.”

Now, your evidence is that — your expert opinion is that the Bank of Korea is not a State organ because it has separate legal personality, given the reasons why it remains free from various political influences.

So rather than it being significant in the fact that it recognises Bank of Korea having its own legal personality, the importance is in the fact that the independence of the Bank of Korea from the government and the State is provided for here. Currently Korea is going through a run–up to a presidential election, and various candidates wanting to become President are mentioning various programmes that they propose that would probably require State resources. And against such movement, political movement, the government, for example the Ministry of Economy and Finance, as well as the economy of finance needs to provide a check and balance against these attempts to drain Korea’s financial resources, and the Bank of Korea would also need to maintain its independence, reach its own decisions, for example, regarding currency issues, so as to prevent excessive inflation by random issuing of currency.

Q. Thank you. Can it be designated — I’m not saying yes or no?

A. (In English) Yes. Yes, yes.

(Interpreted) Yes, correct. It is not a central administrative agency, nor is it a public institution that is designated by the Minister of Strategy and Finance.

Q. Thank you. Can it be designated as a public institution?

A. My view is that it cannot.

Q. Thank you, Professor. Do I have it right that the Bank of Korea, because it has separate legal personality, cannot be designated as a central administrative agency; yes or no?

A. (In English) Yes. Yes, yes.

So to answer your question once again I would say that it cannot be designated as a public institution and I would say that even though public institutions are provided — are entities that have their separate legal personalities, and are granted certain scope of independence and autonomy, as we discussed at quite length yesterday, public institutions or entities that are designated as public institutions are subject to a certain degree of supervision and oversight by, for example, the competent minister.

So if we assume a situation where the BoK is designated as a public institution, it would probably be then put under the supervision of the Ministry of Economy and Finance, and, for example, in that case, if the minister wants to have interest rates lowered because he actually thinks that there is a need to boost up the economy, the question is whether, for example, the Bank of Korea and the Finance and Currency Commission under it that oversees the monetary policies would be able to maintain its independence free of such political — such supervisory pressure coming down from the minister.

The fact that the Bank of Korea is not a part of the State organ, nor has been designated as a public institution, is actually the expression of the
collective intelligence of the Korean people who see it critically important to maintain independence in the operation of its central bank.

Q. Thank you, Professor.

A. And so there is no need or room for further discussion of that issue.

Q. Thank you, Professor, for this very full answer.

Can I move on, please, with the Act. Let us look at Article 1, which is the purpose of the Bank of Korea.

It is —— I read from paragraph 1 —— to contribute to the sound development of national economy through price stabilisation through the establishment and execution of efficient monetary and credit policies.

I pause here. Would you characterise price stabilisation and the efficient monetary and credit policies as an activity which —— I’m using the terms of your report —— is generally one that is governmental in nature?

A. Yes, generally that would apply, but I do feel the need to provide additional explanation about the overall Korean legal framework, starting from the Constitution.

The Constitution does place with a State various tasks, mandates that the State needs to perform. These are public mandates and tasks, including welfare, economic growth, as well as stable inflation.

Even though these are public tasks and State tasks that the Constitution places with the State, the question of how to go about and perform these tasks are then to be stipulated in laws. For example, if we take public education, which I believe you will agree is a very important State task, that is required by the State —— by the Constitution.

The question is how to go about and perform this education service to its people as required. It could be through a State school system or it could be through a private school system. It could be either/or both, and so that would actually be then determined at the law level.

So because education is an important public task, the legislation, legislative body would go about and provide for how to implement that State task, whether it’s through the national school law or through a private school law or either/or both. So there will be flexibility at the law level of how these State and public tasks placed with the State is performed.

The same would go to the currency and the —— the currency and the inflation policies that you’ve mentioned. That is also an example of an important State task, and whether to go about performing that as directly by the State organ or through a public institution or by an entity that is independent, and either a State organ or a public institution is something that is determined by the Constitution and legislative body which actually originates its powers from the people, because Korea is a country that recognises that the source of the State power lies with the people, and because there is no way for the people to perform or realise their power directly, that is why Korea provides for a legislative body, the National Assembly, and it is always through the decisions of the legislatures that this is stipulated by law.

Q. Thank you, Professor. I have your answer.

I am asking you questions about the Bank of Korea Act. I will be grateful to you if you answer my questions based on this specific Act to which I’m directing you for now.

A. Back to —— yes, back to the Bank of Korea, what was your question about the Bank of Korea Act?

Q. Exactly my point.

Let’s pick it up again from Article 1. Professor, I have not asked you a question. I suggest that you please look at Article 1.

Article 1 says that: “The purpose of this Act is to contribute to the sound development of national economy by establishing the Bank of Korea and seeking the price stabilisation through the establishment and execution of efficient monetary and credit policies.”

I’m stopping here and my question to you is this: is this an activity which is governmental in your view; yes, no, or would you prefer not to take a view?

A. It is governmental.

Q. Thank you. I want to direct your attention to Article 4, paragraph 2, which is still on the same page in the English version. {C/534/2}. It says this: “The Bank of Korea shall value the market mechanism in performing its monetary and credit policies.”

I want you to have this provision in mind as we turn to look at another provision now which is at page 21 of the pdf, Article 68. Can we also have the Korean text, I’m reading for the record the English text: “The Bank of Korea may sell, buy, lend, and borrow the following bonds in open markets on its own account in order to implement monetary and credit policies as determined by the monetary policy committee.”

Then if we come to paragraph 3. “Other marketable securities determined by the monetary policy committee.”
Pausing here, now that you've looked at the provision, Professor Kim, is this selling, buying, lending and borrowing bonds a governmental activity in your view; yes, no, or would you prefer not to express a view?

A. I do agree that at a broad sense, in a broad sense, it is indeed a governmental activity, but I would not agree if you are trying to therefore then lead on to the connection that this is a government agency.

Q. Thank you, sir. Can we now turn to page 25 of the English pdf text {C/534/25}. Article 82. This is about foreign exchange activities and it says: "The Bank of Korea may perform the following business after obtaining authorisation from the Minister of Strategy and Finance:

1. Foreign exchange business and foreign currency holdings;
2. Receiving deposits from foreign financial institutions, international financial organisations, foreign governments and their agencies, or the United Nations;
3. Selling and buying precious metals."

Now that you've looked at this, is this kind of business or activity, as it's described here, governmental activity, yes or no, or would you prefer not to express a view?

A. Well, I don't know exactly, and I do not think this was addressed in my report, but if I try to answer your question within the knowledge, the broad knowledge that I have of this, my understanding on how, under the Act on the Management of Public Institutions, the Committee designates or releases public institutions is as follows. Broadly they are classified on the number of employees -- which demonstrates an institution's size -- and whether an institution's own revenues are over 85%, that is, the ratio of its self-generated revenues. I do not know precisely.

Q. No, forgive me. Forgive me. Forgive me. We have the answer so far not to express a view?

A. Yes, I don't know exactly, correct.

Q. I'm shifting gears on to something else. We will now discuss about quasi government public institutions.

Can I ask that you turn to exhibit C-278 which is in volume 2 of your materials. (C/278/1). Now, this document is a press release issued by the Ministry of Economy and Finance. 24, forgive me for that. It's tab 24 in volume 2.

A. Yes.

Q. So this is a press release issued by the Ministry of Economy and Finance at the end of January 2018.

It's issued by the Director of System Planning in the Department of the Public Policy Bureau. And as you will see in the box which follows under the heading, the heading of the document is "Designation of Public Institutions for 2018". You will see that: "The Ministry of Economy and Finance finalised the designation of public institutions for 2018 through deliberation and decision by the Public Institution Management Committee ..."

Let me ask you: do you know if this Public Institution Management Committee has criteria which they follow in designating an entity as a public institution and thereafter in classifying it in one of the several categories of public institutions?

A. Well, I don't know exactly, and I do not think this was addressed in my report, but if I try to answer your question within the knowledge, the broad knowledge that I have of this, my understanding on how, under the Act on the Management of Public Institutions, the Committee designates or releases public institutions is as follows. Broadly they are classified on the number of employees -- which demonstrates an institution's size -- and whether an institution's own revenues are over 85%, that is, the ratio of its self-generated revenues. I do not know precisely.

Q. If the Professor knows that there are criteria that have been published in a document, that is what my question
is. And so what I’m asking you, Professor, is: did you
care to investigate whether this committee has published
or adopted written criteria, a set of criteria, for
making these designations? That is my question.
A. So if your question is whether — if I exerted efforts
to investigate such criteria, my answer would be no.
Q. Thank you. We have, I believe, some indication of the
criteria if we turn to page 2 of the English text. I’m
not sure where it is on the Korean document. It is
a bullet point which starts with the words “in this
PIMC” which means the committee, the Public Institution
Management Committee. Can you find it, madam, and
direct the Professor’s attention to it? {C/278/2}
THE INTERPRETER: So it would be, I think, the following
page in the Korean version, the second page.
MR PETROCHILOS: I think it is the third indented paragraph
indicated by a little square; can you see that?
A. So it’s about the hiring corruption, employment
corruption?
Q. Correct. So as you are reading it in Korean, I’ll read
it for the record. So it says this:
“In this PIMC, there was an opinion that the
Financial Supervisory Service, which was subject to
recent criticisms by the Board of Audit and Inspection
of Korea for employment corruption and lax management,
should be designated as a public institution.”
Let me pause here so we’re on the same page.
A. Yes. I’m looking at it.
Q. Very well. The Financial Supervisory Service is an
entity, indeed a special legal person, under the
Financial Services Commission. That’s correct, isn’t it?
A. It is a special legal person without capital.
Q. Under the supervision of the Financial Services
Commission; correct?
A. Yes, broadly correct.
Q. Very well. Let’s continue with the text:
“Upon considering the fact that discussion on
re—organisation of the financial supervisory regime will
progress in earnest from this year, it was decided that
such designation would be deferred.
“However, the Financial Services Commission and the
Financial Supervisory Service will establish a plan ...
Are you with us, Professor, “will establish a plan”:
“… to eradicate employment corruption and improve
the observations made by the Board of Audit and
Inspection of Korea regarding inefficient organisational
management … and
“Perform management disclosure to the level of
a public institution and implement strict management
evaluation such as having at least one person within the
public corporation/quasi government body management
evaluation group participate in the evaluation.
“The Financial Services Commission will report its
implementation performance to the PIMC and the PIMC will
designate the Financial Supervisory Service as a public
institution in 2019 if the implementation results are
unsatisfactory.”
Professor, having seen these observations here or
conclusions by the PIMC, it seems to me ——— disagree if
you will ——— that the designation of an entity as
a public institution serves to align the operation of
that entity with good public administration, good
practices and public supervision; do you agree or
disagree or do you not care to take a view?
A. I do not think I dealt with this topic in my expert
report. I also understand the intentions of your
questions. This being a government public press
release, I do not believe that it would contain false
information so I would also agree that the designation
or release of an entity with a public institution may be
for such purposes.
Q. Thank you, Professor.
Let us turn, please, to page 6 of the English text
(C/278/6). I can’t help you with what exactly it is in
Korean. It’s 7 in the Korean text. {C/278K/7}.
Sir, what you see here, and I think the same
document was traversed with Professor Lee yesterday,
what you see here is a number of entities which are
classified by certain categories. I would like us to go
through the categories briefly together.
So on the top left—hand side we have market—type
public corporations, immediately following, quasi—market
type public corporations, and immediately thereafter we
have fund management—type quasi—government bodies, of
which we have 16.
A. Yes. I’m looking at it.
Q. And then if we turn to the next page, please {C/278/7},
both in the English and in the Korean version, we have
bodies which are described as delegated execution
quasi—government bodies.
A. Yes. I’m looking at it.
Q. Thank you. Now, having described that, can we go to the
quasi—government bodies that we were looking at on
page 6 again, please {C/278/6}.
A. So the fund management type you are referring to.
Q. The fund management type, indeed.
Let me ask ——— I’m looking at the third entry. So
the third entry includes two entities, I believe under
the Ministry of Energy?

