The backdrop is a high stakes manoeuvre by Samsung's international arbitration. The family to save enormous amounts, over $5 billion, in inheritance tax, while maintaining control of the Samsung Group, the centrepiece of which would be a merger at distorted prices between SCT and Cheil that would transfer vast value, 9 trillion Korean Won, from the shareholders of the former to the shareholders of the latter, in particular the family.

But that could only be achieved with sufficient shareholder support. Indeed, enhanced shareholder support. A super-majority of at least 66.67% of SCT’s own shareholders.

But the Samsung’s family found themselves opposed by this Claimant, a longstanding repeat investor in Samsung C&T. An investor that knew that a restructuring on fair terms to minority shareholders could generate and release significant values for all stakeholders of SCT, that applied its corporate acumen, its added value, to develop a restructuring plan that would both generate and release significant value for all shareholders fairly. That invested a significant amount of money, over US$600 million, on the basis of that plan and expectation, and that mobilised to oppose an unfair merger between SCT and Cheil.

So in one way Samsung’s family and the Elliott Group agreed, members of the tribunal, on at least one thing, and that was that the prize was indeed substantial. Elliott would not have invested the many hundreds of millions of dollars that it did and take the public position that it did to oppose Korea’s most powerful Chaebol family if this was not true, and Samsung, the family in particular, would not have gone to the lengths, we now know the criminal lengths, that it did go to if this was not true from its perspective as well.

The stakes were so high that the family heir, decided to enlist the connivance of the Korean Government. He did so because he recognised that the outcome of the merger would depend upon the vote of Korea’s National Pension Service, as it had for other mergers and other major restructurings of other Chaebol groups in Korea.

So he corrupted a President who is now in prison because of it, and she gave the order that cascaded down through the Ministry of Health and Welfare to the NPS, to the effect that one way or the other it must support the merger in the shareholder vote, and so it did.

Now, that government intervention has already been judiciously confirmed by the kind of evidence that is unusual to see in international arbitration, because it follows independent criminal investigation, a criminal investigation that followed the impeachment of a President, investigations, prosecutions and convictions. Evidence that could not and would not have been obtained in these proceedings otherwise, to include telephone recordings, seized documents, and compelled statements to prosecutors; evidence that reveals the kind of criminal governmental conduct that goes far beyond typical investment Treaty cases.

So this is not a case about a piece of legislation that impairs an investor’s legitimate expectation. This is not a case about a regulatory approval that has been withheld or removed. You have here, members of the tribunal, criminal conduct, and the Claimant comes before you as the targeted victim of this crime.

So this is not a case about a piece of legislation that impairs an investor’s legitimate expectation. This is not a case about a regulatory approval that has been withheld or removed. You have here, members of the tribunal, criminal conduct, and the Claimant comes before you as the targeted victim of this crime.

So this is not a case about a piece of legislation that impairs an investor’s legitimate expectation. This is not a case about a regulatory approval that has been withheld or removed. You have here, members of the tribunal, criminal conduct, and the Claimant comes before you as the targeted victim of this crime.

Now, that government intervention has already been
As we argue, the SCT share price would have risen after 14
This leads to our proposition 5. The observed 1
consequence of the yes vote is the best evidence of the
discount that would have remained on SC&T once the risk
of a predatory merger had been removed.

One thing we can be most sure about, members of the
tribunal, is that the risk of a predatory merger was
eliminated, at least in the short term, but the vote in
favour of the merger, because the merger was then done,
and so the effect of the yes vote on new SCT provides
the most direct empirical evidence of what would have
happened to the discount by removing the merger risk at
that time.

Let us be clear. Our case does not require an
evaluation of the effect of market manipulation before
the shareholder vote and apportioning some to the
government and some to Samsung’s conduct or a mix of
both. Our case is simpler than that. It requires us to
evaluate what would have happened to the value of our
investment if the merger had been rejected.

Our case also does not require us to value the
effect of any individual element of governmental conduct
we complain of on the share price before the shareholder
vote. That is because the conduct was concealed, as
we’ve seen, from us and from the market, and because its
effect on the share price occurred only when the NPS
joined a vote to support the merger, tipping the vote
over the super-majority needed on 17 July.

That is why our valuation date is the day before
that vote, 16 July 2015. That is the day our investment
still incorporated an inherent value, suppressed by the
risk of a predatory merger, that would have been
released if the merger was voted down the next day.
That is the day before that value was permanently lost
as soon as the merger and the merger ratio was
definitively approved.

Now, our expert, Mr Boulton, gave you a resulting
valuation range, based on the net asset value of SCT,
prior to that value transfer, and applying that observed
post-merger vote discount to new SCT that, as we say, is
the best indicator of what the discount would remain
when you remove the risk of the predatory merger.

The Respondent’s expert, as we see on slide 3,
Professor Dow, gave you nothing. A zero valuation, like
all his other zero valuations, in every Treaty case he
has identified he’s been involved in for the Respondent
over time. And nothing else.

Now, while Professor Dow was willing to speculate
about many things, members of the tribunal, some of them
factual, and as requested we will provide you with
a list in due time, he was not willing to give you his
estimate of what the share price increase would have
Prosecutor, and we shall come back to that. But let’s not forget that there are existing convictions already that our friends opposite have confirmed they are stuck with. They are stuck with the existing conviction of Minister [redacted]. You see this on slide 6. This is the Central District Court conviction decision, convicted for unlawful uses of his general powers as a public official, by issuing, you see this underlined at the bottom of the slide, “detailed instructions to intervene in a matter that should be independently decided by the NPS through its voting process”. An existing conviction. We see this in the conviction on slide 7 of the NPS’s Chief Investment Officer [redacted], already convicted for criminal breach of duty, for organising the “manipulated ... synergy effect”, the court’s words, not ours, by “ultimately causing the Committee [that’s the Investment Committee] to decide in favour of the Merger”, thereby going against the defendant’s occupational duty. The court’s findings —— not just our submission, members of the tribunal —— that as you see in the final extract, “had a direct effect of profiting the major shareholders of the Samsung Group such as N” [redacted].

A merger on the one hand, and a merger being proposed at a confiscatory value that would be approved by a super-majority of SCT shareholders on the other hand. Now, that ought to be an obvious distinction. As you see on slide 12, James Smith kept drawing that same distinction during his testimony before you, and that is because this Claimant was aware that the prospect of a restructuring of the Samsung Group was possible, perhaps even likely. There is no dispute about that. Indeed, it was that prospect, members of the tribunal, that created the investment opportunity. The opportunity to address structural anomalies within the group that were undoubtedly suppressing value. And that is why the Claimant itself prepared its own restructuring plan that proposed itself a merger, although in a way that would not be unfair to the shareholders of SCT.

You see again an extract from that restructuring proposal. It’s C– 380 for the record. We’ve become familiar with it. (C/380/1) James Smith during his testimony explained —— let’s go back, please —— that it would involve a merger on fair terms. He explained that it could allow the family to maintain control in a manner that was consistent with Korea’s new corporate governance
mechanism that gives controlling shareholders the means to tunnel value from one corporate entity to another by affecting the value of those two entities and fixing the timing of the merger.

But that merger proposal must pass with enhanced shareholder support, a super-majority, and that is why minority shareholders’ most significant protection is the shareholder vote, and that lies at the heart of this case.

Indeed, we can now say definitively that the merger vote would not have obtained sufficient super-majority without a yes vote from the NPS.

You heard a reference to 50,000 shareholders a few times during the opening submission of the Respondent. That cannot cloud the very clear arithmetic. A super-majority of more than 66.67% of the attending vote was needed and we now know as fact that the family would not have achieved that super-majority without the NPS.

Indeed, as you see from the same slide you saw in our opening, it would not have got its yes vote even if the NPS had abstained. That’s the lower of our columns.

This isn’t merely our hindsight, members of the tribunal, because literally everyone, as you see on slide 18, this has been recognised as well, as you see in the bottom right, by the Korean courts.

Of particular importance, as you see on slide 19, Samsung knew. It knew on 4 June — this is an internal Samsung document obtained on document production in this case in October of this year — that: So the NPS was certainly the key. Everyone knew it. And there was no reason to expect the NPS to vote in a manner that would impair the value of the National Pension Fund.

Here we come to another important distinction that the Respondent has attempted to confound these last two weeks. Distinction number 2. You see it on slide 20.

The distinction between knowing you are entering a Chaebol economy on the one hand, and anticipating gross government illegality on the other. Surely an obvious distinction. Our Korean capital markets expert Professor Milhaupt, as you see on slide 21, articulated the distinction well, and as you look at his testimony, I want to pause here because this is a critical
1. distinction, and I want us all to think about it.
2. You may know you are investing in a Chaebol economy,
3. members of the tribunal. You may know that they have
4. been around for some time, that they may have originally
5. had some justification, and that they involve
6. significant power being exercised by those Chaebols in
7. the Korean jurisdiction.
8. But how can an investor be found to have reasonably
9. expected gross governmental illegality, particularly
10. when it was concealed, as we know it was here, for
11. a period of over a year, which is why you can look
12. through by example of the appraisal price court
13. decisions, the last of which was rendered at the end of
14. May 2016. You will find it at {C/53/1}. And you will
15. find no reference to the governmental conduct that we
16. complain of here because it had not yet become known by
17. anyone within Korea. That’s the middle of 2016, the
18. year after the merger.
19. Let me also note by way of legal submission that
20. this is not a case based on legitimate expectations.
21. It’s a case involving arbitrary conduct, a breach of the
22. minimum standard of treatment; conduct that shocks or at
23. least surprises a sense of juridical propriety.
24. So conflating knowledge of the Chaebol economy
25. generally with an expectation of gross governmental

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1. conduct that has been concealed is not only a factual
2. fallacy; it would involve legal confusion as well.
3. Now, that distinction that I have just referred to,
4. members of the tribunal, is also apparent when you look
5. at the advice that Elliott was receiving at the time
6. about the NPS.
7. Let’s turn to slide 22. This is a summary of the
8. IRC report that NPS commissioned in the spring of
9. 2015 — you may remember that Mr Smith was asked many
10. questions about it — — and which makes clear, if we focus
11. on the second of the three bullet points:
12. “The Fund’s stance on Samsung is favourable, which
13. means the Fund may make decisions a little favourable to
14. Samsung as long as their decision making ... is not
15. against the investment principle — 1) stability, 2)
16. profitability ... the Fund would try to make decisions
17. 100% based on investment principles when they have to
18. make decisions on conglomerates—related matters, to
19. which people are paying attention.
20. “The safest way for the Fund to minimise possible
21. legal responsibilities is making decisions based on the
22. principles.”
23. Let’s turn to those principles again, slide 23. We
24. are all now familiar with those fundamental fund
25. management principles. Here you see them again, in

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1. particular the principle of profitability and management
2. independence. And the Respondent’s answer to these
3. principles, as we understand it, is to suggest that the
4. NPS’s approach may have been different in practice.
5. I suppose what they’re saying is that the tribunal
6. should apparently put these principles to one side
7. because the NPS did, which is an interesting legal
8. submission, but it is also wrong as a matter of fact.
9. You were referred to 25,000 decisions that the NPS
10. has made over the years. You should understand the vast
11. majority of those are mundane decision related to
director appointments, director removals, director
remunerations. There are nevertheless a number related
to mergers and major restructurings, and you have been
pointed to not one in which the principle of
profitability has been ignored by the NPS.

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The closest analogy that we have in this case is to
the SK mergers case, and we all know how the NPS voted
in that case, against the SK merger, opposing the
Chaebol, SK, because it did not comport with the
principles that we are looking at.

Turn to slide 23. [description of slide 23]

He described very clearly, at least in his witness
statements, the reason for the no vote by the NPS’s
Experts Voting Committee, in terms, as you see on
slide 24, that are surely difficult to ignore in the
context of the issues before us.

This leads us to question 3. Was the Blue House’s
intervention in the NPS’s vote motivated by corruption?
As I said to you in our opening, we don’t need to prove
corruption, members of the tribunal. All we need to
prove is that there was a government misconduct, which
is heartily apparent.

But we say that there has been a surprising attempt
to sow some doubt as to whether the evidence and
existing judicial findings of a corrupt quid pro quo
between President and the NPS’s no vote in his
witness statements, and to some degree during his
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demonstrative B that our friends showed you during their opening, the chronology that you were asked to focus on in particular.

What we have done here, members of the tribunal, is repeated Respondent’s chronology and we have added to it, with red text, supplementations that we think are important properly to understand the chronology that you were presented with.

That chronology shows that the first meeting between the President and the President took place, as you see on the far left, on 15 September. You were also taken to the fact that the second meeting took place just after the 17 July shareholder vote on 25 July. You see that on the right of the timeline.

But our friends opposite said very little about what happened in between. So let’s begin by walking through this timeline by focusing first on the period around 15 September, the first meeting between and the President. We’ve added the letter A.

Now, as we understand it, the Respondent seeks to downplay the significance of the 15 September 2014 meeting because it happened so long before the merger took place the following year.

But let us look together, members of the tribunal, six months later.

I took you to it in my opening. Mr President, you asked me what the date of this memo was. We’ve added confirmation of the date in the bottom extract, which is a question and answer statement report of the author of this memo, identifying it as .

It was the day, the very same day that Samsung communicated to enlist the President’s influence specifically over NPS’s voting rights.

But let us look together, members of the tribunal, six months later.

Now, let’s return back to our timeline. That was on 15 September 2014, and what you weren’t drawn attention to during our friends’ opening last week is what happened on 24 June 2015.

Now, let’s remember that this was an important date. 24 June was the day that the Experts Voting Committee voted no to the SK merger. So an important date.

And now let’s move forward to slide 28, because that was the day, the very same day that Samsung communicated again a reminder to the President, in the words of Korea’s own prosecutor that you see at the bottom of the slide — this is an extract from the second indictment — to enlist the President’s influence specifically over NPS’s voting rights.

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Now, let’s remember that this was an important date.
Let’s turn to our question 4. Did the government intervention result in subversion of processes by which the ROK’s assets in the National Pension Fund were to be managed?

Now, before we focus on the NPS, let’s recall again that there is simply no challenge at all to the evidence of the Presidential order or to the ministerial order that was dispatched down to the NPS in the clearest possible terms that could not be ignored and that was not ignored.

On the next slide, 32, we see one example of the evidence of that government instruction. I offered you others during my opening submission. You’ve heard nothing from the other side about them. How could you?

It has never been contested, nor could it. So there has been something from our perspective, something rather unusual, members of the tribunal, about the efforts to suggest that due process somehow nevertheless wasn’t subverted within the NPS, despite this senior governmental instruction.

The centre of that artifice is the proposition that there can be some debate about whether the relevant operational guidelines for the fund or the Voting Guidelines in relation to the fund left the decision of referral to the Experts Voting Committee exclusively to the discretion of the NPS’s Investment Committee itself.

