

OPUS2

Elliott Associates, L.P. v Republic of Korea

Day 5

November 19, 2021

Opus 2 - Official Court Reporters

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1 Friday, 19 November 2021
 2 (9.00 am)
 3 PROFESSOR SUNG-SOO KIM (continued)
 4 Cross-examination by MR PETROCHILOS (continued)
 5 (Evidence given through an interpreter)
 6 THE PRESIDENT: Good morning. It's the fifth day of the
 7 hearing. Welcome to all.
 8 Any issues to be raised in terms of housekeeping,
 9 Mr Petrochilos?
 10 MR PETROCHILOS: Thank you, Mr President. It's not an issue
 11 of housekeeping, but it's a related issue. It's an
 12 issue about the integrity of the transcript. Yesterday
 13 Professor Kim said something which he then directed our
 14 interpreter, having regretted what he said, not to
 15 translate, as he said, so that it would not be in the
 16 transcript.
 17 I now know what the witness said, it was a personal
 18 comment directed at me. So I will not insist on it
 19 being in the transcript. But it will be easier,
 20 I respectfully suggest, sir, for all of us concerned if
 21 the witness be directed not to try to self-edit again
 22 and if our interpreters interpret what he says as
 23 literally as possible.
 24 THE PRESIDENT: It is already on the record already, because
 25 the hearing is being recorded, as I understand it. That

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1 was at least what we indicated in PO1. So it is on
 2 record.
 3 MR PETROCHILOS: I'm grateful for that indication,
 4 Mr President. I simply meant it as a way to move
 5 forward without any interruptions.
 6 THE PRESIDENT: Understood. Maybe just by way of a reminder
 7 to everybody including Professor Kim that this hearing
 8 is being recorded, so whatever you say is part of the
 9 record. So when you yesterday tried to cancel what you
 10 had said, please note that it is anyway on record
 11 because of the recording. I understand it was
 12 interpreted simultaneously. Okay, very good.
 13 Mr Turner, anything on the Respondent's side?
 14 MR TURNER: No housekeeping from us, sir.
 15 THE PRESIDENT: So we'll go on, Dr Petrochilos.
 16 MR PETROCHILOS: Thank you, Mr President.
 17 Good morning, Professor Kim. Thank you for
 18 continuing to be with us. Let me ask, and I think
 19 I know the answer to this question, but it's good to
 20 have it in the record: did you draft the expert reports
 21 yourself? I know they reflect your opinion, but my
 22 question is about whether others took the pen in
 23 drafting them or suggested wording to you.
 24 A. No, not at all.
 25 Q. Thank you, good to have that.

2

1 Now, sir, was the threefold classification of State
 2 organs that you told the tribunal about yesterday
 3 a classification that was suggested to you by others and
 4 you were asked whether you could support it?
 5 A. No, it's fully my work.
 6 Q. Thank you, sir. You testified that this threefold
 7 classification is supported by what you call a plain
 8 reading of the Constitution. But this plain reading
 9 that you told us about is not one that, for example, the
 10 Constitutional Court has ever set forth in a decision.
 11 Am I right about that?
 12 A. The Constitutional Court of Korea has never instructed
 13 on this threefold classification of government or State
 14 organs. That is the conclusion that I reached
 15 personally as a scholar based on Article 96 of the
 16 Constitution as well as the Government Organization Act
 17 that central administrative agencies that are
 18 established either by the Government Organization Act or
 19 other individual Acts form one of these threefold
 20 government -- State organs is, I believe, the inevitable
 21 conclusion to be reached based on the Korean
 22 Constitution as well as Korea's positive law.
 23 Q. Thank you. You referred yesterday, Professor, to public
 24 law professionals. Let us look at a document or a text
 25 which I think emanates from public law professionals,

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1 subject to your views, of course.
 2 Can I ask you to turn to tab 45 of the documents you
 3 have been given. I believe it's in volume 2. This is
 4 exhibit SSK-54. {G4/32/1}, page 1.
 5 A. Would there be a Korean version of this available on the
 6 screen? {G4/32K/1}.
 7 Q. It has been done, as far as I can tell.
 8 So this is an extract of the Online Administration
 9 Dictionary issued by the Korea Association for Public
 10 Administration. Let me pause here. Professor, is this
 11 a body of what you called yesterday public law
 12 professionals? Yes or no?
 13 THE INTERPRETER: I'm trying to find the organisation, the
 14 Korean version of the organisation you've just mentioned
 15 on the Korean version of it.
 16 MR PETROCHILOS: It must be at the very top
 17 THE INTERPRETER: On the very top it only says "online
 18 administrative studies, electronic or online
 19 dictionary". The institution that is the source of this
 20 is not indicated on this Korean document.
 21 MR PETROCHILOS: Madam, thank you for this. Let me see if
 22 I can help.
 23 This is an exhibit of Professor Kim's. So perhaps
 24 Professor Kim could tell us.
 25 A. For me this appears to be an association or society of

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1 administrative law, not public law.
 2 Q. The administrative law is part of public law.
 3 A. (In English) Public administration — association for
 4 public administration — not association for public law.
 5 THE INTERPRETER: So to clarify, to correct the previous
 6 translation, what he said was that it appears to be an
 7 association — a society of public administration, not
 8 public administration law.
 9 MR PETROCHILOS: Thank you. Now, this is the entry,
 10 Professor, which is titled the "Law of Administrative
 11 Organisation". It starts in the first paragraph with
 12 these words:
 13 "The law [on] administrative organisation refers to
 14 the totality of laws pertaining to the organisation of
 15 administrative entities. In other words, it refers to
 16 law that determines administrative [agencies']
 17 establishment ... [abolition] composition, authorities,
 18 and relationships with other administrative [agencies]."
 19 If we then come to the second paragraph:
 20 "The law on administrative organisation may be
 21 divided by the scope of coverage into the law on
 22 administrative organisation in the broadly-defined
 23 version, the law on administrative organisation in the
 24 narrowly-defined version and the law on administrative
 25 organisation in the supra-narrowly-defined version."

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1 Then it continues:
 2 "The law on administrative organisation in the
 3 broadly-defined version includes laws regulating
 4 administrative agencies' establishment, changes,
 5 abolition, composition, authorities, and relationships
 6 with other administrative agencies ..."
 7 I pause here. Then we come to the third paragraph:
 8 "The law on administrative organisation in the
 9 narrowly-defined version includes only the laws
 10 regulating the administrative entities and agencies as
 11 prescribed in the laws on national administrative
 12 organisation and the laws on autonomous administrative
 13 organisation."
 14 Let me pause here and ask you a question.
 15 Forgive me, madam. Mr President, perhaps as the
 16 Professor was looking at the authentic text on his
 17 screen, we don't need to have all of this translated
 18 into the record.
 19 THE PRESIDENT: Can you perhaps indicate the paragraphs that
 20 Dr Petrochilos read and he can read those on his own.
 21 MR PETROCHILOS: Thank you, Professor.
 22 Now, my question. We just read the words
 23 "autonomous administrative organisation". As you told
 24 us yesterday, the NPS is an autonomous administrative
 25 organisation; that's correct, isn't it?

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1 A. Here I read in the text actually an autonomous
 2 administrative organisation law or Act which refers to
 3 the law that provides for the local autonomous
 4 government organisations.
 5 Q. All right. We will come to see that.
 6 Can we go to the third paragraph, please:
 7 "The law on administrative organisation in the
 8 supra-narrowly-defined version includes only the laws
 9 regulating the administrative entities and agencies as
 10 prescribed in the laws on national administrative
 11 organisation ... this scope excludes the portion
 12 regarding the laws on autonomous administrative
 13 organisation from the laws on administrative
 14 organisation in the narrowly defined version."
 15 Let me put a full stop here and ask the Professor.
 16 The evidence he gave to the tribunal yesterday about
 17 entities being regulated and falling under the
 18 Government Organization Act follows that which this
 19 paper describes as the supra-narrowly defined version.
 20 That's correct, isn't it?
 21 THE INTERPRETER: Counsel, I am very sorry, but I'm not able
 22 to actually identify the part of the passage that you
 23 had read. I actually thought you had already read that
 24 passage with the supra-narrow because that's —
 25 THE PRESIDENT: He was referring to the fourth, not the

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1 third paragraph.
 2 MR PETROCHILOS: It is the paragraph which is the fourth
 3 paragraph in the text.
 4 THE INTERPRETER: I was a bit confused because the word
 5 "autonomous administrative organisation" does not appear
 6 on the third paragraph, and that is why I thought he had
 7 read already the fourth paragraph because his previous
 8 question was about the autonomous administrative
 9 organisation.
 10 MR PETROCHILOS: Forgive me. As I have it in the English
 11 translation that was provided by Professor Kim, the
 12 second sentence of the fourth paragraph includes the
 13 words "the laws on autonomous administrative
 14 organisation".
 15 THE INTERPRETER: Yes, it does. Yes. Yes, it does.
 16 MR PARK: It is in the middle of the Korean.
 17 THE INTERPRETER: Counsel, so let me point that out to the
 18 Professor and then do you mind posing your question
 19 again?
 20 MR PETROCHILOS: So my question was: the view that you
 21 testified to the tribunal yesterday that the Government
 22 Organization Act is the Act which exhaustively and
 23 exclusively defines State organs in the administrative
 24 sense is based on what this text here defines as the
 25 supra-narrowly defined version of administrative

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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
 19 Law Review in 2017. {C/699/1}.
 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

1 Korean text and the second page of the PDF on our screen
 2 in the English translation. {C/699/2}
 3 Professor, you may wish to refresh your memory as
 4 I'm reading this into the record. It says this:
 5 "In general, administrative organisation law refers
 6 to the legal establishment of the creation, abolition,
 7 composition, and authority of entities that exercise
 8 administrative authority (ie administrative
 9 institutions) as well as the relations among
 10 administrative institutions. Despite these abstract
 11 definitions of the administrative organisation law,
 12 because administrative organisations exist in various
 13 forms, such as national administrative organisations,
 14 local administrative organisations, public institutions,
 15 etc, and each organisation's organisational and
 16 operational principles differ significantly from one
 17 another, providing a singular definition of the
 18 administrative organisation law applicable to all these
 19 organisations would be difficult."
 20 Now, let me establish one thing so that we're clear
 21 between us. 'Public institutions' in this text includes
 22 entities such as the NPS and KAMCO. That's correct,
 23 isn't it?
 24 A. Correct.
 25 Q. Secondly, you say in this paper that the law on

1 administrative organisation does encompass, is
 2 applicable to public institutions such as NPS and KAMCO.
 3 That is correct, isn't it?
 4 A. (In English) Mr Georgios, Georgios, your name?
 5 Q. That is correct.
 6 A. Once again, as I have mentioned, the "administrative
 7 organisations" in this paper is not referring to State
 8 administrative organisations alone. As I mentioned,
 9 here we're dealing with the broad sense of
 10 administrative organisations that encompass not only
 11 State administrative organisations, but also local
 12 governments, as well as public institutions,
 13 administrative organisation.
 14 So public institutions, as I have mentioned, would
 15 be part of the State organisation, but as an indirect
 16 administration.
 17 Q. Thank you. The words "indirect administrative
 18 organisation" are not in your paper, are they?
 19 A. It is. You mean this paper that we're looking at?
 20 Q. Yes.
 21 A. No, not in this paper.
 22 Q. And the threefold categorisation of State agencies is
 23 not in this paper either, is it?
 24 A. No, not in this paper because this paper is actually an
 25 analysis of a representative State organ which was the

1 water management committee — commission.
 2 Q. Perhaps I have missed something in the title of the
 3 paper. Perhaps we can turn to page 1 of the exhibit and
 4 page 1 of the Korean text {C/699/1}.
 5 The paper refers to the Administrative Organization
 6 Law which is the Act that you have been telling us about
 7 yesterday as a very important statute in Korea.
 8 A. You mean —
 9 (In English) No, no, no, not at all.
 10 Q. It is not at all very important as a statute in Korea or
 11 is it not at all important in this paper? I'm trying to
 12 understand your answer.
 13 A. Well, this paper that we're looking at has nothing to do
 14 with the threefold government organisation structure
 15 that we discussed yesterday or in this case. This paper
 16 actually deals with National Water Management Commission
 17 which is a type of representative government agency that
 18 is governed under the Framework Act on National Water
 19 Management.
 20 Q. Thank you. We have your answer.
 21 I'm still on the topic of that which you call in
 22 this paper a singular definition.
 23 Let us be clear on one point for the discussion
 24 going forward. You told us yesterday that the concept
 25 of State organ that international law has is not used in

1 Korean law. I believe this is at page 142, line 25 to
 2 page 143, line 1 of the transcript {Day4/142:25}.

3 So you I believe are using the concept
 4 guk-ga-gi-gwan which has been rendered in the English
 5 version of your report sometimes as State organ and
 6 sometimes as governmental agency. I'm correct about
 7 that?

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

12 Q. That was not one question. That was not a question at
 13 all. My only question is whether I am right in
 14 understanding that you use in the English version of
 15 your reports the term "State organ" to refer to the
 16 concept in Korean law of guk-ga-gi-gwan. It's
 17 a yes-or-no question.

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

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

25 If you turn to page 4 at paragraph 11 which is now

1 on your screen, you will see it says:
 2 "State organs under the Korean legal system are
 3 classified into three categories ..."

4 This was your threefold categorisation yesterday.
 5 And it says state organs in sub-paragraphs (a), (b) and
 6 (c) and what I wanted to be clear on is that here the
 7 authentic text in Korean uses the term "guk-ga-gi-gwan"?

8 A. Correct.

9 Q. Thank you. Now, correct me if I am wrong, Professor,
 10 this is the term, guk-ga-gi-gwan, that consists of two
 11 words. It's a composite word. And so "guk-ga" means
 12 state or nation, as I understand it, and "gi-gwan" means
 13 agency. That's correct, isn't it?

14 A. The latter part of that word of course may mean an
 15 agency, but I would say that the word "organ" would
 16 actually refer to a larger scope because the word
 17 "agency" would correspond more towards the
 18 administrative agency in the sense of a haengjeong
 19 cheong which is the other Korean word we've been
 20 discussing, whereas organ would actually be a broader
 21 concept that would include the agency.

22 Q. Thank you. So the term "guk-ga-gi-gwan" is also used in
 23 Article 26 of the Constitution; that's correct, isn't
 24 it? The right of petition?

25 A. Even though, yes, I do remember our Constitution, do you

1 mind showing that on the screen just for accuracy's
 2 sake?

3 Q. No difficulty at all. It's tab 12 in volume 1, exhibit
 4 {C/88/6} we are looking at page 6 in the exhibit.
 5 I believe in the Korean version it's page 3. {C/88K/3}
 6 So article 26, paragraph 1, as we have it in the
 7 English translation in the official compilation, is in
 8 paragraph 1 saying this:
 9 "All citizens shall have the right to petition in
 10 writing to any governmental agency under the conditions
 11 as prescribed by Act."
 12 And so the -- forgive me, madam -- and so the word
 13 "agency" here in the authentic Korean text is
 14 guk-ga-gi-gwan; that's correct, isn't it?

15 A. So yes, it does say here "guk-ga-gi-gwan" in the Korean
 16 version of Korea's Constitution.
 17 To comment on this shared official English version
 18 that the parties have been using, even though, as you
 19 have just told me, it says "governmental agencies", my
 20 personal opinion would be perhaps 'governmental organs'
 21 would have been a better wording of that English
 22 version.
 23 If I may add my opinion regarding this article and
 24 your suggestion, even though, yes, it says
 25 "guk-ga-gi-gwan" in the Korean version of Constitution

1 Article 26, paragraph 1 which you say reads "government
 2 agencies", the Article 26, paragraph 1 says that any
 3 national has the right to submit a petition in writing
 4 to this governmental agency as stipulated in law, and
 5 the law that is mentioned here takes form in the
 6 Petition Act of Korea.
 7 So if you go to the Petition Act of Korea, it
 8 actually specifies a very wide scope of agencies or
 9 bodies that are -- that receive or must receive or
 10 people can submit petitions to, including the State,
 11 local autonomous government, as well as organisations,
 12 legal corporations, the subordinate institutions under
 13 these legal corporations, as well as private parties,
 14 private persons that have either been commissioned,
 15 entrusted or delegated power by State or local
 16 government agencies.
 17 So I would suggest that the best way of
 18 understanding the accurate meaning of guk-ga-gi-gwan or
 19 governmental agency/organ mentioned in Article 26,
 20 paragraph 1 of the Korean Constitution, would be to
 21 carefully examine not only the constitutional article
 22 itself, but also the Petition Act that practice -- that
 23 is based on that constitutional article. And the
 24 Petition Act actually prescribes a very wide scope of
 25 bodies and institutions that are subject to this

1 petition and I would like to add a few more comments.
 2 Q. Professor, we will come to look at the Petition Act
 3 later, I hope. So my question was a little more
 4 limited. I'm grateful for your answer.
 5 Can we please turn to Article 111, which is page 23,
 6 24 of the pdf in the English text, and 11 in the Korean
 7 text {C/88/24}.

8 THE INTERPRETER: Are we still on the Constitution?
 9 MR PETROCHILOS: Yes, madam.

10 Q. Is that the Constitutional Court section?
 11 A. Indeed. Professor, can I direct your attention to
 12 Article 111 paragraph 1:
 13 "The Constitutional Court shall have jurisdiction
 14 over the following matters."
 15 And then paragraph 4:
 16 "Competence disputes between ..."
 17 I pause here. I don't want to say the English term
 18 because I'm not interested in the English term. What
 19 follows in Korean is *guk-ga-gi-gwan*; is that correct?
 20 A. Yes, it does say between *guk-ga-gi-gwan*.
 21 Q. Thank you. Can I ask that we turn now to page 17 of the
 22 document which is 18 of the English pdf {C/88/18}.
 23 I trust we will find the Korean version as well. It's
 24 article — just above Article 86 which I have in mind.
 25 Thank you.

17

1 Professor, this is now section 2. Are you with me?
 2 Professor, are you there?
 3 A. Yes, we are there.
 4 Q. So just above Article 86 there is a section heading
 5 called "The Executive Branch". That is part of
 6 chapter 4 of the Constitution. Can we turn, please, to
 7 the next page. {C/88/19}
 8 A. Could you flip back to the previous page?
 9 Q. Certainly. Will the operator please do so. {C/88K/8}
 10 A. Yes.
 11 Q. Professor, paragraph 2 of Article 86 says this:
 12 "The Prime Minister shall assist the President and
 13 shall direct the Executive Ministries under order of the
 14 President."
 15 Do you see that?
 16 A. Yes.
 17 Q. Can we please turn to page 21 of the English pdf,
 18 page 20 of the document, Article 96 {C/88/21}.
 19 So in Article 96 it reads:
 20 "The establishment, organisation and function of
 21 each executive ministry shall be determined by Act."
 22 A. Yes.
 23 Q. This executive ministry that we read in English in
 24 Korean it is Bu; is that correct?
 25 A. Yes, it says "Haengjeong gak Bu".