Q. Yes, I’m following you.

Q. Very well. The Korea Trade Insurance Corporation and the Korea Trade Insurance Agency do you see that?

A. Yes, I’m looking at it.

Q. That is the agency that ensures radioactive waste management in Korea, is it not, sir? If you don’t know, you don’t know.

A. I’m not sure.

Q. All right. Let me ask the question in the abstract. We looked at governmental activities earlier. In your view is the management of radioactive waste governmental activity; yes or no, or would you prefer not to take a view?

A. It is a governmental activity. However —— so controlling nuclear waste would be a governmental activity. However, how to perform that activity, that governmental activity, would be up to the choice of the legislator, whether to do that through a government agency, whether to do that through a State agency, or whether to do that through a public institution is a choice up to the legislator.

So if in this case the legislator has chosen that in the case of managing nuclear waste, for example from nuclear reactors, is a government affair to be performed by a public institution.

Q. Thank you. Let’s look a few lines down, please. This is now the penultimate designation, under the FSC, which we now know is the Financial Services Commission. So we have two bodies listed there, two juridical persons: the Korea Asset Management Corporation and the Korea Housing Finance Corporation. The Korea Asset Management Corporation is the entity we spoke about briefly yesterday called KAMCO.

Sir, we know the NPS doesn’t have any capital. Do you know if KAMCO has capital?

A. I think I have already said several times that I’m not very familiar with KAMCO.

Q. Very well. I’m moving on then to something else which is about voting in respect of the merger. So perhaps we can take down that exhibit because it may distract the witness which is not helpful.

Sir, voting rights for shareholders of a company derive from their ownership of shares. That is correct, isn’t it?

A. Correct.

Q. And as you acknowledge in your reports, the Korean courts have ruled that the ownership in the shares that are held in the National Pension Fund vests in the State, not in the NPS, which merely administers the fund.

A. Would you mind showing me that court decision?

Q. I’ll be very happy to. We can pick up the two decisions on the issue first at tab 22 in volume 2. This is exhibit C—252. {C/252/1}.

THE INTERPRETER: I think you have the wrong exhibit.

MR PETROCHILOS: C—252 in both the English and the Korean version. As I say, tab 22 in volume 2, madam.

THE INTERPRETER: Yes, I have found it.

MR PETROCHILOS: Does the Professor have it in front of him?

A. Yes, I’m only at the first page. Is there —— can you show me the part of the decision that says what you have just described?

Q. I will be coming to that. First I need to identify the document.

So this is a District Court decision, as you can see, in a case involving the National Pension Service, the NPS, against the mayor of a city. This is a decision issued on 25 August 2015.

If we turn to the second page {C/252/2}, you will see the facts are very simple under letter B. It says:

"Plaintiff NPS acquired 86% of the outstanding shares ... issued by Seoul Beltway Corporation ... out of the National Pension Fund on June 29, 2011.”

If we can turn to the third page, {C/252/3} in the Korean heading it is section 2, subsection A, subsection 1. Here it describes the claims of the plaintiff NPS and here is what the NPS said:

"The National Pension Fund belongs to the State, and Plaintiff NPS simply conducts management and operation of the National Pension Fund entrusted by the Minister of Health and Welfare. Therefore, since the subject taxable article was acquired by the State, it constitutes a non-acquisition—taxable item pursuant to the ... Local Tax Act.”

This was the argument, sir, of the NPS. If we can turn to page 4 of the English text {C/252/4} which is part of the judgment, I’m looking at section C, subsection 2, if it helps situate this in the Korean text:

A. Yes, I’m looking at that part.

Q. Thank you, sir.

The question identified by the court is whether the entity that acquired the subject shares is the State.

A. Correct.

Q. And as you acknowledge in your reports, the Korean courts have ruled that the ownership in the shares that are held in the National Pension Fund vests in the
Q. Page 3 in Korean, I'm advised.
A. We're still on A.

THE INTERPRETER: So this is B, parenthesis 2?

MR PETROCHILOS: Yes, that is correct, madam, thank you.

So I'll start again:

"Plaintiff's duties to manage and operate... the National Pension Fund were entrusted by the Minister of Health and Welfare, the entity responsible for managing and operating the Fund under Articles 25 and 102 of the National Pension Act and Article 76 of the Enforcement Decree of the Act. Even if [the] Plaintiff..."

The plaintiff, sir, is the NPS in this case:

"...exercises the voting rights for the subject shares in practice, as the legal effect of such duties is attributed to the State being represented by the Minister of Health and Welfare, it is appropriate to conclude that the entity that acquired the subject shares is the State."

So these are the judgments that you asked me to show to you, but I think you acknowledge in your reports these holdings, the effect of which is that the owner of shares in the National Pension Fund is not NPS but the State.

A. Yes. As you have just explained, that is what this says. But I would like to add the explanation to that and that is that this question -- the matter at issue in these two cases was when the NPS, the service, acquired shares in the market. That activity then was imposed...
In terms of the transaction, the NPF fund is not —— does not have a legal personality. The NPS is a corporation, and therefore has a legal personality, but the fund does not have a legal personality.

So the fund itself could not be the actor of the activities or be the owner of the shares, and so if there are any fruits born of the activity, that fruit would belong to the fund, but ultimately through the fund the State, because the NPF, the fund, is classified as general State property.

So once again this was a court decision that was based on the tax principle of substance over form, and there —— which is also very —— it's a very well—known principle under German law, which is observation which is in German, even though I will not use the German term, is known as the economic observation principle.

Q. Thank you, sir.

So we analyse the implications, so we understand the implications of this substance over form with which I agree, we have now seen that the owner of the shares in legal terms is the State and the NPS exercises —— I can direct you to your screen again —— the court says duties to manage and operate the National Pension Fund, given —— this is my question to you. Given that the NPS is not the owner of the shares, when it votes in respect of these shares, for example whether to accept or not to accept a merger of the company in which it holds shares, the NPS is exercising a public duty entrusted, as the court says here, entrusted by the Minister of Health and Welfare under articles 25 and 102 of the National Pension Act. Do you agree with me?

A. Well, I do not dispute the fact that it has been entrusted with public duties from the minister, but just because it has been entrusted with that public duty or those public duties, it would be too simplistic an understanding to say that the acquisition of shares, as well as exercise of rights by the NPS, is also an exercise of public duties.

This is, I believe, a very critical point and with the indulgence of the chair, I would like to perhaps have the opportunity to explain this for about two to three minutes.

Q. I think I have my answer, but of course I’m in the tribunal’s hands.

THE PRESIDENT: You want to elaborate. I’m sure you will have an opportunity with the counsel for the Respondent. So please go on.

MR PETROCHILOS: Sir, this is not a public law question that I’m going to ask you, so feel free to say you don’t take a view or you don’t want to answer.

What is the private law analogy of a situation where I have some property but I am asking you because I trust you, Professor Kim, to manage this property and I’m giving the handling of my affairs to you; is that called a mandate in Korean law?

A. Are you referring to a trustship?

Well, the Claimant’s counsel has —— so are you referring to delegation, a delegate and a deleger relationship, or ——

Q. Yes. Yes, indeed.

A. So it’s ——

Q. That is what you call it?

A. I’m not sure. You have asked me that question, but frankly, I’m not sure how to answer that question.

MR PETROCHILOS: Forgive me, Professor. You’ve been very patient with me.

Thank you.

Mr President, that concludes my cross—examination.

THE PRESIDENT: Thank you, Dr Petrochilos. Mr Bhat, do you have questions in redirect?

MR BHAT: Mr President, with your permission, if we could request a two—minute recess to confer with my colleagues?

THE PRESIDENT: Let’s take five minutes so we can use it for other purposes as well.

(11.30 am)

(A short break)

(11.34 am)

THE PRESIDENT: Yes, Mr Bhat.

Re—examination by MR BHAT

MR BHAT: Thank you, Mr President. Just one question, Mr President. If I can request that page 52 of the [draft] transcript be put on the screen, line 22.

There was a question there from counsel opposite.

“Question: So we analyse the implications, so we understand the implications of this substance over form with which I agree, we have now seen that the owner of the shares in legal terms is the State and the NPS exercises —— I can direct you to your screen again, the court says duties to manage and operate the National Pension Fund, given —— this is my question to you. Given that the NPS is not the owner of the shares, when it votes in respect of these shares, for example whether to accept or not to accept a merger of the company in which it holds shares, the NPS is exercising a public duty entrusted, as the court says here, entrusted by the Minister of Health and Welfare under articles 25 and 102 of the National Pension Act. Do you agree with me?”

And the response by Professor Kim:

“Answer: Well, I do not dispute the fact that it
has been entrusted with public duties from the minister, but just because it has been entrusted with that public duty or those public duties, it would be too simplistic an understanding to say that the acquisition of shares, as well as exercise of rights by the NPS, is also an exercise of public duties.

“This is, I believe, a very critical point and with the indulgence of the chair, I would like to perhaps have the opportunity to explain this for about two to three minutes.”

My question, Professor Kim, is would you like to explain this, what you wanted to explain before?

A. Would somebody be able to put up Article 102 of the National Pension Act?

MR PETROCHILOS: Let me see if I can try to help. It’s in the cross—examination binder, tab 9. It is exhibit C−77, but you also have it under tab 9 in English and in Korean. {C/77/1}, in volume 1.

THE INTERPRETER: That’s Article 102.

A. So may I answer?

So yes, we are looking at Article 102 which Professor Lee also discussed yesterday. Paragraph 1 provides that, yes, the funds shall be managed and operated by the Minister of Health and Welfare. This is followed by paragraph 2, and the key point of paragraph 2 is that the Minister then entrusts this public duty to the NPS, and I do not dispute once again that what the NPS is entrusted with consists of public duties.

However, just because the management and operation of the Fund, which is entrusted by the Minister of Health and Welfare to the NPS, is a public duty, whether the practical act of the NPS of managing the fund, that is, the acquisition of shares or exercise of voting rights that come with the acquisition of shares, is a public duty — it is a public duty, but conducted via transactions under private law, such as the Civil Code or the Commercial Code.

So as Professor Lee mentioned yesterday, in paragraph — in Article 102, paragraph 2, the Article 102, paragraph 2 provides for some of the principles that apply to the management of the fund, including the profitability principle, as well as stability principle, and then Article 103, paragraph 1, subparagraph 1 provides for the operational guidelines of the fund to achieve maximum profits would be very important as a principle, given the situation that the country faces in terms of ageing population.

And then I would like to take you to paragraph 3 of Article 102, which is a very important paragraph.

So we were on paragraph 3 which actually provides that the — a bona fide effort should be made to outperform market rate returns in cases other than those under paragraph 2, subparagraph 5 and 6.

Subparagraph 5 and 6 of the paragraph 2, which is right above it, are the welfare loan services, as well as the acquisition and disposal of property for achieving the primary objective of the Fund. So other than these activities under items 5 and 6, there are the purchase, sale, and lending of securities under item 3, and transactions in derivative for indexed financial products under item 4.

So paragraph 3 requires that an effort be made to not only meet market rate returns, but to actually outperform market rate returns. So this very clearly states that maximising profitability is a very important principle when the NPS is to go about managing the fund.

I have actually had the chance to talk over the phone with people, staff in the IMF department of the NPS, and they have told me that in the front lines of managing the fund they are very conscious of this need for maximising profitability, that they personally, for example, would not be entitled to year-end bonuses if their performance, the asset management performance, does not meet certain target levels.

So given the fact that there is dire demographical needs to provide for old age of the Korean population, maximising the profit, the returns of the National Pension Fund is of great importance, which requires, for
MR PETROCHILOS: Mr President, I don’t believe I asked that question. There are many people who know much more about this than I do. My understanding is that it is established within the Ministry, but I may be wrong on that.

MR PETROCHILOS: Forgive me, it’s page 33 exactly in the organigram of the Ministry to look at Figure 4 of the CK Lee report, the first CK Lee report. Otherwise, the legal texts would say which committee prepared what. They are already in the cross–examination binders and we can put them up as well.