On the next slide, 33, we see the relevant provision again of the operational guidelines, which lists, as we now know by heart, separately the right to the NPSIM, the Investment Management Division, not specifically the Investment Management Committee, but the Investment Management Division, to refer matters to the Experts Voting Committee, and separately, the right of the chairperson of the Experts Voting Committee to have matters referred to his committee as he deems necessary.

As you heard me say in our opening, members of the tribunal, we do not need to engage in a theoretical debate today about what they mean, and whether there is any conflict between the Voting Guidelines on the one hand and the operational guidelines promulgated pursuant to statute on the other. We only need to look at the evidence of what those involved at the time thought, because the evidence confirms that they all thought that the matter should be referred to the Experts Voting Committee. Both the NPS thought that and so did the Ministry of Health and Welfare.

Now, we showed you evidence of that contemporaneous unanimous conviction that this should be referred during our opening. Let us run through it very quickly again, as it wasn’t touched upon since my opening submission.

Slide 34. This is uncontested.

If we move to slide 35, again we showed you this before. It wasn’t touched on since my opening. The order coming back from the ministry: have the internal Investment Committee decide this issue. Again, that ukase from the ministry is not contested.

Slide 36. The evidence of this demand that is extensive in this case. None of it has been contested. It extended, members of the tribunal, to the chairperson of the Experts Voting Committee himself.

Slide 37 we will see the first of two communications that he wrote early in the morning of 10 July, before the Investment Committee met. That was his interpretation of the guidelines that we’ve been told there can be some dispute about, in the same way that it was the NPS’s interpretation as well until they were overruled by the ministry.

Here we can return to the evidence of Mr., slide 38, who told us during testimony that he had helped the chairman write that letter as he was legally qualified, the letter that says “I find that this is a decision that should be referred to the EVC”, and he confirmed on cross-examination that he and his fellow committee members were surprised that it wasn’t, considered it inappropriate that it wasn’t, considered the situation outrageous that it wasn’t.

Now, in fact Mr.‘s statements to the public prosecutor, both general and specific, as we saw during his examination, now on the record of this arbitration, showed us a lot more than this, members of the tribunal. They confirmed, as we see on slide 39, his statement to the prosecutor records.
Mr [removed] said to the public prosecutor, and yet he was presented as a witness in this case. I have to tell you that I asked myself, as I read his statement reports after his first witness statement, and prepared to cross-examine him, why he was presented as a witness in this case. And then the timing dawned on me. His first witness statement, which made no reference to his statement reports to the prosecutor, was submitted in this arbitration before we or you had possession of his statement reports; before it was clear that we would ever have possession of those statement reports.

On the basis of the attendance of hearings, we made a document production request for the evidence on which those hearings was based. You granted that order, members of the tribunal. We obtained his statement reports after his first witness statement. And then he had to explain them away.

Let’s look at slide 40. So he was confronted with his prior statements to the prosecutor in which he told the prosecutor that [removed] appeared only in the capacity of an administrative secretary and made some reasonable points that the committee took into account.

I put that contradiction between his statement reports to the prosecutor and what he was testifying to you in his witness statements directly to Mr [removed] and you see his answer to my question on slide 40.

Mr [removed], we say, had obviously been put in a difficult position in being asked to testify by his government and we invite you to draw your own conclusions about the evidence that he gave to you in this arbitration in the light of what he previously told Korea’s own prosecutors.

Let us remember that the NPS conducted its own audit, members of the tribunal — you haven’t been referred to this document during this hearing but it appeared in our amended Statement of Claim; it’s exhibit C–84 {C/84/1} — in June of 2018, in which the NPS sought to reach its own conclusions about what had happened within its own building.

It concluded by confirming, as you see on the top extract, the factual findings of the relevant court decisions in relation to valuation improprieties, and it concluded by confirming the falsity of the synergy effect calculation. You see that in the bottom extract.

On the basis of these conclusions that itself was drawing, members of the tribunal, as see on slide 42, it found its own officers responsible for significant violations of duties of care.

Investment manager A is Mr [removed], who was the head of the research group within the NPSIM, and investment managers B and C are two members of his team who were found responsible for significant violations of duty of care.

So on our question 4, members of the tribunal, our conclusion is it would be paradoxical indeed to find that the NPS due process was respected when the NPS has found itself that it wasn’t.

Question 5. Did the government intervention result in the NPS yes vote?

Well, let me begin by addressing a theoretical question on causation, members of the tribunal, that was raised during the Respondent’s opening.

Causation, according to the Respondent, requires the Claimant to demonstrate that the NPS might not anyway have voted in favour of the merger, even if the government hadn’t intervened in the way we now know it did.

Members of the tribunal, that is not how causation works in law. The Respondent intervened in the ordinary course of events and so has rendered what might have happened anyway legally irrelevant.

If my learned friend raises his pistol, points it at me, shoots a bullet that hits me in the chest and I drop dead as a result, he cannot say, as a defence to a charge of murder, that it must be proven that I would not have died anyway because I might have a serious illness. There is no theoretical basis for such a proposition, which is why you don’t find it in Hart & Honore because it isn’t there.

So let’s turn to the true question of causation, whether the evidence confirms on the balance of probabilities that the conduct of which we complain led
To begin with, we invite you to take a step back and ask the following rather obvious question: why would those in government have taken the extraordinary illegal steps that they did if it wasn’t necessary? Again, there is something unreal about the suggestion, given the outcome that they intended was indeed achieved. You could end your enquiry on causation there.

But let’s see what happens when you do look at the evidence. First, let’s consider the evidence presented by the Respondent. Slide 44, please.

As we all have noted, they have presented no member of the Investment Committee to appear before you to give evidence as to what they would have decided had the fraud not been achieved.

The one witness they have presented confirms that he has no way of knowing the views of the Investment Committee members, and of course how could he; and even his own view, as you see on the bottom of slide 44, is apparently that he’s unclear as to how he would have voted on the Experts Voting Committee.

To begin with, we invite you to take a step back and go back to the evidence that we cited in our minutes of the Investment Committee meeting of 10 July itself, which are also on the record of this tribunal. We could go on, members of the tribunal. We have provided you with a slide of each, and I would suggest that rather than us being cavalier with the evidence, others have been cavalier with the word “cavalier”.

So what we have done, members of the tribunal, is we have gone back to the evidence that we cited in our slide and we’ve provided you, in the slides that follow, with the extracts we relied on to show those committee members saying they would have voted differently.

Let’s move to the next one. I’m going to run through these quickly, members of the tribunal. You will have them for your own reference.

We could go on, members of the tribunal. We have provided with you a slide of each, and I would suggest that rather than us being cavalier with the evidence, others have been cavalier with the word “cavalier”.

Let’s turn to the last of these at slide 51 because, as you consider each of these statements individually, what you won’t find in any of those statements or in the minutes of the Investment Committee meeting of 10 July itself, which are also on the record of this arbitration, is any reference to the voting decision being determined by way of a binary question of whether the appraisal price was higher than the share price.

You will remember that this proposition was put to you all during Respondent’s opening, that somehow, if the appraisal price was higher, they would vote against to take the benefit of it, and if the share price was higher, they would vote in favour of the merger to take the share price.

Now, if that was the determinant, members of the tribunal, one wonders why you need a committee meeting at all. It would be a mechanical decision. And when you scratched the surface of that proposition and asked the question pertaining to the one concrete example that we have before us of the SK merger, we saw that the NPS voted against the SK merger in June 2015, even though the appraisal price was lower than the share price, exploding this binary relationship.

Again, you will find no reference to that binary relationship in the Investment Committee meetings at the time explaining how and why this decision was made.

Let’s walk through just a few of them.

Slide 46. We see the phrase "cavalier" in one witness’s testimony or records of their testimony or records of courts.

As we all have noted, there is something unreal about the suggestion, given the outcome that they intended was indeed achieved. You could end your enquiry on causation there.

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As we all have noted, they have presented no member of the Investment Committee to appear before you to give evidence as to what they would have decided had the fraud not been achieved.

The one witness they have presented confirms that he has no way of knowing the views of the Investment Committee members, and of course how could he; and even his own view, as you see on the bottom of slide 44, is apparently that he’s unclear as to how he would have voted on the Experts Voting Committee.

To begin with, we invite you to take a step back and go back to the evidence that we cited in our minutes of the Investment Committee meeting of 10 July itself, which are also on the record of this tribunal. We could go on, members of the tribunal. We have provided you with a slide of each, and I would suggest that rather than us being cavalier with the evidence, others have been cavalier with the word “cavalier”.

Let’s turn to the last of these at slide 51 because, as you consider each of these statements individually, what you won’t find in any of those statements or in the minutes of the Investment Committee meeting of 10 July itself, which are also on the record of this arbitration, is any reference to the voting decision being determined by way of a binary question of whether the appraisal price was higher than the share price.

You will remember that this proposition was put to you all during Respondent’s opening, that somehow, if the appraisal price was higher, they would vote against to take the benefit of it, and if the share price was higher, they would vote in favour of the merger to take the share price.

Now, if that was the determinant, members of the tribunal, one wonders why you need a committee meeting at all. It would be a mechanical decision. And when you scratched the surface of that proposition and asked the question pertaining to the one concrete example that we have before us of the SK merger, we saw that the NPS voted against the SK merger in June 2015, even though the appraisal price was lower than the share price, exploding this binary relationship.

Again, you will find no reference to that binary relationship in the Investment Committee meetings at the time explaining how and why this decision was made.
What you also won’t find in the Investment Committee meeting minutes is any consideration of the broader portfolio valuation implications of the merger being approved on the NPS’s other Samsung holdings. The proposition was put to you, I think, that: perhaps the NPS would lose out here, but if you look at the portfolio holistically, the outcome might be different.

If that was the justification, members of the tribunal, again, you would see it in the Investment Committee meetings. No mention of it at all.

The only mention is of the effect on the NPS’s interests in SCT and Cheil together. And if some broader portfolio justification existed, we have to ask the question: why did the research team of the NPS go to the trouble, the criminal trouble, of falsifying valuations, forging a synergy effect calculation, if they didn’t need to because the portfolio effect was positive?

Let’s remind ourselves of that evidence, slide 52, the first valuation on 30 June 2015 that the NPS arrived at, suggesting, which would reflect a huge dispossession for the NPS, resulting in, as we see on slide 53, a few days later, Why would they need to try a little harder if the portfolio effect was positive for the NPS?

If we look at slide 54, the revised calculation just a few days later, extraordinarily arrived at by a transformed discount rate which still left a hole in value, why would this have been a problem if there was a holistic portfolio positive that the NPS would benefit from?

But instead of noting a portfolio positive, as you see on slide 55, we see, You will recall on slide 56 exactly how that synergy effect calculation was calculated; described as Why would they go to all this trouble, members of the tribunal, if there was a holistic portfolio justification? Very simply, because there wasn’t.

In fact, as you see on slide 57, the Claimant did the portfolio calculation for the NPS in July 2015 precisely to demonstrate that when you took account of all of the NPS’s Samsung holdings, the loss to the NPS was even greater. This was the letter that was sent by Elliott to the NPS on 8 July 2015 attaching that portfolio analysis and revealing an NPS loss of approximately 0.6 trillion Won, which is about US$500 million, which was never contested, and although it was suggested to you that a holistic analysis might lead to a different result, you have never been provided with a different calculation of that number, because it doesn’t exist.

Members of the tribunal, on questions of causation, ultimately we could have asked the Investment Committee members, in front of you, how they would have voted if the impairment in value that the National Pension Fund research team itself had identified was made clear to them.

The Respondent has made sure that we can’t ask those questions, but we say on the evidence we really don’t have to.

Question 6. Has the damage resulting from the merger been remedied by the exercising of appraisal rights attaching to some of SCT’s shares?

Well, as I told you in our opening, all receipts from the Claimant’s appraisal price litigation and settlement with Samsung have already been netted off from the amount that we claim. In respect of any further possible recovery, depending on if and when the Supreme Court finally hears the Ilsung Pharmaceuticals appeal, it’s been pending for about six years now,

I told you that any issue of future recovery against Samsung would raise a future question of double recovery for Samsung to raise before the Korean courts. It is not a matter for you, because there has been no double recovery at this time.

My learned friend offered other practical solutions. You see them on slide 59. Some form of assignment of rights under the Settlement Agreement; some form of clawback.

So we say, one way or the other, any further possible payments at some ill-defined point in the future made by Samsung pursuant to the Settlement Agreement need not obstruct your full award on the basis of amounts already received both on our case and, it appears, on the case of those opposite.

More importantly, the statutory appraisal rights that the Claimant has already exercised does not and does not seek to compensate the Claimant for the loss that we are claiming before you. We are claiming in this arbitration that which would have happened to the share price once the merger had been rejected, ie a forward-looking price. That isn’t what the court was determining in the appraisal price litigation. The Korean High Court said so itself.

Let’s turn to the next — sorry yes, slide 60.
These are two separate decisions that, if they arise, are open and shut. Issues of attribution either do not arise at all or, if they arise, are open to the tribunal to hold that on the record before it, they are not hard, nor are they novel. I need touch upon only three matters in closing briefly, and these are now on your screen.

The first matter is that the tribunal need not dwell on attribution at great length. That is to say it is conceived of it. You have it now on slide 63. The major actors of malfeasance and conspiracy were located in the Presidential office, the Blue House, and the Ministry of Health and Welfare. As you see on this slide, Korea's own record shows that the President, the Minister of Health and Welfare, and their direct close subordinates ordered exactly how the NPS should approve the merger in the Investment Committee. And in this way what occurs within the NPS is simply a predetermined outcome, decided and compelled by the ministry and the Blue House. So the NPS is not an independent actor in this story; on the facts it has no discretion but to approve the merger and to do so in the Investment Committee.

The NPS simply executes a task decided and commanded by others in charge. The NPS does not have the ability to act independently and is not protected by any rule of law. It is a mere agent of the state, a state organ exercising the delegated governmental function of operating the National Pension Fund.

And the evidence is now on your screen as slide 64. Here we have two Korean court judgments, which you will recall we looked at with Professor Kim between pages 46 and 54 of the Day 5 transcript (Day5/46:1). And in that the case the NPS was seeking to be exempted from a tax on a purchase of shares, very much like our case, or analogous to our case.

Why was the NPS doing that? Because acquisitions by the state are tax exempt. And the NPS said — you see that in the first extract on the slide — that an acquisition made by the NPS is an acquisition made by the state.

The court agreed. You have that immediately below, under "Judgement", having regard to what Professor Kim was keen to stress to you was the principle of substance over form.

You recall that was Day 5 of the transcript, pages 52 to 53. (Day5/52:1) So the substantive of the matter, members of the tribunal, is that the state has chosen to act through the form of the NPS.

And you see further down the slide, this is the appellate court decision now, that the court reasons that the NPS's management powers over the pension fund stemmed specifically from statutory source, the National Pension Act, Articles 125 and 102.