18

1 Q. Now, you testified yesterday that there are two types of
 2 ministries. There are Bu and there are Cheo, and the
 3 difference between the Bu and the Cheo is that the Cheo
 4 fall under the Prime Minister, whereas the Bu fall under
 5 the President. Do I have that right?
 6 A. Correct.
 7 Q. So this provision, Article 96, which you told us
 8 yesterday is the constitutional foundation for
 9 administrative legalism, encompasses in terms only the
 10 Bu, not the Cheo; that's correct, isn't it?
 11 A. It will, it says here that it is to be stipulated by
 12 law, "law" here referring to the Government Organization
 13 Act. The Government Organization Act then prescribes
 14 that the Ministry or the organisations are Bu under the
 15 President, Cheo under the Prime Minister, and then
 16 a Cheong under each ministers.
 17 Q. My question was a slightly different one. My question
 18 was: this Article 96 does not provide for Cheo; that is
 19 correct, isn't it?
 20 A. Well, that is what the language says.
 21 Q. And so the legal foundation of Cheo is in an Act; that's
 22 correct, isn't it?
 23 A. The Government Organization Act.
 24 Q. That was not my question, sir. The legal foundation for
 25 Cheo is an Act of the State; yes or no?

19

1 THE INTERPRETER: Counsel, by "Act of the State" do you
 2 refer to an action Act or a law Act?
 3 MR PETROCHILOS: A statute.
 4 A. The Government Organization Act.
 5 Q. Right. And so since the Government Organization Act,
 6 which is a statute, can establish an entity which is an
 7 administrative entity without constitutional foundation,
 8 that can apply to other statutes as well. That's
 9 correct, isn't it? Other statutes as well can establish
 10 administrative entities?
 11 A. As I have already mentioned several times, in order to
 12 create — establish a Cheo, there has to be a revision
 13 of the Government Organization Act.
 14 As you mentioned, yes, other central administrative
 15 agencies may be created, and that is at the liberty of
 16 the National Assembly, Korea's legislative body. They
 17 can if they decide it's necessary create a new or an
 18 additional central administrative agency by, first of
 19 all, establishing a law for that agency. For example,
 20 if there is a need to establish a Korea Communications
 21 Commission, the KCC, as a central administrative agency,
 22 the National Assembly would have to go about
 23 establishing or enacting a law, the Act on the
 24 establishment and operation of the Korea Communications
 25 Commission.

20

1 And then for the sake of the people, because the
 2 people need to know what the central administrative
 3 agencies do, how they operate, given the fact that it is
 4 operated with their tax money, the other procedure that
 5 has to be taken is that it is necessary for the
 6 Government Organization Act Article 2, paragraph 2,
 7 subparagraphs at least to be amended so that this newly
 8 created central administrative agency be reflected into
 9 the subparagraphs under Article 2, paragraph 2, of the
 10 Government Organization Act. Currently there are eight
 11 subparagraphs and a central administrative agency that
 12 is newly created by the National Assembly based on
 13 a specific law would have to be added in there to
 14 complete the process.

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

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

23 A. So that's the Board of Audit and Inspection?

24 Q. That is correct. And it says this:

25 "The Board of Audit and Inspection shall be

21

1 established under the direct jurisdiction of the
 2 President to inspect and examine the settlement of the
 3 revenues and expenditures of the State, the accounts of
 4 the State and other organisations specified by Act and
 5 the job performances of the executive agencies and
 6 public officials."

7 I pause here.

8 Madam, forgive me. You don't need to translate that
 9 because the Professor can see it.

10 The term "executive agencies" here, Professor, reads
 11 in the Korean authentic -- correct me if I am wrong --
 12 haengjeong gi-gwan; is that correct?

13 A. Yes, correct, he confirms.

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

17 A. Of course.

18 Q. Thank you. I'm changing on to something slightly
 19 different.

20 You say that local governments are to be
 21 characterised as State organs within your conception of
 22 what a State organ is; that is correct?

23 A. Not at all.

24 Q. And you say that because they have separate legal
 25 personality?

22

1 A. I don't recall whether it was Article 3 or 4, but do you
 2 mind showing me the local government Act?

3 Q. Well, I'm asking for the Professor's opinion on why
 4 local governments are not characterised as State organs
 5 in his conception, to which he said "absolutely not".
 6 So what is the reason why not?

7 A. Then can we go to Constitution Article 107?

8 Q. Yes, we can indeed, and 107 is at page 23 of the English
 9 pdf {C/88/23}.

10 A. Excuse me. 117.

11 Q. I would have thought that's what you want. That is at
 12 page 26 of the English pdf on the same exhibit, which is
 13 exhibit C-88 {C/88/26}.

14 A. Well, here we are looking at chapter 8, Korea
 15 Constitution, which is about local government autonomous
 16 local government, and we're looking at Article 117
 17 thereunder. Even though Korea as a State is not
 18 a Federation, similar to Germany, and even though Korea
 19 is therefore a single State, Korea does recognise local
 20 autonomy. It provides local governments within Korea
 21 the right to manage its own finances, its own
 22 legislation, as well as its own administration, and this
 23 local autonomy provided to local governments are
 24 actually a very important part of the Korean
 25 Constitution. The Korean Constitution recognises the

23

1 importance of local autonomy, as you can see, by
 2 devoting a separate section to it. Therefore, given the
 3 fact that the Korean Constitution recognises local
 4 autonomy and devotes a separate section to it, the
 5 premise or the argument that local governments are
 6 included or a part of the State administration would be
 7 a serious misconstruction of the Korean Constitution.

8 Also, if you look at Korea, each of the local
 9 governments are provided its own right to overlook
 10 autonomously its affairs. It has its own rights and is
 11 to manage its affairs autonomously.

12 Therefore, saying that local governments are part of
 13 the State administration, if you propose that, I would
 14 say it's absolutely not the case.

15 Also, this is very clear in Article 3 and -- or 4,
 16 I am not sure which article -- of the Local Autonomous
 17 Government Act, where it stipulates that local
 18 government entities are a separate legal personality.

19 Q. Thank you, Professor. Again, shifting gears to
 20 something slightly different, still in the Constitution,
 21 Article 34, please, page 8 of the English pdf, and
 22 page 4 of the Korean text. {C/88/8}, {C/88K/4}.

23 A. Yes, Article 34?

24 Q. Yes, indeed.

25 A. I'm looking at it.

24

1 Q. I'm starting at paragraph 2:
 2 "The State shall have the duty to endeavour to
 3 promote social security and welfare."
 4 If we turn to the next page, please {C/88/9},
 5 paragraph 5:
 6 "Citizens who are incapable of earning a livelihood
 7 due to a physical disability, disease, old age or other
 8 reasons shall be protected by the State under the
 9 conditions as prescribed by Act."
 10 Now, Professor, let me ask you, this is an important
 11 question, and it's a question of public law. The State
 12 funds the national pension programme through the pension
 13 fund, as you know, which is administered by the NPS.
 14 If the NPS manages the fund poorly and the fund
 15 doesn't have the necessary resources to pay out the
 16 pensions that it needs to pay, can the State say these
 17 were all decisions taken by the NPS? We don't have
 18 money to pay out pensions this year. Some people will
 19 not be paid.
 20 Can the State say that or is it a duty of the State
 21 to fund the pension system?
 22 A. Well, of course such a situation should not occur
 23 preferably, but since, as you have posed me
 24 a hypothetical, if that does occur, primarily it would
 25 lie with the NPS and the NPF which are the entities

1 identified under the National Pension Act to provide the
 2 finances for the national pension programme to be liable
 3 for that situation.
 4 I do understand that you have pointed me to
 5 Article 34, paragraph 2 of the Constitution, which says
 6 that the State has the obligation to -- I would like to
 7 emphasise the word "endeavour" to provide for social
 8 security and welfare, and there is this word expression
 9 "endeavour" used with -- so the expression "endeavour"
 10 is used.
 11 So if the State faces a situation where the National
 12 Pension Fund has been depleted, it says under the
 13 Constitution that the State would need to endeavour to
 14 continue to provide, which means that at that point
 15 I would assume that the Korean State would consider its
 16 overall fiscal situation and consider other fiscal needs
 17 that the State needs to provide for, such as not only
 18 the pension programme, but other welfare programmes,
 19 education, national defence, and because of the word
 20 "endeavour" I would think that after considering its
 21 fiscal situation and other programmes it needs to fund
 22 with it, if possible the State would provide additional
 23 financing to the NPS if its financial situation, fiscal
 24 situation, at that point allows.
 25 So it would not be a simply legal issue because,

1 first of all, the expression "endeavour" is used in the
 2 Constitution. At that point in the situation that you
 3 suggest I would assume that various government organs,
 4 including the Ministry of Economy and Finance, Ministry
 5 of Welfare, would get together and consider and discuss
 6 the situation and that would actually create quite
 7 a political process in addressing the issue.
 8 So I would not agree with your reading that because
 9 of Article 34, paragraph 2 of the Constitution, if the
 10 National Pension Fund is suddenly depleted, the State
 11 would be obligated to immediately support or supplement
 12 that fund regardless of its other fiscal needs and
 13 conditions. That would be an extremely simplistic view
 14 and reading of the Constitution because it's not only an
 15 issue of the Constitution, but also it would be a very
 16 serious political process, I think, at that point if
 17 that situation actually occurs.
 18 Q. Thank you. Professor, thank you for this very full
 19 answer.
 20 Let me ask the question in simple terms, if I may.
 21 Look at paragraph 5, please, of Article 34. Now that
 22 you have Article 34, paragraph 5, in mind, my question
 23 to you is: if the National Pension Fund is for some --
 24 God forbid -- reason depleted, can the government say:
 25 we have no liability to fund State pensions; yes or no?

1 A. I would not say it would have absolutely no liability,
 2 but I also think the premise of your question is
 3 incorrect.
 4 Well, the reason why I said the premise of your
 5 question is incorrect is because if you do read
 6 paragraph 5 that you have pointed me to, it says that
 7 the State should protect the citizens that have -- that
 8 are not able to provide their own -- provide for their
 9 own livelihood due to disability, disease, old age and
 10 other various reasons which has actually nothing to do
 11 with the National Pension Programme, the National
 12 Pension Programme which would be closer to paragraph 2
 13 of Article 34 of the Constitution, there's actually
 14 a benefit that is paid to subscribers to the National
 15 Pension Programme, that have paid their contributions on
 16 a monthly basis.
 17 So the State's obligation regarding paragraph 5 is
 18 actually supported by other bodies of law such as the
 19 elderly protection law, the child protection law, as
 20 well as the basic livelihood protection laws of Korea.
 21 So under those laws, if a Korean citizen finds him or
 22 herself unable to provide his or her own livelihood,
 23 under these laws the State would provide protection, but
 24 that would be separate from the National Pension
 25 Programme.

1 Q. Thank you, Professor. Moving on to something slightly
 2 different, let us look now at the case of the Bank of
 3 Korea. You have considered the Bank of Korea in your
 4 reports.
 5 A. Do you mind showing the part of my report that I deal
 6 with?
 7 Q. We will do all of that in order. Let us turn to the Act
 8 on the Bank of Korea. It's exhibit C-534, volume 2 of
 9 the binder, at tab 29 {C/534/1}.
 10 A. I'm looking at it.
 11 Q. So this is the Bank of Korea Act. Let me ask you to
 12 turn to the first page of the Act in the English text
 13 {C/534/2}. Thank you.
 14 I start with Article 2, juristic personality. I'll
 15 read it out, Professor, in English, and you may wish to
 16 read the authentic Korean text:
 17 "The Bank of Korea shall be a special juristic
 18 person without capital."
 19 Now, your evidence is that -- your expert opinion is
 20 that the Bank of Korea is not a State organ
 21 guk-ga-gi-gwan under Korean law. That's correct, isn't
 22 it?
 23 A. Correct.
 24 Q. And you say that because of this reason that we just
 25 read, that it is a separate legal person?

1 A. That is one of the reasons. What is more important is
 2 the fact that Bank of Korea, like many other central
 3 banks, essentially needs to maintain its independence,
 4 especially as it enforces or implements monetary
 5 policies as well as interest rate policies of Korea, and
 6 that is why it is critical that the Bank of Korea
 7 remains free from various political influences.
 8 So rather than it being significant in the fact that
 9 it recognises Bank of Korea having its own legal
 10 personality, the importance is in the fact that the
 11 independence of the Bank of Korea from the government
 12 and the State is provided for here.
 13 Currently Korea is going through a run-up to
 14 a presidential election, and various candidates wanting
 15 to become President are mentioning various programmes
 16 that they propose that would probably require State
 17 resources. And against such movement, political
 18 movement, the government, for example the Ministry of
 19 Economy and Finance, as well as the -- economy of
 20 finance needs to provide a check and balance against
 21 these attempts to drain Korea's financial resources, and
 22 the Bank of Korea would also need to maintain its
 23 independence, reach its own decisions, for example
 24 regarding currency issues, so as to prevent excessive
 25 inflation by random issuing of currency.

1 So I would say that it would be too naive a view to
 2 say the Bank of Korea is not a State organ because it
 3 has its own legal personality, given the reasons why it
 4 is provided with a separate legal personality. It is
 5 similar to the Federal Reserve Board in the US, having
 6 separate powers from the US Government for the same
 7 reasons.
 8 Therefore, my view of Article 2 of the BoK Act is
 9 that it is not an article that actually seeks to create
 10 the legal personality of the BoK, but actually it's an
 11 article that confirms and affirms such independence of a
 12 central bank.
 13 Q. Thank you, Professor. Do I have it right that the Bank
 14 of Korea, because it has separate legal personality,
 15 cannot be designated as a central administrative agency;
 16 yes or no?
 17 A. (In English) Yes. Yes, yes.
 18 (Interpreted) Yes, correct. It is not a central
 19 administrative agency, nor is it a public institution
 20 that is designated by the Minister of Strategy and
 21 Finance.
 22 Q. Thank you. Can it be designated -- I'm not saying
 23 whether it should -- but can it be designated as
 24 a public institution?
 25 A. My view is that it cannot.

1 So to answer your question once again I would say
 2 that it cannot be designated as a public institution
 3 and I would say that even though public institutions are
 4 provided -- are entities that have their separate legal
 5 personalities, and are granted certain scope of
 6 independence and autonomy, as we discussed at quite
 7 length yesterday, public institutions or entities that
 8 are designated as public institutions are subject to
 9 a certain degree of supervision and oversight by, for
 10 example, the competent minister.
 11 So if we assume a situation where the BoK is
 12 designated as a public institution, it would probably be
 13 then put under the supervision of the Ministry of
 14 Economy and Finance, and, for example, in that case, if
 15 the minister wants to have interest rates lowered
 16 because he actually thinks that there is a need to boost
 17 up the economy, the question is -- serious question is
 18 whether, for example, the Bank of Korea and the Finance
 19 and Currency Commission under it that oversees the
 20 monetary policies would be able to maintain its
 21 independence free of such political -- such supervisory
 22 pressure coming down from the minister.
 23 The fact that the Bank of Korea is not a part of the
 24 State organ, nor has been designated as a public
 25 institution, is actually the expression of the

1 collective intelligence of the Korean people who see it
 2 critically important to maintain independence in the
 3 operation of its central bank.
 4 Q. Thank you, Professor.
 5 A. And so there is no need or room for further discussion
 6 of that issue.
 7 Q. Thank you, Professor, for this very full answer.
 8 Can I move on, please, with the Act. Let us look at
 9 Article 1, which is the purpose of the Bank of Korea.
 10 It is -- I read from paragraph 1 -- to contribute to the
 11 sound development of national economy through price
 12 stabilisation through the establishment and execution of
 13 efficient monetary and credit policies.
 14 I pause here. Would you characterise price
 15 stabilisation and the efficient monetary and credit
 16 policies as an activity which -- I'm using the terms of
 17 your report -- is generally one that is governmental in
 18 nature?
 19 A. Yes, generally that would apply, but I do feel the need
 20 to provide additional explanation about the overall
 21 Korean legal framework, starting from the Constitution.
 22 The Constitution does place with a State various
 23 tasks, mandates that the State needs to perform. These
 24 are public mandates and tasks, including welfare,
 25 economic growth, as well as stable inflation .

1 Even though these are public tasks and State tasks
 2 that the Constitution places with the State, the
 3 question of how to go about and perform these tasks are
 4 then to be stipulated in laws.
 5 For example, if we take public education, which
 6 I believe you will agree is a very important State task,
 7 that is required by the State -- by the Constitution.
 8 The question is how to go about and perform this
 9 education service to its people as required. It could
 10 be through a State school system or it could be through
 11 a private school system. It could be either/or both,
 12 and so that would actually be then determined at the law
 13 level .
 14 So because education is an important public task,
 15 the legislation , legislative body would go about and
 16 provide for how to implement that State task, whether
 17 it 's through the national school law or through
 18 a private school law or either/or both. So there will
 19 be flexibility at the law level of how these State and
 20 public tasks placed with the State is performed.
 21 The same would go to the currency and the -- the
 22 currency and the inflation policies that you've
 23 mentioned. That is also an example of an important
 24 State task, and whether to go about performing that as
 25 directly by the State organ or through a public

1 institution or by an entity that is independent, and
 2 either a State organ or a public institution is
 3 something that is determined by the Consitution and
 4 legislative body which actually originates its powers
 5 from the people, because Korea is a country that
 6 recognises that the source of the State power lies with
 7 the people, and because there is no way for the people
 8 to perform or realise their power directly , that is why
 9 Korea provides for a legislative body, the National
 10 Assembly, and it is always through the decisions of the
 11 legislatures that this is stipulated by law.
 12 Q. Thank you, Professor. I have your answer.
 13 I am asking you questions about the Bank of Korea
 14 Act. I will be grateful to you if you answer my
 15 questions based on this specific Act to which I'm
 16 directing you for now.
 17 A. Back to -- yes, back to the Bank of Korea, what was your
 18 question about the Bank of Korea Act?
 19 Q. Exactly my point.
 20 Let's pick it up again from Article 1. Professor,
 21 I have not asked you a question. I suggest that you
 22 please look at Article 1.
 23 Article 1 says that:
 24 "The purpose of this Act is to contribute to the
 25 sound development of national economy by establishing

1 the Bank of Korea and seeking the price stabilisation
 2 through the establishment and execution of efficient
 3 monetary and credit policies."
 4 I'm stopping here and my question to you is this: is
 5 this an activity which is governmental in your view;
 6 yes, no, or would you prefer not to take a view?
 7 A. It is governmental.
 8 Q. Thank you. I want to direct your attention to
 9 Article 4, paragraph 2, which is still on the same page
 10 in the English version. {C/534/2}. It says this:
 11 "The Bank of Korea shall value the market mechanism
 12 in performing its monetary and credit policies."
 13 I want you to have this provision in mind as we turn
 14 to look at another provision now which is at page 21 of
 15 the pdf, Article 68. Can we also have the Korean text
 16 up, please? {C/534/21}
 17 Article 68 says this. As you are reading the Korean
 18 text, I'm reading for the record the English text:
 19 "The Bank of Korea may sell, buy, lend, and borrow
 20 the following bonds in open markets on its own account
 21 in order to implement monetary and credit policies as
 22 determined by the monetary policy committee."
 23 Then if we come to paragraph 3.
 24 "Other marketable securities determined by the
 25 monetary policy committee."