MR PETROCHILOS: It’s relatively straightforward to do so, sir. Give us a minute. I think it’s the NPA.
2. I do understand that the question that I have been posed by the arbitrator is whether this Expert Committee consists a State organ, according to my criteria.
3. I’m very sorry to once again ask for the screen to be switched, but I would have to refer to Article 2, paragraphs 3 through 5 of the Government Organization Act to give you a certain answer, even though at this layer it does look clear that the Expert Committee belongs to the administrative organisation, the State administrative organisation, but please can somebody show me Article 2 of the Government Organization Act. Actually, can someone put up the amended Government Organization Act, the more recent one that’s been updated?

MR BHAT: I believe that’s SSK – 53. (G/43/1)

A. So this is the updated version. Can we look at Article 2, paragraph 7.

So the reason why I have guided you towards Article 2 of the Government Organization Act -- well, first of all, it says in -- -- I think it was paragraph 2 that the Bu, Cheo and Cheong, the Ministries and the Cheong shall be set forth or established by law.

And then we have the following paragraphs. After we skip the entire body of paragraph 2, and go down further...

THE INTERPRETER: So, we’re still on the English page, we’re still on paragraph 2. So these items are -- -- these items are under paragraph 2. He has actually requested for paragraphs, I think, 6 and 7.

(Interpreted) That goes through the very details of under which Ministry what subsidiary agencies or affiliate agencies which are Bo–jo–gi–gwan or Bo–jwa–gi–gwan are to be established, and some are to be established by the ordinance or decree of the Department, or Minister or ordinance or decree of the Prime Minister, some are to be created or established by the decree of the President.

So there are these ministries identified as well as the decrees of different Ministers, Prime Ministers, or the President that are to be used to establish other entities.

So to answer your question, Mr Garibaldi, in order to answer a question of whether the Expert Committee is part of the government organisation as I understand, I would have to go through first of all the exercise of looking through all of the Presidential decrees, Prime Minister decrees or ordinances or Minister ordinances that extend from here and to see whether the Expert Committee has any grounds in there.

If there is actually -- -- if the Expert Committee is covered, then it would be part of the government organisation. But if it is not. Then it would not be part of the government organisation that I understand. I think the latter is most likely at this point, even though I have not gone through the exercise of looking through all of the ordinances.

For example, there is a possibility that the Expert Committee has its grounds in enforcement rules of the operation regulation of the -- -- or administrative rules. These enforcement rules or administrative rules are bodies of provisions that are adopted by entities for their internal purposes alone, without any delegation provided by superior laws.

And so in that case most likely the Expert Committee would be classified as something that we have been referring to as a representative administrative agency in which case it would not be part of the central administrative agency hierarchy that I have in mind.

MR PETROCHILOS: Mr Garibaldi, may I seek to help by just putting up the Act? It’s C–77 under tab 9 in the cross-examination materials, and the English page is 42 (C/77/42), Article 103, paragraph 1 of the Act. I think it answers your question, sir.

A. So Article 103 would be about the Fund Operation Committee.

I was just pointing out paragraph 1 -- -- subparagraph 1 of Article 103, which sets forth about the adoption of the Fund Operational Guidelines. And so the operation guideline, if my understanding is correct, is to be adopted, promulgated, by the operation committee, the Fund Operation Committee. My understanding is that the Voting Expert Committee has its grounds in the Voting Guidelines.

Also, if my understanding is correct, the Article 103, paragraph 1, subparagraph 1, which the Claimant’s counsel has pointed out, provides for the operational guidelines which provides for the IM, the NPSIM and the Investment Committee that we have talked about yesterday.

My understanding is that the Voting Expert Committee is actually grounded in the Voting Guidelines which my understanding, if it is correct, would be an administration or administrative rule which, as I previously described, is a set of rules that are adopted by a body without any delegation from superior laws, and therefore if the Voting Expert Committee is as I assume based on a set of administrative rules, the Voting Guidelines, then it would be classified as...
a representative administrative institution and not be
part of the central administrative agencies.
MR GARIBALDI: Well, it seems that we cannot resolve this
issue because you have not studied the point and so you
are speaking in terms of possibilities.
But it looks as though in your opinion, whether the
Experts Voting Committee is a State organ or part of
a State organ depends on this analysis of delegation,
and does not depend on the functions it performs; is
that right?
A. Correct.
MR GARIBALDI: Okay. I think that that answers my question,
thank you very much.
THE PRESIDENT: I have one further question which is — —
deals with something that you were not asked about.
In both of your reports you discuss the question of
whether certain acts taken by an administrative agency
are dispositions or whether they are not dispositions.
I understand there is a disagreement between you and
Professor Lee as to whether the exercise of voting
rights constitutes a disposition under Korean law, and
maybe — — this is not the question yet, but you may want
to translate already.
THE INTERPRETER: I think, sir, the translation is being
provided simultaneously.

THE PRESIDENT: Apologies.
So I understand you don’t necessarily agree. It
seems you and Professor Lee don’t agree on whether
exercise of voting rights constitutes a disposition
under Korean law, but it seems to me that you do agree
where disposition is defined you both refer to the — —
just a second — — Administrative Litigation Act, and
maybe we can look at that.
Its C–135, Article 2.1. Professor Lee says that
this defines the term “disposition” and the same
definition is apparently also available or included in
the Administrative Appeals Act which is C–128 (C/135/2).
We now see that on the screen.
Article 2.1, and we understand — — I understand that
you both agree that if an administrative act or an act
of an administrative agency falls within the definition
of a disposition under this provision, there can be a — —
a citizen may file an administrative litigation in
accordance with this Act; is that your understanding as
well?
A. Well, yes. So the condition would be if the act
constitutes a disposition within the realm of the
National Pension Act, an example of what constitutes
a disposition would be. For example, looking towards
Article 25, paragraph 1 of the National Pension Act, the
imposition by the NPS of pension contributions or
premiums or in other ways rejecting an application for
pension benefits if someone believes that he is entitled
to pension benefits, applies for it, but the pension
service rejects that. Those two, for example, would
constitute a disposition and a person may file an
administrative process claiming that such a disposition
is unlawful and seeking its revocation.
THE PRESIDENT: I believe in one, I think it was in your
second report, you also referred to a decision of
a Supreme Court.
I believe it’s — — I think it’s in your first report,
page 23. {G2/1/23}. It’s a footnote, if I can find it.
MR PETROCHILOS: I believe it’s G4, Mr President, 18. I say
that for our friends at Opus. And it’s in the binders
that the Professor has.
THE PRESIDENT: I think it’s SSK
— — SS K–3 or SSK–2. I think it’s
the same. I just couldn’t find it now. It’s a footnote
in one of your reports. Professor, you may remember
whether it’s in your first or in your second report.
A. Sir, this is not a Supreme Court, but a Constitutional
Court decision.
THE PRESIDENT: Yes, it’s a Constitutional Court. {G4/18/1}
Give me a second. Yes, I think it’s page 23 of your
first report, and it’s footnote 81. It’s
a Supreme Court of Korea decision.
MR BHAT: It’s SSK–3, members of the tribunal.
We don’t necessarily need to go into this court
decision now. This is a decision from 2000. My
question to you simply is: is this an elaboration on the
provision that we were just looking at or is this
another way of looking at — — what is the legal basis for
the court’s decision here? They are referring to the
State Property Act and they also discuss what
“disposition” means (G2/4/1) in this particular
decision, but they are not referring to the law that we
are — — that we were looking at just a while ago.
The Administrative Litigation Act. We understand
that this is not an administrative litigation because
it’s a decision taken by the Supreme Court. So what is
the legal basis for the court’s understanding what
a disposition is in this decision?
A. Mr Chairman, I very much appreciate your question
because your question bears upon a very important topic.
The reason why I cited this court decision as part
of my report is the following: because even though it
does not directly reference the National Pension Act, it
does address the management of the Fund in the fact that
it addresses the management of other State properties
that are classified in the same group as the National Pension Fund.

As I’ve already explained, under the Korean State Property Act, there are two large types of State property. One is the administrative property. The second is —— was described as general property which used to be referred to as miscellaneous property in the 2000s. There was a change in nomenclature since.

So in this court decision, when the court refers to miscellaneous property, that is actually the previous name that was used to refer to general property under which the National Pension Fund currently belongs.

The administrative property, which is the first type of State property, is defined as State property that is used directly by the State for administrative purposes.

So these would be, for example, items and goods that are used, and that administrative property, State property, is then subdivided into four categories.

THE INTERPRETER: The Professor has given me these four category names. I’ll try to provide my layman translation of them, but I’m not certain that they would correspond to the authoritative English names to it.

(Interpreted) So the four sub—categories of the first type of State property — administrative property — would be properties for official use, properties for public use, properties for government enterprises, and lastly, properties for preservation.

So these four types of administrative State properties fall under the domain of administrative law. So when these properties are loaned or lent or otherwise used, that transaction would form a disposition that we have been addressing.

On the other hand, when properties that fall under the second category, that’s miscellaneous, currently known as general property, general State property, including the National Pension Fund, those transactions would fall under private law. Those would be civil law domains, and therefore if in the course of conducting transactions under these general State properties a private person suffers a loss or damage, then that damage relief would be —— would need to be sought through civil litigation and not an administrative procedure, because that transaction does not constitute a disposition, and that is the finding being provided here.

THE PRESIDENT: Forgive my ignorance, but there are two types of litigation in Korea, as I understand it: civil litigation and administrative litigation. Do they go to the same court system or is there a separate Administrative Court branch?

A. In Korea there is an Administrative Court, and under Korean legal framework administrative litigations do belong under the jurisdiction of the Administrative Court.

But due to various reasons, including limited budget, currently there’s only Administrative Courts set up in Seoul, the capital city, and the Administrative Courts that located in Seoul serves as the first instance court for administrative procedures. And it only deals with, therefore, administrative procedures on the first instance.

The second and third instances of administrative litigations are then dealt with as part of the regular court system.

THE PRESIDENT: Okay, understood. That is very helpful.

Thank you very much.

Thank you very much, Professor Kim. That concludes your examination.

THE WITNESS: Thank you very much. I truly appreciate it.

THE PRESIDENT: We are a little bit ahead of time actually. The lunch is scheduled for 12.50. We have two options. We break for lunch now or we have —— we hear Professor Lee’s presentation before we go for lunch. We are flexible. I’m afraid if we break for lunch now, we have to wait for food for quite some time.

THE SECRETARY TO THE TRIBUNAL: Mr President, if I may briefly intervene. Given that we started earlier than foreseen on the schedule, we have actually forewarned the hotel that they should be ready to set up lunch at 1230 so we’re right on time as far as the hotel is concerned.

THE PRESIDENT: Let’s break for lunch then and we will resume at 1.30. Thank you.

(12.29 pm)

(1.30 pm)

MR GARIBALDI: Before we start I have something in the nature of a quasi public announcement.

Early today I found a lady’s purse, black, on a bench and I know that it had been left there by a Korean lady. I gave it to another Korean lady and I would like to know if it found its owner. (Pause) All right. I’m happy now. Thank you.

PROFESSOR SANG—HOON LEE (called)

(Evidence given through an interpreter)

THE PRESIDENT: Good afternoon, Professor Lee.

THE WITNESS: Good afternoon.

THE PRESIDENT: Welcome. You have been called as an expert witness in this hearing and for that purpose you are expected to express your opinion in accordance with your
sincere belief. For that purpose I would ask you to
read the statement or the declaration of an expert
witness that you should have in front of you, please.

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

THE PRESIDENT: Thank you very much, sir. I understand you
will be making a presentation instead of a direct
examination. So the floor is yours, please.

Presentation by PROFESSOR SANG—HOON LEE

THE PRESIDENT: Thank you very much, sir. I understand you
will be making a presentation instead of a direct
examination. So the floor is yours, please.