Now, our friends agree that the Korean court represented to you that in the Dayyani case, which concerned conduct by the Korean Asset Management Company, or KAMCO, for short, the tribunal attached decisive importance, you were told, to one factor in holding KAMCO to be a Korean State organ. That one factor, you were told on Day 2, was that KAMCO itself had asserted this to be the case before foreign courts.

Now, as this tribunal has remarked already, for an entity to claim sovereign immunity, it must be able to assert that it is a state agency or instrumentality. And as you know, Korea does not deny that the NPS can claim, or in fact has claimed sovereign immunity, and of course it would be very straightforward for Korea to do so, if it could, by producing evidence of NPS's practice or internal legal analysis, and it has not.

From this, you can draw your own conclusions. But I'm putting that to one side because I respectfully submit that the tribunal has affirmative and direct evidence that the NPS does take the position, and it is accepted by the courts, that it is a state organ, a state organ exercising the delegated governmental function of operating the National Pension Fund.

And the evidence is now on your screen as slide 64. Here we have two Korean court judgments, which you will recall we looked at with Professor Kim between pages 46 and 54 of the Day 5 transcript (Day5/46:1). And in that the case the NPS was seeking to be exempted from a tax on a purchase of shares, very much like our case, or analogous to our case.

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And you see further down the slide, this is the appellate court decision now, that the court reasons that the NPS’s management powers over the pension fund stemmed specifically from statutory source, the National Pension Act, Articles 125 and 102.

Now, our friends agree that the Korean court
decisions are binding on the Republic of Korea. Memorable phrase: they’re stuck with them. And these decisions are not a quasi private law entitlement. The NPS has no agency mandate, we will come to look at this, and it has no ownership of the assets. So these decisions also spell out that the NPS manages the pension fund on behalf of the State of Korea. And it is incontrovertible, members of the tribunal, that an entity which in substance acts on behalf of the state is a State organ under international law. The official ILC commentary makes this plain and we will come to see this now.

So this brings me to my second subject for the day, Korea’s submission is that the NPS cannot be an organ of the state. Why? Because it has its own legal personality as a juridical person without capital. This submission, I say with respect, ignores rather elementary rules of international law. Let’s look at them. On slide 67 you have relevant portions of the official ILC commentary, and I’m happy to leave this with you for a quiet moment. It will all be very familiar to you. But you will see that paragraphs 1, 6, 11 and 12 of the commentary make the position crystal clear. States consist typically of a multitude of entities, some of which are given separate personality, and some of which are even given independence of operations, for example the police or the courts. Now, each of these entities is an organ, an organ of a unitary legal person, called the state, which is how international law conceives of the state on the international legal plane. If the tribunal wishes to read further into this uncontroversial point, wholly uncontroversial point, the ILC discussed it in its 1998 session in the first volume of the ILC yearbook for that year. The discussion is between pages 242 and 243.

So our friends, I say with respect, are doing the tribunal a disservice in suggesting that there is contrary authority. What authority there is goes to a different point altogether. It goes to the point: where it is clear, settled, that an entity is not part of the organisation of the state, and therefore it is not a state organ, its separate legal personality, if it has one, is one of the range of factors to consider as part of a further analysis. The further analysis is whether or not that entity is a parastatal entity for purposes of ILC Article 5.

So to the extent that legal personality has a role to play, this is an analysis under ILC Article 5, not an analysis under ILC Article 4, which concerns itself with the status of an organ.

Now, I say legal personality is one in a range of factors. Let me make good on that. We have tabulated the matrix of factors examined by various tribunals. This is on slide 66. As you can see, we have also inserted a row at the very top which concerns the NPS, so you the tribunal can compare it with the entities examined in the other cases. This is by of way of an aide memoire. So you have the full context of the cases relied upon opposite, and you can turn to it in your own time. But the word of caution is again that these are Article 5 cases, parastatal entities, not Article 4 cases.

So having put that to one side, what we submit is of assistance to you is to understand the position and the functions of the NPS within Korea’s legal order. That’s where, inevitably, they have to be found.

Now, the experts on both sides addressed the question whether the NPS is to be regarded as a state agency from the perspective of Korean law. You may recall this is perhaps the only word I can decently pronounce in Korean. The notion is called guk–ga–gi–gwan, and this is found in three provisions of Korea’s Constitution. Now, Professor CK Lee has opined that the NPS is such an agency. He has done so on a functional analysis of its duties and its powers, and that of course is a mainstream classical kind of analysis in Korean public law, as in other systems of public law.

He was not challenged on this important aspect of his expert testimony at all, and you can see that, for example, on page 70 of the Day 4 transcript. "Difficult": difficult given the many types of entities which are part of the administration.

And among those entities, in the same writing he expressly refers to public institutions. And of course the NPS is a public institution, and in fact it is a quasi-government public institution.
So we saw that passage, which you will find in exhibit C-699 (C.699/1). It’s a very short exhibit which was written in 2017. I recalled it to Professor Kim, and this was Day 5 of the transcript between pages 9 and 12. (Day5/9:1)

Now, before you Professor Kim takes a different approach, one that he has never adopted in his scholarly writings, one which no court or scholar in Korea has ever adopted, and Professor Kim readily admitted that this was the case; again Day 5, page 3.

But notwithstanding the novelty of his approach and the word “difficult” used in his writings, when he delivered his scripted presentation to the tribunal, the impression that he sought to convey was that the issue is, after all, the very opposite of being difficult. It’s blindingly obvious.

The blindingly obvious answer, according to Professor Kim, writing for this case, is that only entities which are designated as central administrative agencies are state agencies in the constitutional sense of guk-ga-gi-gwan.

Yet he freely admits that the NPS is such a constitutional agency for two of the three provisions of the Constitution: Article 27, the right of citizens to petition, and Article 97, the jurisdiction of the National Board of Audit.

Professor Kim took no view —— perhaps he was agnostic like Professor Dow —— as to the third provision, which is Article 111, which concerns disputes as between state agencies. And you will find his admissions between pages 15 and 22 of the Day 5 transcript, [Day5/15:1] at paragraph 50 of his first report, and at paragraph 45 of his second report.

Professor Kim, and this is also important from your perspective, was also sanguine about the outcomes to which his approach leads. Let’s take a look at the outcomes.

For one thing, he was categorical that the Bank of Korea — this is the central bank of the country — is not a state organ or agency, as you can see on slide 67.

International law regards this as an absurd conclusion, as you can also see on the slide, if you need authority for that proposition.

He was equally categorical that local governments are not organs of the state either, and you can see that, slide 68. Once more, such a conclusion is absurd in terms of the Treaty that you’re called upon to apply for customary international law.

So much in terms of outcomes.

But it is useful to see precisely on what criterion Professor Kim crafted the approach that Korea urges you to adopt. So you can see for yourselves that he is drawing a fine distinction under Korean law which, with all respect, makes no difference under international law.

So Professor Kim says —— this is his criterion —— that only entities which are directly answerable to the President of Korea —— he calls that oversight —— are administrative state agencies, and these are all designated as central administrative agencies. And the best source or sources for this proposition are paragraphs 69 and 70 of his first report and slides 7 and 12 of his presentation to you on Day 4.

Now, as we have considered a number of state entities in this case, and during this hearing, I have set out the lines of oversight, within the Kim sense, for a number of such entities.

So at the very top of this diagram you have the President of the Republic. The President can directly supervise the Prime Minister, all other ministers and all central administrative agencies.

Now, let us go one level down on the left-hand side of the slide. The Minister of Health and Welfare is, of course, supervised by the President. You see that on the second level on the left-hand side.

And in turn, if we go one more level down, you see the minister directly supervising the NPS.

And so the conclusion here is that the NPS is supervised, has oversight by the President, indirectly through the Minister of Health.

Now, let us look on the right-hand side of the diagram, and here on the second level in the administrative hierarchy we have the Prime Minister, and he or she is of course supervised directly by the President.

Now, on the third level, one level down, we have the FSC, the Financial Services Commission, which Professor Kim says is a classic example of a central administrative agency. You find that in his first report, paragraphs 14 and 15.

As you can see here, the FSC is supervised by the President in two ways: directly, you see the line of oversight, and indirectly via the Prime Minister.

So the conclusion from this, members of the tribunal, is that central administrative agencies or central government agencies are subject to both direct presidential oversight and, just like the NPS, indirect presidential oversight.

Now that we understand fully what fine distinctions Professor Kim was drawing, and our friends rely upon for their international law argument, I respectfully submit...
we can all be clear that these fine distinctions make no
difference in terms of international law.

1. I now come to my third and last, you will be pleased
2. to hear, subject, which concerns the notion of
3. governmental authority. This is a notion relevant under
4. the analysis in terms of ILC Article 5.
5. Now, Korea invites you to hold that in managing the
6. National Pension Fund the NPS exercises the functions of
7. a fund manager, no more, no less.
8. We say Korea adopts the wrong analytical framework,
9. and performes to the wrong conclusion.
10. Let me start with the analytical framework. The
11. main elements of it are set out on this slide 70. This
12. is exactly as I did for ILC Article 4. We have key
13. portions of the official commentary, and I’ll leave this
14. with you, if I may.
15. Paragraphs 5 and 6 of the commentary are central for
16. my purposes. They explain the notion of governmental
17. authority, and they say that governmental activity is to
18. be distinguished from private or commercial activity.
19. That is to say --- this is my submission to you --- an
20. activity will not be governmental if the law authorises
21. anyone, not just a specifically empowered entity, to
22. exercise a certain function which the activity serves to
23. fulfil.

The commentary also says, and this is part of the
same analysis, that in assessing whether the authority
confers is governmental in nature or it is not, one
must look at --- now I’m quoting from paragraph 6 which
is at the bottom of the slide:

"... not just the content of the powers, but the way
in which they are conferred on an entity, the purposes
for which they are to be exercised and the extent to
which the entity is accountable to government for their
exercise."

Korea’s submissions to you fail to engage in the
round, as they must, with the multiple elements of this
legal test. The reasons for this become apparent when
one so much as outlines the NPS’s functions under the
applicable law and regulations.

The diagram now on your screen, slide 71, serves to
do just that. And so you see on the left—hand side of
the diagram that the NPS collects mandatory pension
contributions from Korea’s population. And it is common
ground, as of course it would be, that this is a public
law governmental activity.

The monies collected are state property, but they
don’t go into the general treasury. They come into the
National Pension Fund, which is specifically and
specially established under the National Pension Act,
Article 101.

Now, let us turn to the right—hand side of this
diagram. What the NPS does in the end is to determine
who is eligible to receive a pension; then makes the
pension payments that fall due, and to do that it
utilises of course the resources of the pension fund,
and that activity too is agreed by all to be a public
law governmental activity.

It is therefore paradoxical, to put it no higher,
that Korea should contest that the necessary link
between these two governmental activities of the NPS is
also a public law governmental activity. You see this
activity pictured in the middle of the diagram with some
further explanations and references and I’ll come to
that in a minute.

Members of the tribunal, in the design of the Korean
National Pension System, administering the national
fund, that which Professor Kim called the vault of the
country on Day 4, is the complement of the NPS’s power
to collect the compulsory pension contributions, and it
is also the necessary vault, as I say, out of which the
NPS makes pension payments as required by law.

In this context I specifically and respectfully
recall the content of slide 84 that I used in opening.

I would invite you respectfully to turn to it in your
own time, but I would add the following observations.

We now know that in administering the vault of the
Korean nation, the NPS does not perform a commercial
service. It has no contract. We saw that. It has no
private law agency relationship. We discussed that with
Professor Kim. It does not charge a commission or fees
to the state. And that is why the NPS has no revenue of
its own to speak of, as our friends admit.

We now know also that the NPS does not have
discretion, as an ordinary party would, in choosing in
which types of assets to invest. The permitted assets
are specifically enumerated in Article 102 of the
National Pension Act.

Nor does the NPS have private sector discretion in
its decision—making process. Its decision—making
process has been made for it, has been stipulated for it
by the superior authority, the Ministry of Health, and
we have discussed at some length the various guidelines.

Nor is the NPS accountable in the manner that
a private fund manager would be accountable. The NPS is
subject to audits, in particular, by the National Audit
Board each year without exception.

We now know also that the NPS has no ownership of
the pension fund assets, we looked at that point
earlier, and it derives its management authority from


Finally, we now know — this was Professor Kim. Day 5, page 26 [Day 5/26:1], that the state’s constitutional duty to provide pensions would remain approximately if, perish the thought, the NPS had squandered the assets in the fund. What does this mean for your purposes? It means that the state’s constitutional duty hasn’t been discharged once and for all by appointing the NPS in respect of the function of managing the National Pension Fund. The state has an ongoing responsibility and the NPS is its mere auxiliary that the state uses to fulfil that responsibility.

In light of all this, members of the tribunal, authorising the NPS to do certain things. We have had in fact occasion to test such a suggestion and to dismiss it with Professor Kim. We looked at the Bank of Korea’s functions and activities. This was Day 5, pages 33 to 38 [Day 5/33:1] and the parallels between Bank of Korea and the NPS are striking for your purposes. Let us turn to slide 72.

You will be able to gauge these close parallels from this slide, which extracts the legal texts, the primary texts, which are applicable to the Bank of Korea and the NPS. And I’m happy to skip the detailed references for now and leave these primary texts for you to consider in your own time.

What I submit you will see emerges from these texts is as straightforward as it is fundamental. We have a statute, that is on the left-hand side, authorising the Bank of Korea to do certain things. We have a statute, on the left-hand side, authorising the NPS to do certain things. Both of these institutions are authorised specifically to enter into certain enumerated transactions, such as buying securities.

The law does not simply say that the Bank of Korea or the NPS has all the transactional freedom of a commercial corporation. That would have been course a very simple thing to express in a law, easy to write it into it. But the law doesn’t do that. It allows only for specific types of transactions. And it does so by expressly describing these transactions as a means to serve the statutory functions that are entrusted to the Bank of Korea and the NPS respectively.

So, simply put, neither the NPS nor the Bank of Korea is a commercial actor pursuing its own private ends. No. They’re set up by the state to perform functions that the state has reserved to itself exclusively.

That would conclude my submissions, members of the tribunal, and I would ask you to call upon Mr Partasides to continue.

MR PARTASIDES: Members of the tribunal, given our discussion of facts, there is no need to spend time again on breach. So we will move directly to matters of quantum and our slide 78 and I invite you to recognise my partner, Elizabeth Snodgrass.

Submissions by MS SNOODGRASS

MS SNOODGRASS: Members of the tribunal, over the last few days you have heard at times very detailed, technical, and sometimes quite discursive evidence on issues that relate to the quantum of damages.

My objective in these necessarily summary submissions is to set out the Claimant’s straightforward case on damages in a bit more detail than Mr Partasides previewed at the outset of our submissions, in a way that makes plain the key propositions on which we rely, and the analytical framework for the damages that are claimed.

I hope in this way to remove the confusion that, if my friends opposite will forgive me for saying so, it seems that the ROK is deliberately trying to create on this issue. One observation at the outset. We should not fall into the trap of thinking that because in this case the numbers that a correct valuation analysis yields are large, the analysis must necessarily be complex.