1 Pausing here, now that you've looked at the
 2 provision, Professor Kim, is this selling, buying,
 3 lending and borrowing bonds a governmental activity in
 4 your view; yes, no, or would you prefer not to express
 5 a view?
 6 A. I do agree that at a broad sense, in a broad sense, it
 7 is indeed a governmental activity, but I would not agree
 8 if you are trying to therefore then lead on to the
 9 connection that this is a government agency.
 10 Q. Thank you, sir. Can we now turn to page 25 of the
 11 English pdf text {C/534/25}, Article 82. This is about
 12 foreign exchange activities and it says:
 13 "The Bank of Korea may perform the following
 14 business after obtaining authorisation from the Minister
 15 of Strategy and Finance:
 16 "1. Foreign exchange business and foreign currency
 17 holdings;
 18 "2. Receiving deposits from foreign financial
 19 institutions, international financial organisations,
 20 foreign governments and their agencies, or the United
 21 Nations;
 22 "3. Selling and buying precious metals."
 23 Now that you've looked at this, is this kind of
 24 business or activity, as it's described here,
 25 governmental activity, yes or no, or would you prefer

1 not to express a view?
 2 A. Broadly, once again, this would be governmental
 3 activity. The government needs to operate a monetary
 4 policy. A State cannot forsake its monetary policy. So
 5 the monetary policy has to be implemented and these are
 6 activities necessary to implement a government's
 7 monetary policy.
 8 So yes, this would be a government activity, but
 9 once again I would not agree if you're attempting to
 10 then say that because of this, the BoK is either
 11 a government institution or a State institution.
 12 MR PETROCHILOS: I'm grateful, Professor. Forgive me,
 13 Mr President. Now this would be a convenient time for
 14 a break for me, if it is convenient for the tribunal.
 15 THE PRESIDENT: Yes, it is. It's very good timing, 10.30.
 16 We have going on for an hour and a half. So let's break
 17 for 15 minutes. Professor, I should remind you, you're
 18 still under examination. So I would ask you not to
 19 speak with anybody about your testimony. Thank you very
 20 much.
 21 We will resume at 10.45.
 22 (10.31 am)
 23 (A short break)
 24 (10.46 am)
 25 THE PRESIDENT: Okay, let's resume, Dr Petrochilos.

1 MR PETROCHILOS: Thank you, sir.
 2 Professor, you're ready?
 3 A. Yes.
 4 Q. I'm shifting gears on to something else. We will now
 5 discuss about quasi government public institutions.
 6 Can I ask that you turn to exhibit C-278 which is in
 7 volume 2 of your materials. {C/278/1}. Now, this
 8 document is a press release issued by the Ministry of
 9 Economy and Finance. 24, forgive me for that. It's
 10 tab 24 in volume 2.
 11 A. Yes.
 12 Q. So this is a press release issued by the Ministry of
 13 Economy and Finance at the end of January 2018.
 14 It's issued by the Director of System Planning in
 15 the Department of the Public Policy Bureau. And as you
 16 will see in the box which follows under the heading, the
 17 heading of the document is "Designation of Public
 18 Institutions for 2018". You will see that:
 19 "The Ministry of Economy and Finance finalised the
 20 designation of public institutions for 2018 through
 21 deliberation and decision by the Public Institution
 22 Management Committee ..."
 23 Let me ask you: do you know if this Public
 24 Institution Management Committee has criteria which they
 25 follow in designating an entity as a public institution

1 and thereafter in classifying it in one of the several
 2 categories of public institutions?
 3 A. Well, I don't know exactly, and I do not think this was
 4 addressed in my report, but if I try to answer your
 5 question within the knowledge, the broad knowledge that
 6 I have of this, my understanding on how, under the Act
 7 on the Management of Public Institutions, the Committee
 8 designates or releases public institutions is as
 9 follows. Broadly they are classified on the number of
 10 employees – which demonstrates an institution's size –
 11 and whether an institution's own revenues are over 85%,
 12 that is, the ratio of its self-generated revenues. I do
 13 not know precisely.
 14 Q. No, forgive me. Forgive me. We have the answer so far
 15 on record. Professor, my question was: do you know if
 16 this committee has criteria? Is the answer to that
 17 question "I do not know exactly"?
 18 A. I don't know exactly, correct.
 19 Q. Thank you. Did you care to find out if this committee
 20 has criteria?
 21 A. Well, I have already answered and why are you stopping
 22 me from answering the question? Because I was about to
 23 describe the criteria.
 24 Q. If the Professor knows that there are criteria that have
 25 been published in a document, that is what my question

1 is. And so what I'm asking you, Professor, is: did you
 2 care to investigate whether this committee has published
 3 or adopted written criteria, a set of criteria, for
 4 making these designations? That is my question.
 5 A. So if your question is whether — if I exerted efforts
 6 to investigate such criteria, my answer would be no.
 7 Q. Thank you. We have, I believe, some indication of the
 8 criteria if we turn to page 2 of the English text. I'm
 9 not sure where it is on the Korean document. It is
 10 a bullet point which starts with the words "in this
 11 PIMC" which means the committee, the Public Institution
 12 Management Committee. Can you find it, madam, and
 13 direct the Professor's attention to it? {C/278/2}
 14 THE INTERPRETER: So it would be, I think, the following
 15 page in the Korean version, the second page.
 16 MR PETROCHILLOS: I think it is the third indented paragraph
 17 indicated by a little square; can you see that?
 18 A. So it's about the hiring corruption, employment
 19 corruption?
 20 Q. Correct. So as you are reading it in Korean, I'll read
 21 it for the record. So it says this:
 22 "In this PIMC, there was an opinion that the
 23 Financial Supervisory Service, which was subject to
 24 recent criticisms by the Board of Audit and Inspection
 25 of Korea for employment corruption and lax management,

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1 should be designated as a public institution."
 2 Let me pause here so we're on the same page.
 3 Sir, the Financial Supervisory Service, Professor —
 4 A. Yes, I have finished that bullet point.
 5 Q. Very well. The Financial Supervisory Service is an
 6 entity, indeed a special legal person, under the
 7 Financial Services Commission. That's correct, isn't
 8 it?
 9 A. It is a special legal person without capital.
 10 Q. Under the supervision of the Financial Services
 11 Commission; correct?
 12 A. Yes, broadly correct.
 13 Q. Very well. Let's continue with the text:
 14 "Upon considering the fact that discussion on
 15 re-organisation of the financial supervisory regime will
 16 progress in earnest from this year, it was decided that
 17 such designation would be deferred.
 18 "However, the Financial Services Commission and the
 19 Financial Supervisory Service will establish a plan ..."
 20 Are you with us, Professor, "will establish a plan":
 21 "... to eradicate employment corruption and improve
 22 the observations made by the Board of Audit and
 23 Inspection of Korea regarding inefficient organisational
 24 management ... and
 25 "Perform management disclosure to the level of

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1 a public institution and implement strict management
 2 evaluation such as having at least one person within the
 3 public corporation/quasi government body management
 4 evaluation group participate in the evaluation.
 5 "The Financial Services Commission will report its
 6 implementation performance to the PIMC and the PIMC will
 7 designate the Financial Supervisory Service as a public
 8 institution in 2019 if the implementation results are
 9 unsatisfactory."
 10 Professor, having seen these observations here or
 11 conclusions by the PIMC, it seems to me — disagree if
 12 you will — that the designation of an entity as
 13 a public institution serves to align the operation of
 14 that entity with good public administration, good
 15 practices and public supervision; do you agree or
 16 disagree or do you not care to take a view?
 17 A. I do not think I dealt with this topic in my expert
 18 report. I also understand the intentions of your
 19 questions. This being a government public press
 20 release, I do not believe that it would contain false
 21 information so I would also agree that the designation
 22 or release of an entity with a public institution may be
 23 for such purposes.
 24 Q. Thank you, Professor.
 25 Let us turn, please, to page 6 of the English text

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1 {C/278/6}. I can't help you with what exactly it is in
 2 Korean. It's 7 in the Korean text. {C/278K/7}.
 3 Sir, what you see here, and I think the same
 4 document was traversed with Professor Lee yesterday,
 5 what you see here is a number of entities which are
 6 classified by certain categories. I would like us to go
 7 through the categories briefly together.
 8 So on the top left-hand side we have market-type
 9 public corporations, immediately following, quasi-market
 10 type public corporations, and immediately thereafter we
 11 have fund management-type quasi-government bodies, of
 12 which we have 16.
 13 A. Yes.
 14 Q. And then if we turn to the next page, please {C/278/7},
 15 both in the English and in the Korean version, we have
 16 bodies which are described as delegated execution
 17 quasi-government bodies.
 18 A. Yes. I'm looking at it.
 19 Q. Thank you. Now, having described that, can we go to the
 20 quasi-government bodies that we were looking at on
 21 page 6 again, please {C/278/6}.
 22 A. So the fund management type you are referring to.
 23 Q. The fund management type, indeed.
 24 Let me ask — I'm looking at the third entry. So
 25 the third entry includes two entities, I believe under

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1 the Ministry of Energy?
 2 A. Yes, I'm following you.
 3 Q. Very well. The Korea Trade Insurance Corporation and
 4 then the Korea Radioactive Waste Agency; do you see
 5 that?
 6 A. Yes, I'm looking at it.
 7 Q. That is the agency that ensures radioactive waste
 8 management in Korea, is it not, sir? If you don't know,
 9 you don't know.
 10 A. I'm not sure.
 11 Q. All right. Let me ask the question in the abstract. We
 12 looked at governmental activities earlier. In your view
 13 is the management of radioactive waste a governmental
 14 activity; yes or no, or would you prefer not to take
 15 a view?
 16 A. It is a governmental activity. However -- so
 17 controlling nuclear waste would be a governmental
 18 activity. However, how to perform that activity, that
 19 governmental activity, would be up to the choice of the
 20 legislator, whether to do that through a government
 21 agency, whether to do that through a State agency, or
 22 whether to do that through a public institution is
 23 a choice up to the legislator.
 24 So if in this case the legislator has chosen that in
 25 the case of managing nuclear waste, for example from

1 nuclear reactors, is a government affair to be performed
 2 by a public institution.
 3 Q. Thank you. Let's look a few lines down, please. This
 4 is now the penultimate designation, under the FSC, which
 5 we now know is the Financial Services Commission. So we
 6 have two bodies listed there, two juridical persons: the
 7 Korea Asset Management Corporation and the Korea Housing
 8 Finance Corporation. The Korea Asset Management
 9 Corporation is the entity we spoke about briefly
 10 yesterday called KAMCO.
 11 Sir, we know the NPS doesn't have any capital. Do
 12 you know if KAMCO has capital?
 13 A. I think I have already said several times that I'm not
 14 very familiar with KAMCO.
 15 Q. Very well. I'm moving on then to something else which
 16 is about voting in respect of the merger. So perhaps we
 17 can take down that exhibit because it may distract the
 18 witness which is not helpful.
 19 Sir, voting rights for shareholders of a company
 20 derive from their ownership of shares. That is correct,
 21 isn't it?
 22 A. Correct.
 23 Q. And as you acknowledge in your reports, the Korean
 24 courts have ruled that the ownership in the shares that
 25 are held in the National Pension Fund vests in the

1 State, not in the NPS, which merely administers the
 2 fund.
 3 A. Would you mind showing me that court decision?
 4 Q. I'll be very happy to. We can pick up the two decisions
 5 on the issue first at tab 22 in volume 2. This is
 6 exhibit C-252. {C/252/1}.
 7 THE INTERPRETER: I think you have the wrong exhibit.
 8 MR PETROCHILLOS: C-252 in both the English and the Korean
 9 version. As I say, tab 22 in volume 2, madam.
 10 THE INTERPRETER: Yes, I have found it.
 11 MR PETROCHILLOS: Does the Professor have it in front of him?
 12 A. Yes, I'm only at the first page. Is there -- can you
 13 show me the part of the decision that says what you have
 14 just described?
 15 Q. I will be coming to that. First I need to identify the
 16 document.
 17 So this is a District Court decision, as you can
 18 see, in a case involving the National Pension Service,
 19 the NPS, against the mayor of a city. This is
 20 a decision issued on 25 August 2015.
 21 If we turn to the second page {C/252/2}, you will
 22 see the facts are very simple under letter B. It says:
 23 "Plaintiff NPS acquired 86% of the outstanding ...
 24 shares ... issued by Seoul Beltway Corporation ... out
 25 of the National Pension Fund on June 29, 2011."

1 If we can turn to the third page, {C/252/3} in the
 2 Korean heading it is section 2, subsection A, sub
 3 subsection 1. Here it describes the claims of the
 4 plaintiff NPS and here is what the NPS said:
 5 "The National Pension Fund belongs to the State, and
 6 Plaintiff NPS simply conducts management and operation
 7 of the National Pension Fund entrusted by the Minister
 8 of Health and Welfare. Therefore, since the subject
 9 taxable article was acquired by the State, it
 10 constitutes a non-acquisition-taxable item pursuant
 11 to ... the ... Local Tax Act."
 12 This was the argument, sir, of the NPS. If we can
 13 turn to page 4 of the English text {C/252/4} which is
 14 part of the judgment, I'm looking at section C,
 15 subsection 2, if it helps situate this in the Korean
 16 text.
 17 A. Yes, I'm looking at that part.
 18 Q. Thank you, sir.
 19 The question identified by the court is whether the
 20 entity that acquired the subject shares is the State.
 21 And I would like us to turn to the second consideration
 22 given by the court which is on page 5 {C/252/5}.
 23 A. Yes, I'm looking at that part.
 24 Q. Very well. It starts at this paragraph numbered 2 as
 25 follows:

1 "While plaintiff NPS manages and operates the
 2 National Pension Fund upon entrustment by the Minister
 3 of Health and Welfare, the accounting of plaintiff NPS
 4 and that of the National Pension Fund are separated (see
 5 articles 42–45 of the National Pension Act) ..."
 6 Can the Professor read it? Can you see it, sir?
 7 A. Yes.
 8 Q. I continue:
 9 " ... and just like the government budget, the Fund
 10 is subject to administration and control of the
 11 Government and the National Assembly in respect of its
 12 operation plans as demonstrated by the President's
 13 approval, report to the National Assembly, submission of
 14 the to the Minister of Strategy and Finance ..."
 15 And then it says:
 16 "See article 107 of the National Pension Act ..."
 17 And so on. And here is the final sentence of this
 18 paragraph:
 19 "It is thus appropriate to conclude that the
 20 National Pension Fund belongs to the State even though
 21 it is being managed and operated by Plaintiff NPS with
 22 a separate juristic personality."
 23 Paragraph 3:
 24 "The entity that acquired the subject shares shall
 25 be identified based on who holds the right, ie to whom

1 the effects of acquisition of the subject shares are
 2 attributed. In light of the above–described legal
 3 nature and management and operation environment of the
 4 National Pension Fund, it is appropriate to conclude
 5 that the subject shares acquired by the Fund belong to
 6 the State."
 7 Professor, I think it's fair to you that we look
 8 very quickly at the appellate judgment so you have both.
 9 This is exhibit C–262, which is at tab 47, volume 2.
 10 {C/262/1}
 11 So this is the same case at the appellate level.
 12 The judgment was issued on 9 March 2016, as you can see
 13 on the first page. We have the reasoning on — at least
 14 in the English version, on pages 2 and 3 {C/262/2–3}.
 15 Can we go, please, to page 3 {C/262/3} in the English
 16 text. It is under the heading "Judgment".
 17 Let me read the judgment.
 18 A. We're still on A.
 19 Q. Page 3 in Korean, I'm advised.
 20 {C/262K/3}
 21 So here is what the court said:
 22 " Plaintiff 's duties to manage and operate ... the
 23 National Pension Fund were entrusted by the Minister of
 24 Health and Welfare ..."
 25 THE INTERPRETER: So this is B, parenthesis 2?

1 MR PETROCHILOS: Yes, that is correct, madam, thank you.
 2 So I'll start again:
 3 " Plaintiff 's duties to manage and operate ... the
 4 National Pension Fund were entrusted by the Minister of
 5 Health and Welfare, the entity responsible for managing
 6 and operating the Fund under Articles 25 and 102 of the
 7 National Pension Act and Article 76 of the Enforcement
 8 Decree of the Act. Even if [the] Plaintiff ... "
 9 The plaintiff, sir, is the NPS in this case:
 10 " ... exercises the voting rights for the subject
 11 shares in practice, as the legal effect of such duties
 12 is attributed to the State being represented by the
 13 Minister of Health and Welfare, it is appropriate to
 14 conclude that the entity that acquired the subject
 15 shares is the State."
 16 So these are the judgments that you asked me to show
 17 to you, but I think you acknowledge in your reports
 18 these holdings, the effect of which is that the owner of
 19 shares in the National Pension Fund is not NPS but the
 20 State.
 21 A. Yes. As you have just explained, that is what this
 22 says. But I would like to add the explanation to that
 23 and that is that this question — the matter at issue in
 24 these two cases was when the NPS, the service, acquired
 25 shares in the market. That activity then was imposed

1 local taxes, not State taxes, but local taxes by the
 2 local government, and you've just read through the key
 3 points of both the first instance and the second
 4 instance decisions, and the key point of those decisions
 5 is that even though it was the NPS that acquired the
 6 shares through the NPF, the fund, that the ultimate
 7 ownership of those shares belonged with the State. And
 8 the same wording is repeated in both the first instance
 9 as well as the appellate decision, that the ultimate
 10 ownership of the shares belonged to the State and not to
 11 the NPS.
 12 This is purely a tax discussion, a tax debate, and
 13 not an issue that is in any way connected with the
 14 question of whether the NPS or the NPF is a State organ
 15 or not. This was a court decision that examined the
 16 question of whether the taxes should follow the famous
 17 principle of substance over form. So even though in
 18 form it was the NPS that conducted these transactions,
 19 in substance that ultimately belongs to the State, is
 20 what the court had found, according to the State,
 21 substance over form principle of taxing.
 22 So once again, even though the transaction is
 23 performed by the NPF/NPS, the ultimate ownership of that
 24 belongs to the State. But this has no bearing upon the
 25 question of whether the NPS is a State organ or not.

1 In terms of the transaction, the NPF fund is not --
2 does not have a legal personality. The NPS is
3 a corporation, and therefore has a legal personality,
4 but the fund does not have a legal personality.

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

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

17 Q. Thank you, sir.

18 So we analyse the implications, so we understand the
19 implications of this substance over form with which
20 I agree, we have now seen that the owner of the shares
21 in legal terms is the State and the NPS exercises --
22 I can direct you to your screen again -- the court says
23 duties to manage and operate the National Pension Fund,
24 given -- this is my question to you. Given that the NPS
25 is not the owner of the shares, when it votes in respect

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1 of these shares, for example whether to accept or not to
2 accept a merger of the company in which it holds shares,
3 the NPS is exercising a public duty entrusted, as the
4 court says here, entrusted by the Minister of Health and
5 Welfare under articles 25 and 102 of the National
6 Pension Act. Do you agree with me?