First I would like to explain to you about the
concepts of the merger and merger ratio. A merger is
a transfer of the entire assets, liabilities and
operations of the non—surviving entity to the surviving
entity by issuing shares of the surviving entity to the
shareholders of the non—surviving entity.

This is of course covered by the commercial law of
Korea, but then I believe this is applicable to any
activities that are happening worldwide with relation to the
M&A.

I would like to draw your attention to the target of
the merger. So the assets, liabilities and the
operations of the non—surviving entity would be the
target and in fact the shares are something that are
provided as something in return.

So in Korea other than the shares, bonds can also be
paid out as something in return.

The shares are being issued at a certain proportion.
The merger ratio in effect is the number of shares of the
surviving entity to be issued for one share of the
non—surviving entity.

And the merger entity —— merger ratio is not just
a vague concept. It is in fact based on the Korean
Commercial Act.

If you look at the Article 523 of the Commercial
Act, it requires any merger agreement to identify how
many shares in the surviving entity will be issued for
each share held by shareholders of the non—surviving
entity.

And for the company to meet this requirement, the
companies have to calculate the value and then identify
the merger ratio.

Next slide, please.

Then I would like to explain to you about how the
merger ratio is calculated. On this point, in the
Commercial Act, we do not have any special stipulations
that is within the Commercial Act, but then across the
world I believe that the common method of calculating
the merger ratio is as follows.

It is in four different steps.

The first step is to calculate the total enterprise
value of each merging entity, and then in step 2 you
would divide the enterprise value of each merging entity
by the number of shares in each entity.  
When you do so, you will be able to derive the per share value of each merging entity, which is step 3.
Then step 4, you can calculate the merger ratio based on the per share value of each merging entity, and then this will result in the merging ratio.
But in Korea, when it comes to the listed companies, there is a rule in the Financial Investment Services and Capital Markets Act, and that actually lets the companies omit steps 1 through 3 and use the trading price weighted by trade volume as a substitute for step 3 above. This is in fact mandatory, and this is something called statutory formula.
For the non-listed companies in Korea, the abovementioned four steps are something that are followed.
Next slide, please.
Statutory formula is mandatory, according to the FISCMA, and I would like to explain to you in detail how it works.
It is in fact stipulated in detail in the FISCMA and its Enforcement Decree.
The merger value for each company is obtained by calculating the average of three publicly traded closing prices as of the reference date, and reference date here is the date immediately preceding the earlier of (a) the date the board resolution for the merger or (b) the date of execution of the merger agreement.
And (a) and (b), these dates mostly in practice coincide on the same date. So for the purpose of today's presentation, I would like to simply say that the reference date would be the board resolution date.
And I told you that the three will be averaged and the three elements are as follows.
The first element is average closing price for the latest one month, and this is weighted by trading volume. Then the second element is an average closing price for the latest one week, and this is of course also weighted by trading volume, and the third element is the closing price on the reference date.
So these three elements are being averaged out to give us the merger ratio and this statutory formula is mandatory.
For the merger between SC&T and Cheil, the statutory formula was applied in the following manner.
I would like to explain to you in detail.
Before I draw your attention to the table, I would like to point out that the resolution was made on 25 May 2015. So because the reference date is a day prior to that day, the reference date becomes 25 May 2015.
So the closing prices up to this point will be used for the calculation of statutory formula and the merger ratio.
For the first element, which is the average closing price for the last one month weighted by trading volume, for Cheil it is 153,704 Won and for the SC&T it is 56,953 Won, and then the second element is the period one week in the same manner, and for Cheil the amount was 160,678 Won, and for the old SC&T, it was 55,047 Won.
And I would like to let you look at this third element which is the closing price of the reference date, and that was for Cheil 163,500 Won and for SC&T it was 55,300 Won.
And if you look at the dates, this is —— this should be up to 25 May, but then if you look at the last column, it's 22 May. Why is that? Because 25 May here was the public holiday. That is why we are using the Friday's closing price for the third element.
So after looking at these three elements, we can come to the average price of 159,294 Won for Cheil and 55,767 Won for SC&T.
And the ratio between the two was 1 to 0.35. This means that the value of SC&T was 35% of the value of Cheil shares.
So in fact the SC&T was the non—surviving entity. So for the shares held by the SC&T shareholders, for each share they will be paid 0.35 shares of the new entity.
Next slide.
So the FISCMA of Korea is using the statutory formula to calculate the merger ratio, and this is a mandatory ratio. This is a mandatory formula, and this is in fact quite exceptional if you look at what is happening around the world.
When this law came to its existence, back in the days, in Korea, Chaebol groups are in fact the dominant market players. So what was intended was to prevent the intentional market price manipulation by the Chaebols, and believe the people who made this law believed that the market share prices are the objective representation of the value of the company. That is why this was set up this way.
But then since the capital market experience of Korea is limited, the statutory formula in fact came with some certain limitations. It in fact has some limitations that it may contribute to the manipulation.
1 by the Chaebols or the big market players, and I would
2 like to explain to you about the limitations of the
3 statutory formula.
4 So the period that is observed is quite short. So
5 if there is a manipulation that is happening between the
6 period, then it will be reflected into the statutory
7 formula, and you cannot really correct these kind of
8 manipulation that is happening in this period, and then
9 the second point is quite crucial.
10 The merger between the affiliates happened quite
11 commonly in Korea. And for the merger between the
12 affiliates, you know, the statutory formula is applied
13 to — based on the market share prices, but then in fact
14 these share prices are vulnerable to the influence of
15 the controlling shareholders, or the owner groups,
16 because they can have some control over certain
17 information and the controlling shareholder may
18 influence the following.
19 First of all, the controlling shareholder can in
20 fact make the determination of the reference date. So
21 the statutory formula is in fact backward looking and
22 there is the problem.
23 Let me direct your attention to the earlier slide,
24 slide 6 once again.
25 On 26 May there was a board resolution, and when the

1 board resolution was made on 26 May, the controlling
2 shareholder already knows about the price information of
3 the whole one-month period. That is what I call
4 backward looking.
5 So when you are voting for the merger, the
6 controlling shareholder actually has the understanding
7 of what kind of result would come to them after the
8 merger passes.
9 But then this is not something known to the other
10 general shareholders. The merger information is in fact
11 undisclosed information. So — which is only known
12 to the controlling shareholders. So the controlling
13 shareholders, with the amount of information that they
14 have, they will be able to set up the date that is
15 favourable to them, and this in fact results in the
16 insider trading, something like an insider trading.
17 Let me direct your attention once again to slide 7.
18 So that is the problem that is coming from the fact
19 that this is backward looking.
20 If it is, for example, a forward-looking kind of an
21 activity, then it would be quite difficult for the
22 controlling shareholders to expect how many shares they
23 will be able to get after the merger.
24 Then the second element, which is the information
25 that is disclosed to the market.

The controlling shareholder can have an influence on
the information that is disclosed to the market, the
quality of the information and the timing of when the
disclosure is made, and those would in fact of course
affect the share prices.
And the third element, we have the one-month period
before the reference date, and within that period the
dividend payout and other activities that have great
influence on the share price can be decided by the
controlling shareholders.

The announcement related to certain dividend payouts
can be made within the time period to impact the share
price. This is in fact, I would say, contaminating the
share price and this is not something new. What I’m
saying here is not something new. This is what I said
in my 2016 paper. And this is not an idea that
I developed solely on my own. This idea is already
covered at the American company — corporate law.
So when the controlling shareholders are exerting
this kind of influence, the share price is not something
that is objective. It is contaminated. That is quite
well established in the field of academia.

If the merger ratio between merging companies is set
up based on this distorted share prices, I believe that
this is an unfair merger ratio.

And when there is an unfair merger ratio, it results
in a transfer of value between shareholders of the
merging companies which is harming shareholders of one
company and benefiting the shareholders of the other
company.

Next slide, please.
Such unfair results will need to be corrected
somehow, and the actions — the options should be given
to the market players, but then this is not the case in
Korea, and I would like to explain to you about why.

We have ex ante and ex post actions that are
possible. So as for ex ante, I mean, the ex ante should
be premised based on that there will be that action that
comes afterwards. But then if you have a situation
where the damages would definitely incur, then you will
be able to take the action ex ante.

So the possible actions ex ante in fact are
predicated upon the fact that there would be some
possible actions ex post as well.

So if you look at the possible actions ex ante, the
directors have to be the natural person, and you can
actually take action as preliminary injunction
proceedings against the directors of the company to
prevent the merger from going forward, and there is
another option which is to go for the preliminary
injunction proceedings against the company to prevent the merger.

And then after the decision is made, you can take the ex post action and the first ex post action that is available would be the merger nullification proceedings and this is going in line with the earlier ex ante action.

So the ex ante's number 2 is paired with ex post's number 1. I mean, when the merger actually proceeds, then it would be quite difficult to unwind. That is why the shareholders are bearing the loss if there is a loss. So there is no loss suffered by the company, so only shareholders would follow this path.

Non-controlling shareholders have the right to obtain an injunction against directors to prevent actions that would violate laws and such. But in Korea, this injunction has never been granted, and actually Elliott has taken this action, but then if it succeeded in getting the injunction, then it would have been an unprecedented case. Why is it so difficult then? There are some legal grounds. First of all, the company has suffered no loss. As mentioned earlier, merger is a transfer of the entire assets and liabilities and operations to the other company. And there is nothing that is leaking from the company's assets. So there is no loss suffered by the company, so only shareholders are bearing the loss if there is a loss. In Korea, however, when the -- when it comes to the fiduciary duty of the directors, they do not owe the -- fiduciary duty to shareholders. They only have the fiduciary duty to the company. So no matter how unfair the merger ratio is, since the loss would be only coming to the shareholders, they cannot be saved by the fiduciary remedy -- fiduciary duty remedy.

This is in fact an essential part of my argument: because of this fact, it is almost impossible for the actors to win based on this suit. So when there is a conflict of interest, there would be a great distortion in the market, and only when the fiduciary duty is accepted, the statutory formula being calculated based on the unfair merger ratio is illegal, but since the fiduciary duty to the shareholders is not accepted, the unreasonable, unjust premise is not -- the unjust premise is not reverted.

Now let me move on to the possibility of filing for preliminary injunction against a company, Samsung C&T. In order to avoid significant damages or to prevent an imminent danger from taking place, shareholders have the right to obtain an injunction. The keyword here is their rights. So shareholders must have rights in order to see whether there are potential damages or dangers to their rights.

In the second bullet point the right to file for nullification ex post has to be acknowledged in order for an injunction relief to be granted. So that is why the key issue is whether the merger can be nullified. But if you look at Korean courts, they generally recognise nullification only under special circumstances and in actual court precedents there’s almost no such ruling. There’s only the one precedent that is 30 years old and was a lower court decision, but that’s just along the lines of once upon a time there was such a lower court case. But its value as a precedent is almost unrecognised in general practice. And secondly, if the merger ratio has been calculated in accordance with the statutory formula, according to court precedent, it is presumed to be valid. If you want the merger ratio to be unacknowledged, you have to prove that there was criminal and fraudulent conduct. But we’re talking about an investor, a shareholder who has the burden of proof to prove that there was criminal and fraudulent conduct. Even if they could, it would probably take place mostly with the help of the police or investigatory authorities, five or ten years down the road.

So when a merger has proceeded with the statutory formula, it would be basically impossible for a shareholder to obtain an injunction or a relief on these grounds because the merger ratio is allegedly unfair.

Now let’s talk about the nullification of the merger.
nullification accepted by the court. So here again you have the same problem.

In the case of the SC&T case, the suit to seek nullification was not launched by Elliott, but rather by other shareholders, as can be seen in the court decision.

But in this case as well the court ruled that because the merger ratio was calculated based on the statutory formula, that makes the merger ratio valid.

That is the presumption. Compared to the ex ante procedure, there are many more limitations that apply to this ex post procedure.

For instance, it has to be filed within six months from the date when the merger had been registered, otherwise you are prohibited from filing for nullification on new grounds.

