

IN THE MATTER OF AN ARBITRATION UNDER THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA AND THE UNCITRAL ARBITRATION RULES

PCA Case No. 2018-55

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In the Matter of Arbitration Between: :

MASON CAPITAL L.P. and MASON MANAGEMENT LLC, :

Claimants, :

and :

THE REPUBLIC OF KOREA, :

Respondent. :

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HEARING ON PRELIMINARY OBJECTIONS, Volume 2

Thursday, October 3, 2019

New York International Arbitration Center  
150 East 42nd Street  
17th Floor Conference Room  
New York, New York

The hearing in the above-entitled matter came on  
at 9:35 a.m. before:

PROFESSOR DR. KLAUS SACHS, President of the Tribunal  
THE RT. HON. DAME ELIZABETH GLOSTER, Co-Arbitrator  
PROFESSOR PIERRE MAYER, Co-Arbitrator

Also present:

Registry and Administrative Secretary to the Tribunal:

DR. LEVENT SABANOULLARI

Assistant to the Tribunal:

MR. MARCUS WEILER

Court Reporter:

MR. DAVID A. KASDAN

Registered Diplomate Reporter (RDR)

Certified Realtime Reporter (CRR)

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Interpreter:

MS. WANSOO SUH

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P R O C E E D I N G S

ROLF LINDSAY and RACHEL REYNOLDS,

CONFERENCEING WITNESSES CALLED

PRESIDENT SACHS: So, good morning, ladies and gentlemen, Day 2 of our Hearing on Preliminary Objections.

Today, we will hear the Experts Reynolds and Lindsay.

In front of you is a declaration, or should be a declaration, that we would ask you to read aloud.

THE WITNESS: (Ms. Reynolds) I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT SACHS: Thank you, Ms. Reynolds.

THE WITNESS: (Mr. Lindsay) I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT SACHS: Thank you, Mr. Lindsay.

Now, today, we will ask you questions in form of what we call "hot-tubbing"; that's to say you sit together, and questions will be put to the two of you. The Claimant will start with the questions and Respondent will follow. That was the agreement.

We thank you for your written expert reports that were submitted to the Tribunal. We appreciate that, to some extent, there is agreement between you, so obviously

1 we would like to focus today on the points of disagreement  
2 so that we can hopefully see clearer thereafter.

3 So, unless there are any housekeeping matters to  
4 deal with, and I see that there are none, we would invite  
5 the Claimants to start questioning the two experts.

6 MS. SALOMON: Thank you.

7 BY MS. SALOMON:

8 Q. Ms. Reynolds, my name is Claudia Salomon--

9 MR. VOLKMER: Apologies to interrupt so early, but  
10 there was going to be a presentation by the experts, at  
11 least by our expert.

12 MS. SALOMON: That was not agreed. We agreed to  
13 conferencing and questions. We didn't agree to any  
14 presentations.

15 MR. VOLKMER: Then that was a misunderstanding,  
16 but there was definitely always going to be a presentation  
17 of our expert.

18 MS. SALOMON: We can look back at the joint  
19 document, but I don't believe that's the case.

20 Can we take a moment off the record, please?

21 PRESIDENT SACHS: Yes.

22 So, off the record, David, please.

23 (Off the record.)

24 PRESIDENT SACHS: On the record.

25 MS. SALOMON: Members of the Tribunal, as ordered

1 by the Members of the Tribunal, the Parties met and  
2 conferred with regard to the proposed procedure for this  
3 Hearing, and we submitted a Joint Statement to the Members  
4 of the Tribunal as to how the procedure for the examination  
5 of fact witnesses and then also examination of expert  
6 witnesses would go, and we expressly stated that, for the  
7 conferencing of the Cayman Law Expert, subject to the  
8 Tribunal's preferences, the Parties had agreed on a  
9 particular procedure. That procedure originally had been  
10 proposed that the Parties would exchange a proposed list of  
11 questions, try to reach agreement on a joint list of  
12 questions to be submitted or, alternatively, separate lists  
13 if no agreement can be reached.

14 In the conference, the Tribunal will ask its  
15 questions first. They may choose to ask some or none. And  
16 then following the Tribunal's questions, the Claimants and  
17 then Respondent will have a brief period to ask their own  
18 questions to both experts. The Parties are not limited to  
19 the questions they originally proposed and may react and  
20 seek to clarify the evidence that has already been given.

21 There was no mention of any report by the Experts,  
22 and I can say that it's something that we had considered  
23 because sometimes it is appropriate for experts to give  
24 reports, and we did not think that was the case, or  
25 presentations because they have already submitted their



1 written reports. Then it is our understanding that when we  
2 had the pre-hearing telephonic conference, the Tribunal  
3 stated that they would like to revise this procedure and go  
4 directly to the Parties, asking questions of the Experts  
5 where the Claimants would go first and then Respondent, and  
6 then the Tribunal would ask any questions.

7           Again, during the pre-hearing telephonic  
8 conference, there was no mention whatsoever by the  
9 Respondent that there would be a presentation sought by  
10 their expert, and we, therefore, think it's inappropriate.  
11 We're confident that the Experts' views are going to come  
12 out in the context of the questions. We want to assure  
13 that all questions by the Tribunal with regard to the  
14 points of agreement and disagreement are clarified.

15           Therefore, we would request that we have the  
16 opportunity to certainly go directly into our questions;  
17 and then, if there's something that the Respondent wishes  
18 to have their expert clarify when it is their time, they  
19 would be given the opportunity to do so.

20           PRESIDENT SACHS: Thank you, Mrs. Salomon.

21           (Tribunal conferring.)

22           PRESIDENT SACHS: Yes, probably we will hear that  
23 from the Respondent.

24           MR. VOLKMER: Yes. Thank you, Mr. Chairman.

25           So, the e-mail that I believe counsel on the other

1 side was referring to was the proposed agenda with comments  
2 from the Parties for the pre-hearing conference call--

3 ARBITRATOR GLOSTER: Can you give us the date of  
4 that, please?

5 MR. VOLKMER: Yes. The date of that e-mail was on  
6 the 23rd of September.

7 ARBITRATOR GLOSTER: Thank you.

8 MR. VOLKMER: Now, the Procedural Order for  
9 season--Provision 2.7.3--the Procedural Order in Section  
10 7.3 says that there would be presentations by the Experts  
11 of 30 minutes, up to 30 minutes. The proposal that was  
12 discussed between the Parties was always to decide what  
13 would happen in lieu of cross-examination, which was  
14 foreseen after the presentation. So, when we had these  
15 discussions, it was not our understanding and not our  
16 agreement that we would dispense with the presentations,  
17 but only what would happen with the cross-examination bit  
18 of the Hearing.

19 PRESIDENT SACHS: So, we understand. So, there  
20 seems to be a disagreement more than--well, disagreement.  
21 If I may--

22 MS. SALOMON: Mr. Chairman, might I react?

23 PRESIDENT SACHS: Yes.

24 MS. SALOMON: Just one quick moment, which is that  
25 the timetable provided for the Hearing itself doesn't

1 allocate any time for presentations. One would expect  
2 that, had there been a plan to do so, that would have been  
3 built in, there would have been a discussion to have the  
4 presentations, and then the examination, and certainly  
5 that's not the case.

6           Again, of course, we want to assure that the  
7 Tribunal has all the information they need to address the  
8 Cayman Law issues.

9           PRESIDENT SACHS: Well, I think--well, there is a  
10 disagreement, and I think we must now handle the situation  
11 in a fair way. We note that you, Ms. Reynolds, have  
12 prepared a presentation whereas you, Mr. Lindsay, have not.  
13 So I would say--and I think I speak also in the name of my  
14 two colleagues--that since you're legal experts and since  
15 we're all lawyers and since we have read and studied your  
16 Reports, I think we could go directly to cross-examination.  
17 Of course, it would be helpful, in theory, to hear a  
18 presentation, but we would assume that, in your  
19 presentation, you would summarize what you already told us  
20 in writing, in your Reports, and, therefore, I would  
21 suggest--and please tell me if you are in agreement,  
22 colleagues--that we go immediately to cross-examination.