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

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

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

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

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

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

6 A. Are you referring to a trusteeship?

7 Well, the Claimant's counsel has -- so are you
8 referring to delegation, a delegee and a delegator
9 relationship, or --

10 Q. Yes. Yes, indeed.

11 A. So it's --

12 Q. That is what you call it?

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

15 MR PETROCHILOS: Forgive me, Professor. You've been very
16 patient with me.

17 Thank you.

18 Mr President, that concludes my cross-examination.

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

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

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

55

1 (11.30 am)

(A short break)

2 (11.34 am)

3 THE PRESIDENT: Yes, Mr Bhat.

4 Re-examination by MR BHAT

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

8 There was a question there from counsel opposite.

9 "Question: So we analyse the implications, so we
10 understand the implications of this substance over form
11 with which I agree, we have now seen that the owner of
12 the shares in legal terms is the State and the NPS
13 exercises -- I can direct you to your screen again, the
14 court says duties to manage and operate the National
15 Pension Fund, given -- this is my question to you.

16 Given that the NPS is not the owner of the shares, when
17 it votes in respect of these shares, for example whether
18 to accept or not to accept a merger of the company in
19 which it holds shares, the NPS is exercising a public
20 duty entrusted, as the court says here, entrusted by the
21 Minister of Health and Welfare under articles 25 and 102
22 of the National Pension Act. Do you agree with me?"

23 And the response by Professor Kim:

24 "Answer: Well, I do not dispute the fact that it
25

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1 has been entrusted with public duties from the minister,
2 but just because it has been entrusted with that public
3 duty or those public duties, it would be too simplistic
4 an understanding to say that the acquisition of shares,
5 as well as exercise of rights by the NPS, is also an
6 exercise of public duties.

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

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

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

15 MR PETROCHILLOS: Let me see if I can try to help. It's in
16 the cross-examination binder, tab 9. It is exhibit
17 C-77, but you also have it under tab 9 in English and in
18 Korean. {C/77/1}, in volume 1.

19 THE INTERPRETER: That's Article 102.

20 A. So may I answer?

21 So yes, we are looking at Article 102 which
22 Professor Lee also discussed yesterday. Paragraph 1
23 provides that, yes, the funds shall be managed and
24 operated by the Minister of Health and Welfare. This is
25 followed by paragraph 2, and the key point of

1 paragraph 2 is that the Minister then entrusts this
2 public duty to the NPS, and I do not dispute once again
3 that what the NPS is entrusted with consists of public
4 duties.

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

14 So as Professor Lee mentioned yesterday, in
15 paragraph — in Article 102, paragraph 2, the
16 Article 102, paragraph 2 provides for some of the
17 principles that apply to the management of the fund,
18 including the profitability principle, as well as
19 stability principle, and then Article 103, paragraph 1,
20 subparagraph 1 provides for the operational guidelines
21 of the fund and we saw yesterday that Article 4 of these
22 operational guidelines of the fund set forth these
23 principles again, including the principle of
24 profitability, stability, liquidity, independence, as
25 well as public benefit.

1 Now, I would not go into once again the question of
2 whether a guideline is superior to a law. So definitely
3 Article 102, paragraph 2, which is a law, would take
4 precedence over an operational guideline, and
5 Article 102, paragraph 2, the law sets forth stability
6 and profitability as the principles to be followed when
7 managing the fund, especially given the fact that Korea
8 is going through a very rapid ageing of population
9 process, and suffering from very low fertility rates.

10 It is very important task for the State to provide
11 for the elderly age, the old age of its population, and
12 therefore maximising the profitability of the fund in
13 its management would be a very important priority,
14 principle.

15 Of course, public benefits, public interest is
16 important as a principle, but I would say managing the
17 fund to achieve maximum profits would be very important
18 as a principle, given the situation that the country
19 faces in terms of ageing population.

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

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

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

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

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

22 So given the fact that there is dire demographical
23 needs to provide for old age of the Korean population,
24 maximising the profit, the returns of the National
25 Pension Fund is of great importance, which requires, for

1 example, the fund to take — to make risk taking
 2 investments if necessary, and to actually make
 3 investments that may appear in the market to involve
 4 some uncertainty, but the fund believes or the NPS
 5 believes would bring long-term profits.
 6 So actually this — because the principle of
 7 profitability is of great importance, this requires the
 8 NPS to actually go about its fund management with an
 9 accurate insight into the global capital markets that is
 10 superior than, for example, the market analysts.
 11 So my last question that I would like to pose is
 12 whether this activity is exercise of government powers
 13 or it's a private — it's a commercial activity.
 14 MR PETROCHILOS: Mr President, I don't believe I asked that
 15 in the segment that my friend pointed out to the
 16 witness, but as I say, I'm entirely in your hands.
 17 THE PRESIDENT: Yes, it was a question about the fund's
 18 activities. So broadly it was about the same topic.
 19 Any further questions?
 20 MR BHAT: Nothing further from us, Mr President. Thank you
 21 very much.
 22 Further cross-examination by MR PETROCHILOS
 23 MR PETROCHILOS: Mr President, can I please ask, with your
 24 permission, the witness, Professor Kim told us that he
 25 spoke to the NPSIM. This is line 21 of page 59.

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1 I believe this is new information.
 2 I would like to ask him — I'm putting this to you,
 3 Mr President, and you can tell me if this is agreeable
 4 to you — I would like to ask him whether he had this
 5 discussion with the NPSIM in the course of this case.
 6 A. No, that was not the case. As a future pensioner
 7 myself, I have great personal interest in the national
 8 pension. So I have asked a person that I know.
 9 MR PETROCHILOS: I'm grateful, Mr President. That clarifies
 10 it.
 11 THE PRESIDENT: Thank you very much. There will be
 12 questions from the tribunal.
 13 Questions from THE TRIBUNAL
 14 MR GARIBALDI: Professor Kim, are you familiar with the
 15 Experts Voting Committee, or also called the Special
 16 Voting Committee, on the exercise of voting rights?
 17 A. I heard testimony and discussions about that topic
 18 yesterday here in this room, but that was not a topic
 19 that I was asked to opine on in my expert report.
 20 MR GARIBALDI: I understand. My question is going to be
 21 related to your general expertise as an administrative
 22 law expert.
 23 As I understand it, and I stand to be corrected, is
 24 that the Experts Voting Committee is a body of
 25 individuals which is created within the ambit of the

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1 Ministry of Health and Welfare, and its function is —
 2 and I'm going to put it in the most neutral possible
 3 ways — to decide in certain cases on how the voting
 4 rights of shares held by the fund will be exercised, how
 5 those voting rights would be exercised in certain cases.
 6 Now, on the basis of this information, which I ask
 7 you to take as a hypothetical case if you don't agree
 8 with these facts, do you believe that the
 9 Experts Voting Committee is a State organ or a part of
 10 a State organ under your views about what a State organ
 11 is under Korean law?
 12 A. Yes, thank you for that question.
 13 First of all, is it correct that my understanding is
 14 correct that the Expert Committee is under the Fund
 15 Operation Committee which is then in turn under the
 16 Ministry of Health and Welfare?
 17 MR GARIBALDI: I'm not an expert to testify on that matter.
 18 There are many people who know much more about this than
 19 I do.
 20 My understanding is that it is established within
 21 the Ministry, but I may be wrong on that.
 22 If there is a document that will answer this
 23 question, the parties can point us to it.
 24 MR PETROCHILOS: It's relatively straightforward to do so,
 25 sir. Give us a minute. I think it's the NPA.

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1 Sir, it may be helpful if you want to see the
 2 organigram of the Ministry to look at Figure 4 of the
 3 CK Lee report, the first CK Lee report. Otherwise, the
 4 legal texts would say which committee prepared what.
 5 They are already in the cross-examination binders and we
 6 can put them up as well.
 7 MR GARIBALDI: I think the most useful thing would be
 8 something that the witness can see and read.
 9 MR PETROCHILOS: Very well. Can we then put up, please,
 10 Figure 4 of — I'm directing myself to Opus, my friends
 11 at Opus — it's {F1/1/1}, and we are looking at page 6.
 12 THE INTERPRETER: I have just taken the liberty of showing
 13 Professor Kim the part of Professor Lee's presentation
 14 that has the diagram, and he has confirmed that, yes,
 15 indeed —
 16 MR PETROCHILOS: Forgive me, it's page 33 exactly in the
 17 English text. {F1/1/33}
 18 Does this assist the tribunal?
 19 MR GARIBALDI: Yes.
 20 A. So it seems that through this chart we have been able to
 21 confirm that the Expert Committee, the Voting Expert
 22 Committee, does belong under the Minister of Health and
 23 Welfare, but in between there is the Fund Operation
 24 Committee between the Minister and the Expert Committee,
 25 and the Fund Operation Committee has its basis in the

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1 National Pension Act.
 2 I do understand that the question that I have been
 3 posed by the arbitrator is whether this Expert Committee
 4 consists a State organ, according to my criteria .
 5 I'm very sorry to once again ask for the screen to
 6 be switched, but I would have to refer to Article 2,
 7 paragraphs 3 through 5 of the Government Organization
 8 Act to give you a certain answer, even though at this
 9 layer it does look clear that the Expert Committee
 10 belongs to the administrative organisation, the State
 11 administrative organisation, but please can somebody
 12 show me Article 2 of the Government Organization Act.
 13 Actually, can someone put up the amended Government
 14 Organization Act, the more recent one that's been
 15 updated?
 16 MR BHAT: I believe that's SSK-53. {G4/31/1}
 17 A. So this is the updated version. Can we look at
 18 Article 2, paragraph 7.
 19 So the reason why I have guided you towards
 20 Article 2 of the Government Organization Act -- well,
 21 first of all, it says in -- I think it was paragraph 2
 22 that the Bu, Cheo and Cheong, the Ministries and the
 23 Cheong shall be set forth or established by law.
 24 And then we have the following paragraphs. After we
 25 skip the entire body of paragraph 2, and go down further

1 to -- not the subparagraphs, but the paragraph 6 and 7,
 2 we go through.
 3 THE INTERPRETER: So, we're still on the English page, we're
 4 still on the paragraph 2. So these items are -- these
 5 items are under paragraph 2. He has actually requested
 6 for paragraphs, I think, 6 and 7.
 7 (Interpreted) That goes through the very details of
 8 under which Ministry what subsidiary agencies or
 9 affiliate agencies which are Bo-jo-gi-gwan or
 10 Bo-jwa-gi-gwan are to be established, and some are to be
 11 established by the ordinance or decree of the Department
 12 or Minister or ordinance or decree of the
 13 Prime Minister, or some are to be created or established
 14 by the decree of the President.
 15 So there are these ministries identified as well as
 16 the decrees of different Ministers, Prime Ministers, or
 17 the President that are to be used to establish other
 18 entities .
 19 So to answer your question, Mr Garibaldi, in order
 20 to answer a question of whether the Expert Committee is
 21 part of the government organisation as I understand,
 22 I would have to go through first of all the exercise of
 23 looking through all of the Presidential decrees,
 24 Prime Minister decrees or ordinances or Minister
 25 ordinances that extend from here and to see whether the

1 Expert Committee has any grounds in there.
 2 If there is actually -- if the Expert Committee is
 3 covered, then it would be part of the government
 4 organisation. But if it is not. Then it would not be
 5 part of the government organisation that I understand.
 6 I think the latter is most likely at this point,
 7 even though I have not gone through the exercise of
 8 looking through all of the ordinances.
 9 For example, there is a possibility that the Expert
 10 Committee has its grounds in enforcement rules of the
 11 operation regulation of the -- or administrative rules.
 12 These enforcement rules or administrative rules are
 13 bodies of provisions that are adopted by entities for
 14 their internal purposes alone, without any delegation
 15 provided by superior laws.
 16 And so in that case most likely the Expert Committee
 17 would be classified as something that we have been
 18 referring to as a representative administrative agency
 19 in which case it would not be part of the central
 20 administrative agency hierarchy that I have in mind.
 21 MR PETROCHILLOS: Mr Garibaldi, may I seek to help by just
 22 putting up the Act? It's C-77 under tab 9 in the
 23 cross-examination materials, and the English page is 42
 24 {C/77/42}, Article 103, paragraph 1 of the Act.
 25 I think it answers your question, sir .

1 A. So Article 103 would be about the Fund Operation
 2 Committee.
 3 I was just pointing out paragraph 1 --
 4 subparagraph 1 of Article 103, which sets forth about
 5 the adoption of the Fund Operational Guidelines. And so
 6 the operation guideline, if my understanding is correct,
 7 is to be adopted, promulgated, by the operation
 8 committee, the Fund Operation Committee. My
 9 understanding is that the Voting Expert Committee has
 10 its grounds in the Voting Guidelines.
 11 Also, if my understanding is correct, the
 12 Article 103, paragraph 1, subparagraph 1, which the
 13 Claimant's counsel has pointed out, provides for the
 14 operational guidelines which provides for the IM, the
 15 NPSIM and the Investment Committee that we have talked
 16 about yesterday.
 17 My understanding is that the Voting Expert Committee
 18 is actually grounded in the Voting Guidelines which my
 19 understanding, if it is correct, would be
 20 an administration or administrative rule which, as
 21 I previously described, is a set of rules that are
 22 adopted by a body without any delegation from superior
 23 laws, and therefore if the Voting Expert Committee is as
 24 I assume based on a set of administrative rules, the
 25 Voting Guidelines, then it would be classified as

1 a representative administrative institution and not be
 2 part of the central administrative agencies.
 3 MR GARIBALDI: Well, it seems that we cannot resolve this
 4 issue because you have not studied the point and so you
 5 are speaking in terms of possibilities .
 6 But it looks as though in your opinion, whether the
 7 Experts Voting Committee is a State organ or part of
 8 a State organ depends on this analysis of delegation,
 9 and does not depend on the functions it performs; is
 10 that right?
 11 A. Correct.
 12 MR GARIBALDI: Okay. I think that that answers my question,
 13 thank you very much.
 14 THE PRESIDENT: I have one further question which is --
 15 deals with something that you were not asked about.
 16 In both of your reports you discuss the question of
 17 whether certain acts taken by an administrative agency
 18 are dispositions or whether they are not dispositions .
 19 I understand there is a disagreement between you and
 20 Professor Lee as to whether the exercise of voting
 21 rights constitutes a disposition under Korean law, and
 22 maybe -- this is not the question yet, but you may want
 23 to translate already.
 24 THE INTERPRETER: I think, sir, the translation is being
 25 provided simultaneously.

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1 THE PRESIDENT: Apologies.
 2 So I understand you don't necessarily agree. It
 3 seems you and Professor Lee don't agree on whether
 4 exercise of voting rights constitutes a disposition
 5 under Korean law, but it seems to me that you do agree
 6 where disposition is defined you both refer to the --
 7 just a second -- Administrative Litigation Act, and
 8 maybe we can look at that.
 9 It's C-135, Article 2.1. Professor Lee says that
 10 this defines the term "disposition" and the same
 11 definition is apparently also available or included in
 12 the Administrative Appeals Act which is C-128 {C/135/2}.
 13 We now see that on the screen.
 14 Article 2.1, and we understand -- I understand that
 15 you both agree that if an administrative act or an act
 16 of an administrative agency falls within the definition
 17 of a disposition under this provision, there can be a --
 18 a citizen may file an administrative litigation in
 19 accordance with this Act; is that your understanding as
 20 well?
 21 A. Well, yes. So the condition would be if the act
 22 constitutes a disposition within the realm of the
 23 National Pension Act, an example of what constitutes
 24 a disposition would be. For example, looking towards
 25 Article 25, paragraph 1 of the National Pension Act, the

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1 imposition by the NPS of pension contributions or
 2 premiums or in other ways rejecting an application for
 3 pension benefits if someone believes that he is entitled
 4 to pension benefits, applies for it, but the pension
 5 service rejects that. Those two, for example, would
 6 constitute a disposition and a person may file an
 7 administrative process claiming that such a disposition
 8 is unlawful and seeking its revocation.
 9 THE PRESIDENT: I believe in one, I think it was in your
 10 second report, you also referred to a decision of
 11 a Supreme Court.
 12 I believe it's -- I think it's in your first report,
 13 page 23. {G2/1/23}. It's a footnote, if I can find it .
 14 MR PETROCHILOS: I believe it's G4, Mr President, 18. I say
 15 that for our friends at Opus. And it's in the binders
 16 that the Professor has.
 17 THE PRESIDENT: I think it's SSK-3 or SSK-2. I think it's
 18 the same. I just couldn't find it now. It's a footnote
 19 in one of your reports. Professor, you may remember
 20 whether it's in your first or in your second report.
 21 A. Sir, this is not a Supreme Court, but a Constitutional
 22 Court decision.
 23 THE PRESIDENT: Yes, it's a Constitutional Court. {G4/18/1}
 24 Give me a second. Yes, I think it's page 23 of your
 25 first report, and it's footnote 81. It's

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1 a Supreme Court of Korea decision.
 2 MR BHAT: It's SSK-3, members of the tribunal.
 3 THE PRESIDENT: SSK-3. {G2/1/25}.
 4 We don't necessarily need to go into this court
 5 decision now. This is a decision from 2000. My
 6 question to you simply is: is this an elaboration on the
 7 provision that we were just looking at or is this
 8 another way of looking at -- what is the legal basis for
 9 the court's decision here? They are referring to the
 10 State Property Act and they also discuss what
 11 "disposition" means {G2/4/1} in this particular
 12 decision, but they are not referring to the law that we
 13 are -- that we were looking at just a while ago.
 14 The Administrative Litigation Act. We understand
 15 that this is not an administrative litigation because
 16 it's a decision taken by the Supreme Court. So what is
 17 the legal basis for the court's understanding what
 18 a disposition is in this decision?
 19 A. Mr Chairman, I very much appreciate your question
 20 because your question bears upon a very important topic.
 21 The reason why I cited this court decision as part
 22 of my report is the following: because even though it
 23 does not directly reference the National Pension Act, it
 24 does address the management of the Fund in the fact that
 25 it addresses the management of other State properties

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1 that are classified in the same group as the National
2 Pension Fund.

3 As I've already explained, under the Korean State
4 Property Act, there are two large types of State
5 property. One is the administrative property. The
6 second is -- was described as general property which
7 used to be referred to as miscellaneous property in the
8 2000s. There was a change in nomenclature since.

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

13 The administrative property, which is the first type
14 of State property, is defined as State property that is
15 used directly by the State for administrative purposes.
16 So these would be, for example, items and goods that are
17 used, and that administrative property, State property,
18 is then subdivided into four categories.

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

23 (Interpreted) So the four sub-categories of the
24 first type of State property -- administrative property --
25 would be properties for official use, properties for

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1 public use, properties for government enterprises, and
2 lastly, properties for preservation.