After the merger had taken place, six months had passed before new facts were discovered, but it had passed the six-month statutory period. That is why the shareholders were unable to use this in their claim.

As I mentioned earlier, once the merger has taken place, there’s a high degree of recognition regarding the status of the merger as having taken place.

Therefore, even if the merger ratio is deemed to be unfair, the court can still use its discretion to dismiss a merger nullification claim.

This is not unique in Korea, but globally there are not that many cases. In fact, almost none, in which the merger was pronounced nullified.

When you break an egg to fry the egg you can never separate the yellow and the white. That is the analogy that the corporate law experts use to say it is not easy or virtually impossible to dissolve a merger.

This particular court decision was appealed in 2017 and currently remains pending. But, as I mentioned, the only case in which the nullification claim was accepted was 30 years ago, and it involved a non-listed company. And because Korean courts place emphasis on the statutory formula, and, furthermore, there are strict limitations on — in terms of the new grounds on which you can file a nullification claim, so all in all I do not believe that the decision of the higher court will be any different from the court of first instance.

In other words, a shareholder’s interest is basically impossible to protect through lawsuits on grounds such as fiduciary duty breach or merger nullification. In the end you have no choice but to present yourself at the shareholders’ meeting and exercise your vote against the merger. That is in fact the only practical method to protect your interest.

On the next page, now let me move on to the appraisal rights that I mentioned earlier.

A dissenting shareholder has the right to request that the company or the merged entity purchase the shareholder’s shares.

This system originated in the mid 19th century for the first time in the world in the US, and since then Korea and Japan and select others have taken in this benchmark and are operating this system.

But when the dissenting shareholder and the company cannot agree on a purchase price, the Capital Markets Act states that there is an appraisal price formula which is almost similar to the statutory formula that I mentioned earlier. In fact, they’re basically identical. The only difference is that the observation period is different, slightly.

And according to this law, if the shareholder objects to the appraisal price that has been determined according to the appraisal price formula, it can ask the court to determine an appraisal price, but in this case the Korean courts do not deviate from the appraisal price formula.

As a result, this appraisal price formula has the same limitations as does the statutory formula. The only difference is that the observation period has been extended from one month to two months in the case of the appraisal price formula. So the overestimation/underestimation issues or manipulation and selective disclosure will still be reflected in the trading price and that would leave the trading price still distorted.

Next page, please.

In exercising his or her appraisal rights, the shareholder runs into certain limitations. Let me elaborate on that point.

The trading prices of the shares in listed companies are the base prices and this means the prices between shareholders in the Korea Stock Exchange, the public market.

But the appraisal rights process serves as a means of providing liquidity to a shareholder who objects to a proposed merger and wishes to exit his or her investment in the company. Therefore, the sale and purchase of shares in the exercise of the appraisal right is a transaction between the company and its shareholder.

As such, the company must pay the proportionate share of the value of the whole company, without
reflecting elements that might decrease the trading price. This is from a corporate law perspective.

So these downward elements must not be reflected in theory, but in reality sometimes that is what happens. As for the last bullet point on this page, the appraisal price proceedings are non-contentious proceedings. And because they are non-contentious proceedings, there’s no process in which the two parties will take an adversarial approach toward identifying the truth, and the court is not obligated to make a determination on the parties’ legal arguments.

So the role of the court is basically that of a real estate appraiser, to use an analogy. The court only serves as technical appraiser early and it does not correct a wrong or provide relief against a breach of a legal obligation or infringement. That is the limitation that I have been referring to.

The next page, please.

So I have spoken about the general limitations and in this Samsung C&T case the limitations that I have just mentioned are manifested themselves. For instance, the court of first instance regarding the appraisal price formula simply chose to collectively dismiss all the objections and made its determination exactly in accordance with the appraisal price formula.

On appeal, the Seoul High Court made a decision that slightly increased the price and it said that other valuation methods can be taken into consideration. However, on grounds that the trading prices cannot be discarded altogether, it simply applied the appraisal price formula and changed the reference date to the date before the listing of Cheil, which is about five months prior to the original reference date.

So just a reference date was changed and nothing else, and as a result of this, the listing of Cheil Industries, the court said that it could have influenced the trading price of SC&T subsequently.

And another point that I would like to emphasise is that in reaching this conclusion, the Seoul High Court said that this process is not for the purpose of examining whether the merger ratio was unfair or not. So this clearly shows the limitation of this appraisal price formula and the claims based on it.

On the next page shows the details from the Samsung C&T case. The Seoul High Court changed the reference date and then they used the appraisal price formula exactly as it is in the FISCMA. On the left of the chart you see the first two-month period, as I mentioned, the observation period increased from one month to two months. So the reference date is in parentheses, the reference date being the SC&T case.

As I have said earlier, appraisal is the process of setting the price for a transaction between the company and its shareholders, and by using the stock market trading prices, the overall value of the company is not properly reflected. That’s the first problem.

The second problem is as follows. The appraisal price formula has almost exactly the same problems that I described when talking about the statutory formula. The only difference is that the observation period is two months instead of one. During that period the conflict of interest as well as the possible price distortion that could have been affected by the controlling shareholder is not addressed.

The third problem is the appraisal price formula does not provide any reparation as to the various wrongdoings that took place at the time.

So regarding the problems inherent in this methodology, this is what I will address on this page because these are the problems that were identified in the SC&T case.
1 state of the company.
2 If you look at the court decision, it is as if just
3 by taking out the listing of Cheil Industries, all the
4 other problems will be solved, and I do not need to
5 point out that this in itself is in no way sufficient to
6 address the problems.
7
8 So the Seoul High Court decision in the appraisal
9 price litigation only showed that the incomplete remedy
10 at best is available regarding the issues in the SC&T
11 merger.
12
13 The next page, please.
14
15 Now for the conclusion. Let me summarise what
16 I have said thus far.
17
18 First of all, the merger ratio calculation system in
19 Korea, I believe, works only if you have complete trust
20 in the statutory formula. There are various — —
21 virtually no means of appeal. The system is built on
22 the firm belief that the statutory formula is perfect, but as I mentioned earlier, the statutory formula has
23 clear limitations. In particular, when it comes to
24 mergers between affiliates of a business group in which
25 the interest of the controlling shareholder is involved, this could lead to a high degree of distortion.
26 But the possibility of litigation is basically
27 blocked off from the beginning, as I have just
28 mentioned.
29 Having said that, in my view from a corporate law
30 perspective, and this is not the first time I'm making
31 this claim, since 2008 I have spent about 13 years
32 studying this problem, and my conclusion has been the
33 same. Regarding mergers in which the conflict of
34 interest with controlling shareholder is present, the
35 legal relief through the courts is very hard to come by.
36 So perhaps the only way for the shareholder to
37 protect himself is to vote against the merger. But
38 always. If they have a high degree of control over the
39 company, it will not be easy to even take this approach.
40 In the case of Samsung, the shareholding of the
41 collective companies was 13%. That of the controlling
42 shareholder himself was in the 1% range. That is why
43 the voting at the shareholders' meeting was highly
44 important. This is the end of my presentation. I thank
45 the tribunal for your time and attention.
46 THE PRESIDENT: Thank you very much, Professor Lee.
47 Are there any supplementary questions on direct?
48 MR TERCEÑO: No, sir.
49 THE PRESIDENT: Thank you very much. So then we move
50 straight to cross-examination.
51 Cross-examination by MR TERCEÑO

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1 English, and spent six months working in the
2 Washington DC office of Covington & Burling but again, we are not asking him to testify in English. I just
3 want to caution him to wait for the consecutive
4 translation.
5 Are we ready to proceed?
6 A. I will do so.
7 Q. Now, before we go any further, I just wanted to
8 establish a few ground rules.
9 First, we've got some material to go through and
10 I will try to put my questions to you fairly simply. If
11 you do not understand any of the questions, please do
12 ask that they be repeated, and I in turn will ask that
13 you keep your answers as short as you reasonably can.
14 The documents in the binder before you, you have the
15 English version first and then there's a blue sheet of paper and you'll find the Korean version behind the blue
16 sheet of paper in each tab, and I'll direct you to the page in the Korean version so that you can be looking on
17 that.
18 It also should come up on the screen in front of you
19 when we go to discuss documents.
20 Can I just confirm with the operator that the screen
21 is on, on the witness table? Because from where I'm
22 look at, it is just black screen.
I will just wait while that’s addressed. The screen is not currently on. (Pause) So I just wanted to confirm a couple of things by way of introduction. You stated that you’ve advised various government ministries and served as an adviser to the Republic of Korea in various roles; is that correct?

A. Yes, correct.

Q. And you do describe these in paragraphs 5 to 7 of your witness statement. I don’t think we need to go through those, but in general you seem to have provided advice in relation to public private partnerships, including with respect to infrastructure projects and including assisting with the interpretation of relevant laws and regulations; is that a fair summary? {F2/1/4}

A. Yes. In paragraph 7 of your report you list three current appointments and then state that: “Besides the above, I am not providing any service to the Korean Government, quasi governmental organisations or local governments.” So am I right that these three that you list in paragraph 7 are the only current appointments you have related to work for the Republic of Korea?

A. Yes, correct.

Q. And you do describe those in paragraphs 5 to 7 of your report, and I’m looking at paragraph 10, your report, and I’m looking at paragraph 10, subparagraph (ii), to address the issue of whether the actions pursued by EALP in the Korean courts did or were calculated to provide EALP with a remedy to recover damages; is that correct?

A. Yes, that’s correct.

Q. And actually the language you used, and I’m reading from the English, so you will correct me if the Korean says something any different, but it says that you prepared your report, and I’m looking at paragraph 10, subparagraph (ii), to address the issue of whether the actions pursued by EALP in the Korean courts did or were calculated to provide EALP with a remedy to recover damages; is that correct?

A. The way I read it in Korean it is correct, but then if you’re asking me whether the English translation in my expert report in English is correct, I’m not in a position to say whether it is. But I think it is roughly correct and if you are asking this question because -- -- if you’re focusing on the part that says whether the actions did offer -- -- did provide EALP the remedies, then I would say that the actions did not provide remedies to EALP. That is why I feel my response is a little vague.

Q. Yes. We understand that is your opinion, but you actually skipped the part that I am focusing on, which is the -- -- you say that you were asked to consider whether those actions did or were calculated to; is the phrase “or were calculated to” in the Korean version?

A. In this Korean version that I am looking at, there is no phrase that says “were calculated to”.

Q. Okay, thank you, Professor. Then we will move on to maybe a paragraph that gives a clearer statement of this first issue, or this issue that you looked at. If we look at paragraph 10 of your report, {F2/1/7}, there you say at the beginning: “None of the actions taken by EALP in the Korean courts did or could have entitled EALP to recover as damages the losses caused by the value transfer...”
resulting from an unfair merger ratio."  

Is that a better statement of the issue that you address in your report? 

A. Yes. 

Q. So your opinion is about whether Korean law and in particular based on the type of lawsuits that the Claimant pursued in relation to this merger could have offered a remedy for a minority shareholder if that shareholder claimed a loss arising from an unfair merger ratio; is that a fair description of the issue you address? 

A. My conclusion is that they would not have been able to be offered a substantive remedy. 

Q. Yes. And by "them" you mean minority shareholders who are claiming that they suffered a loss from what they say is an unfair merger ratio; correct? 

A. Correct. 

Q. And during your presentation, and this was when you were talking about slide 5, you made the point that the merger ratio as calculated under Korean statutes is mandatory for any mergers of publicly listed companies; correct? 

A. This may require some more explanation, but roughly I would say yes. If it deviates from the statutory formula, then the FSS (Financial Supervisory Service) would not accept the application, and there would be some sanctions given to the merging entities. That is why in practice it is known that there is almost no — no single merger case that is deviating from this statute. 

Q. Thank you for that helpful context. Since there is no known case deviating from this statute, would you expect an investor purchasing shares in a Korean company to be aware of this mandatory statutory formula for calculating a merger ratio? 