Notwithstanding the ROK’s continuing efforts to caricature and demonise, and Professor Dow’s efforts to sow doubt about quantum in this case in order to support his habitual conclusion that no damages should be awarded, this is actually a simple quantum case.

As of the valuation date, the Claimant had an investment: shares in SC&T. There is no dispute, as we will see on slide 78, that the valuation date should be 16 July 2015, which is the day immediately before the extraordinarily general meeting of SC&T shareholders to vote on the merger.

To the extent there is any confusion about that, it may arise from the fact that in the counterfactual scenario, that of course unfolds after the merger vote. That is typical and it doesn’t change the valuation date.

On the day after the valuation date, the inexorable outcome and culmination of the ROK’s breaches of the Treaty, the NPS casting vote in favour of the merger, caused the Claimant to suffer a loss in respect of its
evidence showing that there are good reasons to believe shareholders demonstrated their negative control to reducing the discount to NAV, from the stock trading at investment in SC&T shares if Elliott’s restructuring plans had gained traction, after a group of minority shareholders demonstrated their negative control to block a predatory transaction.

Now, those gains might have resulted from further reducing the discount to NAV, from the stock trading at a premium to NAV, as it had done at points in the past, or even from increasing the NAV. We have advanced evidence showing that there are good reasons to believe that by adopting the measures the Claimant proposed, the Claimant could have realised at least up to the full undiscounted intrinsic value of its investment in SC&T. But the Claimant accepts that Mr Boulton’s analysis supports a claim for damages subject to the 5–15% discount and not beyond.

Third, as we see on slide 81, the Claimant would also have enjoyed gains on other assets, namely the Cheil short swaps that Professor Dow realised, acknowledged, would have materialised if the merger had been rejected. The Claimant could have included those losses in its claim for damages, but it has not done so. While I’m on the topic of the Cheil swaps, I wanted to make a brief further observation about them. So these were not offsetting bets in Professor Dow’s pejorative terminology. They were not heads I win, tails you lose positions. They exposed Elliott to the same risk in respect of the outcome of the merger as the SC&T shares did, which is why, as Professor Dow recognises, they resulted in a loss when the merger went through.

One function of the swaps was to dampen down market volatility, and in that way to isolate the investment risk, the alpha, ensuring that the Claimant remained exposed to it, but to minimise exposure to general market volatility, which Mr Smith described as the beta, or the beta (pronounced) in American English.

As I said, the Claimant does not claim for its losses on the swaps.

Finally, as we see on slide 82, contrary to the calculations that Professor Dow presented, the Claimant actually suffered trading losses.

As Mr Smith explained in his evidence, the Claimant suffered an immediate trading loss on its shares in SC&T of $87 million. After deducting gains on the swaps the net trading loss was $45 million. But the Claimant does not advance a separate claim for these trading losses.

So turning now to how we say the tribunal should frame the quantum analysis, we say this case gives rise to a typical quantum analysis. What would Claimant’s investment in the SC&T shares have been worth in the immediate aftermath of a no vote, ie in the counterfactual scenario that the ROK had not breached the Treaty?

The framework for calculating damages is therefore a straightforward comparison of the actual and the counterfactual. What the shares would have been worth, counterfactual, less what the Claimant actually received, the actual.

This is of course the normal damages framework, but it is not usually not addressed by any expert on behalf of the ROK.

So we say that in the counterfactual scenario the merger would not have been approved. This we say is a matter of simple arithmetic.

We also note the total absence of any evidence, any actual evidence, beyond Professor Dow’s inexpert speculations that Samsung had any plan B for achieving the merger beyond the desperate and corrupt scheme it actually deployed to secure the NPS votes. If that had failed, the merger, being the merger at the predatory ratio that was meticulously prepared, was off the table.

Nor is it credible to suggest that a similar transaction would have been put forward immediately. As we’ve seen from the contemporaneous evidence that is excerpted on slide 83, ...
And in the final weeks before the merger vote, we see on the slide, incredible, agnosticism concerning the very existence of position depicted on slide 88, expressing uncredible, tunneling as a phenomenon.

As Mr Smith set out in his uncontested evidence invested in SC&T to the fact that the SC&T shareholders were 9 trillion Korean Won better off after the merger was rejected, this news would have been reflected instantaneously. As you see from the excerpt on slide 90, his analysis is of no use to you. He doesn’t offer you an answer.

The only exception was Professor Dow, and we see his Professor Bae. The only exception was Professor Dow, and we see his position depicted on slide 88, expressing uncredible, incredible, agnosticism concerning the very existence of tunneling as a phenomenon.

But, as Mr Boulton persuasively testified, if the SC&T shareholders were 9 trillion Korean Won better off after the merger was rejected, this news would have been instantaneously reflected in the market price. 9 trillion Won was half the value of SC&T in the market. So any market reaction to this news can have been expected to be significant.

Moreover, in the counterfactual scenario, there would have been a galvanised blocking minority to oppose future such predatory transactions, and indeed this was precisely what Elliott had identified going into the investment. As Mr Smith set out in his uncontested evidence — I’m referring here to his first witness statement, paragraph 15 — Elliott was alert at the time it invested in SC&T to the fact that the family and Samsung affiliates held only a minority position in SC&T, and that is what led Elliott to conclude that, notwithstanding some rumours, a merger would only take place on fair terms, as Mr Partasides took you through earlier.

So the key quantum question really is, therefore, not would the SC&T share price have gone up in the counterfactual scenario, but by how much. And answering that question requires a specific focus on what would have happened to SC&T’s share price if the merger had not been approved.

On that key quantum question you heard from Professor Dow himself in testimony excerpted on slide 89. His analysis is of no use to you. He doesn’t offer you an answer.

As you see from the excerpt on slide 90, Mr Boulton’s analysis does answer that question. That was the central focus of his second report. Mr Boulton quantifies by how much SC&T’s share price would have increased on news of a shareholder vote against the merger, in three steps. So first, he values the investment, being Claimant’s shares in SC&T, as of the valuation date, using sum of the parts methodology.

Second, in order to determine by how much they were discounted, he compares that to market price. And then finally, he evaluates by how much the shares would have appreciated in value, by how much the discount would have reduced, in the counterfactual scenario.

Taking each step in turn, in terms of valuing the shares on the valuation date, and this is an area where obviously the experts disagree, we say the shares cannot properly be valued at the share price on the valuation date, for two reasons.

First, we say so because using the share price on the valuation date would patently undervalue them, and it would not remove the effects of the ROK’s wrongdoing. There was at the time widespread consensus that SC&T shares were undervalued, and there was no real mystery as to why that was, at least in large part.

The market perceived a risk, not a certainty, but a risk that SC&T would be the target of a tunneling merger, and it was pricing that uncertainty into the share price. In addition, as we now know, for years prior to that date the share price had been the subject of a sustained campaign by Samsung and the family to depress the share price in order to accomplish the very tunneling merger that ultimately caused the loss at issue here.
Indeed, as the evidence that’s recalled on slide 91 shows, the assertion that the share price was affected by the Samsung campaign is based on things the ROK’s courts have either already found or allegations that the ROK is itself currently advancing.

On Wednesday you heard Professor Dow suggesting that only impacts on share price due to market manipulation should be taken into account, while those due to tunneling should not. That argument, an excerpt of which is shown on slide 92, is fundamentally misconceived, as we will explain in greater detail in written submissions.

But perhaps the biggest problem with it is that the distinction breaks down as soon as one understands that what Professor Dow categorises as market manipulation is the method by which tunneling was achieved in this situation.

Market manipulation was used to drive the share price down so that the merger could affect the value transfer. In this way, to extend Professor Dow’s analogy, the watch was smashed or at least tampered with so thoroughly by market manipulation so that it had entirely ceased to tell time on any reliable basis.

Notably, and importantly, there is absolutely no evidence that the SC&T share price was meaningfully affected at any point prior to the valuation date by market appreciation of governmental involvement or a breach of the Treaty.

Notwithstanding Professor Dow’s eagerness to draw the analogy, this case is not RosInvestCo, and the ROK has advanced no evidence to counter the Claimant’s contention that, like everybody else in Korea, it was unaware of the concealed collusion between the government and Samsung until the corruption scandal broke in 2016, one year after the merger was consummated.

It would also be wrong as a matter of logic and principle to use a distorted share price as the measure of value when entrenching the distorted share price was the very means by which the loss was inflicted. Doing so would only obscure the loss. It would not serve as a reliable measure or method for measuring it.

It would be equivalent to measuring the market value of an expropriated business after the government had announced its plan to expropriate. The Treaty tells us that cannot be done, and the same underlying principles should defeat the ROK’s preferred methodology here.

So if, as we say, you cannot use the actual share price, then you have to use some other method of valuation, and there seems to be no serious dispute that the proper way to value an entity like SC&T is the sum of the parts methodology that Mr Boulton used. We see that on slide 93, Professor Dow accepting that market price is only a starting point.

Despite the oft—repeated label of “subjective” being applied to Mr Boulton’s modelling choices, no analytical errors have been identified in his sum of the parts valuation and none were raised with him on cross—examination.

Professor Dow’s only criticism of Mr Boulton’s analysis is that the residual holding company discount that he applies is too low, an issue that does not go to the integrity of the sum of the parts valuation itself.

Indeed, as you can see on slide 94, Mr Boulton has adopted a number of conservative assumptions in his analysis. In the interests of time, I’m not going to go through all of them, but I’ll leave those with you for your further review.

And of course, and fundamentally, the ROK offers no alternative valuation of SC&T itself. Certainly Professor Dow’s musings on Wednesday about possible alternative valuation methods that the tribunal might wish to consider undertaking shouldn’t be taken seriously, given that he didn’t actually do any of that analysis himself.
The direction of travel is clear. It's also clear that the impact would have been rapid and significant. As you can see on slide 96, Mr Boulton noted in his oral evidence that even though he does not agree with the conclusions of Professor Dow's event study, he agreed that it shows the market -- and I'm quoting -- "is responding fast to signals about whether the merger is likely to go through".

Specifically, Mr Boulton noted that if something merely moves the dial of the likelihood of the merger caused a 10% change in the market, as many of the events in Professor Dow's event study did, he said then that absolute news, the merger has not gone through, is going to have a more significant effect.

The contemporaneous note by Samsung Securities excerpted on slide 97 recognised the same swift and significant impact that was caused by news that simply made the merger more likely, more or less likely. Samsung Securities noted on 10 June 2015, with and it further remarked that:

[redacted]

1. is no difficulty over discounting.
2. Whether Professor Dow wanted to admit it or not, we are dealing with information that plainly was and would have been incorporated into price. The risk of the merger was affecting price. So the certainty of no merger undoubtedly would have done so.
3. There can be no credible debate concerning the directional impact on price. No merger was only good news for SC&T shareholders.

Indeed, as the tribunal will recall by reference to the evidence that's shown on slide 95, the NPS research team itself concluded contemporaneously that:

[redacted]

Professor Dow's sarcastic attempts to downplay the significance of this contemporaneous analysis by the ROK's own pension experts should be ignored. The fact is that it was deemed sufficiently important to be censored by Mr, head of the NPS research team. Further, the analysis by the Seoul High Court in the appraisal price litigation shows that the NPS research team was not alone in its views. The court referred to contemporaneous analysis from Hanhwa Investment that concluded that if the merger were to fail, the potential upturn in the share price will reach 40%.

So what remains for the tribunal to decide is the amplitude: how high would the price go. Mr Boulton presents the tribunal with a precise figure based on robust analysis. As we see on slide 98, Professor Dow simply refused to engage.

Mr Boulton quantifies the Claimant's damages in four steps. First, he calculates the sum of the parts value of SC&T.

Second, he subtracts a holding company discount for SC&T of 5% or 15%. Why 5 or 15%? This derives from Mr Boulton's merged entity analysis, and this is illustrated on slide 99.

Now, the merged entity analysis is an analytical method of separating the discount attributable to fears of a predatory merger from other factors. It comprises, first, combining the depressed listed price of SC&T and the inflated listed price of Cheil to calculate a merged entity listed price, and this has the effect analytically of removing the effect on price of fears of the predatory merger, because the two cancel each other out.

Mr Boulton then combines his sum of the parts valuations for SC&T and Cheil, and subtracts the sum from the merged entity listed price.

The result is the holding company discount with concerns about the predatory merger removed. On 25 May 2015, one day prior to the merger announcement, and 1 September 2015, which was the day the merger was completed, Mr Boulton observes that discount was approximately 5%. Within 30 days before and after that range, so moving out 30 days from either side of that range, the highest observed discounts in that period were approximately 13.9%, and that is where Mr Boulton derived the conservatively calculated 5—15% range for SC&T's holding company discount in the counterfactual scenario.

He then subtracts this discount from the sum of the parts value of SC&T to identify SC&T's adjusted intrinsic value, and he subtracts from this intrinsic value of SC&T's shares the amounts that EALP has received, the actual, to derive the damages calculation.

Professor Dow's focus on Wednesday appeared to be to argue that the residual discount that Mr Boulton calculated was too low. Now, we'll have to address a number of Professor Dow's arguments in written submission, but perhaps the most egregious of the arguments we heard from him involved his use of the trading plans prepared by Elliott as a basis for imputing to the Claimant a view on the holding company
discount for SC&T, and I do want to take just one minute
to address that today.

The effort to equate those trading plans with an
assessment by Elliott of the expected long--term holding
company discount is completely baseless.

First , Mr Smith testified that the unwind plan did
not reflect an intended sales strategy at all .

Moreover, as Mr Smith testified in his witness
statements and repeatedly confirmed in
cross--examination, "The trading plans entirely ceased to
be relevant whenever we adopted a more active approach
to an investment" . That's his third witness statement
at paragraph 18. And Elliott did that in relation to
this investment after March 2015.

What's more, Professor Dow did not address in
Figure 7 of his second report, which we addressed with
him in re-examination on Wednesday, what Mr Smith
actually said about what Elliott actually knew about
SC&T's long--term discount, and we see this on our final
slide, slide 100, that in the more than seven--year
period from July 2007 to November 2014, SC&T's discount
to NAV, SC&T traded at an average of an approximately
16% discount to intrinsic value. That's exhibit C--395
(C/395/1).

Professor Dow just ignored that, presumably because
that degree of historical cross--check actually bears out
Mr Boulton's range, and Mr Smith's further evidence,
which was completely untested in cross--examination, and
I'm quoting here from paragraph 23 of his third witness
statement, that:

"Defeating the merger would have gone a significant
way towards narrowing the discount to NAV of SC&T's
shares. I expected that the discount would have reduced
to 10% or less."

In the light of all the evidence and the experts'
analysis, and to conclude, the Claimant contends that
instantaneously upon rejection of the merger, SC&T's
share price can be expected to have incorporated the
information that the specific risk of the merger had been averted. The share price would have risen
accordingly.