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

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

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

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

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

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

15 THE PRESIDENT: Okay, understood. That is very helpful.
16 Thank you very much.

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

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

20 THE PRESIDENT: We are a little bit ahead of time actually.

21 The lunch is scheduled for 12.50. We have two options.

22 We break for lunch now or we have -- we hear

23 Professor Lee's presentation before we go for lunch. We
24 are flexible. I'm afraid if we break for lunch now, we
25 have to wait for food for quite some time.

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1 THE SECRETARY TO THE TRIBUNAL: Mr President, if I may
2 briefly intervene. Given that we started earlier than
3 foreseen on the schedule, we have actually forewarned
4 the hotel that they should be ready to set up lunch at
5 1230 so we're right on time as far as the hotel is
6 concerned.

7 THE PRESIDENT: Let's break for lunch then and we will
8 resume at 1.30. Thank you.
9 (12.29 pm)

10 (The short adjournment)

11 (1.30 pm)

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

14 Early today I found a lady's purse, black, on
15 a bench and I know that it had been left there by
16 a Korean lady. I gave it to another Korean lady
17 and I would like to know if it found its owner. (Pause)

18 All right. I'm happy now, thank you.

19 PROFESSOR SANG-HOON LEE (called)

20 (Evidence given through an interpreter)

21 THE PRESIDENT: Good afternoon, Professor Lee.

22 THE WITNESS: Good afternoon.

23 THE PRESIDENT: Welcome. You have been called as an expert
24 witness in this hearing and for that purpose you are
25 expected to express your opinion in accordance with your

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1 sincere belief. For that purpose I would ask you to
 2 read the statement or the declaration of an expert
 3 witness that you should have in front of you, please.
 4 THE WITNESS: I solemnly declare upon my honour and
 5 conscience that my statement will be in accordance with
 6 my sincere belief.
 7 THE PRESIDENT: Thank you very much, sir. I understand you
 8 will be making a presentation instead of a direct
 9 examination. So the floor is yours, please.
 10 Presentation by PROFESSOR SANG—HOON LEE
 11 PROFESSOR SANG—HOON LEE: Members of the tribunal and the
 12 counsel of the both parties, good to see you. I am
 13 Professor Lee Sang—hoon of Kyungpook National University
 14 School of Law.
 15 Today's expert opinion will be shared with you
 16 through the PowerPoint slides that I have prepared.
 17 On slide 1 I would like to walk you through my
 18 professional curriculum vitae first, to help you
 19 understand my career.
 20 Since 2013 I have spent nine years at the Ministry
 21 of Government Legislation as a member of the Statutory
 22 Interpretation Deliberation Committee and for two years,
 23 between 2013 and 2015, I worked at the Korea Development
 24 Institute, with is a Korean think—tank.
 25 Here I served as an expert legal adviser and I have

1 provided my advice on matters of corporate law and
 2 finance. And since 2018 I am serving as a member of
 3 advisory committee, as part of the Presidential
 4 Commission on Policy Planning. And since 2019 I have
 5 been serving as the Financial Supervisory Service which
 6 serves a similar purpose to the US SEC.
 7 I am a member of the Financial Dispute Mediation
 8 Committee, and Financial Supervisory Service's financial
 9 disputes can be categorised as broadly involving three
 10 categories: the Capital Markets Act, Insurance Act, and
 11 the Bank Act. I came here as an expert in the field of
 12 the Capital Markets Act.
 13 And since 2019 I have been serving at the Fair Trade
 14 Commission and I am giving feedback and the advice on
 15 the conglomerates evaluation.
 16 And quite recently I started to work with the
 17 Ministry of Justice as an adviser to the Ministry of
 18 Justice on corporate M&A law.
 19 Slide 2.
 20 So this content may be slightly long and boring, so
 21 I would like to give you the conclusion first.
 22 So the content of today's presentation will be this.
 23 I am going to be looking at the M&A merger ratio and
 24 then when the shareholders are feeling that the merger
 25 ratio is unfair, there are no limits of remedies

1 available in Korea. The only option that we have is to
 2 vote against the merger at the general shareholders
 3 meeting.
 4 It may sound like a simple sentence, but I would
 5 like to walk you through how this works in Korea. So
 6 merger, merger ratio in Korea, and the Commercial Act
 7 and the FISCMA, Financial Investment Services and
 8 Capital Markets Act are going to be explained to you in
 9 detail. Next slide, please.
 10 First I would like to explain to you about the
 11 concepts of the merger and merger ratio. A merger is
 12 a transfer of the entire assets, liabilities and
 13 operations of the non—surviving entity to the surviving
 14 entity by issuing shares of the surviving entity to the
 15 shareholders of the non—surviving entity.
 16 This is of course covered by the commercial law of
 17 Korea, but then I believe this is applicable to any
 18 activities that are happening worldwide with relation to
 19 the M&A.
 20 I would like to draw your attention to the target of
 21 the merger. So the assets, liabilities and the
 22 operations of the non—surviving entity would be the
 23 target and in fact the shares are something that are
 24 provided as something in return.
 25 So in Korea other than the shares, bonds can also be

1 paid out as something in return.
 2 The shares are being issued at a certain proportion.
 3 The merger ratio in effect is the number of shares of
 4 the surviving entity to be issued for one share of the
 5 non—surviving entity.
 6 And the merger entity — merger ratio is not just
 7 a vague concept. It is in fact based on the Korean
 8 Commercial Act.
 9 If you look at the Article 523 of the Commercial
 10 Act, it requires any merger agreement to identify how
 11 many shares in the surviving entity will be issued for
 12 each share held by shareholders of the non—surviving
 13 entity.
 14 And for the company to meet this requirement, the
 15 companies have to calculate the value and then identify
 16 the merger ratio.
 17 Next slide, please.
 18 Then I would like to explain to you about how the
 19 merger ratio is calculated. On this point, in the
 20 Commercial Act, we do not have any special stipulations
 21 that is within the Commercial Act, but then across the
 22 world I believe that the common method of calculating
 23 the merger ratio is as follows.
 24 It is in four different steps.
 25 The first step is to calculate the total enterprise

1 value of each merging entity, and then in step 2 you
2 would divide the enterprise value of each merging entity
3 by the number of shares in each entity.

4 When you do so, you will be able to derive the per
5 share value of each merging entity, which is step 3.
6 Then step 4, you can calculate the merger ratio
7 based on the per share value of each merging entity, and
8 then this will result in the merging ratio.

9 But in Korea, when it comes to the listed companies,
10 there is a rule in the Financial Investment Services and
11 Capital Markets Act, and that actually lets the
12 companies omit steps 1 through 3 and use the trading
13 price weighted by trade volume as a substitute for
14 step 3 above. This is in fact mandatory, and this is
15 something called statutory formula.

16 For the non-listed companies in Korea, the
17 abovementioned four steps are something that are
18 followed.

19 Next slide, please.
20 Statutory formula is mandatory, according to the
21 FISCMA, and I would like to explain to you in detail how
22 it works.

23 It is in fact stipulated in detail in the FISCMA and
24 its Enforcement Decree.

25 The merger value for each company is obtained by

1 calculating the average of three publicly traded closing
2 prices as of the reference date, and reference date here
3 is the date immediately preceding the earlier of (a) the
4 date the board resolution for the merger or (b) the date
5 of execution of the merger agreement.

6 And (a) and (b), these dates mostly in practice
7 coincide on the same date. So for the purpose of
8 today's presentation, I would like to simply say that
9 the reference date would be the board resolution date.
10 And I told you that the three will be averaged and the
11 three elements are as follows.

12 The first element is average closing price for the
13 latest one month, and this is weighted by trading
14 volume. Then the second element is an average closing
15 price for the latest one week, and this is of course
16 also weighted by trading volume, and the third element
17 is the closing price on the reference date.

18 So these three elements are being averaged out to
19 give us the merger ratio and this statutory formula is
20 mandatory.

21 For the merger between SC&T and Cheil, the statutory
22 formula was applied in the following manner.

23 I would like to explain to you in detail.

24 Before I draw your attention to the table, I would
25 like to point out that the resolution was made on

1 26 May 2015. So because the reference date is a day
2 prior to that day, the reference date becomes
3 25 May 2015.

4 So the closing prices up to this point will be used
5 for the calculation of statutory formula and the merger
6 ratio.

7 For the first element, which is the average closing
8 price for the last one month weighted by trading volume,
9 for Cheil it is 153,704 Won and for the SC&T it is
10 56,953 Won, and then the second element is the period
11 one week in the same manner, and for Cheil the amount
12 was 160,678 Won, and for the old SC&T, it was
13 55,047 Won.

14 And I would like to let you look at this third
15 element which is the closing price of the reference
16 date, and that was for Cheil 163,500 Won and for SC&T it
17 was 55,300 Won.

18 And if you look at the dates, this is -- this should
19 be up to 25 May, but then if you look at the last
20 column, it's 22 May. Why is that? Because 25 May here
21 was the public holiday. That is why we are using the
22 Friday's closing price for the third element.

23 So after looking at these three elements, we can
24 come to the average price of 159,294 Won for Cheil and
25 55,767 Won for SC&T.

1 And the ratio between the two was 1 to 0.35. This
2 means that the value of SC&T was 35% of the value of
3 Cheil shares.

4 So in fact the SC&T was the non-surviving entity.
5 So for the shares held by the SC&T shareholders, for
6 each share they will be paid 0.35 shares of the new
7 entity.

8 Next slide.
9 So the FISCMA of Korea is using the statutory
10 formula to calculate the merger ratio, and this is
11 a mandatory ratio. This is a mandatory formula, and
12 this is in fact quite exceptional if you look at what is
13 happening around the world.

14 When this law came to its existence, back in the
15 days, in Korea, Chaebol groups are in fact the dominant
16 market players. So what was intended was to prevent the
17 intentional market price manipulation by the Chaebols,
18 and believe the people who made this law believed that
19 the market share prices are the objective representation
20 of the value of the company. That is why this was set
21 up this way.

22 But then since the capital market experience of
23 Korea is limited, the statutory formula in fact came
24 with some certain limitations. It in fact has some
25 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 an 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.

1 The controlling shareholder can have an influence on
 2 the information that is disclosed to the market, the
 3 quality of the information and the timing of when the
 4 disclosure is made, and those would in fact of course
 5 affect the share prices.
 6 And the third element, we have the one--month period
 7 before the reference date, and within that period the
 8 dividend payout and other activities that have great
 9 influence on the share price can be decided by the
 10 controlling shareholders.
 11 The announcement related to certain dividend payouts
 12 can be made within the time period to impact the share
 13 price. This is in fact, I would say, contaminating the
 14 share price and this is not something new. What I'm
 15 saying here is not something new. This is what I said
 16 in my 2016 paper. And this is not an idea that
 17 I developed solely on my own. This idea is already
 18 covered at the American company -- corporate law.
 19 So when the controlling shareholders are exerting
 20 this kind of influence, the share price is not something
 21 that is objective. It is contaminated. That is quite
 22 well established in the field of academia.
 23 If the merger ratio between merging companies is set
 24 up based on this distorted share prices, I believe that
 25 this is an unfair merger ratio.

1 And when there is an unfair merger ratio, it results
 2 in a transfer of value between shareholders of the
 3 merging companies which is harming shareholders of one
 4 company and benefiting the shareholders of the other
 5 company.
 6 Next slide, please.
 7 Such unfair results will need to be corrected
 8 somehow, and the actions -- the options should be given
 9 to the market players, but then this is not the case in
 10 Korea, and I would like to explain to you about why.
 11 We have ex ante and ex post actions that are
 12 possible. So as for ex ante, I mean, the ex ante should
 13 be premised based on that there will be that action that
 14 comes afterwards. But then if you have a situation
 15 where the damages would definitely incur, then you will
 16 be able to take the action ex ante.
 17 So the possible actions ex ante in fact are
 18 predicated upon the fact that there would be some
 19 possible actions ex post as well.
 20 So if you look at the possible actions ex ante, the
 21 directors have to be the natural person, and you can
 22 actually take action as preliminary injunction
 23 proceedings against the directors of the company to
 24 prevent the merger from going forward, and there is
 25 another option which is to go for the preliminary

1 injunction proceedings against the company to prevent
 2 the merger.
 3 And then after the decision is made, you can take
 4 the ex post action and the first ex post action that is
 5 available would be the merger nullification proceedings
 6 and this is going in line with the earlier ex ante
 7 action.
 8 So the ex ante's number 2 is paired with ex post's
 9 number 1. I mean, when the merger actually proceeds,
 10 then it would be quite difficult to unwind. That is why
 11 the players are given the option to stop the process
 12 ex ante, and then the second possible actions ex post is
 13 the exercise of a dissenting shareholder's statutory
 14 appraisal rights and I would like to walk you through
 15 each element in the next slides.
 16 Slide 9.
 17 I would like to first explain to you about the
 18 preliminary injunction proceedings against the
 19 directors.
 20 Non-controlling shareholders will -- not necessarily
 21 non-controlling shareholders, but it tends to be the
 22 case that the controlling shareholders would not pursue
 23 this path because the overall merger design is made up
 24 by them. So it's most likely that the non-controlling
 25 shareholders would follow this path.

1 Non-controlling shareholders have the right to
 2 obtain an injunction against directors to prevent
 3 actions that would violate laws and such. But in Korea
 4 this injunction has never been granted, and actually
 5 Elliott has taken this action, but then if it succeeded
 6 in getting the injunction, then it would have been an
 7 unprecedented case.
 8 Why is it so difficult then? There are some legal
 9 grounds.
 10 First of all, the company has suffered no loss. As
 11 mentioned earlier, merger is a transfer of the entire
 12 assets and liabilities and operations to the other
 13 company. And there is nothing that is leaking from the
 14 company's assets.
 15 So there is no loss suffered by the company, so only
 16 the shareholders are bearing the loss if there is
 17 a loss.
 18 In Korea, however, when the -- when it comes to the
 19 fiduciary duty of the directors, they do not owe the --
 20 their fiduciary duty to the shareholders. They only
 21 have the fiduciary duty to the company.
 22 So no matter how unfair the merger ratio is, since
 23 the loss would be only coming to the shareholders, they
 24 cannot be saved by the fiduciary remedy -- fiduciary
 25 duty remedy.

1 This is in fact an essential part of my argument:
 2 because of this fact, it is almost impossible for the
 3 actors to win based on this suit. So when there is
 4 a conflict of interest, there would be a great
 5 distortion in the market, and only when the fiduciary
 6 duty is accepted, the statutory formula being calculated
 7 based on the unfair merger ratio is illegal, but since
 8 the fiduciary duty to the shareholders is not accepted,
 9 the unreasonable, unjust premise is not -- the unjust
 10 premise is not reverted.
 11 Now let me move on to the possibility of filing for
 12 preliminary injunction against a company, Samsung C&T.
 13 In order to avoid significant damages or to prevent
 14 an imminent danger from taking place, shareholders have
 15 the right to obtain an injunction. The keyword here is
 16 "their rights".
 17 So shareholders must have rights in order to see
 18 whether there are potential damages or dangers to their
 19 rights.
 20 In the second bullet point the right to file for
 21 nullification ex post has to be acknowledged in order
 22 for an injunction relief to be granted. So that is why
 23 the key issue is whether the merger can be nullified.
 24 But if you look at Korean courts, they generally
 25 recognise nullification only under special circumstances

1 and in actual court precedents there's almost no such
 2 ruling.
 3 There's only the one precedent that is 30 years old
 4 and was a lower court decision, but that's just along
 5 the lines of once upon a time there was such a lower
 6 court case. But its value as a precedent is almost
 7 unrecognised in general practice.
 8 And secondly, if the merger ratio has been
 9 calculated in accordance with the statutory formula,
 10 according to court precedent, it is presumed to be
 11 valid. If you want the merger ratio to be
 12 unacknowledged, you have to prove that there was
 13 criminal and fraudulent conduct.
 14 But we're talking about an investor, a shareholder
 15 who has the burden of proof to prove that there was
 16 criminal and fraudulent conduct. Even if they could, it
 17 would probably take place mostly with the help of the
 18 police or investigatory authorities, five or ten years
 19 down the road.
 20 So when a merger has proceeded with the statutory
 21 formula, it would be basically impossible for
 22 a shareholder to obtain an injunction or a relief on
 23 these grounds because the merger ratio is allegedly
 24 unfair.
 25 Now let's talk about the nullification of the merger

1 ex post. In the previous page I mentioned that it is
 2 difficult for a party to get their claim to seek
 3 nullification accepted by the court. So here again you
 4 have the same problem.
 5 In the case of the SC&T case, the suit to seek
 6 nullification was not launched by Elliott, but rather by
 7 other shareholders, as can be seen in the court
 8 decision.
 9 But in this case as well the court ruled that
 10 because the merger ratio was calculated based on the
 11 statutory formula, that makes the merger ratio valid.
 12 That is the presumption.
 13 Compared to the ex ante procedure, there are many
 14 more limitations that apply to this ex post procedure.
 15 For instance, it has to be filed within six months
 16 from the date when the merger had been registered,
 17 otherwise you are prohibited from filing for the
 18 nullification on new grounds.
 19 After the merger had taken place, six months had
 20 passed before new facts were discovered, but it had
 21 passed the six-month statutory period. That is why the
 22 shareholders were unable to use this in their claim.
 23 As I mentioned earlier, once the merger has taken
 24 place, there's a high degree of recognition regarding
 25 the status of the merger as having taken place.