A. If you are a professional investor, I would say that you would naturally assume it that way. 

Q. Thank you. Just to talk about that statutory formula for a moment, you described it in your presentation. You also describe it in your report at paragraphs 17 and 18, and just, stated very simply, I know there's weighting that goes on and some other aspects, but stated very simply, the formula sets a merger ratio based on the average market share prices of the two companies for the previous one month, one week, and one day, usually starting from the day before the merger announcement; is that right? (F2/1/6) 

A. Yes. 

Q. And that statutory formula was applied to the Samsung C&T and Cheil merger; correct? 

A. Yes, correct. 

Q. And that statutory formula is the same now as it was at that time in May 2015? 

A. Korean law changes quite frequently. So I will need to check to give you the accurate answer. But based on my memory, I think that is still the same. But I will need to double-check to give you the accurate answer because the detailed regulations are changing quite often. 

Q. Thank you. That's understood. You did testify during your presentation that you have written a great deal about the Samsung C&T and Cheil merger; correct? 

A. Yes, that is correct, and I would like to explain to you about the background. 

I am focusing on the fact that the fiduciary duty aspect in the Korean law does not work in a way to protect the shareholders, and since I was looking at this as my focus point, I happened to write a lot about the Samsung C&T and Cheil merger. 

Q. Thank you. So at least as far as you are aware in the wake of the Samsung C&T and Cheil merger, there has not been any amendment made to the statutory formula, has there? 

A. I believe that there was no amendment to the statutory formula right after the — in the period that is right after the merger between Samsung C&T and Cheil. 

Q. Do you believe that there's been any amendment at all in any period since 2015 at least to your knowledge? 

A. I would say that my recollection isn't clear — isn't completely accurate because the financial regulations would stay quite the same in the big theme, but then the small detailed rules may change quite often. That is why I'm not quite sure which part that you're asking — directing my attention to, but I cannot tell you that it would be perfectly the same. 

Q. Thank you, Professor. Looking at paragraph 18 of your expert report, here you describe the two limitations that you claim the statutory formula has, and right now I'm just looking at the first one which is in the (i). You say the first limitation is that if the average share price for the one—month period does not accurately reflect the relative value of the companies, the resulting merger ratio might transfer value from one set of shareholders to the other; correct? 

A. I see "will" instead of "might" in the report that I have submitted. 

Q. Yes. The statutory form will result in a merger ratio that causes a transfer. 

A. Yes, correct. 

Q. Now, you are familiar with the so-called Korea discount
Let's look briefly at another one of your articles. This is in tab 10. It is exhibit R–303. It's an article that you wrote about the NPS ruling in the wake of the merger. (R/303/1)

I would like to turn to page 61 in this article (R/303/10). You're writing about the issue of companies holding stock in other affiliated companies in the Chaebol system as I understand it, and I'm going to read a passage from — about the middle of this block of text (R/303/10).

And reading:

"In other words, if an entity is not affiliated with the group, it can sell Samsung Electronics' stocks or use its value in many other ways. However, since C&T must retain them for the controlling shareholder, it is only a 'warehouse keeper without pay' ...."

THE INTERPRETER: I'm very sorry, but I was not able to find the passage you were referring to and it seems Professor Lee is also struggling.

MR TERCEÑO: Is it not the page that is up on screen? It's right in the middle essentially of that block, and it should be page 61. It begins the fourth line from the top in the Korean, as I understand it. "In other words, if an entity is not affiliated ", do you see where I'm reading?

THE INTERPRETER: Please proceed, thank you.

numbered 2 that talks about same person and self-dealing; do you find that page? (R/276/8)

Just above that heading, I'm reading the last sentence in the paragraph above it, you wrote: "If the market is efficient, these risks (weakness of the Korean company law that does not legally protect this) will be reflected in stock prices to some extent, and that is what makes up the Korea discount."

You're taking about the facts of the risk of shareholder control will create a discount between what might be considered the net asset value of a company and what it's actually selling for in the Korean market; correct?

Well, the net asset value is not exactly the word that I used and this is not exactly the kind of concept that is absolutely necessary to explain my point here. What I'm trying to explain here is regardless of what the value is, and it is, I would like to tell you that I'm not in a position to make the appraisal or the valuation of the value, but then whatever the value is, if there is a value that is regarded as just in the market, then there is a discount compared to that value in the market.

Q. Thank you for that, Professor.

Let's look briefly at another one of your articles.

This is in tab 9 in the bundle that you have. It is exhibit R–276. This is an article that you wrote, as I understand it. "In other words, if an entity is not affiliated with the group, it can sell Samsung Electronics' stocks or use its value in many other ways. However, since C&T must retain them for the controlling shareholder, it is only a 'warehouse keeper without pay' ...."

THE INTERPRETER: I'm very sorry, but I was not able to find the passage you were referring to and it seems Professor Lee is also struggling.

MR TERCEÑO: Is it not the page that is up on screen? It's right in the middle essentially of that block, and it should be page 61. It begins the fourth line from the top in the Korean, as I understand it. "In other words, if an entity is not affiliated ", do you see where I'm reading?

THE INTERPRETER: Please proceed, thank you.
You say here, Professor, that a merger ratio that if approved is unfair to circumstances that give rise to the calculation of controlling shareholder can deliberately create expert report, this time (ii), where you write that the let’s look at that. It’s again paragraph 18 of your presentation?

Q. Professor, I think you’ve given enough of an answer now. The other side can bring you to that if they wish to, but I would like to move on. But I just want to clarify one thing. From what you said in the case of this merger, it’s an M&A case, and it should be trading based on the entire value of the company. So according to the corporate law perspective, you cannot see that the M&A trading should be happening at discount.

Q. Would you mind opening for me slide 13 of my presentation?

A. Yes, correct.

Q. Then you say that the controlling shareholder might achieve this by influencing the share price of the two companies for the month before the merger announcement; correct?

A. Yes, correct.

Q. And just so I understand it, your concern here is that the statutory formula therefore is potentially subject to share price manipulation when there’s —— the companies being merged are affiliates with a single controlling shareholder; do I have that right?

A. So I do not think that that is an accurate explanation of my opinion or my concern. In fact, the market share price manipulation is a criminal act and since this is a criminal act, this is not something that would happen normally when you’re pursuing a merger and it would be quite difficult to identify too, unless you are a police investigative agency, it would be difficult for you to identify such criminal act.

My concern is more around something that is not amounting to the criminal act, but then more subtle and more difficult to identify. More subtle and some activities that would be more difficult to identify, and the controlling shareholders are in complete control of —— it wasn’t the complete control, let me rephrase that.

The controlling shareholder has control over the management rights. So they have a lot of ways, and various ways and power to influence the share price, and that is happening quite easily in reality.

Q. Thank you, Professor. Just so we’re clear, any merger between public listed —— publicly listed affiliates in Chaebols in Korea is governed by the statutory formula and thus subject to these opportunistic actions by controlling shareholders; correct?

A. I would say it is easy for —— easy to have such incentive in this situation. I cannot say that all companies would be following that path, but structurally there is strong incentive to pursue that path, and also they have strong power to push that through.
MR TERCEÑO: Thank you, Mr President, I’m in your hands,

but this might be a good time for a short break since

we’ve been going for about an hour and a half.

THE PRESIDENT: Yes, it would be. Let’s break for a coffee

or tea until 3.15. And Professor Lee, I should remind

you that you cannot speak with anybody about your
testimony during the break.

Please feel free to have a coffee or tea or go to
the restroom. You can move around.

THE WITNESS: Understood, thank you.

(3.03 pm)

(A short break)

(3.15 pm)

THE WITNESS: Sorry for being late.

THE PRESIDENT: Mr Terceño.

MR TERCEÑO: Thank you, Mr President.

Professor Lee, I just have a few more questions
before we can wrap up for the day.

I want to talk to you about one of the lawsuits that
you discuss in your expert report. You discuss this
initially in paragraph 19 of your expert report. You
point to what I’ll call the appraisal rights lawsuit
that the Claimant brought which you say was a lawsuit
that could not provide a remedy for the purportedly
unfair merger ratio; is that correct? {F2/1/7}.

A. Yes, correct.

Q. And don’t you think you will need to read them, but you
discuss this in paragraph 67 to 70 of your expert report
where you say that a shareholder who dissents from
a merger has a right to request that the company buy
back its shares at a particular appraisal price.

{F2/1/27}.

So one way to compensate for a purported value
transfer from an unfair merger ratio would be to set an
appraisal price for the Claimant’s shares that reflected
the purported full value of those shares; correct?

A. I couldn’t quite understand the part about the shares
reflecting the purported full value of those shares.

Q. My question was that one way to compensate for what you
say is a value transfer from one group of shareholders
to another if a merger ratio is unfair would be to set
an appraisal price for the Claimant’s shares that
reflect that purported full value of those shares so it
can recover.

A. Yes, that is my opinion that was presented in the slide
earlier.

Q. And if we look at — —

A. So my intent is that the accurate compensation would be
the compensation made in proportion to the value of the
company as a whole.

Q. And as you testified earlier, do you not know what the
value of the company of Samsung C&T was, do you?

A. Yes, because I’m not a valuation expert or a financial
expert, I didn’t really give my thought into that.

Q. So let’s look at the appraisal price litigation which
you did give some thought into in your expert report.

This is tab 2 in the bundle in front of you. It’s
exhibit C–53. {C/53/1}

You list this in Appendix 3 of your report. So this
is a decision that you read in preparing your expert
report; correct?

A. Yes, correct.

Q. Now, if you take a look at the first page, you will
see — — which I think the Korean pdf might be labelled as
page 43. It should be the first page of the decision.

It lists the appellants who are multiple Korean
companies and individuals, but you do not see the
Claimant EALP listed there; correct?

A. Yes, correct.

Q. And you understand, don’t you, that the Claimant was
originally an appellant in this case before it reached
this court? In fact if we see on page 2 it states under
“Purpose of the Application and Purpose of the Appeal”
there’s a parenthetical that says:

“(Elliott Associates LP withdrew its application on
March 23, 2016).”

{C/53/2}

A. Yes.

Q. So when you talk about in your report at paragraph 38
certain actions taken by the Claimant in the Korean
courts that you say could not have offered them full
compensation and you say these include the exercise of
appraisal rights, you’re talking about this action;
correct? {F2/1/15}.

A. Yes, correct.

Q. And as we also see on page 2 of the decision, again
under the “Purpose of the Application” heading, it
reads:

“(The) applicants seek a determination of the
purchase price of each common shares issued by Samsung
C&T Corporation.”

And you understand that to mean Samsung C&T prior to
the merger; correct? {C/53/2}.

A. If you look at the upper part of that, it seems that the
new Samsung C&T has become the successor of the case and
is in fact identified as the party, a merged entity
after the Merger.

Q. Professor, this is the appraisal rights litigation which
was meant for the buy back of the Claimant’s shares in
Samsung C&T; correct? I’m simply clarifying that that’s
Q. Okay. Well, as this decision says it’s reversing the first instance decision. So before we go further, let’s take a look at that first instance decision. It’s tab 8 in your binder. It’s exhibit C-259. {C/259/1}.

A. Yes, I can see that.

Q. And you also understand that until it withdrew its claim, those common shares would have included about 7.7 million of the shares that the Claimant held in the original Samsung C&T; correct? These were the shares it was trying to sell back.

A. I am not familiar with the exact number, but I have heard about the event.

Q. Okay. Well, as this decision says it’s reversing the first instance decision. So before we go further, let’s take a look at that first instance decision. It’s tab 8 in your binder. It’s exhibit C-259. {C/259/1}.

A. Yes, I can see that.

Q. Understood. I just had a couple of questions about the Capital Markets Act had come out to Korean Won 57,234,222 that the calculation of the appraisal price under the Capital Markets Act and make no adjustment; correct?