23           ARBITRATOR GLOSTER: I agree.

24           ARBITRATOR MAYER: I agree also.

25           PRESIDENT SACHS: But during the

1 cross-examination, if you feel the need to expand, then, of  
2 course, you are invited to do so, but keep in mind that we  
3 studied carefully your Reports and that we are lawyers and  
4 that we understood your positions. I just want to make  
5 sure that we understand your points of disagreement.

6 Okay. So, please proceed.

7 MS. SALOMON: Thank you.

8 CROSS-EXAMINATION

9 BY MS. SALOMON:

10 Q. Ms. Reynolds, my name is Claudia Salomon--I am  
11 counsel for Claimants here--and, as agreed between the  
12 Parties, I will have the opportunity to ask both Experts  
13 questions first. And then, after I am finished with my  
14 questions to both Experts, then Korea's counsel will have  
15 the opportunity to ask you both questions.

16 I first want to focus on the background of both  
17 Experts.

18 Ms. Reynolds, does your practice focus on the  
19 formation of investment funds and their activities?

20 A. (Ms. Reynolds) My practice involves disputes  
21 concerning Limited Partnership Agreements, formation, any  
22 vehicle related to investment funds or, say, trust  
23 vehicles, so both trust and investment funds. I head up  
24 the litigation practice for Ogier, globally, and, in my  
25 practice, I tend to specialize in investment fund disputes

1 because that's the large part of what Cayman does.

2 Q. And you're a member of the firm's restructuring  
3 and insolvency group and trust advisory groups as well?

4 A. (Ms. Reynolds) That's right.

5 Q. Okay. Mr. Lindsay, does your practice focus on  
6 the formation of investment funds?

7 A. (Mr. Lindsay) Yes.

8 Q. And can you describe your practice a bit?

9 A. (Mr. Lindsay) We have an investment funds  
10 practice, which is based in the Cayman Islands. I am the  
11 partner principally responsible--

12 COURT REPORTER: Keep your voice up, please.

13 THE WITNESS: (Mr. Lindsay) Certainly.

14 I'm the partner principally responsible for  
15 matters in relation to particularly Partnerships within the  
16 context of that practice. I've led that part of the  
17 practice for some 10 years now.

18 BY MS. SALOMON:

19 Q. Ms. Reynolds, are you recognized or recommended in  
20 any of the well-established directories, Chambers, Legal  
21 500 or Who's Who in the category of investment funds?

22 A. (Ms. Reynolds) In dispute resolution regarding  
23 investment funds, yes.

24 Q. Is there a specific category for dispute  
25 resolution in investment funds or broadly in dispute

1 resolution?

2 A. (Ms. Reynolds) There is a category for dispute  
3 resolution.

4 Q. And have you ever established an Exempt Limited  
5 Partnership?

6 A. (Ms. Reynolds) No. I litigate in relation to  
7 investment funds.

8 Q. Right.

9 And have you ever drafted an Exempt Limited  
10 Partnership Agreement?

11 A. (Ms. Reynolds) No. I analyze them on a regular  
12 basis, but I have never drafted one.

13 Q. Mr. Lindsay, are you recognized or recommended by  
14 any of the well-established directories in the category of  
15 investment funds?

16 A. (Mr. Lindsay) Yes, I am.

17 Q. And do you know what that category is?

18 A. (Mr. Lindsay) I have the higher recommendations  
19 available in most of the recognized directories.

20 Q. And have you ever established an Exempt Limited  
21 Partnership and, if so, can you estimate about how many?

22 A. (Mr. Lindsay) It would be in the thousands.

23 Q. And is that estimate of thousands the same for the  
24 number of Exempt Limited Partnership Agreements you've  
25 drafted?

1           A.     (Mr. Lindsay) Drafting--the drafting of  
2 Partnership Agreements tends to be done in conjunction with  
3 offshore counsel, U.S. counsel, Asian counsel, so it's a  
4 collaborative process; but yes, I've collaborated on the  
5 preparation of that many Partnership Agreements.

6           Q.     And I understand the law on Exempt Limited  
7 Partnerships was comprehensively redrafted in 2013.

8                     Ms. Reynolds, were you involved in the drafting of  
9 the new ELP Law?

10          A.     (Ms. Reynolds) I was aware of it, and a member of  
11 my firm was involved in the process. It was something we  
12 talked about quite regularly. Some of the issues that were  
13 there in the original version were sorted out. We'd  
14 identified to our committee a number of issues that we saw  
15 at that time, and those were rectified in the new version.  
16 We were part of that process, yes.

17          Q.     And were you, yourself, selected to be on the  
18 committee to draft the law?

19          A.     (Ms. Reynolds) I'm on other committees, the  
20 Financial Services Division, particularly. One of the  
21 areas I sit on, the Drafting Committee, is how one deals  
22 with financial services in the Cayman Islands and issues  
23 with the regime generally.

24          Q.     And, Mr. Lindsay, were you involved in the  
25 drafting of the new ELP Law, and if so, what was your role?

1           A.     (Mr. Lindsay) Yes, I chaired the Committee that  
2 drafted the new law.

3           Q.     Thank you.

4                     Now I want to turn to the use of ELPs, which will  
5 sometimes be referred to as "Partnerships."

6                     The Exempt Limited Partnership structure at issue  
7 in this arbitration that Mason has--is commonly used  
8 investment firm structure; isn't that right, Ms. Reynolds?

9           A.     (Ms. Reynolds) Yes.

10          Q.     And you're in agreement?

11          A.     (Mr. Lindsay) Yes, yes.

12          Q.     And the Cayman Exempt Limited Partnerships are  
13 commonly used by hedge funds and private equity firms from  
14 the U.S. and from Asia; correct?

15          A.     (Ms. Reynolds) Yes. It's something we see often.

16          Q.     And, Mr. Lindsay, you're in agreement?

17          A.     (Mr. Lindsay) That is correct, yes.

18          Q.     Ms. Reynolds, do you know what percentage of hedge  
19 funds use Cayman ELPs?

20          A.     (Ms. Reynolds) Globally or just in the Cayman  
21 Islands?

22          Q.     Globally?

23          A.     (Ms. Reynolds) Well, the Cayman Islands has a high  
24 proportion, and a high percentage of the ones that I see in  
25 my practice are Partnerships. Across my desk I see roughly



1 50:50, whether it's corporate entities or it's Exempt  
2 Limited Partnerships.

3 Q. Mr. Lindsay, can you comment on the use of Cayman  
4 ELPs by hedge funds and private-equity funds globally? Who  
5 is using them and about what percentage of funds are using  
6 them globally?

7 A. (Mr. Lindsay) Certainly.

8 In the hedge fund context, about 49 percent on our  
9 numbers earlier this year, about 49 percent of hedge funds  
10 are formed in Delaware. About 44-45 percent are formed  
11 used Cayman Islands structures globally. Of those hedge  
12 funds, a significant portion used Exempted Limited  
13 Partnerships, particularly in relations to the master fund  
14 aspect of a hedge fund structure. The sort of structure  
15 that we have today is extremely typical.

16 In terms of the people that use those structures  
17 for hedge funds, the hedge funds are formed in the Cayman  
18 Islands by managers based in London, in particular from a  
19 European perspective, and then all across North, Central,  
20 and South America and across the Asian region, the Cayman  
21 Islands structure would be the default structure used in  
22 those jurisdictions.

23 Q. And this structure is often used where funds are  
24 ultimately sourced from entities which are exempt from U.S.  
25 tax; is that correct, Ms. Reynolds?

1           A.     (Ms. Reynolds) Used for a number of reasons, but  
2 typically an onshore feeder and an offshore feeder, and  
3 it's used because people need to invest through a normal  
4 onshore.