1 Therefore, even if the merger ratio is deemed to be
 2 unfair, the court can still use its discretion to
 3 dismiss a merger nullification claim.
 4 This is not unique in Korea, but globally there are
 5 not that many cases. In fact, almost none, in which the
 6 merger was pronounced nullified.
 7 When you break an egg to fry the egg you can never
 8 separate the yellow and the white. That is the analogy
 9 that the corporate law experts use to say it is not easy
 10 or virtually impossible to dissolve a merger.
 11 This particular court decision was appealed in 2017
 12 and currently remains pending. But, as I mentioned, the
 13 only case in which the nullification claim was accepted
 14 was 30 years ago, and it involved a non-listed company.
 15 And because Korean courts place emphasis on the
 16 statutory formula, and, furthermore, there are strict
 17 limitations on -- in terms of the new grounds on which
 18 you can file a nullification claim, so all in all I do
 19 not believe that the decision of the higher court will
 20 be any different from the court of first instance.
 21 In other words, a shareholder's interest is
 22 basically impossible to protect through lawsuits on
 23 grounds such as fiduciary duty breach or merger
 24 nullification. In the end you have no choice but to
 25 present yourself at the shareholders' meeting and

1 exercise your vote against the merger. That is in fact
 2 the only practical method to protect your interest.
 3 On the next page, now let me move on to the
 4 appraisal rights that I mentioned earlier.
 5 A dissenting shareholder has the right to request
 6 that the company or the merged entity purchase the
 7 shareholder's shares.
 8 This system originated in the mid 19th century for
 9 the first time in the world in the US, and since then
 10 Korea and Japan and select others have taken in this
 11 benchmark and are operating this system.
 12 But when the dissenting shareholder and the company
 13 cannot agree on a purchase price, the Capital Markets
 14 Act states that there is an appraisal price formula
 15 which is almost similar to the statutory formula that
 16 I mentioned earlier. In fact, they're basically
 17 identical. The only difference is that the observation
 18 period is different, slightly.
 19 And according to this law, if the shareholder
 20 objects to the appraisal price that has been determined
 21 according to the appraisal price formula, it can ask the
 22 court to determine an appraisal price, but in this case
 23 the Korean courts do not deviate from the appraisal
 24 price formula.
 25 As a result, this appraisal price formula has the

1 same limitations as does the statutory formula. The
 2 only difference is that the observation period has been
 3 extended from one month to two months in the case of the
 4 appraisal price formula. So the
 5 overestimation/underestimation issues or manipulation
 6 and selective disclosure will still be reflected in the
 7 trading price and that would leave the trading price
 8 still distorted.
 9 Next page, please.
 10 In exercising his or her appraisal rights, the
 11 shareholder runs into certain limitations. Let me
 12 elaborate on that point.
 13 The trading prices of the shares in listed companies
 14 are the base prices and this means the prices between
 15 shareholders in the Korea Stock Exchange, the public
 16 market.
 17 But the appraisal rights process serves as a means
 18 of providing liquidity to a shareholder who objects to
 19 a proposed merger and wishes to exit his or her
 20 investment in the company. Therefore, the sale and
 21 purchase of shares in the exercise of the appraisal
 22 right is a transaction between the company and its
 23 shareholder.
 24 As such, the company must pay the proportionate
 25 share of the value of the whole company, without

1 reflecting elements that might decrease the trading
 2 price. This is from a corporate law perspective.
 3 So these downward elements must not be reflected in
 4 theory, but in reality sometimes that is what happens.
 5 As for the last bullet point on this page, the
 6 appraisal price proceedings are non-contentious
 7 proceedings. And because they are non-contentious
 8 proceedings, there's no process in which the two parties
 9 will take an adversarial approach toward identifying the
 10 truth, and the court is not obligated to make
 11 a determination on the parties' legal arguments.
 12 So the role of the court is basically that of a real
 13 estate appraiser, to use an analogy. The court only
 14 serves as technical appraiser early and it does not
 15 correct a wrong or provide relief against a breach of
 16 a legal obligation or infringement. That is the
 17 limitation that I have been referring to.
 18 The next page, please.
 19 So I have spoken about the general limitations and
 20 in this Samsung C&T case the limitations that I have
 21 just mentioned are manifested themselves.
 22 For instance, the court of first instance regarding
 23 the appraisal price formula simply chose to collectively
 24 dismiss all the objections and made its determination
 25 exactly in accordance with the appraisal price formula.

1 On appeal, the Seoul High Court made a decision that
 2 slightly increased the price and it said that other
 3 valuation methods can be taken into consideration.
 4 However, on grounds that the trading prices cannot
 5 be discarded altogether, it simply applied the appraisal
 6 price formula and changed the reference date to the date
 7 before the listing of Cheil, which is about five months
 8 prior to the original reference date.
 9 So just a reference date was changed and nothing
 10 else, and as a result of this, the listing of
 11 Cheil Industries, the court said that it could have
 12 influenced the trading price of SC&T subsequently.
 13 And another point that I would like to emphasise is
 14 that in reaching this conclusion, the Seoul High Court
 15 said that this process is not for the purpose of
 16 examining whether the merger ratio was unfair or not.
 17 So this clearly shows the limitation of this
 18 appraisal price formula and the claims based on it.
 19 On the next page shows the details from the Samsung
 20 C&T case. The Seoul High Court changed the reference
 21 date and then they used the appraisal price formula
 22 exactly as it is in the FISCMA.
 23 On the left of the chart you see the first two-month
 24 period, as I mentioned, the observation period increased
 25 from one month to two months. So the reference date is

1 in parentheses, the reference date being
 2 17 December 2014.
 3 The date of the merger was 26 May and the two dates
 4 should be identical, but you can see that in this case
 5 the observation period has been brought up by about five
 6 months or so.
 7 So during the two-month period the trading volume
 8 and the closing prices are multiplied and the total of
 9 that multiplication is shown in the second column, and
 10 then you add the total trading volume.
 11 So if you divide that by the total trading volume,
 12 you arrive at 70,129 Won. This is the concept of the
 13 weighted average closing -- weighted average trading
 14 price.
 15 Moving on to the second row, which looks at the past
 16 one month, using the same formula, you arrive at
 17 67,522 Won. If you use the recent one week as the
 18 observation period, you arrive at 62,156 Won. Then on
 19 the far right there are three numbers. If you take
 20 a mathematical average of these three numbers, the
 21 result is 66,602 Korean Won.
 22 Next page, please.
 23 So regarding the problems inherent in this
 24 methodology, this is what I will address on this page
 25 because these are the problems that were identified in

1 the SC&T case.
 2 As I have said earlier, appraisal is the process of
 3 setting the price for a transaction between the company
 4 and its shareholders, and by using the stock market
 5 trading prices, the overall value of the company is not
 6 properly reflected. That's the first problem.
 7 The second problem is as follows. The appraisal
 8 price formula has almost exactly the same problems that
 9 I described when talking about the statutory formula.
 10 The only difference is that the observation period is
 11 two months instead of one. During that period the
 12 conflict of interest as well as the possible price
 13 distortion that could have been affected by the
 14 controlling shareholder is not addressed.
 15 The third problem is the appraisal price formula
 16 does not provide any reparation as to the various
 17 wrongdoings that took place at the time.
 18 Some might say whether the change of the reference
 19 date by about five months is a wise decision, but that
 20 in itself is highly problematic because it's so
 21 arbitrary.
 22 By bringing up the reference date, the association
 23 or relationship between the merger and the reference
 24 date weakened because you're talking about a five month
 25 difference. This is quite a bit away from the current

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 So the Seoul High Court decision in the appraisal
 8 price litigation only showed that the incomplete remedy
 9 at best is available regarding the issues in the SC&T
 10 merger.
 11 The next page, please.
 12 Now for the conclusion. Let me summarise what
 13 I have said thus far.
 14 First of all, the merger ratio calculation system in
 15 Korea, I believe, works only if you have complete trust
 16 in the statutory formula. There are various —
 17 virtually no means of appeal. The system is built on
 18 the firm belief that the statutory formula is perfect,
 19 but as I mentioned earlier, the statutory formula has
 20 clear limitations. In particular, when it comes to
 21 mergers between affiliates of a business group in which
 22 the interest of the controlling shareholder is involved,
 23 this could lead to a high degree of distortion.
 24 But the possibility of litigation is basically
 25 blocked off from the beginning, as I have just

1 mentioned.
 2 Having said that, in my view from a corporate law
 3 perspective, and this is not the first time I'm making
 4 this claim, since 2008 I have spent about 13 years
 5 studying this problem, and my conclusion has been the
 6 same. Regarding mergers in which the conflict of
 7 interest with controlling shareholder is present, the
 8 legal relief through the courts is very hard to come by.
 9 So perhaps the only way for the shareholder to
 10 protect himself is to vote against the merger. But
 11 depending on the company, this option is not available
 12 always. If they have a high degree of control over the
 13 company, it will not be easy to even take this approach.
 14 In the case of Samsung, the shareholding of the
 15 collective companies was 13%. That of the controlling
 16 shareholder himself was in the 1% range. That is why
 17 the voting at the shareholders' meeting was highly
 18 important. This is the end of my presentation. I thank
 19 the tribunal for your time and attention.
 20 THE PRESIDENT: Thank you very much, Professor Lee.
 21 Are there any supplementary questions on direct?
 22 MR CONSEDINE: No, sir.
 23 THE PRESIDENT: Thank you very much. So then we move
 24 straight to cross-examination.
 25 Cross-examination by MR TERCEÑO

1 MR TERCEÑO: Thank you, Mr President, members of the
 2 Tribunal.
 3 Good afternoon, Professor Lee. My name is
 4 Joaquin Terceño and I represent the Republic of Korea,
 5 the Respondent in this arbitration. I'm going to be
 6 asking you a few questions about your report.
 7 You have a copy of the report in front of you; is
 8 that correct?
 9 A. Yes.
 10 Q. You also have a binder that includes some other
 11 documents that I may be bringing you to ask you some
 12 questions about today. Given that it is Friday
 13 afternoon, at the end of a long week for those in the
 14 room, I'll try to heed your warning and not allow this
 15 to become long and boring, and I hope for your
 16 assistance in that effort.
 17 I understand you may be fluent in English, but have
 18 requested to testify in Korean. So I just wanted to
 19 caution you to allow the consecutive translation to
 20 complete before you answer the questions. That would
 21 make it easier for everyone to follow along. (Pause)
 22 With apologies, my understanding is he earned
 23 a Bachelor of Law degree from Georgetown University, he
 24 also passed a certified public accounting exam in the US
 25 State of Maine which I'm pretty sure was given in

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

1 I will just wait while that's addressed. The screen
 2 is not currently on.
 3 (Pause)
 4 So I just wanted to confirm a couple of things by
 5 way of introduction.
 6 You stated that you've advised various government
 7 ministries and served as an adviser to the Republic of
 8 Korea in various roles; is that correct?
 9 A. Yes, correct.
 10 Q. And you do describe these in paragraphs 5 to 7 of your
 11 witness statement. I don't think we need to go through
 12 those, but in general you seem to have provided advice
 13 in relation to public private partnerships, including
 14 with respect to infrastructure projects and including
 15 assisting with the interpretation of relevant laws and
 16 regulations; is that a fair summary? {F2/1/4}
 17 A. Yes.
 18 Q. In paragraph 7 of your report you list three current
 19 appointments and then state that:
 20 "Besides the above, I am not providing any service
 21 to the Korean Government, quasi governmental
 22 organisations or local governments."
 23 So am I right that these three that you list in
 24 paragraph 7 are the only current appointments you have
 25 related to work for the Republic of Korea?

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1 A. I'm working on various projects at the moment. So
 2 I will need some time to think about what kinds of
 3 projects I'm working on. I do not have any intention at
 4 all to hide anything from you, but then before I think
 5 about all the work that I'm doing as I sit here, I may
 6 not be able to give you an accurate answer. That is why
 7 I would like to ask you to explain to me the reason why
 8 you are asking me this question, and that will in fact
 9 allow me to give you a better answer and more accurate
 10 answer.
 11 On your previous question, on my paragraph 6, it may
 12 in fact mislead people to understand that I was only
 13 providing the interpretation on the relevant laws and
 14 regulations. So I would like to in fact add a little
 15 more points to that.
 16 Q. Professor, excuse me, I'm sorry. I don't think for my
 17 purposes it's necessary for you to add a few points.
 18 Counsel on the other side may ask you to later if they
 19 consider it necessary.
 20 I do want to point out that I'm not trying to
 21 suggest that you're hiding anything. If we can take the
 22 explanations you give in your report as expected to be
 23 accurate, that's fine. And I also will point out just
 24 so you know that it is not my place or intention to
 25 explain to you the reason for my questions, just so you

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1 don't spend time asking for that again.
 2 A. Noted.
 3 Q. Thank you. If we could turn to paragraph 10 of your
 4 expert report, you were asked by the Claimant to address
 5 two questions. {F2/1/5}.
 6 First, you explain how a merger ratio for listed
 7 companies is determined under Korean law and you offer
 8 your opinion on the limitations that you see in that
 9 law; correct?
 10 A. That's correct.
 11 Q. And then you offer your opinion on whether the
 12 Claimant's various lawsuits in the Korean courts that
 13 came in the wake of the Samsung C&T and Cheil merger
 14 could have provided a remedy to the loss that the
 15 Claimant alleged it would suffer from the merger ratio
 16 in that merger; correct?
 17 A. Yes, that's correct.
 18 Q. And actually the language you used, and I'm reading from
 19 the English, so you will correct me if the Korean says
 20 something any different, but it says that you prepared
 21 your report, and I'm looking at paragraph 10,
 22 subparagraph (ii), to address the issue of whether the
 23 actions pursued by EALP in the Korean courts did or were
 24 calculated to provide EALP with a remedy to recover
 25 damages; is that correct?

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1 A. The way I read it in Korean it is correct, but then if
 2 you're asking me whether the English translation in my
 3 expert report in English is correct, I'm not in
 4 a position to say whether it is. But I think it is
 5 roughly correct and if you are asking this question
 6 because — if you're focusing on the part that says
 7 whether the actions did offer — did provide EALP the
 8 remedies, then I would say that the actions did not
 9 provide remedies to EALP. That is why I feel my response
 10 is a little vague.
 11 Q. Yes. We understand that is your opinion, but you
 12 actually skipped the part that I am focusing on, which
 13 is the — you say that you were asked to consider
 14 whether those actions did or were calculated to; is the
 15 phrase "or were calculated to" in the Korean version?
 16 A. In this Korean version that I am looking at, there is no
 17 phrase that says "were calculated to".
 18 Q. Okay, thank you, Professor. Then we will move on to
 19 maybe a paragraph that gives a clearer statement of this
 20 first issue, or this issue that you looked at.
 21 If we look at paragraph 19 of your report, {F2/1/7},
 22 there you say at the beginning:
 23 "None of the actions taken by EALP in the Korean
 24 courts did or could have entitled EALP to recover as
 25 damages the losses caused by the value transfer

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1 resulting from an unfair merger ratio.”
 2 Is that a better statement of the issue that you
 3 address in your report?
 4 A. Yes.
 5 Q. So your opinion is about whether Korean law and in
 6 particular based on the type of lawsuits that the
 7 Claimant pursued in relation to this merger could have
 8 offered a remedy for a minority shareholder if that
 9 shareholder claimed a loss arising from an unfair merger
 10 ratio; is that a fair description of the issue you
 11 address?
 12 A. My conclusion is that they would not have been able to
 13 be offered a substantive remedy.
 14 Q. Yes. And by “them” you mean minority shareholders who
 15 are claiming that they suffered a loss from what they
 16 say is an unfair merger ratio; correct?
 17 A. Correct.
 18 Q. And during your presentation, and this was when you were
 19 talking about slide 5, you made the point that the
 20 merger ratio as calculated under Korean statutes is
 21 mandatory for any mergers of publicly listed companies;
 22 correct?
 23 A. This may require some more explanation, but roughly
 24 I would say yes. If it deviates from the statutory
 25 formula, then the FSS (Financial Supervisory Service)

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1 would not accept the application, and there would be
 2 some sanctions given to the merging entities. That is
 3 why in practice it is known that there is almost no —
 4 no single merger case that is deviating from this
 5 statute.
 6 Q. Thank you for that helpful context. Since there is no
 7 known case deviating from this statute, would you expect
 8 an investor purchasing shares in a Korean company to be
 9 aware of this mandatory statutory formula for
 10 calculating a merger ratio?
 11 A. If you are a professional investor, I would say that you
 12 would naturally assume it that way.
 13 Q. Thank you. Just to talk about that statutory formula
 14 for a moment, you described it in your presentation.
 15 You also describe it in your report at paragraphs 17 and
 16 18, and just, stated very simply, I know there’s
 17 weighting that goes on and some other aspects, but
 18 stated very simply, the formula sets a merger ratio
 19 based on the average market share prices of the two
 20 companies for the previous one month, one week, and one
 21 day, usually starting from the day before the merger
 22 announcement; is that right? {F2/1/6}
 23 A. Yes.
 24 Q. And that statutory formula was applied to the Samsung
 25 C&T and Cheil merger; correct?

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1 A. Yes, correct.
 2 Q. And that statutory formula is the same now as it was at
 3 that time in May 2015?
 4 A. Korean law changes quite frequently. So I will need to
 5 check to give you the accurate answer. But based on my
 6 memory, I think that is still the same.
 7 But I will need to double-check to give you the
 8 accurate answer because the detailed regulations are
 9 changing quite often.
 10 Q. Thank you. That’s understood. You did testify during
 11 your presentation that you have written a great deal
 12 about the Samsung C&T and Cheil merger; correct?
 13 A. Yes, that is correct, and I would like to explain to you
 14 about the background.
 15 I am focusing on the fact that the fiduciary duty
 16 aspect in the Korean law does not work in a way to
 17 protect the shareholders, and since I was looking at
 18 this as my focus point, I happened to write a lot about
 19 the Samsung C&T and Cheil merger.
 20 Q. Thank you. So at least as far as you are aware in the
 21 wake of the Samsung C&T and Cheil merger, there has not
 22 been any amendment made to the statutory formula, has
 23 there?
 24 A. I believe that there was no amendment to the statutory
 25 formula right after the — in the period that is right

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1 after the merger between Samsung C&T and Cheil.
 2 Q. Do you believe that there’s been any amendment at all in
 3 any period since 2015 at least to your knowledge?
 4 A. I would say that my recollection isn’t clear — isn’t
 5 completely accurate because the financial regulations
 6 would stay quite the same in the big theme, but then the
 7 small detailed rules may change quite often. That is
 8 why I’m not quite sure which part that you’re asking —
 9 directing my attention to, but I cannot tell you that it
 10 would be perfectly the same.
 11 Q. Thank you, Professor. Looking at paragraph 18 of your
 12 expert report, here you describe the two limitations
 13 that you claim the statutory formula has, and right now
 14 I’m just looking at the first one which is in the (i).
 15 You say the first limitation is that if the average
 16 share price for the one-month period does not accurately
 17 reflect the relative value of the companies, the
 18 resulting merger ratio might transfer value from one set
 19 of shareholders to the other; correct?
 20 A. I see “will” instead of “might” in the report that
 21 I have submitted.
 22 Q. Yes. The statutory form will result in a merger ratio
 23 that causes a transfer.
 24 A. Yes, correct.
 25 Q. Now, you are familiar with the so-called Korea discount

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1 that affects the market price of Chaebol companies in
 2 relation to their potential estimated net asset value,
 3 are you not?
 4 A. So as a legal professional, I do understand the term
 5 "Korea discount" that is used in this profession, but
 6 then the word "Korea discount" is very widely used in --
 7 very widely used in different fields so I cannot tell
 8 you -- it would be difficult for me to tell you that
 9 I know the meaning that is used in various different
 10 fields.
 11 But as in the legal background, I would say that
 12 I have good understanding of the context where the word
 13 "Korea discount" is used.
 14 Q. Well, let's look at one of your articles. This is in
 15 tab 9 in the bundle that you have. It is exhibit R-276.
 16 {R/276/1}. This is an article that you wrote, as
 17 I understand it, but please correct me if I am wrong,
 18 but you discuss how the conflict of interest between
 19 a controlling shareholder and minority shareholders in
 20 Chaebols might have an impact on a merger ratio; is that
 21 right? {R/276/2}
 22 A. Yes, correct.
 23 Q. And if you turn to page 483, I'm looking at an English
 24 translation, but I understand it's the same in the
 25 Korean. On that page you should have a heading

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1 numbered 2 that talks about same person and
 2 self-dealing; do you find that page? {R/276/8}
 3 Just above that heading, I'm reading the last
 4 sentence in the paragraph above it, you wrote:
 5 "If the market is efficient, these risks (weakness
 6 of the Korean company law that does not legally protect
 7 this) will be reflected in stock prices to some extent,
 8 and that is what makes up the Korea discount."
 9 You're taking about the facts of the risk of
 10 shareholder control will create a discount between what
 11 might be considered the net asset value of a company and
 12 what it's actually selling for in the Korean market;
 13 correct?
 14 A. Well, the net asset value is not exactly the word that
 15 I used and this is not exactly the kind of concept that
 16 is absolutely necessary to explain my point here.
 17 What I'm trying to explain here is regardless of
 18 what the value is, and it is, I would like to tell you
 19 that I'm not in a position to make the appraisal or the
 20 valuation of the value, but then whatever the value is,
 21 if there is a value that is regarded as just in the
 22 market, then there is a discount compared to that value
 23 in the market.
 24 Q. Thank you for that, Professor.
 25 Let's look briefly at another one of your articles.