A. Yes, correct.

Q. Now, if we look at page 8, this is under a heading numbered 3, “Arguments by Applicant Elliott Associates LP” {C/259/6}. You will see there’s a … (Pause)

A. Yes, I found page 6.

Q. So I’m looking again under the heading number 3.

A. “Arguments by applicant Elliott Associates LP”, and you will see a couple of sentences in there’s a heading number 12 and it says:

“Despite the fact that the former SC&T obtained a construction project for a combined fossil fuel power plant in Qatar, it made a late disclosure of such fact after the merger with the former Cheil was complete.”

A. Yes, correct.

Q. I am not familiar with the exact number, but I have heard about the event.

A. I think so.

Q. If we turn back to the previous page under the heading that says “Order” {C/259/2}, we see that the court has ordered that the purchase price for these common stocks shall be Korean Won 57,234 per share, so you understand that what the court did here was accept the calculation under the Capital Markets Act and make no adjustment; correct?

A. Yes, correct.

Q. Now, if we look at page 8, this is under a heading numbered 3, “Arguments by Applicant Elliott Associates LP” {C/259/6}. You will see there’s a … (Pause)

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A. Yes, correct.

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“Despite the fact that the former SC&T obtained a construction project for a combined fossil fuel power plant in Qatar, it made a late disclosure of such fact after the merger with the former Cheil was complete.”

A. Yes, correct.

Q. I am not familiar with the exact number, but I have heard about the event.

A. I think so.

Q. If we turn back to the previous page under the heading that says “Order” {C/259/2}, we see that the court has ordered that the purchase price for these common stocks shall be Korean Won 57,234 per share, so you understand that what the court did here was accept the calculation under the Capital Markets Act and make no adjustment; correct?

A. Yes, correct.
1 A. Yes, I understand that the reference date has been put forward. That is why the price has gone up.
2 Q. And as you explained, that reference date was put forward to December 18, 2014, because the court felt that that was a date where the market price had not been affected unduly by the upcoming merger; correct?
3 A. Yes, correct.
4 Q. You said during your presentation that the Seoul High Court had “slightly increased the price”. You were talking about this increase; correct?
5 A. Yes, correct.
6 Q. I’ll ask you to trust my math. I’m sure there are plenty of people in the room that will be checking it anyway. But the increase was of Korean Won 9,368 per share, which is the difference between the 66,602 and the 57,234. Does that sound right to you?

1 A. Yes, that sounds right.
2 Q. And you remember as we saw in the decisions that the Claimant was selling back 7,732,779 shares; correct?
3 A. I think it is correct. I do not recall the exact number, but I think it is correct.
4 Q. Thank you. I’m happy to look at it again or you could just trust me on it, either way.
5 A. I can trust you on that.
6 Q. Thank you. I appreciate that.

1 Q. So this slight increase in the price of Korean Won 9,368 per share would mean, if this is upheld, that the Claimant for its 7.7 million shares would be receiving an additional Korean Won 72,440,673 for its alleged loss; does that sound right to you?
2 A. I think so.
3 MR TERCEÑO: And I do apologise for making you struggle over the numbers, having seen that earlier in the hearing.
4 Q. I wrote mine out so that I could get it right.
5 A. Thank you very much, Professor.
6 MR President, we have no further questions.
7 A. Thank you.
8 THE PRESIDENT: Thank you, Mr Terceño. Any questions in redirect?
9 MR CONSEDINE: Very briefly, sir, with your indulgence.
10 THE PRESIDENT: Thank you, Mr Terceño. Any questions in redirect?
11 MR CONSEDINE: Very briefly, sir, with your indulgence.
12 MR TERCEÑO: Mr President, with your indulgence, if counsel opposite is going to ask him to give his opinion with reference to this line in the court’s judgment, could I ask that he read the entire sentence into the record; he only read half of it.
13 MR CONSEDINE: Can you explain what you meant by “incomplete remedy” by reference to this part of the court’s judgment?
14 A. Are we talking about reading the full paragraph or the line?
15 Q. The line that I took you to was the line that reads: “The court in this case is not examining whether the merger ratio was significantly unfair ...” Do you see that?
16 A. Yes, I see that.
17 Q. Thank you. In your presentation today you described the appraisal price proceedings as an incomplete remedy. Can you explain what you meant by “incomplete remedy” by reference to this line in the court’s judgment?
18 MR TERCEÑO: Mr President, with your indulgence, if counsel opposite is going to ask him to give his opinion with reference to this line in the court’s judgment, could I ask that he read the entire sentence into the record; he only read half of it.
19 MR CONSEDINE: Can you explain what you meant by “incomplete remedy” by reference to this part of the court’s judgment?
20 A. Are we talking about reading the full paragraph or the line?
21 Q. The line that I took you to was the line that reads: “The court in this case is not examining whether the
merger ratio was significantly unfair ... ".
And I'm asking you what you meant in your presentation by "incomplete remedy" by reference to that part of the court's judgment.
A. I will do so. I would like to ask to have my screen on.
I would like to have the presentation slide page 13 for everyone to have a look at. (J/18/14) Basically, as I mentioned earlier, the appraisal price --- statutory appraisal price formula is basically the same as the statutory formula.
Therefore, the fundamental limitations of not being able to remove the conflict of interest of the controlling shareholders still remains. For example, may I direct your attention to slide 15. (J/18/16) As you can see here, the share price of SC&T started off with 70,129 Won in the two-month observation period and it went down to 62,156 Won up to the point that is closer to the reference date, and it is a decrease of 10%.
So the Seoul High Court seems to think that the mere act of putting the reference date forward would be able to remove the conflict of interest, but as you can see, it is not the case.
The High Court held that the reference date should be brought forward to remove the impact from the listing of the Cheil Industries, but then the news of the potential listing of the Cheil has been going around in the market since end of 2013 and all throughout 2014. And anyone who is --- who has practical experience in the securities law would understand that the listing doesn't happen overnight. I mean, since many months before the actual listing, the company has to make an application to the exchange and also there are certain objective and open requirements to be met.
So the activities are going on many months prior to the actual listing.
So my point is not to bring the date forward a lot further. My point is that the decision to bring the date forward in and of itself is arbitrary and illogical, especially the statutory formula is using the one-month or two-month observation period before the merger, and that is being criticized a lot, but then the system is maintained because based on the grounds that this is the information that is the latest.
If the court --- when the court brings the date forward by five months, then it is in fact undermining the meaning of the existence of the statutory formula.
Most importantly, as I mentioned earlier, the exercise of appraisal right is in fact exercised when the shareholder has a complaint about the activities that is pursued by the company in terms of the M&A. When the company is pushing forward with a merger or acquisition, irrespective of their intention or their will, and makes the impact of that acquisition or the merger attributable to all the shareholders, then when the shareholder is dissenting from that opinion, then they would be exercising the appraisal right.
Therefore, according to the principles of M&A, the payment has to be made in accordance with the value of the entire company, and I have in fact mentioned this in my slide as well, and this is well established by the Delaware Supreme Court.
I'm not an expert in the US law, but then since the system was originated from the US, and if you are a Korean academic who is working in this field, then you must be aware --- you must be familiar with this precedent. That is why I am using this as evidence.
There is one last point that I would like to make, and this is in fact regarding something that would --- that is quite problematic and I can --- so problematic that I can write a paper out of it.
So as you could see in the example of the statutory formula, the Korean courts, if it is not the manipulation of the market price or the criminal conduct, the implicit influence by the controlling shareholder is considered part of the market price and then that is why the Korean court did not accept any merger nullification proceedings or the injunctions with regards to it.
And in the appraisal litigation, even though there was no evidence of any criminality, the court decided arbitrarily to bring the date forward by five months, saying that this --- there was influence in the market price.
So one might think that this is a good --- this was a good thing because in the end you got a higher price out of it, and then you were paid off based on a higher price. But if you are allowing for such arbitrary decision and something that is not based on the principles, then there can be a lot of other cases where you would not be compensated for the due amount.
And one more thing. And one more thing is that the appraisal proceedings, as it was stated by the court is not a process to examine the unjust and unfair merger ratio. It is not looking into any wrongdoing. It is not designed to rectify the wrongdoing or the unfair merger ratio.
The court in this case is only acting like a real estate appraiser, and it is only a technical approach, and it is also only applied to a single company.
So, as I said earlier, this is not a process to examine whether something is done well or something is wrong or right. Just because the controlling shareholder had an influence on the prices the court decided that the reference date should be brought forward by five months, and the fact that this sort of decision was given is showing that the system is used in an illogical, irrational way.

And it is only looking at the two-month window, so that is why if the suppression on the share price by, for example, not paying out the dividends and so forth has been going on for a long term, for example, one or two years, then the damages will not be repaired with the two-month period only.

That’s all I have to say.

MR CONSEDINE: Thank you very much, Professor. Nothing further from us, sir.

THE PRESIDENT: Thank you. There will be questions from the tribunal, Professor.

Questions from THE TRIBUNAL

MR GARIBALDI: Professor Lee, you made a distinction between the market for shares traded because they are used for controlling purposes? I understand that part correctly?

A. Do you think it would be necessary for me to give you the explanation? If you don’t find it to be necessary, then I would not want to take your time.

MR GARIBALDI: All right. More concretely, in an M&A market valuation, when you are determining the standalone value of each one of the companies, do you discount the value of the controlling shareholders and the value of the non-controlling minority shareholders, then it will result in the value of the entire company and, as far as I understand, the legal grounds of the Delaware courts and such are in the same line.

MR GARIBALDI: Briefly, thank you.

MR GARIBALDI: In the M&A market, by contrast, you need to determine the value of the companies being merged. I have done it myself in early — at a very early stage of my career. I used to be an M&A lawyer.

Now, in that case you say the values determined by — just determining the value of the two merging entities; is that right?

A. Yes — are you referring to the standalone value?

1. You made a distinction between the market for shares and the M&A market. As I understood it, in the market of shares a person buys shares from an existing shareholder or sells to another person, a shareholder sells to another person, and in that case the fair value of the shares can be established by the market. Did I understand that part correctly?

A. That’s correct.

9. MR GARIBALDI: In the M&A market, by contrast, you need to determine the value of the companies being merged. I have done it myself in early — at a very early stage of my career. I used to be an M&A lawyer.

11. Now, in that case you say the values determined by — just determining the value of the two merging entities; is that right?

13. A. Yes — are you referring to the standalone value?

17. I believe that what is right is to estimate — evaluate the value of each merging entities.

19. MR GARIBALDI: That’s the way I understood it. You value each individual entity and then you determine the right ratio for purposes of the merger.

22. Now, my question is this: suppose that the merging entities, or at least one of them, owns shares in other companies, and some of those shares reflect the controlling interest. Now, as a theoretical matter, and not as a matter of an exercise in valuation, how do you handle those blocks of controlling shares in determining the standalone value of the entities to be merged?

A. In terms of the theory, I mean, the financial — there is room for financial theory. So it would be difficult for me to give all the details specifically in a legal perspective.

But in general, if, because of the conflict of interest of the controlling shareholders, the share price of the minority shareholders is at a discount, legally speaking, that would be in fact reflected to the — as a premium to the controlling shareholder.

So in my opinion if you add the values of the controlling shareholders and the value of the non-controlling minority shareholders, then it will result in the value of the entire company and, as far as I understand, the legal grounds of the Delaware courts and such are in the same line.

MR GARIBALDI: All right. More concretely, in an M&A market valuation, when you are determining the standalone value of each one of the companies, do you discount the value of the controlling blocks of shares?

A. It was the specific question of how the valuation is done and how the discount works in the specific valuation scenario is not something that I am an expert in because I’m not in practice for the financial valuation and I’m a legal expert. But in terms of the difference between the M&A markets value and the stock exchange markets value, this is something that can be explained from the legal perspective, and is also held by the Delaware court as well. So I would be able to give you more explanation on this aspect.

MR GARIBALDI: Briefly, thank you.

A. Do you think it would be necessary for me to give you the explanation? If you don’t find it to be necessary, then I would not want to take your time.

MR GARIBALDI: I think I understand the principles. So as far as I’m concerned, I don’t need to take your time any further.

THE PRESIDENT: You must bear with me because I have a few other questions about the same topic, actually.