Mr Boulton's analysis should give the tribunal
confidence that this would be to within 5--15% of full
intrinsic value, meaning damages of between $379,270,999
and $486,314,418.

It will be for the tribunal to judge where within
that range to set an award of damages, and this is
a point that we'll develop more in our written
submissions. But in circumstances where the 5% discount
is supported by the evidence of the merged entities

discount closest in time to the date on which in the
counterfactual scenario the market would have impounded
the information that the merger had been rejected, there
are clear grounds for considering that an award towards
the top of that range is warranted here.

With that, I will conclude our closing submissions.

MR THOMAS: Ms Snodgrass. I'm just going to go back to
around page 67 of the [draft] transcript .

I'm sorry, mine is moving a little slowly.

Okay. It's starting at line 22.

MS SNODGRASS: Yes.

MR THOMAS: You said: "... as we now know for years prior to that date the
share price had been the subject of a sustained campaign
by Samsung and the family to depress the share
price..."

(Day9/68:18)

What do you say -- can you tell the tribunal what
that period of time is?

MS SNODGRASS: You're testing my recollection here.

I believe the evidence shows that beginning with the
listing of SDS and then the listing of Cheil, the entire
succession scheme began with a proposal to line up all
of the Samsung subsidiaries to move towards eventually

listing of Everland, Cheil, and prepare the merger so
that Cheil would be in position to be the merger
vehicle, and its share price would be in the right
state, i.e at a premium, and then SC&T's share price
would be at a depressed state.

So this -- could someone give me the date of the SDS
listing? November 2014 is the SDS listing.

MR THOMAS: Okay. That's when I thought that listing took
place. But you said for years, for a period of years.

MS SNODGRASS: That is a mis--statement by me then. I stand

MR THOMAS: Okay, because I'm trying to understand your
point about the impact of the campaign on the
suppression of the price, and you're saying now that
it's November of 2014?

MS SNODGRASS: Indeed.

MR THOMAS: Not any time --

MS SNODGRASS: November 2014 was the Cheil listing. So
that's a mis--statement by me.

MR THOMAS: Thank you. I just wanted to clarify that.

MR GARIBALDI: Ms Snodgrass, I hope that in your submissions
you're going to address the question of the discount for
taxes and the fact that the calculations of Mr Boulton
were pre--tax and also, something that I'm interested in
particularly, which is the effects, if any, of the
There were rumours in the market, and indeed the key

MR PARTASIDES: Yes. There was no public communication.

it didn’t go to the market at large; is that right?

only to Samsung and to the Blue House and all that. But

the vote of the Investment Committee was a communication

have just said that the communication of the result of

17 July, a Tuesday. The extraordinary general meeting of

shareholders of SC&T took place on 17 July, the

following Friday.

There were rumours following the Investment

Committee meeting on 10 July that the Investment

Committee had taken the decision. Those rumours were

circulating from 11 July, but there were no rumours as

to the outcome of the decision before 17 July. We’re

not aware of any evidence that it was known what the

Investment Committee’s decision was before the EGM on

17 July.

So we see no effect between 11 July, the Monday, and

17 July, the EGM, to the share price resulting from the

rumour only of the Investment Committee taking the

decision, rather than the Experts Voting Committee.

But we can set that out in more detail in our

written closing submission.

MR GARIBALDI: I hope you do. So it follows from what you

have just said that the communication of the result of

the vote of the Investment Committee was a communication

only to Samsung and to the Blue House and all that. But

it didn’t go to the market at large; is that right?

MR PARTASIDES: Yes. There was no public communication.

There were rumours in the market, and indeed the key

piece of information that would have made it on to the

market, but didn’t until after the 17th, was the

Experts Voting Committee statement that, as we heard,

was delayed until after the vote.

MR GARIBALDI: Thank you very much.

MR THOMAS: Thank you very much.

THE PRESIDENT: Thank you very much.

We break for an hour for lunch and we will resume at

1.05. Thank you very much.

(The short adjournment)

THE PRESIDENT: Welcome back. I understand — it looks like

at least everybody is ready to resume. So we don’t need

to necessarily wait for a few minutes to start.

We are good to go. So, Mr Turner.

MR TURNER: Thank you, sir, good afternoon.

Let me begin by echoing my learned friend’s comments

at the beginning of his closing speech this morning,
thanking the arbitrators for their attention over the

last fortnight. It’s been a long haul, and I share my

learned friend’s thoughts as to the spirit of

collegiality with which this hearing has been conducted.

Can I begin by asking — which I hadn’t intended to
do, but which is prompted by Mr Thomas’ question at the
end of the Claimant’s submissions this morning, asking
the Opus operator to put a page of the Claimant’s Reply
on the screen, please. It is Opus reference {B/6/117}.

This relates to the question that was asked of my

learned friend Ms Snodgrass by Mr Thomas and which was

in the end answered by Mr Partasides.

This is an extract from my learned friend’s Reply

{B/6/117} at paragraph 147, and I’ll go through the

first two pages quickly.

This is the discussion in the Reply of the famous

meeting of the Investment Committee of the NPS on

10 July 2015, and a number of allegations are made about

it on page 117.

If you go over the page to page 118 {B/6/118},

paragraph (e), my learned friend says:

"It is also apparent that the outcome of the
Investment Committee meeting was leaked to the media by
the NPS’s CIO and Chairman as recorded in
text messages ...”

Etc.

Then on page 119 {B/6/119} he sets out a table, and
then in paragraph (f) he notes that:

"... the day after the NPS’s Merger decision, the
Korean press reported that the NPS Investment Committee
had decided that the NPS would vote in favour of the
Merger.”

The footnote reference is to my Statement of Defence
and also exhibit R–131, and if we can put {R/131/1} on the screen, this is a press release posted — — you can see under the picture — — on 11 July 2015. That’s the Saturday after the Friday on which the decision was made, which also answers the question that was put to Professor Dow as to when that decision was known.

The press release says, and we need only look at the first paragraph, although the fourth is also interesting:

“It is reported that the National Pension Service ... the largest shareholder of Samsung C&T, has decided to vote yes to the merger between Samsung C&T and Cheil Industries.”

So that is the answer to your question to Mr Partasides that I wanted to begin with.

Sir, as I say, we have been here for the last fortnight and the question is what we have learned. The Claimant has taken the decision, which is perfectly proper and legitimate, I’m not at all seeking to suggest otherwise, to present the tribunal today with a summary of its case.

We have made the decision to deal with highlights of the evidence as it has unfurled before you over the last two weeks, and we will not be repeating our opening submissions. Where therefore we do not deal with certain subjects, and one that was dealt with at length and in respect of which a number of corrections as to what is agreed and not agreed will have to be made in writing, being attribution, it is not that we are — — no inference is to be drawn from our not dealing with topics such as that this afternoon, as to how we situate that in our case.

We will deal with all of that in our written closing submissions in due course.

So what is the big issue that we have heard over the last fortnight that has changed the shape of this case? And the answer is, in one word: swaps.

We have learned that there was one transaction with two parts. Elliott made an investment in SC&T and it also made an investment, not in the technical sense of the Treaty, but in economic terms, in Cheil through the swaps that have been the subject of discussion with the arbitral tribunal and also were covered with the quantum experts on Tuesday and Wednesday.

It is important to recognise, and I’ll come on to this in more detail, that this was indeed one transaction, part of which, the Cheil part, was withheld from the arbitral tribunal, from us, and indeed, as we saw, from Mr Boulton.

We say this is the beginning and the end of the case. The Claimant made no loss at all. Indeed, overall it made a trading profit.

Sir, in introducing our closing submissions this afternoon, I would like to repeat one point from our opening submissions, which has also cropped up once or twice over the last fortnight, and that is the Republic of Korea’s position so far as the ongoing and completed legal proceedings, both criminal and civil, are concerned. That is that the Republic of Korea is a state governed by the rule of law. The Republic of Korea in no way seeks to resile from the decisions of its courts. We ask the arbitral tribunal to look at those decisions, whether they are of the criminal courts or of civil courts, in the context in which they were rendered and for the purposes for which they were rendered, and we ask the tribunal to look at the claim that is defended by the Republic of Korea in the light of the Treaty.

It is a claim under the Treaty, and the Claimant needs to meet all of the requirements of the Treaty. In so doing, we do not seek in any way, I repeat, to resile from the decisions of the Korean courts, which must though be seen in their context in the Korean legal system.

Sir, before I hand over to my learned friend Mr Lingard, who will deal with questions of liability, let me also raise one other introductory point. That is — — and we heard a lot about it from my learned friend Mr Partasides this morning — — the Claimant’s assumption of risk.

This cannot be simply dismissed with a wave of the hand. It is clear that when the Claimant bought the 7.7 million odd shares between January and the end of May 2015 — — that is to say before the announcement of the merger and the setting of the merger ratio — — it knew of the regulatory environment in the Republic of Korea. It knew how merger ratios were to be set. It knew of the prospect of a merger in order to re-organise the Samsung Group, as had been widely discussed as Mr Smith was taken to by Mr Lingard in cross-examination. It knew that there was a risk of what has been called tunneling — — which we understand, by the way, to be a term that comes from ultimately the Czech Republic, but Eastern Europe more widely after the fall of the Berlin Wall to describe the risk of shareholders taking assets from companies, and which has been widely debated as a known and current phenomenon in the Korean market.

Not only did they know that that was a risk, which gives rise to the Korea discount itself, but they also...
MR LINGARD: Mr President, members of the tribunal, good afternoon.

I’m going to continue the theme Mr Turner has begun, and that is to focus only on highlights of the evidence as they’ve emerged over the past two weeks, and I begin, before turning squarely to questions of liability, with just one point on the Republic’s preliminary objections. The tribunal will of course recall Professor CK Lee telling the administrative law expert, Professor CK Lee. The tribunal will of course recall Professor CK Lee telling the administrative law expert, Professor CK Lee. The tribunal will of course recall Professor CK Lee telling the administrative law expert, Professor CK Lee. The tribunal will of course recall Professor CK Lee telling the administrative law expert, Professor CK Lee.

The starting premise in his cross-examination was an uncontroversial one. It’s on the left-hand side of slide 2. That is that one organ of the state can obviously not sue another organ of the state. That is that one organ of the state can obviously not sue another organ of the state.


If we turn then to slide 3 in our deck, we see in further questioning from Mr Garibaldi that Professor CK Lee quickly resiled from his published view, saying he had gotten it wrong. We can see his answer at line 22 on the slide:

"Now that you have posed ... that question, I realise [I] was not correct."

We would simply urge the members of the tribunal to accept the consequences of Professor CK Lee’s written opinion, not the one he offered on the fly on examination in this hearing. We say it follows that the NPS must not found to be an organ of the Korean State.

That’s all I propose to say for now on the subject of preliminary objections. Once again, we will return to those and other aspects of the Republic’s defence in writing in due course.

I turn then to the question of liability and key developments in the facts as they’ve emerged over the past two weeks that go to the case for breach advanced against us.

The tribunal will of course recall that the alleged breaches are two. There is first an allegation that the Republic breached the minimum standard of treatment, and second, an allegation that the Republic breached the guarantee of national treatment. We’ve heard nothing from the Claimant about the latter of those allegations in this hearing. We say it is not a serious allegation and so my focus this afternoon will be on the allegation of breach of the minimum standard.

As Mr Turner did, I begin in that context with the question of assumption of risk.

If we turn to slide 4, we see on the left of that slide an example of a proposition that repeatedly has been put by the Claimant in these proceedings. It’s that it bought shares in SC&T on the basis that the shareholder vote approving the merger was, and these are the words from the Claimant’s opening in these proceedings, “extremely unlikely.” You see that in the final highlighted extract on the left of this slide 4.

Again, from the Claimant’s opening:

That proposition, that the shareholder vote going in favour of the merger was extremely unlikely, as the Claimant would have it, is simply not borne out in the contemporaneous evidence.

I invite you to compare that proposition put by the Claimant to the contemporaneous advice it received from Spectrum Asia, which we have extracted on slide 4.

Again, it’s exhibit R–255. (R/255/1).

We see first that that advice was plain, that the merger was, and I quote, considered “inevitable,” and...
second, that there was no reason to believe the NPS would oppose the merger. That goes squarely to the question of the shareholder vote. We can see the second extract from Spectrum Asia on slide 4:

“So far, the NPS’s stake has not upended the complex web of cross-shareholdings...”

And Spectrum continues in its contemporaneous advice to the Claimant:

“...there is no evidence that it intends to.”

More specifically, we learned from Mr Smith in cross-examination that the merger, the merger that is impugned before this international tribunal, had all along been part of the Claimant's modelling. If we turn to slide 5, we see an example of that. You can see Mr Smith accepting in the extract on the left that a merger involving C&T and Cheil was part of his own proposals and plans.

He then concludes with a qualification that, as counsel opposite this morning rightly said, Mr Smith made repeatedly throughout his examination, and that is that any such merger would be on what Mr Smith called fair terms. We see that at the bottom of the extract on the left of slide 5.

It is not entirely clear what Mr Smith meant by fairness. It may have been Elliott’s own unilateral conception of fairness. It may have been a merger derived from a merger ratio based on Elliott’s calculation of the net asset value of the companies. And to be fair to Mr Smith, there was a suggestion of that in his examination at Day 3 of the transcript at page 86, lines 13 to 18 (Day8/36:13–18). Of course there is no such provision in Korean law, nor had there been at any relevant time, for a merger to be concluded based on net asset values.

More generally, let me make three observations in response to the testimony we heard from Mr Smith about the merger being on his construction of fair terms.

The first observation is this. Elliott knew, as indeed any investor in South Korea would know, that the timing of a public company merger was wholly in the discretion of the merging companies. The managers of those companies could propose the merger at any time. It follows that any unfavourable merger ratio, as determined from the perspective of the shareholders of one of those companies, could be the result of what we’ve come to know as tunneling. It could be the result of tunneling properly so-called. That is the ordinary preference of a controlling family or controlling shareholder, to direct contracts to one company rather than the other.

If that resulted in an unfavourable merger ratio, it would result from the timing of the merger’s proposal, and that timing was, as the Claimant knew, wholly in the control of the companies.

The third observation is this. Elliott also knew, as any sophisticated investor in South Korea would know, that the two factors I have just spoken to inexorably led to the conclusion that a merger ratio may not be in the best interests of the shareholders of one of the companies.

Recall on the right-hand side of slide 5 that Spectrum’s advice to Elliott was similarly unambiguous on this point. See the second highlighted extract on the right of slide 5; C&T shareholders may not necessarily benefit from the merger.

Before I leave Spectrum Asia, let me note briefly on slide 6 that there can be no doubt but that the Claimant relied on Spectrum Asia in connection with this investment, as indeed it had evidently on frequent occasions with respect to other investments.

The Claimant also evidently knew of the particular transaction structure that came to characterise this merger. We see that as we turn then to slide 7.