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1 This is in tab 10. It is exhibit R-303. It's an
 2 article that you wrote about the NPS ruling in the wake
 3 of the merger. {R/303/1}
 4 I would like to turn to page 61 in this article
 5 {R/303/10}. You're writing about the issue of companies
 6 holding stock in other affiliated companies in the
 7 Chaebol system as I understand it, and I'm going to read
 8 a passage from -- about the middle of this block of text
 9 {R/303/10}.
 10 And reading:
 11 "In other words, if an entity is not affiliated with
 12 the group, it can sell Samsung Electronics' stocks or
 13 use its value in many other ways. However, since C&T
 14 must retain them for the controlling shareholder, it is
 15 only a 'warehouse keeper without pay' ..."
 16 THE INTERPRETER: I'm very sorry, but I was not able to find
 17 the passage you were referring to and it seems
 18 Professor Lee is also struggling.
 19 MR TERCEÑO: Is it not the page that is up on screen? It be
 20 right in the middle essentially of that block, and it
 21 should be page 61. It begins the fourth line from the
 22 top in the Korean, as I understand it. "In other words,
 23 if an entity is not affiliated", do you see where I'm
 24 reading?
 25 THE INTERPRETER: Please proceed, thank you.

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1 MR TERCEÑO: "In other words, in an entity is not affiliated
 2 with the group, it can sell Samsung Electronics' stocks
 3 or use its value in many other ways. However, since C&T
 4 must retain them for the controlling shareholder, it is
 5 only a 'warehouse housekeeper without pay' that does not
 6 have much benefit even if the stock price rises and the
 7 undervaluation of C&T can be said to be a 'penalty' of
 8 the market or a 'cold evaluation' of the market
 9 concerning such a point."
 10 So what you're describing here is that in the
 11 market's cold evaluation, a company in a Chaebol that is
 12 holding shares from which it cannot benefit, is ascribed
 13 a lower market value because of that; correct?
 14 A. That's correct, but if you are not a corporate law
 15 expert, it may be misleading. So let me explain a bit
 16 more.
 17 Q. Please do. I'm a litigator.
 18 A. So the point here is that in the stock market, there is
 19 a stock exchange that is where the shares of the
 20 non-controlling shareholders are being traded and then
 21 there is an M&A market where the shares of the
 22 controlling shareholders in the companies are being
 23 traded. And here the term "Korea discount" means that
 24 since there is an additional premium to the shares of
 25 the controlling shareholders, the shares of the

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1 non—controlling shareholders are being traded at
2 discount.
3 So broadly, there is the Korea Stock Exchange, where
4 the trading is happening between general,
5 non—controlling shareholders and there is the M&A
6 market, where the controlling shareholders' shares or
7 the whole company are traded.
8 So when you are in the trading market, you are
9 selling and buying at discount. And in the case of the
10 Samsung C&T and Cheil merger, it is an M&A case. So in
11 the M&A market, the trading has to happen based on the
12 entire value of the company.
13 So according to the corporate law perspective, you
14 cannot see that the M&A trading should be happening at
15 discount.
16 Would you mind opening for me slide 13 of my
17 presentation?
18 Q. Professor, I think you've given enough of an answer now.
19 The other side can bring you to that if they wish to,
20 but I would like to move on.
21 But I just want to clarify one thing. From what you
22 said in the case of this merger, it's an M&A case, and
23 it should be trading based on the entire value of the
24 company. But it actually, as you said, trades on
25 a mandatory statutory formula that sets the merger

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1 ratio; correct? That determines how the merger goes
2 forward.
3 A. Yes, that is true. That is why a statutory formula is
4 often thought to be a means that would be quite
5 difficult to become an accurate remedy among the people
6 who are studying corporate law. And, for example, in
7 the case of the Samsung C&T and Cheil merger, prior to
8 the merger, the owner family had the share of 1.4%, but
9 it jumped to 30% after the merger. And they actually
10 benefited a lot from a legal perspective because the
11 trading happened at a discounted market price, and they
12 didn't have to pay for the premium.
13 Q. Professor, that actually brings us to the second
14 limitation that you find in the statutory formula. So
15 let's look at that. It's again paragraph 18 of your
16 expert report, this time (ii), where you write that the
17 controlling shareholder can deliberately create
18 circumstances that give rise to the calculation of
19 a merger ratio that if approved is unfair to
20 non—controlling shareholders. Do you see where I am?
21 {F2/1/6}
22 You say here, Professor, that — you may want to
23 look at the hard copy, Professor, because on the screen
24 it only seems to have the end part of that paragraph.
25 A. Yes, I have found it.

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1 Q. You also say here, and I believe it's what you also just
2 testified, that the reason it could be unfair is that
3 the result would be to give the controlling shareholder
4 more shares in the merged entity than it might otherwise
5 get if the merger ratio were more fair in your view it
6 wouldn't — that wouldn't happen; correct?
7 A. Yes, correct.
8 Q. Then you say that the controlling shareholder might
9 achieve this by influencing the share price of the two
10 companies for the month before the merger announcement;
11 correct?
12 A. Could you please point me to the exact phrase that we
13 are looking at?
14 Q. The phrase was my own. I was just summarising the point
15 here.
16 A. Yes.
17 Q. And just so I understand it, your concern here is that
18 the statutory formula therefore is potentially subject
19 to share price manipulation when there's — the
20 companies being merged are affiliates with a single
21 controlling shareholder; do I have that right?
22 A. So I do not think that that is an accurate explanation
23 of my opinion or my concern. In fact, the market share
24 price manipulation is a criminal act and since this is
25 a criminal act, this is not something that would happen

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1 normally when you're pursuing a merger and it would be
2 quite difficult to identify too, unless you are a police
3 investigative agency, it would be difficult for you to
4 identify such criminal act.
5 My concern is more around something that is not
6 amounting to the criminal act, but then more subtle and
7 more difficult to identify. More subtle and some
8 activities that would be more difficult to identify, and
9 the controlling shareholders are in complete control
10 of — it wasn't the complete control, let me rephrase
11 that.
12 The controlling shareholder has control over the
13 management rights. So they have a lot of ways, and
14 various ways and power to influence the share price, and
15 that is happening quite easily in reality.
16 Q. Thank you, Professor. Just so we're clear, any merger
17 between public listed — publicly listed affiliates in
18 Chaebols in Korea is governed by the statutory formula
19 and thus subject to these opportunistic actions by
20 controlling shareholders; correct?
21 A. I would say it is easy for — easy to have such
22 incentive in this situation. I cannot say that all
23 companies would be following that path, but structurally
24 there is strong incentive to pursue that path, and also
25 they have strong power to push that through.

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1 MR TERCEÑO: Thank you. Mr President, I'm in your hands,
 2 but this might be a good time for a short break since
 3 we've been going for about an hour and a half.
 4 THE PRESIDENT: Yes, it would be. Let's break for a coffee
 5 or tea until 3.15. And Professor Lee, I should remind
 6 you that you cannot speak with anybody about your
 7 testimony during the break.
 8 Please feel free to have a coffee or tea or go to
 9 the restroom. You can move around.
 10 THE WITNESS: Understood, thank you.
 11 (3.03 pm)
 12 (A short break)
 13 (3.15 pm)
 14 THE WITNESS: Sorry for being late.
 15 THE PRESIDENT: Mr Terceño.
 16 MR TERCEÑO: Thank you, Mr President.
 17 Professor Lee, I just have a few more questions
 18 before we can wrap up for the day.
 19 I want to talk to you about one of the lawsuits that
 20 you discuss in your expert report. You discuss this
 21 initially in paragraph 19 of your expert report. You
 22 point to what I'll call the appraisal rights lawsuit
 23 that the Claimant brought which you say was a lawsuit
 24 that could not provide a remedy for the purportedly
 25 unfair merger ratio; is that correct? {F2/1/7}.

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1 A. Yes, correct.
 2 Q. And I don't think you will need to read them, but you
 3 discuss this in paragraph 67 to 70 of your expert report
 4 where you say that a shareholder who dissents from
 5 a merger has a right to request that the company buy
 6 back its shares at a particular appraisal price.
 7 {F2/1/27}.
 8 So one way to compensate for a purported value
 9 transfer from an unfair merger ratio would be to set an
 10 appraisal price for the Claimant's shares that reflected
 11 the purported full value of those shares; correct?
 12 A. I couldn't quite understand the part about the shares
 13 reflecting the purported full value of those shares.
 14 Q. My question was that one way to compensate for what you
 15 say is a value transfer from one group of shareholders
 16 to another if a merger ratio is unfair would be to set
 17 an appraisal price for the Claimant's shares that
 18 reflect that purported full value of those shares so it
 19 can recover.
 20 A. Yes, that is my opinion that was presented in the slide
 21 earlier.
 22 Q. And if we look at —
 23 A. So my intent is that the accurate compensation would be
 24 the compensation made in proportion to the value of the
 25 company as a whole.

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1 Q. And as you testified earlier, you do not know what the
 2 value of the company of Samsung C&T was, do you?
 3 A. Yes, because I'm not a valuation expert or a financial
 4 expert, I didn't really give my thought into that.
 5 Q. So let's look at the appraisal price litigation which
 6 you did give some thought into in your expert report.
 7 This is tab 2 in the bundle in front of you. It's
 8 exhibit C-53. {C/53/1}
 9 You list this in Appendix 3 of your report. So this
 10 is a decision that you read in preparing your expert
 11 report; correct?
 12 A. Yes, correct.
 13 Q. Now, if you take a look at the first page, you will
 14 see — which I think the Korean pdf might be labelled as
 15 page 43. It should be the first page of the decision.
 16 It lists the appellants who are multiple Korean
 17 companies and individuals, but you do not see the
 18 Claimant EALP listed there; correct?
 19 A. Yes, correct.
 20 Q. And you understand, don't you, that the Claimant was
 21 originally an appellant in this case before it reached
 22 this court? In fact if we see on page 2 it states under
 23 "Purpose of the Application and Purpose of the Appeal"
 24 there's a parenthetical that says:
 25 "(Elliott Associates LP withdrew its application on

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1 March 23, 2016)."
 2 {C/53/2}
 3 A. Yes.
 4 Q. So when you talk about in your report at paragraph 38
 5 certain actions taken by the Claimant in the Korean
 6 courts that you say could not have offered them full
 7 compensation and you say these include the exercise of
 8 appraisal rights, you're talking about this action;
 9 correct? {F2/1/15}
 10 A. Yes, correct.
 11 Q. And as we also see on page 2 of the decision, again
 12 under the "Purpose of the Application" heading, it
 13 reads:
 14 "[The] applicants seek a determination of the
 15 purchase price of each common shares issued by Samsung
 16 C&T Corporation."
 17 And you understand that to mean Samsung C&T prior to
 18 the merger; correct? {C/53/2}.
 19 A. If you look at the upper part of that, it seems that the
 20 new Samsung C&T has become the successor of the case and
 21 is in fact identified as the party, a merged entity
 22 after the Merger.
 23 Q. Professor, this is the appraisal rights litigation which
 24 was meant for the buy back of the Claimant's shares in
 25 Samsung C&T; correct? I'm simply clarifying that that's

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1 the Samsung C&T shares they're talking about.
 2 A. Yes, that's correct.
 3 Q. And you also understand that until it withdrew its
 4 claim, those common shares would have included about
 5 7.7 million of the shares that the Claimant held in the
 6 original Samsung C&T; correct? These were the shares it
 7 was trying to sell back.
 8 A. I am not familiar with the exact number, but I have
 9 heard about the event.
 10 Q. Okay. Well, as this decision says it's reversing the
 11 first instance decision. So before we go further, let's
 12 take a look at that first instance decision. It's tab 8
 13 in your binder. It's exhibit C-259. {C/259/1}.
 14 Now, this decision is not listed in your Appendix 3.
 15 So have you read this decision before, Professor?
 16 A. I do not have a clear recollection because it's a while
 17 back. I remember that I focused more on the second
 18 instance decision because I was aware that the first
 19 instance decision didn't have anything new because it
 20 was made based on the general statutory formula based
 21 decisions. So I didn't pay much attention to it
 22 and I focused my attention to the second instance
 23 decision.
 24 Q. Understood. I just had a couple of questions about
 25 this, so hopefully they will be simple enough. But of

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1 course if you need to look at the decision in detail,
 2 you're welcome to.
 3 We see on page 1 — sorry, go ahead.
 4 We see on page 1 that here the Claimant, Elliott
 5 Associates LP is listed. So it was one of the
 6 appellants at this stage; do you see that? {C/259/1}
 7 A. Yes, I see that.
 8 Q. And if you turn to the bottom of page 3 under grounds
 9 for the application {C/259/2}, at the end it states:
 10 "Applicant Elliott Associates LP requests for the
 11 court to determine the fair purchase price of the common
 12 shares issued by Samsung C&T corporation."
 13 And then you see it listing the number of shares
 14 I just mentioned previously. It's 7,732,779 common
 15 shares. {C/259/2}
 16 A. Yes, I can see that.
 17 Q. Now, on the next page there's a heading number 1, called
 18 basic facts, and I'm going to direct your attention to
 19 subparagraph F {C/259/3}.
 20 There you will see that it lists as one of the facts
 21 that the calculation of the appraisal price under the
 22 Capital Markets Act had come out to Korean Won 57,234,
 23 and you understand that to be the calculation done under
 24 the formula that you've described for appraisal rights;
 25 correct?

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1 A. I think so.
 2 Q. If we turn back to the previous page under the heading
 3 that says "Order" {C/259/2}, we see that the court has
 4 ordered that the purchase price for these common stocks
 5 shall be Korean Won 57,234 per share, so you understand
 6 that what the court did here was accept the calculation
 7 under the Capital Markets Act and make no adjustment;
 8 correct?
 9 A. Yes, correct.
 10 Q. Now, if we look at page 8, this is under a heading
 11 numbered 3, "Arguments by Applicant Elliott Associates
 12 LP" {C/259/6}. You will see there's a ... (Pause)
 13 THE INTERPRETER: Counsel, would you mind ...
 14 MR TERCEÑO: Apologies for that. Page 6 in the Korean
 15 translation — Korean original. {C/259K/6}
 16 A. Yes, I found page 6.
 17 Q. So I'm looking again under the heading number 3.
 18 "Arguments by applicant Elliott Associates LP", and
 19 you will see a couple of sentences in there's a heading
 20 number 12 and it says:
 21 "Despite the fact that the former SC&T obtained
 22 a construction project for a combined fossil fuel power
 23 plant in Qatar, it made a late disclosure of such fact
 24 after the merger with the former Cheil was complete."
 25 Are you aware that the Claimant was arguing that

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1 that late disclosure was used to manipulate the share
 2 price?
 3 A. Yes, I am aware.
 4 Q. And so if we turn to page 10, which I believe is page 9
 5 in the Korean original {C/259/9}, this is the findings
 6 of the court and two paragraphs above a heading
 7 numbered 3, we see a paragraph that reads:
 8 "With respect to the construction project for the
 9 combined fossil fuel power plant in Qatar, the
 10 disclosure cannot be considered to be in violation of
 11 applicable disclosure rules so as to constitute an
 12 adoption of unlawful means based on the materials on
 13 record."
 14 So do you understand this to mean that the court
 15 found that there was no issue with the Qatar contract
 16 disclosure with respect to manipulating share price?
 17 A. Yes, it reads so according to the decision.
 18 Q. So let's go back to the appellate decision on this.
 19 This is again tab 2 in exhibit C-53. As I have
 20 mentioned, this reversed the lower court decision that
 21 we were just looking at {C/53/1}.
 22 On page 31, which in Korean should be before —
 23 there's a list of charts that begin — it's the one that
 24 has the conclusion. {C/53/31}. Are you there,
 25 Professor?

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1 A. (In English) Yes.
 2 Q. So it says here that the appellate court has found that
 3 the price derived through the Capital Markets Act
 4 calculation of Korean Won 57,234 per share is unjust,
 5 and this court finds the applicants' appeal to have
 6 justifiable grounds:
 7 "Therefore, the first instance decision is reversed
 8 and the fair purchase price shall be Korean Won 66,602
 9 per share."
 10 I believe you had this on one of your slides, but
 11 you understand that what this court did was increase the
 12 purchase price for the Claimant's shares; correct?
 13 A. Yes, I understand so.
 14 Q. And if I can just for the sake of accuracy, the Claimant
 15 was not an appellant at this point. So it may not be
 16 perfectly accurate to say that the court increased the
 17 purchase price for their shares, but as we know and the
 18 tribunal knows through a Settlement Agreement, the
 19 Claimant has, it will receive any increase in the
 20 purchase price that is paid out as a result of this
 21 court case.
 22 You understand, Professor, and explained that the
 23 way the court arrived at this higher price was to change
 24 the date from which it applied the capital markets
 25 calculation; correct?

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1 A. Yes, I understand that the reference date has been put
 2 forward. That is why the price has gone up.
 3 Q. And as you explained, that reference date was put
 4 forward to December 18, 2014, because the court felt
 5 that that was a date where the market price had not been
 6 affected unduly by the upcoming merger; correct?
 7 A. Yes, correct.
 8 Q. You said during your presentation that the Seoul
 9 High Court had "slightly increased the price". You were
 10 talking about this increase; correct?
 11 A. Yes, correct.
 12 Q. I'll ask you to trust my math. I'm sure there are
 13 plenty of people in the room that will be checking it
 14 anyway. But the increase was of Korean Won 9,368 per
 15 share, which is the difference between the 66,602 and
 16 the 57,234. Does that sound right to you?
 17 A. Yes, that sounds right.
 18 Q. And you remember as we saw in the decisions that the
 19 Claimant was selling back 7,732,779 shares; correct?
 20 A. I think it is correct. I do not recall the exact
 21 number, but I think it is correct.
 22 Q. Thank you. I'm happy to look at it again or you could
 23 just trust me on it, either way.
 24 A. I can trust you on that.
 25 Q. Thank you. I appreciate that.