5           Q.     And the structure is not used to evade taxation;  
6 isn't that right?

7           A.     (Ms. Reynolds) Well, that's not the purpose of the  
8 Cayman vehicle, no.

9           Q.     And, Mr. Lindsay, do you have any further comments  
10 on that issue?

11          A.     (Mr. Lindsay) No, that's absolutely right.

12                 So, the Investors into the Cayman part of the  
13 structure, it's no surprise that the numbers come out just  
14 about even between Cayman and Delaware because you do often  
15 see a side-by-side structure. The investors into the  
16 Cayman Islands structure will, as you say, be not liable to  
17 U.S. tax in the ordinary course. So, U.S. taxable  
18 investors would invest into the U.S. structure and then  
19 tax-exempt investors from the U.S. and then international  
20 investors who have no tax relationship to the U.S. would  
21 invest in Cayman and then be taxed in their home  
22 jurisdictions in the ordinary course.

23          Q.     And, Ms. Reynolds, it's correct that the identity  
24 of the General Partner of an Exempt Limited Partnership is  
25 not a secret.

1 A. Yes, of course.

2 Q. The identity of a General Partner of an Exempt  
3 Limited Partnership is not a secret. It's a matter of  
4 public record; isn't that right?

5 A. (Ms. Reynolds) Yes.

6 Q. Mr. Lindsay?

7 A. (Mr. Lindsay) Yes, that's correct.

8 Q. I think it's uncontroversial, but would like it  
9 stated on the record that the Experts are in agreement that  
10 an Exempt Limited Partnership does not have a separate  
11 legal personality or capacity under Cayman Law; is that  
12 correct, Ms. Reynolds?

13 A. (Ms. Reynolds) That's certainly correct. There  
14 are certain aspects of a Partnership where--and it has  
15 features which make it akin to a commercial corporate  
16 structure. So, for example, it's possible for the  
17 Partnership to enter into a transaction with its own  
18 Partners; it's possible for a Partner to be a Partner of a  
19 Partner, as it were.

20 So--but, technically and legally, it's not a  
21 separate legal entity.

22 Q. Mr. Lindsay, can you comment on that?

23 A. (Mr. Lindsay) Yes, that's absolutely correct. It  
24 has no separate legal personality.

25 Q. And I also believe the next question I have is

1 uncontroversial, but wish to have confirmation on the  
2 record: That as a matter of Cayman Law, the General  
3 Partner was the legal owner of the Samsung Shares; isn't  
4 that right, Ms. Reynolds?

5 A. (Ms. Reynolds) Well, I think that may be a  
6 question for Korean law, but to the extent that the General  
7 Partner or the Partnership has an asset, it's deemed to be  
8 held on trust by the General Partner.

9 Q. As a matter of Cayman Law?

10 A. (Ms. Reynolds) Well--

11 Q. My question--my question is specifically on Cayman  
12 Law. As a matter of Cayman Law.

13 A. (Ms. Reynolds) Well, Cayman Law would defer to the  
14 Law of Incorporation to determine who owns shares. So, if  
15 we're talking about Korean shares, then we would refer to  
16 the law of Korea as to who owns them.

17 But as a matter of if this were a Cayman company  
18 and we're talking about shares in a Cayman company,  
19 absolutely correct that it would be--any assets held by the  
20 Partnership is deemed to be held on trust by the General  
21 Partner.

22 Q. What is the basis--what specific Cayman Law are  
23 you referencing to make the assertion you're now making  
24 that the legal ownership of the Shares would be determined  
25 by Korean law and not Cayman?

1           A.     (Ms. Reynolds) It's common law. It's referred to  
2 in Dicey and Morris. It's a well-known principle that  
3 you--where there's a foreign company, you defer to the law  
4 of incorporation.

5           Q.     Why didn't you deal with that in your Report?

6           A.     (Ms. Reynolds) I wasn't asked that. I wasn't  
7 asked to deal with that in my Report.

8           Q.     Mr. Lindsay, can you address this issue?

9           A.     (Mr. Lindsay) That slightly confuses the point.

10                   The point is--the point that Dicey and Morris  
11 makes is about whether the Shares are owned--if the  
12 analysis is that the Shares are owned by the Partnership,  
13 then the legal title to those Shares is determined as a  
14 matter of Cayman Islands law. It's a noncontroversial  
15 point of international law.

16                   It cannot be correct to say that the Partnership  
17 owns anything because the Partnership has no legal  
18 personality. If the analysis under Korean law is that the  
19 Shares are conveyed to the name of the Partnership, then  
20 our law is quite specific on how we deal with those sets of  
21 circumstances, and we say specifically--this is not  
22 controversial--it's in both experts' evidence--that assets  
23 conveyed in the name of the Partnership are held by the  
24 General Partner.

25                   PRESIDENT SACHS: May I interject?

1 THE WITNESS: (Mr. Lindsay) Yes.

2 PRESIDENT SACHS: You didn't mention the words "in  
3 trust," "on trust," which your colleague read us mentioned  
4 those words in your questions--

5 (Overlapping speakers.)

6 THE WITNESS: Sorry, sorry.

7 PRESIDENT SACHS: I thought reading your Reports  
8 that you both agree that the General Partner owns the  
9 assets on trust for the Exempted Limited Partnership.  
10 Could you both agree with that?

11 THE WITNESS: (Mr. Lindsay) That's correct.  
12 That's in accordance with the express provisions of the  
13 law. The question was in relation to who holds legal title  
14 to the Shares, and legal title to the Shares is held by the  
15 General Partner.

16 THE WITNESS: (Ms. Reynolds) The full picture is  
17 it's a statutory trust that's created and so, to the extent  
18 they do own the legal title, by necessity it has to be held  
19 on trust.

20 THE WITNESS: (Mr. Lindsay) That's correct.

21 PRESIDENT SACHS: Okay.

22 THE WITNESS: (Mr. Lindsay) On trust--the full  
23 sentence is on trust for the benefit of the Partners, and  
24 that is all of the Partners.

25 PRESIDENT SACHS: And the words "for the benefit

1 of the Partners," is that in the law?

2 THE WITNESS: (Mr. Lindsay) It is on trust for  
3 benefit of the Exempted Limited Partnership, and the  
4 Exempted Limited Partnership is the Partners and their  
5 contractual and statutory relationships that persist.

6 ARBITRATOR GLOSTER: Am I right--and I'm  
7 addressing this question to both of you--that under Cayman  
8 Law there is a distinction recognized between legal title  
9 and beneficial interest?

10 THE WITNESS: (Ms. Reynolds) Yes.

11 THE WITNESS: (Mr. Lindsay) Yes.

12 ARBITRATOR GLOSTER: And am I right that, under  
13 Cayman Law, the General Partner, as a matter of Partnership  
14 Law, has to have the legal title?

15 THE WITNESS: (Mr. Lindsay) That's correct.

16 ARBITRATOR GLOSTER: --vested in it--

17 THE WITNESS: (Ms. Reynolds) Yes.

18 ARBITRATOR GLOSTER: --to any asset?

19 THE WITNESS: (Ms. Reynolds) Yes.

20 ARBITRATOR GLOSTER: And, as I understand both  
21 your evidence, you both agree with that proposition, and  
22 you also agree that the beneficial interest, although  
23 however you want to define it, is held on trust for  
24 the--the property is held on trust for the benefit of the  
25 General Partner and the Limited Partner in accordance with

1 their entitlement under the relevant Partnership deed.

2 THE WITNESS: (Ms. Reynolds) Exactly.

3 THE WITNESS: (Mr. Lindsay) That's correct, yes.

4 ARBITRATOR GLOSTER: And therefore, since the  
5 Partnership as such has no separate personality, which you  
6 both agree, it's a bit of a fudge to say that the asset is  
7 held on trust for the Partnership because there is no such  
8 thing. What that really means is on trust for the General  
9 Partner and the Limited Partner in accordance with whatever  
10 their interests are under the Partnership Agreement.

11 THE WITNESS: (Ms. Reynolds) Yes.

12 THE WITNESS: (Mr. Lindsay) That's exactly right.

13 ARBITRATOR GLOSTER: And you both agree about  
14 that. Thank you, that clarifies my view.

15 MS. SALOMON: Mr. Chairman, I would like to get to  
16 the whole issue of on trust in more detail as well in just  
17 a moment to further address the question that you raised.