Mr Smith confirms on cross-examination that he knew that
The Claimant’s expert, Professor Milhaupt, confirmed that any sophisticated investor in Korea, logically enough, would be aware of that risk, that risk of tunneling.

I also want to be clear that our assumption of risk arguments apply to the entirety of the Claimant’s shareholding, to all 11.1 million shares. Professor Dow was asked on examination about a smaller portion of those shares. That is the 3.4 million shares that were bought after the formal announcement of the merger. He was cross-examined on his testimony in the RosInvest case.

The tenor of those questions was that the merger was an intermediary in order to help him pass the plans to SC&T. That was dated March 19, 2015, from the company.

The CEO did not express to Mr. Ham that this was something he wanted to discuss with him.”

But in any event, it’s our submission that those plans represent nothing more than an artifice. They were draft internal ideas. The document to which counsel opposite took Mr. Smith on re-direct examination is plainly marked “Draft”, and altogether more importantly, as we see on slide 11, it was simply never communicated to the company.

Mr. Smith testified that he engaged the individual identified in the documents as phillipham63@gmail.com as an intermediary in order to help him pass the plans to Samsung C&T. Mr. Smith also accepted on cross-examination that this Mr. Ham got no traction in those discussions. See his answer in the top extract on the right of slide 11:

“... we suspect Gov support may not be withheld given Samsung’s size and status.”

Let me turn now from the question of assumption of risk to the Claimant’s so-called restructuring plans.

And I turn to this subject because it is related to our submissions on assumption of risk, though clearly it also goes to our submissions on damages, to which Mr. Turner will come.

Mr. Smith spoke at some length about these so-called restructuring plans in re-direct examination by counsel opposite. Members of the tribunal will recall the reference in those plans to Elliott’s success, as it characterised it, with the restructuring of a Hong Kong group, there being no reference in those plans whatever to any success in restructuring any Korean company.

Chaebol or otherwise.

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Let me turn now from the question of assumption of risk to the Claimant’s so-called restructuring plans.

And I turn to this subject because it is related to our submissions on assumption of risk, though clearly it also goes to our submissions on damages, to which Mr. Turner will come.

Mr. Smith spoke at some length about these so-called restructuring plans in re-direct examination by counsel opposite. Members of the tribunal will recall the reference in those plans to Elliott’s success, as it characterised it, with the restructuring of a Hong Kong group, there being no reference in those plans whatever to any success in restructuring any Korean company.
That’s the Republic’s demonstrative C, setting out the full context of precisely what the members of the Investment Committee in fact said, rather than the conclusions drawn by the Claimant.

I have been speaking to the Investment Committee. I turn now to a separate question, and this separate question had, at least until the hearing, been, as we understood it, the thrust of the case advanced against its Republic. It’s the question of which committee ought to have made the decision, whether it be the Investment Committee or the Special Committee.

As I turn to that question, I begin, as we say we must, with the text of the Voting Guidelines, and that’s on slide 14 of our deck.

The central provision here is Article 8, sub 2, of the Voting Guidelines, and that is set out at the top of slide 14. It provides that if the Investment Committee finds a matter difficult, that’s the word used, it may, and again that is the word used, “may”, request a decision from the Special Committee.

Now, I’m reluctant to say this, I say it with some trepidation, but it is our understanding that it is accepted that there must first be a finding of difficulty. It seems to us that is the natural consequence of at least the testimony of the Claimant’s expert Professor CK Lee, and I turn to that on slide 15.

It seems to us that Professor CK Lee could not quite bring himself to say it, but there is only one thing to be drawn from the contortions one sees extracted on this slide 15.

Professor CK Lee says that the Investment Committee or, as I understand his testimony, only one member of the Investment Committee, need simply intuit, that’s the word he used, need simply “intuit” that a matter is difficult, and that would constitute a finding.

As a mechanism, we say that simply makes no sense. As a mechanism for a committee finding, the intuition in Professor CK Lee’s construction of a finding of difficulty cannot suffice. But this testimony should suffice to establish that a finding of such difficulty is in fact necessary.

If we compare to the process adopted in connection with the SK merger on which the Claimant places such emphasis, it is plain from the record that the Investment Committee members there in fact voted, as one would expect for a body comprised of more than one individual, voted to find that that matter was difficult, and thus that it ought be referred to the Special Committee. We see that in the minutes at 104.
Let me note briefly before I leave the SK merger, the testimony from Mr. [ ] as to reasons why that merger, the SK merger, ought be considered different from the merger that concerns us in these proceedings.

On cross-examination at [Day3/196:11] through [Day3/196:12], Mr. [ ] testified to the relevance of the treasury shares that were issued in connection with the SK merger, and in his witness statements, he testified in both of his witness statements to the relevance of the judicial imprimatur that had been granted by way of civil court proceedings in the SCT—Cheil merger that was not present in the SK merger.

That testimony appears at paragraph 21 of his first witness statement and paragraph 6 of his second witness statement.

Returning though to the process question, the finding of difficulty, which is documented in the minutes of the Investment Committee meeting on the SK merger, there is simply no such evidence of a finding by the Investment Committee here.

What then do we have? We have evidence of sustained deliberation of the merger at the Investment Committee, and evidence of a clear mechanism decided at that meeting for finding the matter difficult. It was not a mechanism designed to make it difficult to find the matter difficult, but rather that there be clarity on the process, and that is the open voting system to which I spoke on opening.

We see that set out at pages 14 and 15 of the IC minutes in the SCT—Cheil merger at exhibit R—128 (R/128/1).

In the absence of a finding by the Investment Committee of difficulty, we say on a proper analysis of which body ought make the decision, that is the end of the matter. There being no such finding, that is the end of the matter.

Mr. [ ], on cross-examination, was asked at great length about the potential role of the Special Committee. But over the three and a half hours of his cross-examination, he was not asked at all, not once, about his view as to what the Special Committee might have done if it had been asked to decide the SCT—Cheil merger.

He did testify to that subject in his two witness statements. I have an extract on slide 16. We know that his testimony is that he simply did not believe it was possible to predict a decision of the Special Committee before in fact there had been Special Committee deliberations on the substance of a particular transaction.

Now, it’s no doubt true that Mr. [ ], who we say is a straightforwardly honest witness presented by the Republic in these proceedings, there is no doubt that he was angry, as he testified before you, he was angry that this matter was not referred to his committee.

That anger, though, we say, tells you nothing at all about what the guidelines require.

Mr. [ ] was similarly clear, and I have this set out in slide 17, on cross-examination, that he had not previously engaged with the question of how matters came to the Special Committee. His testimony was, and I quote:

“Prior to this SC&T merger case, the requirement for any referral to the Special Committee was never handled or discussed.”

In other words, he saw matters that came to his committee; he did not deal with the question of how those matters got there.

We also heard a lot in the cross-examination of Mr. [ ] and indeed again this morning, about the meeting convened by the Special Committee to discuss these process questions. On that subject, Mr. [ ] was clear that regardless of what the members of the Special Committee may have wished for, that they may have wished this merger to come to them for decision, Mr. [ ] was clear that his committee had no legal authority at all to overturn the decision that had been taken.

That testimony is extracted on slide 18. His evidence was unambiguous:

“We reviewed the relevant regulations and confirmed that there was no basis in the regulations for us to overturn the Investment Committee’s decision, and to do so, to overturn the Investment Committee’s decision, would be problematic from a legal standpoint.”

In that context, and finally on this point for now, there is a question that was raised again this morning about whether the chair of the Special Committee had authority to convene a meeting to decide how the NPS would vote.

The members of the tribunal may recall the reference made by the Claimant to Article 5, sub 5. sub 6 of the Fund Operational Guidelines. Those are at exhibit R—99 (R/99/1), providing that the chair of the Special Committee can call the meeting with respect to “other matters” that are deemed necessary by the chair of the Special Committee.

In short, our submission is that the Claimant wholly ignores the word “other” this that provision. That provision follows the standard provision that it is for
the Investment Committee to decide how to vote, but if
the Investment Committee decides that the matter is
difficult, it may refer to the Special Committee.
Thereafter there is the provision that the chair of the
Special Committee can convene a meeting for other
matters.
No suggestion on the text of the guidelines, nor in
Mr [R's evidence, that the Special Committee
unilaterally could usurp the standalone regular power of
the Investment Committee to decide how to vote shares.
Those then in summary are our short submissions on
highlights from the past two weeks on the questions of
the facts as they go to liability for the claims
advanced against the Republic. With that, I will stop
and invite you once again to recognise Mr Turner on the
questions of damages. Thank you very much.
Further submissions by MR TURNER
MR TURNER: And I very much hope you do recognise me, sir,
after these ten days of hearing.
Sir, I will begin with one or two remarks on the
question of causation, picking up on the points that my
partner, Mr Lingard, has just taken you to.
Let me begin on slide 19 with Professor Dow's
presentation of the counterfactual in his view, what he
called his but—for scenarios.

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There is a third scenario that Professor Dow did not
deal with, but that is that there remains the
possibility that the NPS's vote itself is not what my
learned friend has called the casting vote, and this is
an example of where you need to look at decisions of
courts and people's discussions in the light of how
people use language in an imprecise way. Nobody has
been called upon to analyse what other shareholders
would have done in the light of the NPS's decisions one
way or the other.
But let us look just at these two decision trees.
If the NPS vote was unchanged, then nothing changes. If
the NPS had voted against the merger, the merger could
either still have been approved or rejected. And it is
important for you, the arbitrators, to take all of these
possibilities into account in the light of what
Mr Lingard has explained, about what the Investment
Committee might have done in different circumstances,
and the Claimant's burden of proof to show that the bad
acts that it complains of, if you find them proved, were
the proximate cause of its loss.
This comes back to the point that I made both in
opening and in introducing these closing remarks, about
the need for you to consider this case and the
Claimant’s claims in the light of this free trade
agreement, and where the Claimant bears the burden of
proving causation as well as other matters.
There is no certainty that the Investment Committee
would have voted to reject the merger without the
alleged government interference. There is no certainty,
as we have seen, and if we can go to slide 21, somewhat
out of sequence. You have seen this slide just now from
Mr Lingard's submissions. There is no certainty as to
what the Special Committee would have done had the
matter been referred to them as being too difficult for
the Investment Committee.
You have got to know on the appropriate standard
what would have happened in order to accept my learned
friend's case on causation.
If we go back to slide 20, there is a further matter
that was picked up by the Claimant during the course of
closing submissions this morning, and that is whether or
not the extensive holdings of the NPS, and we saw that
they had holdings in no fewer than 17 Samsung companies,
could have been a reason for a decision to vote in
favour of the merger. We will develop all of these
points more fully in writing.
But you will see here on slide 20 that Mr Boulton
accepted, when I took him to the table that showed the
extent of those holdings, that considering the holdings
overall would have been an alternative perspective for
the NPS to vote in favour of the merger.
I refer you, in the light of the comments made by my
learned friends this morning, to the minutes of the
Investment Committee, especially on page 11. That's
R–128 [R/128/12]. A summary of that decision,
especially on page 2, at C–428, (C/428/2) and the
evidence of Mr [R at C–500 (C/500/1). All of
those go to show that this was indeed something that the
NPS had in mind.
Furthermore, the Claimant's damages claim depends on
a rejection of the merger leading to, and we saw it
again in the Claimant's slides this morning,
a skyrocketing of the SC&T share price.
Nothing alleged against the Republic of Korea would
have, in the absence of those allegations, changed the
persistent nature of the Korea discount. And we will
come back to that during the course of these submissions
this afternoon.
I turn from that to the question of swaps, and we
saw this morning a calculation —— I thought I had noted
the slide, but I clearly haven't —— from my learned
friend Ms Snodgrass purporting to show that when the
tribunal looks at the transaction in the round —— that
is to say the shares in SC&T and the swaps in Cheil and
the other far lesser swaps in SC&T shares —— that that
gives rise to a trading loss.

The figures used on that slide are the figures that
Mr Smith has given as those numbers that were received
by Elliott from the settlement with Samsung after paying
tax on that settlement.

That is not the Claimant’s damages case. The
numbers that the Claimant has put forward on which its
damages claim has been calculated, and which is still
advanced, looking at the numbers given at the end of her
submissions by my learned friend, Ms Snodgrass, are the
figures that Mr Boulton analyses in his report and which
are put forward also by my learned friend in his
submissions of the gross proceeds which one takes from
the gross investment to look at the overall trading
loss, which has been the number of 49.5 billion Korean
Won that the parties have been debating since the
beginning of this case.

If my learned friend is now changing his damages
case, then we will have something to say about that in
due course.

Sir, if you look now —— we go to slide 22. I said
earlier this afternoon that the full existence of this
side of the Claimant’s transaction in SC&T and Cheil had
been withheld from us, from you and from Mr Boulton.

And Mr Boulton was very candid about this when we spoke
to him on Tuesday. He confirmed that he had not been
told, indeed his second expert report contains
a definitive statement to the contrary, that there had been
been a transaction, short swaps involving Cheil.

Mr Boulton did not consider that to be a matter of
relevance to his damages calculation. We will come on
to that in due course this afternoon.

But if we go to slide 23, it is absolutely apparent
from Mr Smith’s evidence —— chief —— this is
paragraph 11 of his fourth witness statement, you will
remember, the witness statement that he prepared at
short notice because of the disclosure during the course
of this hearing of the extent of these swaps. He said
in the passage that is highlighted in the middle of this
extract:

"These short swaps could therefore be expected to
neutralise any beta—derived changes in value to our long
position in SC&T shares (so-called ‘beta—hedging’)."

He went on:

"Third, in (what we considered at the time) the very
unlikely event that the Merger was approved, the Cheil
swaps would offset some of the downward movement in the
price of SC&T shares that was to be expected following
their exchange into overvalued New SC&T shares upon the
consummation of the Merger.”

It is absolutely obvious and apparent from this
extract, as well as from any sensible analysis of the
underlying documents, that the SC&T share acquisition
and the Cheil swap acquisition were two sides of the
same transaction.

Mr Smith accepted that the overall transaction gave
rise to a profit, as we can see from the next slide,
slide 24.

Now, we disagree with the actual calculation.

I refer you to slide 12 of Professor Dow’s presentation
for the number of 2.5 billion Korean Won that we say was
the overall profit on the transaction. Obviously we
will develop this in our written submissions. I just
note here that no questions were asked of Professor Dow
about those calculations that he presented on Wednesday
morning at all.

But Mr Smith accepts that even on his calculation of
the figures arising out of the swaps, there was an
overall trading profit for Elliott.

We said at paragraph 387 of our Rejoinder that if
there was any loss at all to the Claimant, it was its
trading loss, calculated, as I have said, on the basis
of the numbers that the Claimant had put forward.

If that loss is accepted by the tribunal, it has
been wholly wiped out by the profit, whether on our or
Mr Smith’s calculation, on the short swaps.

Even on that acceptance of loss, there is therefore
no right to damages at all because there has been in
fact no loss.