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1 So this slight increase in the price of
 2 Korean Won 9,368 per share would mean, if this is
 3 upheld, that the Claimant for its 7.7 million shares
 4 would be receiving an additional Korean Won
 5 72,440,673,672 for its alleged loss; does that sound
 6 right to you?
 7 A. I think so.
 8 MR TERCEÑO: And I do apologise for making you struggle over
 9 the numbers, having seen that earlier in the hearing,
 10 I wrote mine out so that I could get it right.
 11 Thank you very much, Professor.
 12 Mr President, we have no further questions.
 13 A. Thank you.
 14 THE PRESIDENT: Thank you, Mr Terceño. Any questions in
 15 redirect?
 16 Re—examination by MR CONSEDINE
 17 MR CONSEDINE: Very briefly, sir, with your indulgence.
 18 It may be the tab you have open, Professor Lee,
 19 tab 2, the High Court's decision in the appraisal price
 20 proceedings. Do you have that open?
 21 A. Yes.
 22 Q. You won't need a long memory to recall you were asked
 23 some questions about this by Mr Terceño; yes? Do you
 24 remember that?
 25 A. Yes. I remember that.

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1 Q. If you turn to page 9 of that decision {C/53/9}, the
 2 second paragraph from the bottom beginning with the word
 3 in English "furthermore", and please look with me at the
 4 sentence that reads:
 5 "The court in this case is not examining whether the
 6 merger ratio was significantly unfair ..."
 7 Do you see that?
 8 A. Yes, I see that.
 9 Q. Thank you. In your presentation today you described the
 10 appraisal price proceedings as an incomplete remedy.
 11 Can you explain what you meant by "incomplete remedy" by
 12 reference to this line in the court's judgment?
 13 MR TERCEÑO: Mr President, with your indulgence, if counsel
 14 opposite is going to ask him to give his opinion with
 15 reference to this line in the court judgment, could I
 16 ask that he read the entire sentence into the record; he
 17 only read half of it.
 18 THE PRESIDENT: We can all read it.
 19 MR CONSEDINE: Can you explain what you meant by "incomplete
 20 remedy" by reference to this part of the court's
 21 judgment?
 22 A. Are we talking about reading the full paragraph or the
 23 line?
 24 Q. The line that I took you to was the line that reads:
 25 "The court in this case is not examining whether the

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1 merger ratio was significantly unfair ...".
 2 And I'm asking you what you meant in your
 3 presentation by "incomplete remedy" by reference to that
 4 part of the court's judgment.
 5 A. I will do so. I would like to ask to have my screen on.
 6 I would like to have the presentation slide page 13 for
 7 everyone to have a look at. {J/18/14} Basically, as
 8 I mentioned earlier, the appraisal price -- statutory
 9 appraisal price formula is basically the same as the
 10 statutory formula.
 11 Therefore, the fundamental limitations of not being
 12 able to remove the conflict of interest of the
 13 controlling shareholders still remains. For example,
 14 may I direct your attention to slide 15. {J/18/16}
 15 As you can see here, the share price of SC&T started
 16 off with 70,129 Won in the two-month observation period
 17 and it went down to 62,156 Won up to the point that is
 18 closer to the reference date, and it is a decrease of
 19 10%.
 20 So the Seoul High Court seems to think that the mere
 21 act of putting the reference date forward would be able
 22 to remove the conflict of interest, but as you can see,
 23 it is not the case.
 24 The High Court held that the reference date should
 25 be brought forward to remove the impact from the listing

1 of the Cheil Industries, but then the news of the
 2 potential listing of the Cheil has been going around in
 3 the market since end of 2013 and all throughout 2014.
 4 And anyone who is -- who has practical experience in
 5 the securities law would understand that the listing
 6 doesn't happen overnight. I mean, since many months
 7 before the actual listing, the company has to make an
 8 application to the exchange and also there are certain
 9 objective and open requirements to be met.
 10 So the activities are going on many months prior to
 11 the actual listing.
 12 So my point is not to bring the date forward a lot
 13 further. My point is that the decision to bring the
 14 date forward in and of itself is arbitrary and
 15 illogical, especially the statutory formula is using the
 16 one-month or two-month observation period before the
 17 merger, and that is being criticised a lot, but then the
 18 system is maintained because based on the grounds that
 19 this is the information that is the latest.
 20 If the court -- when the court brings the date
 21 forward by five months, then it is in fact undermining
 22 the meaning of the existence of the statutory formula.
 23 Most importantly, as I mentioned earlier, the
 24 exercise of appraisal right is in fact exercised when
 25 the shareholder has a complaint about the activities

1 that is pursued by the company in terms of the M&A.
 2 When the company is pushing forward with a merger or
 3 acquisition, irrespective of their intention or their
 4 will, and makes the impact of that acquisition or the
 5 merger attributable to all the shareholders, then when
 6 the shareholder is dissenting from that opinion, then
 7 they would be exercising the appraisal right.
 8 Therefore, according to the principles of M&A, the
 9 payment has to be made in accordance with the value of
 10 the entire company, and I have in fact mentioned this in
 11 my slide as well, and this is well established by the
 12 Delaware Supreme Court.
 13 I'm not an expert in the US law, but then since the
 14 system was originated from the US, and if you are
 15 a Korean academic who is working in this field, then you
 16 must be aware -- you must be familiar with this
 17 precedent. That is why I am using this as evidence.
 18 There is one last point that I would like to make,
 19 and this is in fact regarding something that would --
 20 that is quite problematic and I can -- so problematic
 21 that I can write a paper out of it.
 22 So as you could see in the example of the statutory
 23 formula, the Korean courts, if it is not the
 24 manipulation of the market price or the criminal
 25 conduct, the implicit influence by the controlling

1 shareholder is considered part of the market price and
 2 then that is why the Korean court did not accept any
 3 merger nullification proceedings or the injunctions with
 4 regards to it.
 5 And in the appraisal litigation, even though there
 6 was no evidence of any criminality, the court decided
 7 arbitrarily to bring the date forward by five months,
 8 saying that this -- there was influence in the market
 9 price.
 10 So one might think that this is a good -- this was
 11 a good thing because in the end you got a higher price
 12 out of it, and then you were paid off based on a higher
 13 price. But if you are allowing for such arbitrary
 14 decision and something that is not based on the
 15 principles, then there can be a lot of other cases where
 16 you would not be compensated for the due amount.
 17 And one more thing. And one more thing is that the
 18 appraisal proceedings, as it was stated by the court is
 19 not a process to examine the unjust and unfair merger
 20 ratio. It is not looking into any wrongdoing. It is
 21 not designed to rectify the wrongdoing or the unfair
 22 merger ratio.
 23 The court in this case is only acting like a real
 24 estate appraiser, and it is only a technical approach,
 25 and it is also only applied to a single company.

1 So, as I said earlier, this is not a process to
2 examine whether something is done well or something is
3 wrong or right, and just because the controlling
4 shareholder had an influence on the prices the court
5 decided that the reference date should be brought
6 forward by five months, and the fact that this sort of
7 decision was given is showing that the system is used in
8 an illogical, irrational way.

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

15 That's all I have to say.
16 MR CONSEDINE: Thank you very much, Professor. Nothing
17 further from us, sir.

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

20 Questions from THE TRIBUNAL

21 MR GARIBALDI: Professor Lee, you made a distinction -- I'm
22 sorry.

23 THE INTERPRETER: Good afternoon, Mr Garibaldi, is what he
24 said.

25 MR GARIBALDI: Thank you so much.

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

8 A. That's correct.

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

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

16 A. Yes -- are you referring to the standalone value?
17 I believe that what is right is to estimate -- evaluate
18 the value of each merging entities.

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

22 Now, my question is this: suppose that the merging
23 entities, or at least one of them, owns shares in other
24 companies, and some of those shares reflect the
25 controlling interest. Now, as a theoretical matter, and

1 not as a matter of an exercise in valuation, how do you
2 handle those blocks of controlling shares in determining
3 the standalone value of the entities to be merged?

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

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

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

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

23 A. It was the specific question of how the valuation is
24 done and how the discount works in the specific
25 valuation scenario is not something that I am an expert

1 in because I'm not in practice for the financial
2 valuation and I'm a legal expert. But in terms of the
3 difference between the M&A markets value and the stock
4 exchange markets value, this is something that can be
5 explained from the legal perspective, and is also held
6 by the Delaware court as well. So I would be able to
7 give you more explanation on this aspect.

8 MR GARIBALDI: Briefly, thank you.

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

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

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

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

21 A. Yes, generally so.

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

24 A. Yes, that's correct, and in the stock exchange market,
25 the shares are like the small sands that are lying

1 around. So these are the shares that are priced at
2 a discount and there is no premium of the controlling
3 shareholders that are reflected to this price. So no
4 controlling shareholder would want to sell their shares
5 at that price.

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

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

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

16 THE PRESIDENT: Now, in case of a merger between two Chaebol
17 companies which are controlled by the same owners, in
18 case of a merger, the value of the two companies cannot
19 actually be determined because the owner is the same.
20 So there is no market value.

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

25 A. Yes, in Korea the affiliate, the term "affiliates" is

1 defined according to the Fair Trade Act, and it is
2 defined as the entity that is controlled by the single
3 person or the single business group. But even if the
4 transaction is about the two affiliates, it doesn't mean
5 that there will be no premium at all. For example, in
6 the case of the SC&T merger, the stake of the owner
7 family was only 13%.

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

11 In such case, control is not clearly established.
12 So, for example, there could be a case where other
13 shareholders hold hands to request for an improvement in
14 governance or initiate a control dispute, in which case
15 there remains the possibility for the share price to
16 increase or for enterprise value to improve.

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

20 11 years ago, back in 2004, the British hedge fund
21 Hermes actually started buying SC&T which came off as
22 threatening to the management of the Samsung Group and
23 that became a big issue in Korea.

24 And by pursuing this merger, they were able to get
25 away from such trauma because this merger ensured them

1 to have up to 40% of the control.

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

4 THE INTERPRETER: Sorry.

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

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

12 THE PRESIDENT: Okay, yes. I understand. I'm just trying
13 to understand your evidence.

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

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

1 is believed to be the fair value.

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

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

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

11 THE WITNESS: Thank you.

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

(The witness withdrew)

17 Certainly stay in the room, but you don't need to
18 sit there.

Housekeeping

20 THE PRESIDENT: We have on the schedule a final discussion
21 before we finish today, a discussion or a -- on the
22 outstanding matters and schedule for next week. We
23 started that discussion already yesterday and we
24 understand that there is an agreement now how to deal
25 with Mr Smith's testimony.

1 We didn't want to open that unless either party
2 wants to clarify anything, but what we wanted to discuss
3 with the parties is the schedule for the next week,
4 including possible closing or post-hearing submissions.
5 MR TURNER: Sir, if I may, before we talk about that,
6 there's just an update on our examination of my learned
7 friend's documents.

8 We have been looking at them. As I said yesterday,
9 there are 269 pages. We received this in eight blocks
10 and my learned friend referred to an application that he
11 would make to put eight new documents into evidence. We
12 will discuss this directly with the Claimant, but we
13 think that each individual trade should be a separate
14 document to help in dealing with that during the course
15 of next week.

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

22 The first is that we have yet to make a final
23 decision about whether we would object to any of the
24 269 pages being admitted into evidence, but we will deal
25 with that as quickly as possible and bilaterally, but

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1 just to keep the tribunal updated.

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

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

9 THE PRESIDENT: Claimant?

10 MR PARTASIDES: Thank you, Mr President.

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

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

24 As you heard from me yesterday, we propose that all
25 of those be on the record. It seems to us that it would

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1 be easier, as long as they are paginated, if they were
2 eight new exhibits. But if there is a preference that
3 they be individually exhibited, then of course that is
4 another way of doing it. I'm not quite sure I see the
5 point of that as long as they are paginated, but that is
6 a practical question that I express no further view on.
7 THE PRESIDENT: Okay. So that was by way of an update. No
8 need for a tribunal intervention at this stage. So that
9 is noted.

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

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

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

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

24 It seemed to us that oral submissions may serve
25 a different purpose, and therefore still be useful to

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1 the tribunal, not duplicatory, if organised in the right
2 way, and as we have scheduled time next Friday for those
3 oral submissions, both sides suggest that, subject to
4 the tribunal's preferences, we might use that time for
5 oral closings on the Friday of next week.

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

12 I'll let my learned friend speak for the Respondent.

13 On our side it seems to us that oral closings up to
14 but no more than two hours, given the subject matter,
15 seems appropriate. That is up to but no more than two
16 hours each. But of course we're in your hands as to
17 whether that accords with your preferences as well.

18 THE PRESIDENT: Mr Turner?

19 MR TURNER: Thank you, sir.

20 So yes, that's right. And we can discuss modalities
21 for written closing submissions now or at the end of the
22 hearing as the tribunal wishes. Our suggestion would be
23 for two simultaneously exchanged rounds, with sensible
24 page limits. All of that we can talk about in due
25 course. Sensible to the extent (a) that there isn't

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1 just a complete repetition of everything that is before
2 you. I remember a hearing many years ago before
3 Yves Fortier who said that the tribunal had been briefed
4 out of its skull, and the tribunal may know what he
5 meant.

6 But also long enough to enable the parties -- it's
7 a complicated case, and it is for that reason that both
8 parties think that you would be helped by written
9 closing submissions.

10 So far as oral closing submissions are concerned, we
11 think they could be shorter. We suggested one hour
12 each.

13 I just wanted to explain to the tribunal what our
14 thinking was in that respect. We don't want to deprive
15 the tribunal of the benefit of hearing our mellifluous
16 voices for any longer than is needed, but nor do we want
17 to fall, as it were, between two stools, and have
18 closing speeches that are neither full closing
19 submissions nor simply highlights of the fortnight that
20 we will have spent together to help you in your initial
21 deliberations and to orient you when you read our
22 written submissions thereafter.

23 Nor do we want there to be unnecessary duplication
24 where we say the same thing orally and then in writing.

25 So that was our thinking, but we are in the

1 tribunal's hands correctively as to what you would like.
2 We are obviously -- there is a smorgasbord of options
3 available to the tribunal, including setting specific
4 topics or questions that you would like the parties to
5 address orally, while leaving the field open, as it
6 were, in written submission thereafter. We are in the
7 tribunal's hands. I think the only difference and it's
8 only a difference of emphasis between my learned friend
9 and myself is that we would suggest shorter rather than
10 longer oral submissions, but as I say, we are entirely
11 in your hands.

12 THE PRESIDENT: The tribunal did have a chance to discuss as
13 well and we ended up in roughly in the same place.

14 Given the nature of the case and the types of issues
15 we are dealing with, our sense was also that it would be
16 useful to have post-hearing submissions to allow the
17 parties to summarise their case.

18 The tribunal will have questions to the parties and
19 the thinking was -- and again this was a preliminary
20 thinking -- that the tribunal would put questions in
21 writing to the parties and we would expect that those
22 questions are then addressed, but without limiting the
23 parties' ability to summarise their case as a whole in
24 rather concise submissions.

25 I think we ended up in something like 100 pages to

1 make sure they are focused and not repeat what has
2 already been said. Your opening statements were very
3 helpful. What remains from the tribunal's perspective
4 is to make sure that the parties address each other's
5 key issues so that we don't have ships passing in the
6 night, but make sure that both parties address the key
7 points of the case of the other side.

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

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

22 And then the question becomes -- and maybe this is
23 something the parties wish to reflect on -- whether the
24 oral closings should be focused on answering tribunal's
25 questions or whether they should be more of a summary of

1 the parties' case now that we have heard the evidence.

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

9 I have already spoken too much. Any further
10 comments?

11 So we seem to be in the same place. Oral closings
12 on Friday and then post-hearing submissions. We have
13 given the tribunal's indication, 100 pages or so. The
14 parties can confer and see whether you're comfortable
15 with that, and making sure you address the tribunal's
16 questions at least in the written submissions.

17 I think that sums it up unless there's anything that
18 my colleagues would like to raise. Whether one or two
19 hours, it may not make a big difference whether it's one
20 or the other. You may want to think about it. We can
21 confirm Monday morning whether it would be one or the
22 other or something in between.

23 MR PARTASIDES: Let me say a word why we thought of two,
24 Mr President, on our side. Of course I appreciate that
25 what you will want is focus and brevity as much as

1 possible, but given the subject matter here, it seemed
 2 to us up to two hours was a safer estimate. Of course,
 3 there's no obligation on either side to use all of the
 4 two hours, and if someone on either side can do this
 5 more briefly, then more power to them.
 6 But it seemed to us, given the different categories
 7 of issue here, and we haven't turned our minds yet to
 8 the significant subject of quantum, which will dominate
 9 much of next week, it seemed to us that a two hour
 10 estimate was both safer and also not one that would be
 11 unreasonable, given the time we have available to us.
 12 So that is the reason for our estimate, but you
 13 have, I think, heard from both sides on that now. If
 14 you didn't have a preference, it might be that you would
 15 leave it to the parties to choose how they wish to make
 16 their closing, spending no more than two hours.
 17 THE PRESIDENT: So then we will end up with two hours. But
 18 that will be fine.
 19 MR TURNER: That is of course the risk, sir, and we are in
 20 your hands.
 21 Let's see if we can reach any further agreement
 22 between us. Otherwise I would prefer the tribunal to
 23 tell the parties what it would prefer and just as
 24 a further and probably last point from me, 100 pages, we
 25 thought, was exactly right, and 50 pages for the

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1 simultaneous Reply if the tribunal wanted two rounds.
 2 Just to give you a flavour where we were thinking,
 3 but all of that we are happy to discuss at the end of
 4 next week.
 5 THE PRESIDENT: So why don't we come back to the length of
 6 the closing statements on Monday morning. We'll have
 7 the tribunal's preference by then if there's no
 8 agreement.
 9 Thank you.
 10 Enjoy the weekend to the extent you can.
 11 Thank you very much. See you Monday morning, and it
 12 will be -- let me see -- it's 9 o'clock -- it's 9.30.
 13 We'll have Mr Milhaupt and Professor Bae or
 14 Professor Milhaupt and Professor Bae. So we keep 9.30
 15 for Monday morning.
 16 MR TURNER: Perhaps -- we will have told you on Sunday
 17 evening time to be defined whether we want to talk to
 18 Mr Smith. We are happy to meet at 9 o'clock on Monday
 19 morning if that is helpful to the tribunal to discuss
 20 any practical questions that arise out of what we say to
 21 you on Sunday evening.
 22 I haven't discussed this with my learned friend, but
 23 it just seems sensible to have a buffer if there's
 24 anything to -- we can always not use the buffer and have
 25 an extra cup of coffee if we don't need to.

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1 THE PRESIDENT: Absolutely. So let's meet 9 o'clock Monday
 2 morning and if we need to extend the day, we have a bit
 3 more leeway.
 4 MR PARTASIDES: That suits us.
 5 THE PRESIDENT: Thank you.
 6 (4.38 pm)
 7 (The hearing adjourned until Monday, 22 November 2021 at
 8 9.00 am)
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