18 PRESIDENT SACHS: Yes, please.

19 BY MS. SALOMON:

20 Q. Just with regard to the issue of legal ownership,  
21 as Dame Gloster noted, Ms. Reynolds, in Paragraph 9 of your  
22 Report, you concede, indeed, in your Report that the  
23 General Partner was the legal owner of the Samsung Shares;  
24 isn't that right?

25 A. (Ms. Reynolds) Well, I think for a while it was.



1 So, to the extent it is the owner--and I can't speak to  
2 whether they own the Samsung Shares or not--that's going to  
3 be a question for law of incorporation. What I can say is  
4 to the extent that they own the Shares, they're deemed to  
5 hold them on trust for the Partnership.

6 Q. Let's take you to Paragraph 9 of your Report. You  
7 don't have any language of "to the extent" they are the  
8 legal owner under Cayman Law. You don't qualify that. You  
9 say in your clause expressly: "While the General Partner  
10 was the legal owner of the Samsung Shares."

11 A. (Ms. Reynolds) Can I take you to Paragraph 6 where  
12 I say "I understand that the Partnership acquired Shares in  
13 Samsung, and I understand the Partnership sold the Samsung  
14 Shares." So, I've made it clear the basis of my  
15 understanding, and therefore what I go on to say in nine is  
16 based on that understanding and clearly my Report is based  
17 on that understanding. If they were the owner, they hold  
18 them in trust, so it's consistent.

19 Q. So, the word "while" in your Paragraph 9 is during  
20 the time the General Partner was the legal owner of the  
21 Samsung Shares, then you qualify it held the Samsung Shares  
22 on trust?

23 A. (Ms. Reynolds) It's a way of saying whilst. So,  
24 to the extent, if in the event that, whilst, so while they  
25 may have their legal ownership of the Shares, they hold

1 them on trust. That's really all I was trying to get to in  
2 that paragraph.

3 Q. There is no dispute--and I think it's clear--that,  
4 as a matter of Cayman Law, the General Partner is, indeed,  
5 the legal owner--

6 A. (Ms. Reynolds) Correct.

7 Q. --of the Samsung Shares; correct?

8 A. (Ms. Reynolds) Well, I would not speculate about  
9 who the legal owner of the Samsung Shares were. What I'm  
10 saying is, to the extent that Korean law, or whichever  
11 asset we're talking about, the local law of incorporation,  
12 if they determine that someone holds it, all I'm saying is  
13 as a matter of Cayman Law, that asset is held on trust for  
14 the Partnership.

15 Q. Mr. Lindsay, can you comment, please?

16 A. (Mr. Lindsay) I think the point--we may be talking  
17 slightly at cross-purposes. I think this answers the point  
18 because if we look at Paragraph 6, I understand the  
19 Partnership acquired the Shares. What we're saying in  
20 Paragraph 9 of that Report and elsewhere in my Report is  
21 what that means from a Cayman perspective is, if the  
22 Partnership acquired the Shares, then those Shares are held  
23 by the General Partner.

24 Q. And the Shares are held by the General Partner  
25 because the Exempted Limited Partnership itself has no

1 capacity to hold title or otherwise own assets; correct,  
2 Ms. Reynolds?

3 A. (Ms. Reynolds) So, any property, whether it's  
4 registered in the name of the Partnership or not, is deemed  
5 to be held on trust by the General Partner, and yes, it is  
6 true that the Partnership is not a separate legal entity,  
7 and that's the reason that the General Partner holds the  
8 assets.

9 Q. Okay. And Mr. Lindsay, you agree?

10 A. (Mr. Lindsay) Yes, that's correct.

11 Q. Now, the beneficial interests in an Exempted  
12 Limited Partnership are governed by the Partnership  
13 Agreement; is that correct, Ms. Reynolds?

14 A. (Ms. Reynolds) That's correct.

15 Q. And Mr. Lindsay?

16 A. (Mr. Lindsay) Yes, that's correct.

17 Q. And under the Partnership Agreement, in this case,  
18 the General Partner has an indivisible beneficial interest  
19 in all of the Partnership assets; isn't that right?

20 A. (Ms. Reynolds) So, the concept of "indivisibility"  
21 is talking about--and I think Mr. Lindsay agrees with me on  
22 this--is simply saying that a Partner can't point to a  
23 particular asset and say "I own it. Because under the  
24 Partnership Agreement I'm entitled to 50 percent, that says  
25 a proportion I can't look at 50 percent of the assets and

1 say they're mine." And it is akin to a trust in that a  
2 beneficiary has a right for a Trustee to administer the  
3 entirety of the property in accordance with the trust. It  
4 has a right to expect that the property as a whole will be  
5 used to discharge the debts and liabilities of the entity,  
6 of the trust or the Partnership, whatever we're talking  
7 about, and it's the same here. So, that indivisibility  
8 doesn't say that the GP has 100 percent beneficial  
9 interest. It simply says, "until such time as those assets  
10 are distributed, there is an interest in making sure that  
11 it's the whole thing is administered properly." So, the  
12 LP, yes, has an indivisible right to the entirety of the  
13 property being administered in accordance with the  
14 fiduciary obligations and the contractual obligations of  
15 the General Partner.

16 Q. Mr. Lindsay, can you comment on that?

17 A. (Mr. Lindsay) Yeah. That's largely correct, the  
18 idea of the indivisible interest is--simply means that you  
19 cannot point to any particular asset of the Partnership and  
20 say, "because I'm entitled to 10 percent or 20 percent or  
21 40 percent of the Partnership that I'm entitled to 10 or 20  
22 or 40 percent of that particular asset." We're all  
23 interested in the assets, the way in which we're interested  
24 in those assets financially is determined by reference to  
25 the provisions of the Partnership Agreement. That is

1 largely correct.

2 Q. And Ms. Reynolds made a comment that the  
3 indivisible beneficial interest is akin to a trust. Can  
4 you comment on that?

5 A. (Mr. Lindsay) Each of the Partners' interests in  
6 the underlying assets is--well, it's akin to a trust in the  
7 sense--this is the trust aspect of a Partnership, the  
8 assets are held on trust, and what we mean by that is there  
9 are certain persons who are beneficiaries of those assets,  
10 and in that sense it is very similar to a trust in  
11 structure, but it isn't, in fact, a trust because there is  
12 a distinction here between the legal title that the General  
13 Partner holds, the beneficial title that all of the  
14 Partners have in the underlying assets, and the context of  
15 a trust you would distinguish between the legal title which  
16 the Trustee has and the beneficial title which all of  
17 the--which the beneficiaries have excluding the Trustee,  
18 and that is the key distinction between the Partnership  
19 here and a trust. The distinction is that the General  
20 Partner, in addition to its legal title, has a beneficial  
21 interest.

22 As to what the beneficial interest is in respect  
23 of any particular asset, that is not possible to determine  
24 at any particular point because no aspect of the Agreement  
25 requires you to look or allows you to look at any

1 particular asset and to say "I have--each asset is divided  
2 up in this way."

3           What the Agreement requires us to do is to look at  
4 the overall performance of the Partnership; and, by looking  
5 at the overall performance of the Partnership, that then  
6 tells us how our interest in the overall assets of the  
7 Partnership is divided, and so it's absolutely true to say  
8 the General Partner cannot look to an asset and say  
9 "because of my indivisible interest, I'm 100 percent  
10 interested in that particular asset." There may be assets  
11 in the final analysis where its interest does work out to  
12 100 percent, but that's not a meaningful question to ask in  
13 the circumstances. The meaningful question to ask is we  
14 are all, as Partners, beneficially interested in all of  
15 these assets at the same time.

16           A.     (Ms. Reynolds) Could I just pick up on one point  
17 which is that it's not a trust, and in fact, and it is,  
18 it's a statutory trust. There are different types of  
19 trusts and this one is a statutory trust. The trust is  
20 created by the legislation.