The Claimant’s profits are real and attested. The
losses that they claim in this proceeding are not only
unreal and certainly unattested, as I shall discuss in
a moment; they are an attempt to extract from this
arbitral tribunal a litigation windfall that could never
have been obtained in reality.

With that discussion of swaps, I pass to the quantum
of damages, and I note that in closing submissions today
the Claimant has abandoned its primary claim, which
I showed to Mr Boulton on Tuesday, of damages without
any discount to Mr Boulton’s sum of the parts or net
asset value calculation of the value of SC&T.

The claim that is now made before you is that that
sum of the parts valuation should be discounted by at
least 5% and up to 15%. There is no case now that no
discount should be applied at all.

Sir, what is the standard that this tribunal has to
apply in assessing the Claimant’s damages claim? The
answer that both experts give, and we discussed this at
some length with Mr Boulton on Tuesday, is fair market
value.

The question is what fair market value means. On
slide 25 we have Mr Boulton’s position as to the role of
the market price in setting fair value, fair market
value.

He believes that the people who believe that the
market is everything and that the market price is always
right are on the extreme of the idea that the collective
wisdom of thousands of investors is to be preferred to
anything else. That’s Mr Boulton’s position as to the
relevance of the market price.

His own authority on slide 26 was put to him during
cross-examination, and it’s extracted on the slide in
front of you:

"Question: … One often hears statements such as
'I couldn’t get anywhere near the value of my house if
I put it on the market today’ or ‘The value of XYZ
Company stock is really much more (or less) than the
price it’s selling for on the New York Stock Exchange
today’. The standard of value contemplated by such
statements is some standard other than fair market
value…”

And Mr Boulton agreed with that. He nonetheless
preferred what he called intrinsic value, and one

Now, Mr Boulton himself of course, and as he
accepted, had to make choices in the net asset value for
SC&T that he calculated. We see that on slide 27.

Now, Mr Boulton said that we had to draw a line
through the market price, but let us look at the
elements of the market price that we have to take into
consideration.

First, it is common ground, and indeed we heard this
from the Claimant this morning, that the market price
includes the assessment of the risk of the merger or any
merger taking place. As Professor Dow explained in his
presentation on Wednesday, it is in any event circular
because there is a fear of the merger taking place, but as
the merger takes place at market price in Korea, it is
a circular fear because the market will always then
reflect the market price.

But in any event, as we see on slide 30, Mr Boulton
accepts that the market price at which, I remind the
tribunal, Elliott bought shares in SC&T, reflects the
potential for the merger.

So that is not a reason for saying it is not fair
market value. Market participants recognise there is
a potential merger, and that will be taken into account
in the market price, and of course, as we see on the
next slide, 31, Professor Dow agrees.
That leaves us, if we look at slide 32, only with allegations of manipulation of the price that could lead us to reject market price as the fair market value, and that is what Mr Boulton is saying on this slide 32: “Providing false information would all be aspects of manipulation. But I wasn’t referring to the broader tunneling issues.”

Manipulation, as opposed to tunneling, as it has been described, which is the way in which a controlling shareholder can divert value from one company that he controls to another, needs to be serious enough, significant enough, to justify drawing a line through the market price, rather than making a necessary adjustment.

First, on slide 33 we can see Professor Dow expounding on his malfunctioning or smashed watch analogy. The question was put to him: “The tribunal should consider the market price only if they could be confident that the process was robust and conflict—free?”

He agrees: “This is like my watch. If I think the watch is totally smashed I would have to draw a line through the market price, as Mr Boulton said …”

“So if it’s completely smashed, if the market price means nothing, I can’t trust it.”

As we see on slide 34, though, in deciding what to consider as to whether the watch is smashed, you have to carefully distinguish between tunneling and manipulation. Mr Boulton agreed.

“Question: … you have been careful to distinguish between the two categories that we talked about earlier, namely allegations of what Professor Milhaupt called tunneling, and withholding information, disclosing false information, and the like.”

“Answer: I think I do understand that distinction [said Mr Boulton], as I said to you earlier, and what has been concerning me [ie about the reliability of the market price] is not the general threat of tunneling, but rather the items that I list on slide 8.”

Which are allegations by the prosecutor in the second indictment against [said Mr Boulton], as I said to you earlier, and what has been concerning me [ie about the reliability of the market price] is not the general threat of tunneling, but rather the items that I list on slide 8.”

Which are allegations by the prosecutor in the second indictment against [said Mr Boulton], as I said to you earlier, and what has been concerning me [ie about the reliability of the market price] is not the general threat of tunneling, but rather the items that I list on slide 8.”

The only allegation in the relevant time window would be different in a counterfactual. And the point that Professor Dow is making in his evidence on slide 35 is that if an independent SC&T, that is to say an SC&T that has rejected the merger, is no longer the company merged with Cheil, as it is in reality at what Professor Dow called the top of the Samsung food chain, it wouldn’t expect to get many favours from the Samsung Group, and therefore housing contracts, as was discussed between him and my learned friend Ms Snodgrass.

The point that you need to bear in mind, we say, members of the arbitral tribunal, is that this is why there is a Korea discount.

On slide 36 you can see Professor Milhaupt’s explanation. He was asked:

“I have it right, don’t I, that in your view, the Korea discount exists because of the risk that value might be expropriated from minority shareholders and transferred to Chaebol controllers?”

“Answer: Yes, I believe that the Korea discount is unique to Korea in the sense that it reflects corporate governance risk. That’s the way that I would explain the Korea discount. It reflects corporate governance risk …”

There is a corporate governance problem. It is known to the market. The market pays a lower price — attributes a lower price to the companies that are susceptible to that risk. The price that is then set is the fair market price for those companies.

I will not dwell on this, but any manipulation that has to be shown to this arbitral tribunal also needs to be in the appropriate time window and I will refer briefly on slide 37 to what happens purely coincidentally, I assure the arbitrators, to be slide 37, of Professor Dow’s presentation on Wednesday.

I stress, as did Professor Dow, that we take allegations of share price manipulation very seriously. South Korea is a state governed by the rule of law. These allegations are, if they are made, to be heard in court. They are, as the learned arbitrator Mr Garibaldi accepted, {Day6/56:10}, the subject of evidence, and they are the subject of hearings in independent courts at which the defendants have the right to defend themselves.

But we take them very seriously. What we are saying is that they need to be shown, they need to be shown to be in the right time window, and they need to be shown to have had a measurable effect on fair market value or on the market price in order for the market price to be adjusted to reflect fair market value.

That all needs to be proved by the Claimant.

The only allegation in the relevant time window relating to SC&T, the SC&T share price, is the Qatar
contract. This was fully examined by Professor Dow, his first report, paragraphs 108 to 116. He concluded that there would be a very small effect, if any, on the share price and thus the merger ratio had that been taken into account.

Professor Dow also examined the effect of Mr Boulton’s allegations relating to Biogen on the Cheil share price in paragraph 109 of his second report. Professor Dow concluded, and this was not challenged, that any such very small effect was quantifiable and he thus quantified it.

We do not accept that these allegations are proved. Insofar as they exist, though, Professor Dow shows that, to go back to his watch analogy, the watch was a minute or two out. It was not smashed. It needs to be adjusted at most.

I should just add that the Seoul High Court in the buyback proceedings about which we have heard so much over the last fortnight concluded that in fact the non-disclosure of the letter of intent in that contract was not shown to be a breach of market rules. But my learned friend Ms Snodgrass also said that the valuation date was the day after the merger, the supposedly incredible transfer of value. Economically, looking at the movement of the shares in the companies, this is simply not true.

On slide 38 —— ah, we’re there already —— I asked Mr Boulton how he would value an expropriation claim as at the valuation date, 16 July 2015, the day before the merger.

He said that the starting point would be the market value of those shares on that date. He made the very fair point that expropriation cases give rise to layers of complexity, and the analysis can be taken only so far. But that’s right, we say. The value of a shareholding the day before the merger, when the outcome of the merger vote is still uncertain, even on my learned friend’s case, must be the value of the shares.

I take advantage of that discussion to make a point about the nature of the merger, and we’ll develop all of these points more in writing, of course. But everything that is said on the other side of the room proceeds from the premise that the merger was “predatory”, involved a massive transfer of value. Economically, looking at the movement of the shares in the companies, this is simply not true.

On slide 39 we have Professor Dow’s slide 12. This was in the context of the analysis of the trading gain, and you can see the calculation on the slide. But you will contrast this with my learned friend’s showing you the slide before this in Professor Dow’s presentation, slide 11, and it’s the Claimant’s slide 81, where he showed what Elliott’s bet was.

Elliott’s bet was that the share prices would move in opposite directions. They didn’t. Their bet, the value transfer theory, was wrong. That is why they made a profit on the Cheil swaps, because the Cheil shares after the merger, the supposedly incredible transfer of 9 trillion Won, I think my learned friend Ms Snodgrass said this morning, was not perceived by the market as such. Cheil shares went down. So the Claimant made money on its short swaps.

Now, Mr Boulton, sticking with his evidence, as we know, applied no discount to his sum of the parts valuation in his first report at all. Didn’t think about it. Didn’t think of a holding company discount. Common or garden, holding company discount applies everywhere. Didn’t think of a Korea discount, the Korea discount that Professor Milhaupt explained earlier in our submissions this afternoon.
Accepted he wasn’t a Korea expert. Indeed, he is so far from being a Korea expert that he did not take those things into account whatsoever. Didn’t ask any questions about it. Didn’t think it might be a point that he would talk to the Claimant about, the Claimant’s trading plans all having identified the discount and tried to bet on the discount and what they considered to be the net asset value narrowing. He didn’t apply a discount at all.

And yet in his second report Mr Boulton ventured where angels fear to tread and he is the only person who has been able to distinguish between a Korea discount and a holding company discount.

Neither Professor Milhaupt nor Professor Bae could do this, as we see on the next slides.

This was the question asked by the President of both of the capital markets experts after their evidence on Monday: how would you distinguish between a Korea discount and a holding company discount? And Professor Milhaupt said:

“It’s admittedly challenging ... I think that one of the interesting features of this case is it’s, to my knowledge, the first case that would require [it to be done].”

But never fear, Mr Boulton can do it.

On slide 41, you see Professor Bae could not answer the question either.

But on slide 42 you can see that Mr Boulton, although he knew that neither of the capital markets experts could do it, he could, and he did.

He came up with a discount to be applied to his sum of the parts valuation, his subjective analysis of the value of SC&T of between 5 and 15%.

Now, one of the subjective choices that Mr Boulton made was to include in his net asset value the value of listed holdings of SC&T; that is to say, their investments in other companies that were also listed, he valued at the market price. Now, we say in principle that is quite right, because the market price is the fair market value.

So in principle he begins in the right place.

But then he falls into error because he does not account for tax. Elliott in their net asset values always accounted for tax. We can see Mr Smith’s acceptance of this on slide 43.

“We’ve taken off taxes on any gain as between these amounts and the acquisition costs for Samsung of these stakes which Nomura [the analyst that he was discussing with my learned friend Mr Lingard] didn’t do.”

Elliott, and we heard something about trading plans, my learned friend Ms Snodgrass said that Professor Dow’s reliance on this was egregious. I don’t quite see how that could follow, given that these trading plans exist, show the discount to net asset value as calculated by Elliott at which Elliott intended to begin its investment, and also show the smallest discount at which they would have completely sold their investment. And there are three such trading plans in evidence at C–368 {C/368/1}, C–374 {C/374/1} and C–684 {C/684/1}.

But, leaving the categorisation of those to one side, you can see from those trading plans that Elliott calculated the discount from the traded price to its net asset value as being the difference between the traded price and the net asset value after tax.

We’ll come on to how this affects Mr Boulton, but you can see from the simple arithmetic, it is an equivalent to 14.6% of the gross net asset value.

You will recall that with Mr Boulton we went back to gross up Elliott’s net asset value calculation Figure for tax. When you do that, you arrive at a Figure, and taking the January trading plan, which was C–368 {C/368/1}, the net asset valuation is a gross Figure, having grossed up for tax, of 111,232 Won per share.

The tax that has been deducted was 16,266 Won per share, which implies a tax deduction of 14.6%.

Now, obviously the precise numbers vary from valuation to valuation because the calculated profit on those investments would differ, but the principle is important.

The point is that Mr Boulton doesn’t do this. He takes a discount of at most 15% using a net asset value that includes the gross figures for the listed investments. And we can see from that simple calculation, looking at Elliott’s net asset value, that the most that Mr Boulton’s highest discount does is take account of the tax liability. In other words, he is attributing no discount at all for governance issues or any other issues.

We say that is highly implausible. You need to be aware of that when you are considering the plausibility of Mr Boulton’s evidence.

Now, if we look at slide 44, this is also from Professor Dow’s presentation, his slide 34, and you can see the effect on the chart where he puts a range of figures for the NAV discounts that one sees in South Korea, and the Elliott figures translate into the light green bars.