18. More in the context of Chaebol specifically, I understand your testimony to be that in case of a Chaebol, the minority shares are being traded in the stock market at a discount.

A. Yes, generally so.

THE PRESIDENT: And in fact the controlling shares are not traded because they are used for controlling purposes?

A. Yes, that’s correct, and in the stock exchange market, the shares are like the small sands that are lying...
In such case, control is not clearly established.

THE PRESIDENT: Okay. So then I’m trying to understand your evidence, to make sure I understood it.

If then the value of the controlling shares is not reflected in the share price, it’s reflected in the value of the company in the M&A market?

A. That’s correct, and I also — I explained to you earlier that the Korea discount is quite severe, and according to some of the literature that I read in my studies, the M&A market’s controlling shareholders’ premium in Korea is very high, and it goes up to 50%.

THE PRESIDENT: Now, in case of a merger between two Chaebol companies which are controlled by the same owners, in case of a merger, the value of the two companies cannot actually be determined because the owner is the same.

So there is no market value.

This is what you mean by self-dealing because the merger is between companies that are owned by the same or controlled by the same party. So that’s self-dealing? That’s what you mean by self-dealing?

A. Yes, in Korea the affiliate, the term “affiliate” is defined according to the Fair Trade Act, and it is defined as the entity that is controlled by the single person or the single business group. But even if the transaction is about the two affiliates, it doesn’t mean that there will be no premium at all. For example, in the case of the SC&T merger, the stake of the owner family was only 13%.

On the other hand, NPS held 11% stake and Elliott held around 7% stake. So this was in fact higher than what was owned by the Samsung Group.

In such case, control is not clearly established.

So, for example, there could be a case where other shareholders hold hands to request for an improvement in governance or initiate a control dispute, in which case there remains the possibility for the share price to increase or for enterprise value to improve.

And the owner of the Samsung Group didn’t like the idea. That is probably why the owner of the Samsung Group pushed for this kind of merger.

11 years ago, back in 2004, the British hedge fund Hermes actually started buying SC&T which came off as threatening to the management of the Samsung Group and that became a big issue in Korea.

And by pursuing this merger, they were able to get away from such trauma because this merger ensured them to have up to 40% of the control.

So when they have the 30% stake, the value of the way that they would feel about the — — when.

THE INTERPRETER: Sorry.

A. — — when they had the 13% stake, the value of the 7% stake of Elliott would be completely different from the value of the 7% stake of Elliott when they have 40% stake.

This is exactly what the Delaware court says. The controlling premium has been permanently lost, and here I’m referring to the Elliott’s value.

THE PRESIDENT: Okay, yes. I understand. I’m just trying to understand your evidence.

So what you’re basically saying is that if the minority shares are being traded at a discount, the premium would be in the value of the controlling shares, but because the controlling shares are not traded, and they are self-dealing, there’s no market price for the controlling shares. Is that what you’re saying? Please correct if I’m wrong.

A. So the — — if you’re saying that there is no market price because that is not traded at the market, then I think you have the right point. But then when one is asked the question what is the fair value, those in finance would be able to calculate something that would — — that is believed to be the fair value.

Also, in reality, in the M&A market, the shares of the controlling shareholder do get traded. So it is not that the shares of the control shareholders are not traded at all.

THE PRESIDENT: Yes, understood. I understand you are also saying you are not a valuation expert. We will hear the valuation experts a bit later this week.

So I have taken enough of your time. Thank you for your patience, Professor Lee.

THE WITNESS: Thank you.

THE PRESIDENT: That concludes your examination, so you are free to go. And there will be a further discussion between the parties. So you don’t need to stay, at least on the hot seat. Thank you.

(The witness withdrew)

CERTAINLY STAY IN THE ROOM, BUT YOU DON’T NEED TO SIT THERE.

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We didn’t want to open that unless either party wants to clarify anything, but what we wanted to discuss with the parties is the schedule for the next week, including possible closing or post-hearing submissions.

MR TURNER: Sir, if I may, before we talk about that, there’s just an update on our examination of my learned friend’s documents. We have been looking at them. As I said yesterday, there are 269 pages. We received this in eight blocks and my learned friend referred to an application that he would make to put eight new documents into evidence. We will discuss this directly with the Claimant, but we think that each individual trade should be a separate document to help in dealing with that during the course of next week.

We have identified that a number of the trades — the underlying documentation for which has been provided to us, seemed to deal with swaps in SC&T shares, rather than Cheil shares. It may be that all of that is explicable. I’m simply saying two things to the arbitral tribunal this afternoon.

The first is that we have yet to make a final decision about whether we would object to any of the 269 pages being admitted into evidence, but we will deal with that as quickly as possible and bilaterally, but just to keep the tribunal updated.

Secondly, we will want to ask the tribunal to admit my learned friend’s spreadsheet into evidence that we received with the Claimant’s counsel’s letter late on Monday night.

So that is an update on the documentary position so far as the discussion about the swaps that we’ve been having this week is concerned.

THE PRESIDENT: Claimant?

MR PARTASIDES: Thank you, Mr President.

To confirm, the spreadsheet is the first of those eight new proposed exhibits. The other seven exhibits, which indeed compile the individual transaction confirmations, have been organised into seven exhibits because those reflect the seven different brokers with which those transactions have been arranged.

So it seemed to us to be a convenient way in which to tally the spreadsheet that we provided with the underlying transaction documents, but having said that, I understand that my friend opposite needs some more time to formulate a final position, which I will await when it is ready.

As you heard from me yesterday, we propose that all of those be on the record. It seems to us that it would be easier, as long as they are paginated, if they were eight new exhibits. But if there is a preference that they be individually exhibited, then of course that is another way of doing it. I’m not quite sure I see the point of that as long as they are paginated, but that is a practical question that I express no further view on.

THE PRESIDENT: Okay. So that was by way of an update. No need for a tribunal intervention at this stage. So that is noted.

Anything else that either party would like to raise before we discuss the schedule for next week?

MR PARTASIDES: I’m able to say that the parties have liaised on the question of closing submissions which will have an impact on how we spend our weekends, of course.

If I may, I’m happy to give the tribunal an update on that now, and then allow my friend to confirm.

I think both sides suggest that it may be useful for this tribunal to have post-hearing written submissions in the normal way and we can discuss the exact modalities perhaps at the end of the hearing, but we are both anticipating that that will be of use to the tribunal.

It seemed to us that oral submissions may serve a different purpose, and therefore still be useful to the tribunal, not duplicatory, if organised in the right way, and as we have scheduled time next Friday for those oral submissions, both sides suggest that, subject to the tribunal’s preferences, we might use that time for oral closings on the Friday of next week.

As I said, that’s subject to your preferences, members of the tribunal, and that would also lead us to hear from you as to your preferences as to how long those oral submissions should be. Let me tell you on the question of length where I think the parties have got to.

I’ll let my learned friend speak for the Respondent. On our side it seems to us that oral closings up to but no more than two hours, given the subject matter, seems appropriate. That is up to but no more than two hours each. But of course we’re in your hands as to whether that accords with your preferences as well.

THE PRESIDENT: Mr Turner?

MR TURNER: Thank you, sir.

So yes, that’s right. And we can discuss modalities for written closing submissions now or at the end of the hearing as the tribunal wishes. Our suggestion would be for two simultaneously exchanged rounds, with sensible page limits. All of that we can talk about in due course. Sensible to the extent (a) that there isn’t
THE PRESIDENT: The tribunal did have a chance to discuss as well and we ended up in roughly in the same place. We are obviously — there is a smorgasbord of options available to the tribunal, including setting specific topics or questions that you would like the parties to address orally, while leaving the field open, as it were, in written submission thereafter. We are in the tribunal’s hands. I think the only difference and it’s only a difference of emphasis between my learned friend and myself is that we would suggest shorter rather than longer oral submissions, but as I say, we are entirely in your hands.

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1. I just wanted to explain to the tribunal what our thinking was in that respect. We don’t want to deprive the tribunal of the benefit of hearing our mellifluous voices for any longer than is needed, but nor do we want to fall, as it were, between two stools, and have to say — that it’s useful to have post-longer oral submissions, but as I say, we are entirely in your hands.

2. I think we ended up in something like 100 pages to make sure they are focused and not repeat what has already been said. Your opening statements were very helpful. What remains from the tribunal’s perspective is to make sure that the parties address each other’s key issues so that we don’t have ships passing in the night, but make sure that both parties address the key points of the case of the other side.

3. Our sense was that if we have post—hearing — written post—hearing submissions, we may not need oral closings. And our concern was that there would be duplication, that you would basically say — you would be saying basically or stating the same things in different words, first orally and then in a written submission. And given the amount of work that tends to go to oral closings, we didn’t want to impose them unless the parties prefer.

4. I don’t think we have a strong view on that. If the parties feel that the tribunal would benefit from oral closings, brief oral closings, I don’t think we would be saying no. And we would be prepared and would be happy to receive your oral submissions on Friday.

5. And then the question becomes — and maybe this is something the parties wish to reflect on — whether the oral closings should be focused on answering tribunal’s questions or whether they should be more of a summary of the parties’ case now that we have heard the evidence.

6. It may well be that some of the questions from the tribunal would require further thinking on the part of the parties. So maybe the questions could be then rather addressed in the written submissions. But we leave that for the parties then to decide. You may want to wish — you may wish to give at least preliminary answers in the oral closings.

7. I have already spoken too much. Any further comments?

8. So we seem to be in the same place. Oral closings on Friday and then post—hearing submissions. We have given the tribunal’s indication, 100 pages or so. The parties can confer and see whether you’re comfortable with that, and making sure you address the tribunal’s questions at least in the written submissions. I think that sums it up unless there’s anything that my colleagues would like to raise. Whether one or two hours, it may not make a big difference whether it’s one or the other. You may want to think about it. We can confirm Monday morning whether it would be one or the other or something in between.

9. MR PARTASIDES: Let me say a word why we thought of two, Mr President, on our side. Of course I appreciate that what you will want is focus and brevity as much as
possible, but given the subject matter here, it seemed to us up to two hours was a safer estimate. Of course, there’s no obligation on either side to use all of the two hours, and if someone on either side can do this more briefly, then more power to them. But it seemed to us, given the different categories of issue here, and we haven’t turned our minds yet to the significant subject of quantum, which will dominate much of next week, it seemed to us that a two hour estimate was both safer and also not one that would be unreasonable, given the time we have available to us. So that is the reason for our estimate, but you have, I think, heard from both sides on that now. If you didn’t have a preference, it might be that you would leave it to the parties to choose how they wish to make their closing, spending no more than two hours.

THE PRESIDENT: So then we will end up with two hours. But that will be fine.

MR TURNER: That is of course the risk, sir, and we are in your hands. Let’s see if we can reach any further agreement between us. Otherwise I would prefer the tribunal to tell the parties what it would prefer and just as a further and probably last point from me, 100 pages, we thought, was exactly right, and 50 pages for the simultaneous Reply if the tribunal wanted two rounds. Just to give you a flavour where we were thinking, but all of that we are happy to discuss at the end of next week.

THE PRESIDENT: So why don’t we come back to the length of the closing statements on Monday morning. We’ll have the tribunal’s preference by then if there’s no agreement. Thank you.

MR TURNER: Enjoy the weekend to the extent you can. Thank you very much. See you Monday morning, and it will be — let me see — it’s 9 o’clock — it’s 9.30. We’ll have Mr Milhaupt and Professor Bae or Professor Milhaupt and Professor Bae. So we keep 9.30 for Monday morning.

MR TURNER: Perhaps — we will have told you on Sunday evening time to be defined whether we want to talk to Mr Smith. We are happy to meet at 9 o’clock on Monday morning if that is helpful to the tribunal to discuss any practical questions that arise out of what we say to you on Sunday evening. I haven’t discussed this with my learned friend, but it just seems sensible to have a buffer if there’s anything to — we can always not use the buffer and have an extra cup of coffee if we don’t need to.