21           But, secondly, where Mr. Lindsay says that this is  
22 distinct from a trust because whereas in a trust situation  
23 it's just the beneficiaries who benefit and not the  
24 Trustee. In an Exempted Limited Partnership context, the  
25 GP wears two hats, and that's made clear in the law and

1 other contexts that the GP has its "I'm the GP hat" and it  
2 has fiduciary obligations in that capacity as the Trustee,  
3 but it also may wear its hat as its own personal capacity  
4 and have an interest as itself. And so there is no  
5 difference. It becomes a beneficiary through that personal  
6 capacity but it's not the same hat it's wearing when it's  
7 the GP and the Trustee.

8 So, the only distinction I suppose is it itself  
9 can become a beneficiary, and it can do that in a number of  
10 ways, but in this particular one it is a beneficiary of the  
11 trust.

12 PRESIDENT SACHS: You said that's a number of ways  
13 namely? Give some examples.

14 THE WITNESS: (Ms. Reynolds) So, it may be that it  
15 can itself have a Limited Partnership Interest. The GP can  
16 have a separate Limited Partnership Interest. It would be  
17 wearing two hats in that way. In this particular case, it  
18 has a Capital Account into which money flows, so that's a  
19 second way.

20 THE WITNESS: (Mr. Lindsay) That's precisely the  
21 point, a General Partner could also have a Limited  
22 Partnership Interest. It doesn't happen to have one, and  
23 that's meaningless.

24 The point is that the General Partner has, in its  
25 capacity as General Partner a beneficial interest in the

1 assets. Its entitlement to the Incentive Allocation comes  
2 to the General Partner because it is the General Partner.  
3 It comes to the General Partner because of the way in which  
4 the General Partner exercises the powers, authorities,  
5 controls that the Partnership Agreement gives it. If it  
6 exercises that authority well, then it earns the Incentive  
7 Allocation. The Incentive Allocation is part of the  
8 General Partner's interest in the Partnership. It's not  
9 some other separate interest that it holds in some other  
10 capacity. It's directly related.

11 Q. But that defines its beneficial interest.

12 THE WITNESS: (Mr. Lindsay) Yes.

13 ARBITRATOR MAYER: May I point to--sorry.

14 MS. SALOMON: Please.

15 ARBITRATOR MAYER: To a provision in the law, it's  
16 Article 4(2) of the law which says--the last words of the  
17 paragraph: "A General Partner without derogation from his  
18 position as such may in addition take an interest as a  
19 Limited Partner in the Exempted Limited Partnership."

20 THE WITNESS: (Mr. Lindsay) Yes.

21 ARBITRATOR MAYER: So, it's not as General  
22 Partner. It's as one of the Limited Partners. That's in  
23 the law. That's not, I think, exactly how it's written in  
24 the Agreement.

25 THE WITNESS: (Mr. Lindsay) It may in addition



1 take an interest as a Limited Partner, so the terms of the  
2 Partnership Agreement determine your beneficial interest on  
3 the basis of whether you're a General Partner or a Limited  
4 Partner. In circumstances of this transaction, had the  
5 General Partner contributed a sum of capital to the  
6 Partnership, for example, in terms of a dollar number, it  
7 had given \$100 million to the Partnership, that would be a  
8 Limited Partnership Interest, and the benefit that the  
9 General Partner had in respect of that interest would be  
10 determined as though it were a Limited Partner.

11 So, it would then sit alongside the other Limited  
12 Partners for the divvying up of the Partnership assets and  
13 the Partnership profits, but that is separate from the  
14 interests that it holds then as General Partner.

15 And the interest that it receives as General  
16 Partner is the Incentive Allocation, that is one that is  
17 directly applied to its position as General Partner.

18 ARBITRATOR MAYER: Thank you. But in this case,  
19 is the General Partner also a Limited Partner?

20 THE WITNESS: (Mr. Lindsay) There isn't, as far as  
21 I'm aware, no material investment by the General Partner,  
22 also as a Limited Partner.

23 THE WITNESS: (Ms. Reynolds) No, but I would say  
24 that the fact that it has a Capital Account and is paid  
25 into the Capital Account in that sense it has its own

1 personal interest, beneficial interest, in the Partnership.

2           And just as an example that a GP, whilst a GP and  
3 only a GP can act in two separate capacities, there's a  
4 reference in 27(1) of the law, for example, so 27(1) of the  
5 ELP Law provides that it's doing some things in its  
6 capacity of its own right and some things in its capacity  
7 as General Partner. That's just an example where it's  
8 negotiating, for example, the LPA.

9           So, it can have two different capacities. I don't  
10 think anything turns on this because the reality is that  
11 the beneficial interest is determined by the Partnership  
12 Agreement, and I think we're both in agreement as to how  
13 you work it out.

14           BY MS. SALOMON:

15           Q.    So, indeed, if as in this case where the General  
16 Partner is only acting in its capacity as the General  
17 Partner of the Partnership and not also as the Limited  
18 Partner, it's not wearing two hats here. It's wearing its  
19 hat as the General Partner of the Exempted Limited  
20 Partnership; is that correct?

21           A.    (Mr. Lindsay) That's correct. The determination  
22 of its beneficial interest depends on how well it performs  
23 its functions as General Partner, so the two things are  
24 directly related and linked.

25           A.    (Ms. Reynolds) Except that it has a beneficial

1 interest as well, and the beneficial interest is its own  
2 interest, but it's GP, it's got fiduciary obligations to  
3 both Partners.

4 Q. Mr. Lindsay--

5 ARBITRATOR GLOSTER: Could I ask a question?

6 THE WITNESS: (Mr. Lindsay) Sorry, I'm just  
7 confused by that distinction.

8 ARBITRATOR GLOSTER: Can I ask you a question not  
9 dealing with this particular Partnership and the terms of  
10 the Trust Deed but generally.

11 The General Partner, not the Limited Partner, has  
12 an obligation to pay the debts and liabilities--

13 THE WITNESS: (Mr. Lindsay) That's correct.

14 ARBITRATOR GLOSTER: --of the Partnership.

15 What is the position as to the assets under the  
16 statutory trust? Could you direct me, please, one or both  
17 of you, to the provision in the Partnership Act/Law or the  
18 Exempted Partnership Law that tells me, if it be the case  
19 that the assets are held on trust in the first instance to  
20 discharge the debts of the Partnership?

21 THE WITNESS: (Mr. Lindsay) If we look at Section  
22 4(2) which is the section we've just gone to.

23 ARBITRATOR GLOSTER: Of the Exempted?

24 THE WITNESS: (Mr. Lindsay) Of the Exempted  
25 Limited Partnership Law.

1 MS. SALOMON: We can provide the CLA number. It's  
2 22. It's CLA-22.

3 And it will be on your screens.

4 PRESIDENT SACHS: That's paragraph?

5 THE WITNESS: (Mr. Lindsay) Section 4(2), which is  
6 the section that's on the screen.

7 So, the first sentence: "An Exempted Limited  
8 Partnership shall consist of one or more persons called  
9 General Partners who shall, in the event that the assets of  
10 the Exempted Limited Partnership are inadequate, be liable  
11 for all debts and obligations of the Limited Partnership."

12 ARBITRATOR GLOSTER: That's not quite the question  
13 I'm asking.

14 THE WITNESS: (Mr. Lindsay) I understand.

15 ARBITRATOR GLOSTER: The provision I'm looking for  
16 is the provision that says the statutory trust in relation  
17 to the assets is that they are in the first instance to be  
18 applied--

19 THE WITNESS: (Ms. Reynolds) 16(2).

20 THE WITNESS: (Mr. Lindsay) I'm taking you through  
21 the relevant provisions of the law that will get us to that  
22 answer.

23 THE WITNESS: (Ms. Reynolds) But I think it's just  
24 16(2) is the answer. 16(2) of the Exempted Limited  
25 Partnership.

1 ARBITRATOR GLOSTER: Thank you very much.

2 THE WITNESS: (Ms. Reynolds) It's "Any debt or  
3 obligation incurred by a General Partner in the conduct of  
4 the business of an Exempted Limited Partnership shall be a  
5 debt or obligation of the Exempted Limited Partnership."