You can see that the Elliott figures go up from a discount of between 32.8 and 44.6%, to 42.5 and 52.1% respectively. In other words, those were the discounts,
1. grossed up, therefore on an equivalent basis to
2. Mr Boulton, that Elliott was observing in the market.
3. We showed by conducting the same exercise with
4. Mr Boulton that grossing up his numbers implied
5. a discount of at least 32.8%; {Day7/141:20} to
6. {Day7/142:6}.
7. In so doing, we are not accepting that his net asset
8. valuation is right, and we aren’t accepting that 32.8%
9. is the right discount. We are simply showing that
10. mechanically his own figures, taking a discount of 20%
11. on an Elliott basis, ie after tax, is equivalent to
12. a discount to his number of 32.8%. And I remind the
13. tribunal that in Elliott’s trading plans the lowest
14. Figure for a discount was 20%.
15. They never forecast the gap narrowing further. We
16. say that 20% is extremely low in any event, but if you
17. take a 20% discount on after—tax NAV, you have, taking
18. Mr Boulton’s numbers, a 33% discount mechanically.
19. Sticking with this slide 44, you also see
20. Mr Boulton’s comparables in the purplish bars on the
21. right.
22. Now, these are the figures that Professor Dow
23. calculated from Mr Boulton’s list of comparable
24. companies, having taken the outliers out. You remember
25. that some of Mr Boulton’s comparables showed holding

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1. company premiums rather than holding company discounts.
2. And what Professor Dow did was to take those out as
3. outliers, because, with them in, the mean and the median
4. were very far apart.
5. These figures here are after that adjustment.
6. But let me remind you that Mr Boulton himself
7. calculated a median with what he himself considered to
8. be the unusual companies with premiums of 35.5% median
9. discount, and he quite properly accepted that the median
10. is to be preferred over the mean, simply because it
11. accounts for any difference that is caused by outliers
12. and we see that on slide 45.
13. If we go back to slide 44, and we look at the
14. left—hand side of the graph, we see the two companies
15. that Professor Dow looked at in his first report, namely
16. SK, about which we’ve heard a great deal because of its
17. involvement in a merger, and LG. Both of those
18. companies, and we saw this in the annexes to
19. Professor Bae’s report —— I won’t take you to it this
20. afternoon —— which have a clean holding company
21. structure, at least clean by reference to the spaghetti
22. diagram of the Samsung structure before the merger, we
23. see that both trade at very substantial discounts to net
24. asset value indeed.
25. It’s particularly interesting to see that for SK

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1. because, as we know, the SK merger that was put forward
2. by that particular Chaebol was one that the NPS voted
3. against.
4. Just to put this in context, and Mr Lingard has
5. explained that we do in fact contest the realism of
6. Elliott’s restructuring plan at C—380 (C/380/1), but as
7. we understand it, what Elliott was seeking to do,
8. realistically or unrealistically, was to make a more
9. conventional holding company structure for Samsung.
10. We look at the examples of SK and LG, which have
11. a more traditional holding company structure, and we see
12. that there is no magic bullet in so doing that would
13. result in the discounts disappearing, which is what
14. Mr Boulton says it would once you account for tax.
15. So Mr Boulton says, and the Claimant adopts as its
16. case, that the day after the merger the share price of
17. SC&T, had the merger been rejected, would have
18. skyrocketed.
19. This is wholly implausible on at least three levels.
20. The first is the persistence of the discount, which
21. I have just taken you through.
22. The second is, as we said in our defence at
23. paragraph 1, and the exhibit number is R—88 (R/88/1),
24. the relevant regulations at the time in any event
25. prevented a more than 15% movement on the Korean Stock

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1. Exchange in any stock on any day.
2. The third is that if you wake up on the Saturday
3. morning, after the merger, and you postulate that the
4. merger has been rejected on the Friday, nothing has
5. changed. Samsung’s spaghetti junction structure is the
6. same. The governance of the Samsung Group is the same.
7. The incentives on are the same. The regulatory
8. environment that gives rise to mergers at market prices
9. and the way in which the courts interpret that, all of
10. that is the same.
11. Mr Boulton had not taken into account, when he
12. prepared his opinion, that not everybody who was against
13. the merger thought that the price would skyrocket.
14. Indeed, far from that. And if we look at slide 46, we
15. see Mr Boulton’s acceptance that we were right to point
16. out to him that ISS in their report at C—30 (C/30/1) had
17. predicted that if the merger did not go through, there
18. would be a short—term downside of as much as 22.6%.
19. We also know that in the counterfactual world, and
20. whatever the valuation date may be —— and I just add, in
21. complement to the submissions I made earlier about the
22. significance of the valuation date that, if that is
23. being changed again, submissions would be needed and we
24. would he have a word to say about that.
25. But that apart from Mr Boulton, nobody else can
predict the magnitude of any increase in the share price. Certainly Professor Milhaupt could not, as we see on slide 47:

“Question: ... just to make sure I have your response ... you have not considered the magnitude of that immediate reaction in the stock price?

“Answer: That’s correct.

“Question: Would you expect it to effectively be doubling the stock price overnight, Professor?

“Answer: I have undertaken no effort to gauge or to measure the magnitude ... Mr Boulton is the evaluation expert.”

Here again, I submit to the tribunal, Mr Boulton knows better than the Korea experts.

Sir, that brings me to slide number 48, and I would like to spend a moment or two with the tribunal going through a number of numbers. Let me explain this slide to the tribunal.

Yesterday, at [Day8/218:15–23], Mr Garibaldi asked a question that related to the price of SC&T shares before the leak of the NPS’s decision to vote in favour of the merger.

In the light of that question we have compiled the following table.

The first line of this table shows the average price paid by Elliott: 61,621 Won a share.

We have broken the receipts down into two lines and I will explain in a moment why.

The first line is the price received by Elliott for the 7,732,779 shares bought before the merger announcement. These are the shares that are subject to the buyback right and that were the subject of the buyback price appraisal litigation, including the decision of the Seoul High Court at C–53 which we will come on to [C/53/1].

The third row is the average price per share that Elliott received for the 3,393,148 shares bought after the merger announcement.

Those two are added together as being -- or are averaged out as being the receipt price that is deducted from the average price per share to give the trading loss in SC&T shares as we’ve discussed already.

The next row or line is the market price on 10 July 2015. This was a Friday. It was the day on which the Investment Committee met to decide how to vote on the NPS’s shares in SC&T. As we have seen, from my learned friend’s Reply at paragraph 147(f) and exhibit R–131 [R/131/1], that decision was leaked therefore to the market the next day, the Saturday morning, at 05.48 on 11 July 2015.

So the price on 10 July is unaffected because that decision had not been made, let alone leaked. And that price is 64,400 Won per share.

The valuation date price, interestingly, several days, of course, after the market knew that the NPS was going to vote in favour of the merger, is 5,000–odd Won higher at 69,300 Won. So that’s another number.

The market price determined by the Seoul High Court in the buyback litigation is in the next line. It is 66,602 Won per share.

And I pause there because this ties in with the answer given by my learned friend Ms Snodgrass to Mr Thomas’ question just before lunch about when it is said that Samsung began to do bad things to the SC&T and Cheil share prices. And I say bad things not in a flippant way, but because we know there are two categories of things that could be done, one of which, tunneling, is priced in because the market knows it is likely to go on and does go on, and one of which, manipulation, is not priced in because it isn’t known.

My learned friend, in answer to the learned arbitrator Mr Thomas, said that the earliest on which that could be said to have begun is November 2014 with the famous listing of Samsung SDS that gave rise to the difficulty in the perceived discount in Elliott’s net asset value models, and the listing of Cheil in December 2014.

It is the latter that was taken by the Seoul High Court as being a relevant date that removes all influence of the merger from the price. And that is why it went back and applied the statutory formula to the period leading up to the date of Cheil’s listing, and it arrived, applying that formula, at a price of 66,602 Won a share.

I pause there to make the point that my learned friend also referred to in our opening submissions: if that price is upheld by the Korean Supreme Court, under the terms of the Settlement Agreement between Elliott and Samsung, Elliott, although no longer party to the buyback price litigation, will get the benefit of it.

And that would be some 72.4 billion Korean Won.

We will deal with this in our written submissions, but a way needs to be found in order to ensure that if the tribunal were to award any damages to Elliott, that there could be no double recovery.

But as I say, I’ll deal with that further in written submissions.

Yes, sir?

MR GARIBALDI: Before you turn to the next slide, because you did me the honour of attempting to answer my
...
allegations in this proceeding, evidentiary value or
otherwise, of those allegations in this proceeding, or
the value in this proceeding of the evidence, if any, on
which those allegations are made to the extent that that
evidence may be made available to us.
I want to make that absolutely clear, so that my
remarks, which you have used twice, are not
misinterpreted.
Now, going to the substance of your closing
argument, two areas.
I am still confused about your position on
causation. I thought that that had been clarified to
some extent in answer to my questions after your opening
statement, but now certain statements that you make, you
have just made, again introduce this source of confusion
in my mind.
So I understand the argument being that there is no
evidence or not sufficient evidence to prove a causal
relationship between A and B. But that is one thing,
and that is understandable. That is a question of fact.
Another different question is to say that there is no
causal relationship between A and B because B could have been caused by something else.
Let me give you an example. Mr Partasides asked
a question, made an example in referring to this topic,
but I’ll give you a different one, which I think
clarifies the matter in my mind better.
To take an example based on a recent case, let’s
suppose that the armourer in a movie set gives a loaded
gun to an actor. The actor shoots the gun and kills
another actor.
Now, one thing is to say that the armourer caused
the death of the victim. Another thing is to say that
there is no sufficient evidence to prove that there was
intent or that that armourer was the person who loaded
the gun or all sort of issues of fact of that kind.
A different thing is to say that there is no
causation because the actor who shot the other actor
could have on his own decided to shoot the other actor.
That, I think, is a theory of causation that I don’t
understand. And you may not mean this theory of
causation, but some of your statements suggest that to
my mind, and I hope that that is clarified in the
written submissions.
Now, let me turn to the last question I have.
The Republic of Korea has put a lot of emphasis on
a defence of assumption of risk. The argument has been
mostly factual and my question is a legal question.
We all know that assumption of risk is an
affirmative defence, at least in American common law of
torts, but I would like to know: what is the legal basis
in the Treaty and/or in customary international law as
defined in the Treaty for the proposition that
assumption of risk is an affirmative defence under
international law, either as a factor that precludes the
unlawfulness of the action, or otherwise.
I’m not looking for an answer which consists of
a sound bite, like, for example, Maffezini v Spain.
Maffezini is not a legal theory. Maffezini is a sound
bite.
I would like to know what the real legal basis is
for this proposition.

Thank you.

MR TURNER: Sir, I understand that you are expecting us to
deal with these points in our written submissions and
they will be. I thought I would just clarify very
quickly on your second point — your first point is well
taken, sir, and thank you for the clarification.
I don’t think there was any misunderstanding, but in any
event, the clarification is on the transcript.
On the second, sir, I think one needs to distinguish
between causation of liability and causation of damages.
It was to the latter that we were addressing our
remarks, and I think that should set your mind at, at
least, more ease, to understand what our position is,
but we will clearly develop that further. There’s no
time now for us to develop that further this afternoon.

MR THOMAS: I just had a factual question, perhaps two.
Would you go back to slide 10 of your presentation,
please. Sorry, it’s ... (Pause)
The question I had, and it may be that the record
has not really been developed in this area because of
the relatively later emergence of Cheil as an issue, but
the internal Elliott email speaks of the view that the
NPS has a 13% shareholding of Samsung C&T and is
currently not a shareholder of Cheil Industries,
and I guess the question I had is: is there any evidence
on the record as to when the NPS began to acquire shares
in Cheil?

MR LINGARD: As I sit here, Mr Thomas, I’m afraid I cannot
give you an answer. But we shall undertake to provide
one in writing. In other words, as to whether this
statement in exhibit R—252 (R/252/1), that at this date,
February 18, the NPS was not a shareholder in Cheil,
whether that statement is correct and, if it is, when it
became a shareholder. We will check the record
thoroughly and come back with an answer in writing, if
we may.

MR THOMAS: Just a supplementary to that, and this is a more
general question of the operation of the Korean capital
Mr Lingard: The short answer again, for supplementing in writing, the short answer is: at a certain threshold. Disclosure is required once a certain shareholding threshold is met, and there has been a dispute about, for example, whether the Claimant complied with those disclosure obligations upon the acquisition of a certain threshold. And again, we can provide more detail on that in writing. But the short answer is yes, once the shareholding reaches a certain threshold.

Mr Thomas: I’m interested not only in the Claimant; I’m interested in the NPS as well.

Mr Lingard: Of course.

Mr Thomas: Thank you.

The President: I have two questions, both of which I should have asked earlier, so apologies in advance.

Can we go back to your slide 7. It’s sort of loosely related to what you say there about there being discussion about Everland, as Cheil was known back then, to become the ultimate owner of shares in any Samsung holding company. That was of course several months before Cheil was listed.

My question is simply whether there is anything in the record about when Cheil was listed in December 2014, any type of disclosure about what its business plans were, why it was being listed, what was the purpose of the listing at the time. It would assist us if you point to — you don’t need to do it now, it might take a while to find — whether there’s anything in the record about the purpose of that listing.

Of course, NPS may have started buying their shares earlier, but it would assist the tribunal to understand that, what was the purpose of the listing in the longer term or mid-term, and there may be something on that in the decision of the Seoul High Court on the appraisal litigation. But that is in a sense a question to both — or a request to both parties.

A second question is that I should have put actually earlier to the Claimant. It is proposition 4 on page 2 of your slides. This is the comment that I understand put Mr Turner — or disposed Mr Turner of his ability to speak.

It would help the tribunal also if you could clarify in your written submissions as to what the Claimant’s theory is, whether this means an adjustment in the Claimant’s position on the valuation date or whether this simply goes to another question which is the basis of the valuation, rather than the valuation date.

I understood you were talking about the basis of the valuation date, but perhaps it should have been clarified.

So these two comments are more — we don’t expect that you need to address them now. It would be helpful if you addressed them in your written submissions, just to make sure that you have a full opportunity to make sure that the tribunal understands what your position is.

I think that brings the closing statements to an end, although we are opening a new phase in the proceedings. So that’s not too far off.

So, unless there’s something else from my colleagues, we could go back to more interesting issues of housekeeping and try to agree on the steps going forward.

The President: There are several items and maybe we start in an order of logical priority about the post-hearing submissions.

We asked the parties to confer and see whether you can agree on the timing, length, and whether one or two rounds would be sufficient. If there is anything that has been agreed, it would be good to know.

Mr Partasides?
I suggest we leave the more mundane issues of everybody, that is certainly fine with the tribunal. I think you would want to be addressed on potential corrections to transcript and redactions for a later date. There are a few other issues we will communicate through the PCA logistical issues relating to the availability of the Opus database. It would be helpful if that would remain available for the tribunal and the PCA for at least some time after the hearing. It’s quite helpful and we’ll organise —— maybe we can revert to that through the PCA in the coming days. Anything else that either party would like to raise before we close?

MR PARTASIDES: Only to thank our friends opposite and the tribunal, as I said earlier today, for strong opposition and great attention from the tribunal. We’re very grateful.

MR TURNER: Seconded, of course, sir, and I add our thanks, and I’m sure those of my learned friends to the court reporters and to the representatives of the PCA.

Everything has gone extremely smoothly, and just so far as the court reporters are concerned, I imagine that any corrections to the transcript will be minimal. It has been, as we’ve been working through it every evening, very good indeed as a first cut.

So I echo everything my learned friend has said.

THE PRESIDENT: Thank you very much. Then it just remains for the tribunal to thank the parties, counsel, for a very constructive hearing over the last two weeks.

I trust I can speak on behalf of my colleagues when I say that the tribunal has been greatly assisted by the exceptionally high level of advocacy on both sides. It’s rare that issues are equally crystallised at the end of the hearing as they are now. Both parties are in good hands.

Of course, we also want to thank the court reporters, the interpreters, the technical people, as well as the PCA for the hard work over the last two weeks. Now that the holiday period is approaching, the tribunal wants also to give something back to the parties. That will be in the form of questions to be addressed in your post-hearing briefs. I believe they are fresh from the oven as we speak.

So again to repeat, these are not exhaustive and they are not intended to prevent the parties from addressing all the issues that you feel you need to address in your post-hearing submissions.

As you will see, these are mostly questions that seek to clarify some of the issues that have been debated and nothing should be read into these questions in terms of decisions that have already been —— would already have been taken. There are no decisions taken on these issues. The tribunal will deliberate. We have had preliminary discussions but we have not reached
final conclusions on these points, the points that are
raised in these questions. Just to make it clear, the
tribunal’s minds remain open to be persuaded otherwise
through your written submissions.

With all that, thank you very much all and safe
travels home for those who will be travelling. Not all
of us will be. But some will. Most of you will. Thank
you very much, and enjoy the weekend.

(3.25 pm)

(The hearing concluded)