6 ARBITRATOR GLOSTER: And does that mean that the  
7 assets are held on trust--

8 THE WITNESS: (Ms. Reynolds) And 16(1) provides  
9 that the--all rights of property, every description,  
10 including choses in action that's conveyed or vested in or  
11 held on behalf of any one or more of the General Partners--

12 ARBITRATOR GLOSTER: It's 16(2), effectively.

13 THE WITNESS: (Ms. Reynolds) Yes, 16(1) and (2).  
14 So, 16(1) is the trust, 16(2) is the assets of a trust  
15 asset.

16 ARBITRATOR GLOSTER: Well, the debts.

17 THE WITNESS: (Ms. Reynolds) The debts and  
18 obligations.

19 (Overlapping speakers.)

20 THE WITNESS: (Mr. Lindsay) It's important to  
21 understand that in the context--that's why I was going to  
22 take you through the law building up to Section 16 because  
23 it's important to understand all of that context. So, the  
24 General Partner is liable to the extent that the assets are  
25 inadequate.

1           16(2), as part of the trust concept that's set out  
2 in the Partnership law, entitles the General Partner to  
3 have recourse to the assets that it holds on trust for the  
4 benefit of the Partnership.

5           ARBITRATOR GLOSTER: Yes.

6           THE WITNESS: (Mr. Lindsay) So, the General  
7 Partner is liable. 16(2) tells you where the General  
8 Partner can look to in terms of settling that liability.

9           But it comes to the same point, the assets of the  
10 General Partner apply to the obligations of the  
11 Partnership.

12          THE WITNESS: (Ms. Reynolds) It's only in the  
13 event that there are no assets in the Partnership that the  
14 GP becomes liable.

15          ARBITRATOR GLOSTER: Yes, but obviously he has got  
16 an interest in making sure that the assets are applied in  
17 discharge of the Partnership's debts?

18          THE WITNESS: (Mr. Lindsay) Yes.

19          THE WITNESS: (Ms. Reynolds) All Partners do, yes.

20          THE WITNESS: (Mr. Lindsay) The General Partner  
21 has a particular interest because if they're not, then his  
22 separate assets are subject--if you look at the provisions  
23 of the law that deal with the way in which the General  
24 Partner interacts with third parties, third parties  
25 contract with the General Partner. If there is a dispute,

1 the General Partner is the person the third parties are  
2 required to sue. From a third parties' perspective, it  
3 matters not a jot where those assets happen to be. From a  
4 third party perspective, it sues the General Partner. The  
5 General Partner, then because it's acting in its capacity  
6 as General Partner, has recourse to the assets that it  
7 holds and to its own separate assets. If the assets that  
8 it holds for the Partnership are insufficient, then the  
9 General Partner's assets are applied.

10 ARBITRATOR GLOSTER: Can I, again following on  
11 from a question from the President, may I ask you both this  
12 question--and again, I'm not asking specifically in  
13 relation to this Partnership deed--but if the Partnership  
14 were to say that the General Partner had an interest in  
15 50 percent of the assets--leave aside any Incentive  
16 Allocation--and the Limited Partner had an interest in  
17 50 percent that it contributed, is that possible as a  
18 matter of the law of Exempted Partnerships?

19 THE WITNESS: (Mr. Lindsay) Of course.

20 ARBITRATOR GLOSTER: So, it all depends--the  
21 interest of the General Partner qua General Partner depends  
22 on the terms of the Partnership deed?

23 THE WITNESS: (Ms. Reynolds) Yes, because it would  
24 be normally be limited unless it had a separate LP  
25 interest, the interests of the GP are going to be limited

1 to the remuneration terms of it serving as a General  
2 Partner--

3 ARBITRATOR GLOSTER: That's the question  
4 why--explain to me why if the General Partner makes a  
5 contribution, why his interest cannot be defined as  
6 25 percent, 50 percent of the assets at any time?

7 THE WITNESS: (Ms. Reynolds) So, if it makes a  
8 financial contribution, a Capital Contribution, typically  
9 that's going to be done in its Capital Account, and yes,  
10 they would effectively have a Limited Partnership Interest,  
11 although it may not call itself a Limited Partnership--

12 ARBITRATOR GLOSTER: Why would it be--what I'm not  
13 understanding at the moment is why it has to be a Limited  
14 Partnership Interest.

15 THE WITNESS: (Ms. Reynolds) I'm just using that  
16 phrase as in that's the investor. Those who typically put  
17 in the capital--

18 ARBITRATOR GLOSTER: I'm not asking about typical.  
19 I'm asking so that I understand--

20 (Overlapping speakers.)

21 ARBITRATOR GLOSTER: I'm not asking as typical,  
22 I'm asking as a matter of the Exempted Partnership Law, can  
23 you have a situation--and I would like both your views on  
24 this, where the General Partner puts in a hundred, the  
25 Limited Partner puts in a hundred, the Limited Partner has



1 limited liability, the General Partner doesn't, and the  
2 terms of the Partnership Agreement, apart from any  
3 incentivization provision is that the Partner, the Limited  
4 Partner and the General Partner, share 50:50.

5 THE WITNESS: (Ms. Reynolds) Yes.

6 ARBITRATOR GLOSTER: And that doesn't involve the  
7 General Partner becoming a Limited Partner? That's the  
8 question I'm putting to you.

9 THE WITNESS: (Ms. Reynolds) Not by name. It  
10 would just be another investor, Partner in the business.

11 ARBITRATOR GLOSTER: Okay.

12 PRESIDENT SACHS: And why would a General Partner  
13 exercise the option to become a Limited Partner in addition  
14 to its function as a General Partner? I mean, this is  
15 provided for by the law, but what could be the interest of  
16 a General Partner to add on the hat, as you say, of a  
17 Limited Partner?

18 THE WITNESS: (Ms. Reynolds) Because, if it was a  
19 Limited Partner and held assets as a Limited Partner, those  
20 assets wouldn't be exposed to unlimited liability, so  
21 that's why typically a General Partner won't have free  
22 assets that are available. The typical entity that says  
23 it's a GP is an SPV entity. It's specially set up--

24 PRESIDENT SACHS: For funds.

25 THE WITNESS: (Ms. Reynolds) --for a particular

1 Partnership, it won't have assets in its name that are  
2 available.

3           So, this may exist and--and this is quite  
4 important to note--that this may be the provision that  
5 there is unlimited liability, but in reality we don't come  
6 across GP vehicles themselves and leave aside the sponsor,  
7 leave aside the Investment Manager that will have free  
8 assets in their names that will be exposed to this  
9 unlimited liability.

10           BY MS. SALOMON:

11           Q.   Mr. Lindsay, can you correct this?

12           THE WITNESS:   (Mr. Lindsay) That's not accurate at  
13 all.   The circumstances in which a General Partner might  
14 also become a Limited Partner is if we had a slightly more  
15 simplified fund structure where all of the Investors came  
16 into the same investment structure alongside one another,  
17 it's often the case that investors will want the General  
18 Partner, the persons controlling the General Partner, to  
19 have an element of what's called "skin in the game," and we  
20 have that in this structure, but the investment is made  
21 into a different part of the structure.   It could easily  
22 have been made into this Master Fund structure.

23           And what that does is it means that in addition  
24 to--in addition to conducting the business of the General  
25 Partner there are separate and additional assets of the

1 people involved in managing the General Partner that are  
2 also at risk and stand alongside the other Investors on  
3 precisely the same terms.

4           So, it's not necessarily the case--and the General  
5 Partner may regard the investment strategy as being one  
6 that's fantastically interesting and one that he would like  
7 to be involved in the investment of also, so you could have  
8 a variety of people then pooling their capital and the  
9 General Partner would also like to do so, and it pools its  
10 capital.

11           The idea that that LP interest has been somehow  
12 insulated from third-party creditors, is not correct. But  
13 there are a variety of reasons why the General Partner may  
14 also want to invest capital on the same terms as the other  
15 Limited Partners. Either, because it's compelled to or  
16 because the investment opportunity is particularly  
17 attractive.

18           But that interest is then a general asset of the  
19 General Partner. If the General Partner is sued, then its  
20 interest as a Limited Partner, which is its personal  
21 separate interest is available to those creditors to  
22 satisfy the obligations of the Partnership.

23           PRESIDENT SACHS: That's clear.

24           THE WITNESS: (Mr. Lindsay) So, it doesn't somehow  
25 insulate it from risk.

1 PRESIDENT SACHS: Now, please proceed. And  
2 apologies for having somehow hijacked it.

3 MS. SALOMON: No apologies needed. The purpose is  
4 truly to provide information the Tribunal needs.

5 BY MS. SALOMON:

6 Q. I want to loop back to this discussion where the  
7 Experts are in agreement that you can't point to any  
8 particular asset and say the General Partner's interest in  
9 that asset is only a certain percentage. And following  
10 through on that I want to give a hypothetical that, for  
11 example, even though the Limited Partner may have provided,  
12 let's say, 10 percent of the starting cash for the General  
13 Partner to purchase, say, 100 shares, the Limited Partner  
14 cannot say it beneficially owns 10 percent of those shares;  
15 isn't that true?

16 A. (Ms. Reynolds) Yes, it would depend on what the  
17 Limited Partnership Agreement provides in terms of  
18 allocating the assets.

19 Q. And Mr. Lindsay?

20 A. (Mr. Lindsay) Yes, that's correct.

21 Q. Okay. And a Partner's beneficial interest is its  
22 entitlement to share in the assets of the Partnership;  
23 correct?

24 A. (Ms. Reynolds) On the terms of the Limited  
25 Partnership Agreement, yes.

1 Q. Yes. And Mr. Lindsay?

2 A. (Mr. Lindsay) Yes, that's correct.

3 Q. And under the Partnership Agreement in this case,  
4 the General Partner may be entitled to an Incentive  
5 Allocation; correct?

6 A. (Ms. Reynolds) Correct.

7 A. (Mr. Lindsay) Yes, that's correct.

8 Q. And that Incentive Allocation is based on the net  
9 profits for assets in the relevant period; correct?

10 A. (Ms. Reynolds) Well, there are a number of  
11 conditions. The first one is it has to have made a profit  
12 during the relevant period, yes.

13 Q. So based on Net Profits during the Relevant  
14 Period?

15 A. (Ms. Reynolds) That's the first hurdle.

16 Q. Okay. And Mr. Lindsay, is that your  
17 understanding?

18 A. (Mr. Lindsay) Yes, it's based on profits  
19 calculated over the Relevant Period, yes.

20 Q. And so, it is an entitlement to share in the  
21 assets of the Partnership; correct? In other words, the  
22 beneficial interest is an entitlement to share in the  
23 assets of the Partnership; correct?

24 A. (Ms. Reynolds) Well, it's not unconditional in  
25 that sense, no. You have to overcome several hurdles

1 before you get there. So, it's quite possible that the  
2 Partnership can make a profit in any one year and no  
3 Incentive Allocation would be payable.

4 Q. But that doesn't change the fact that by having  
5 the right to an Incentive Allocation in the future, the  
6 General Partner then has an indivisible beneficial  
7 interest; correct?

8 A. (Ms. Reynolds) Well, I would say the indivisible  
9 interest is completely separate. That's just a concept.  
10 It doesn't tell you what the--I think indivisibility has  
11 got no bearing on what the beneficial entitlement is in the  
12 assets in terms of allocation.

13 Q. Mr. Lindsay, can you correct that?

14 A. (Mr. Lindsay) That's not true.

15 If I could illustrate the indivisible nature of  
16 the interest in the assets and why that's meaningful. I  
17 will use an example, say a Partnership has 10 Partners, it  
18 makes 10 investments, each of those Partners and each of  
19 those investments is \$100 and each Partner has committed  
20 \$100, so the notional asset base of the Partnership is  
21 \$1,000. Each Partner is then interested indivisibly in all  
22 of those assets to the extent of its ability to share in  
23 the outcome. That's the indivisible aspect of the  
24 beneficial interest.

25 If one of those Partners was to withdraw from the

1 Partnership, the way in which you deal with that withdrawal  
2 is not to go to each asset and sell 10 percent of each  
3 asset. You might sell one, you might sell half of two.  
4 You might sell a third of three of the assets, depending on  
5 how you wanted to manage the liquidity of the Partnership,  
6 but you might then come to a position if you decided just  
7 to sell one asset in order to pay for the withdrawal of  
8 that Limited Partner, that that Limited Partner then is  
9 interested in 100 percent of that asset which it then takes  
10 the proceeds of, and the other Partners continue to be  
11 indivisibly interested in the rest of the assets.

12 As to what the ultimate interest of each of those  
13 Partners in each of those assets is depends on the point of  
14 which the Partner is entitled to cash and take that cash  
15 out.

16 Does that make sense?

17 Q. So, I want to now focus on the term "Partnership  
18 Interest" in the Partnership Agreement.

19 It's true that the term "Partnership Interest"  
20 isn't used anywhere in the Partnership Agreement to  
21 calculate the Partner's entitlement to share in the assets;  
22 correct, Ms. Reynolds?

23 A. (Ms. Reynolds) So--well, I think we should turn to  
24 Partnership Interest.

25 MS. SALOMON: And that's C-30.

1 BY MS. SALOMON:

2 Q. So, I want you to answer my specific question,  
3 which is--

4 A. (Ms. Reynolds) I'm answering your question, I  
5 think, by reference to what Partnership Interest is under  
6 the LPA, if that's all right.

7 Q. Yes.

8 A. (Ms. Reynolds) So, if you look at 2.12 of the  
9 Limited Partnership Agreement, this provides the  
10 Partnership Interest shall mean a Partner's interest in the  
11 Partnership, and it's part of the same definition, it goes  
12 on. The Partner's economic interest shall be divided as a  
13 percentage equal to (1) the balance in the Capital Accounts  
14 of each Partner divided by, (2), the aggregate balance in  
15 the Capital Accounts of all the Partners at any given time.

16 And so, the Partnership Interest is the term what  
17 a Partner's interest is in the Partnership. It includes an  
18 economic interest which is described here.

19 Now, the economic interest is described as a  
20 percentage or a proportion. That's replicated elsewhere.  
21 You have in the context of distributions, you have--and  
22 distributions are dealt with I think in 4.09. And in 4.09,  
23 the way that you calculate distributions is in the same  
24 way. It's by fraction, and fraction is simply the same as  
25 the percentage.



1           Equally, when you go to 4.06, 4.06 talks about how  
2 you allocate profits and losses. It's exactly the same way  
3 as economic interest as described in Partnership Interests.  
4 And also in termination, it's the same thing, you pay off  
5 the debts and liabilities, and then the balance is  
6 distributed. So, I am answering your question in that  
7 Partnership Interest is defined by reference to economic  
8 interests, and that concept is used throughout the  
9 Agreement.

10         Q.    Mr. Lindsay, can you please respond?

11         A.    (Mr. Lindsay) Yes.

12           So, one of the things that we agree upon is that  
13 in order to work out beneficial interest, which is what  
14 this is all about, is that you have to look to the context  
15 of the Transaction, and to the particular provisions of the  
16 Partnership Agreement.

17           "Partnership Interest" is a defined term under the  
18 Partnership, the language that's used there is used in  
19 order to define that term. It's not used in order to  
20 create economic rights or describe the economic rights of  
21 any particular Parties. It's there to define a term. That  
22 is a term that's used in a handful of places in the  
23 Partnership Agreement to deal with circumstances pertaining  
24 only to Limited Partners, either to their withdrawal or to  
25 the transfer of their interests or to circumstances in

1 which you might look to Limited Partners for consent to do  
2 something.

3           The beneficial interest is determined by reference  
4 to the provisions of the Partnership Agreement. And those  
5 provisions are in Section 4. At no point in Section 4.06  
6 does it talk about the Partnership Interest, and the reason  
7 it doesn't talk about the Partnership Interest is because  
8 the beneficial interest is not distributed amongst Partners  
9 in accordance with that term. If it were then it would  
10 simply use the shorthand reference to "Partnership  
11 Interest" there and would simply say, the profits and  
12 losses of the Partnership will be divided amongst Partners  
13 in accordance with their Partnership Interests, and that  
14 would be the end of it. That's not what the Agreement  
15 says. The Agreement is quite particular in the context--in  
16 Section 4.06 about how the profits and losses are divided  
17 up.

18           To use a defined term that has limited  
19 application, the Partnership Agreement to override somehow  
20 the provisions of Section 4.06 which is the detailed  
21 analysis of how the profits are allocated is contrary to  
22 what we agree to be the law in this regard.

23           A. (Ms. Reynolds) But no one is trying to override  
24 4.06. I'm pointing to 4.06. What I'm simply saying is you  
25 just said there that the economic interest isn't determined

1 by Partnership Interest. Part of the definition of  
2 Partnership Interest is the economic interest which is  
3 determined as the Capital Account balance divided as a  
4 proportion of the total, and that's exactly what 4.06 does.

5 So when it comes to distributing the Net Profits  
6 and Net Losses you look at the proportionality of the  
7 Capital Accounts, and you divide it accordingly. That's  
8 all I'm saying. I don't think we're in disagreement on  
9 that.

10 A. (Mr. Lindsay) We are absolutely in disagreement on  
11 this point.

12 The Limited Partner's beneficial interest is  
13 determined by reference to its Capital Account balance.  
14 The General Partner's beneficial interest is not determined  
15 by reference to its relative Capital Account balance.

16 BY MS. SALOMON:

17 Q. And why is that, please?

18 PRESIDENT SACHS: The question is, for my  
19 understanding--take the scenario that Dame Elizabeth  
20 mentioned earlier, so a Limited--a General Partner that  
21 invests 50 or 100 and a Limited Partner that contributes  
22 100, so would in that case the Partnership Interest of the  
23 General Partner be addressed here or would fall under the  
24 definition of Partnership Interest?

25 THE WITNESS: (Mr. Lindsay) It wouldn't be

1 meaningful because of the way in which the Partnership  
2 Interest of the defined term is used. It only applies to  
3 Limited Partners.

4 PRESIDENT SACHS: That is my question because it  
5 speaks of "Partners," and "Partners" is a defined terms.  
6 "Partner" includes both General Partner and Limited  
7 Partner, so assume a General Partner contributes as  
8 50 percent contributed to the Capital Account, his Capital  
9 Account, so wouldn't that apply, then, also to the General  
10 Partner?

11 THE WITNESS: (Mr. Lindsay) I will explain why it  
12 wouldn't be meaningful to the General Partner.

13 PRESIDENT SACHS: Would it apply?

14 THE WITNESS: (Mr. Lindsay) The definition would  
15 include the General Partner. So, if--but I will tell you  
16 why that doesn't make sense in the context of the  
17 Agreements. We have to look to the Agreements in the  
18 context. So that's defined--

19 PRESIDENT SACHS: It's not our agreement. It's a  
20 hypothetical.

21 THE WITNESS: (Mr. Lindsay) But "Partnership  
22 Interest," as it's defined here, only has a meaning in this  
23 Agreement. It doesn't have a hypothetical meaning.

24 THE WITNESS: (Ms. Reynolds) But it does include  
25 General Partners.

1           THE WITNESS: (Mr. Lindsay) So the question that  
2 would be it--so, "Partnership Interest" is used in the  
3 defined term when you transfer--when Limited Partners  
4 transfer their interest, so a Limited Partner may transfer  
5 its Partnership Interest; a Limited Partner may withdraw  
6 its Partnership Interest. Those are only points that have  
7 meaning for Limited Partners.

8           So, what happens ordinarily is if the General  
9 Partner does have a significant investment into the  
10 Partnership, if that was the case--and we've described  
11 circumstances in which that might happen--then in those  
12 circumstances, the drafting Parties are quite careful to  
13 make sure that where they talk about "Partnership Interest"  
14 where they go to Limited Partners for a vote, for instance,  
15 they will always ensure that when we aggregate the interest  
16 of Limited Partners when they are voting on a piece of  
17 conduct by the General Partner, we exclude from that the  
18 General Partner's separate economic interest because  
19 otherwise the General Partner is voting in respect of  
20 itself, and that's commercially unacceptable.

21           But that phrase here in this context, and the rule  
22 is quite clear, you look at the Partnership Agreement and  
23 you look at the context. That phrase in this context has  
24 no bearing on the General Partner's beneficial interest.

25           THE WITNESS: (Ms. Reynolds) Could I come back--

1 MS. SALOMON: Let Mr. Lindsay finish the point.

2 THE WITNESS: (Mr. Lindsay) If you let me finish  
3 the point. The General Partner's beneficial--the Limited  
4 Partner's beneficial interest is determined by reference to  
5 their Capital Account balances from time to time. Nobody  
6 here is disputing that Limited Partners have a beneficial  
7 interest. The question that we're looking to is whether  
8 the General Partner has a beneficial interest. The General  
9 Partner's beneficial interest in this Partnership under  
10 this Agreement is not determined at all by reference to its  
11 Capital Account balance.

12 BY MS. SALOMON:

13 Q. And why is that? Why isn't the General Partner's  
14 beneficial interest not defined by its contribution to the  
15 Capital Account?

16 A. The General Partner's beneficial interest here,  
17 the Incentive Allocation, is determined by reference to how  
18 well the General Partner has done its job, and as a  
19 consequence what the overall profits of the Partnership  
20 are. It has nothing to do with what the General Partner's  
21 Capital Account balance is from time to time.

22 Q. And why isn't the General Partner required to  
23 contribute cash to the Partnership in order to have a  
24 beneficial interest?

25 A. (Mr. Lindsay) Because the beneficial interest of

1 the General Partner is determined by reference to how well  
2 it does its job.

3           What the General Partner contributes in order to  
4 receive its beneficial interest, is the doing of its job.

5       Q.    And can you describe--

6           (Overlapping speakers.)

7       A.    (Ms. Reynolds) Could I go back on answer on the  
8 question--

9       Q.    I will give you a moment to answer the questions.

10       MR. VOLKMER:  Apologies, to interrupt, but this is  
11 supposed to be a conference.  And if you cut off our  
12 experts in giving answers, that defeats the purpose of a  
13 conference.

14       MS. SALOMON:  And we're dealing with the total  
15 topic, and I want to have this--

16       PRESIDENT SACHS:  Just one more question, and then  
17 Ms. Reynolds.

18       MS. SALOMON:  Thank you, please.

19       BY MS. SALOMON:

20       Q.    In what ways does the General Partner,  
21 Mr. Lindsay, contribute other than by contributing cash to  
22 the Partnership?  And then, of course, I will allow  
23 Ms. Reynolds to address these issues.

24       A.    (Mr. Lindsay) Well, the General Partner  
25 contributes its management of the Partnership assets, its

1 time, care, skill, attention, expertise, experience, the  
2 ability to source assets, all of these things. All of the  
3 Partners agree that that has a value. We determine what  
4 that value is by how well you do that. If you say, "I'm  
5 exceptionally good at finding investments, managing  
6 investments, entering into them at the right time, exiting  
7 them at the right time, that is what I bring to this  
8 arrangement, to this Partnership between us. You will  
9 bring the capital, I will bring my expertise. Hopefully as  
10 a consequence we will generate a profit, that's what a  
11 Partnership is formed to do. And if we do generate a  
12 profit, this is how we will divide the proceeds."

13 PRESIDENT SACHS: Ms. Reynolds?

14 THE WITNESS: (Ms. Reynolds) So, I'm going back  
15 because we were talking about Partnership Interest. You've  
16 now talked about another point, which is contribution. But  
17 going back to Partnership Interest in 2.12, Mr. Lindsay  
18 said they would be very careful in how they defined things  
19 in a Partnership Agreement were it to be the case that it  
20 was intended that the GP have an interest based on its  
21 Capital Account. But if we look at the definition in this  
22 particular agreement at 2.12, it says: "The  
23 Partners' "--capital P--"economic interest shall be  
24 expressed as." Now, that's got to have a meaning, the  
25 "Partners' economic interest."



1           And if you look at the Preamble on the very first  
2 page of the Partnership Agreement, it's express that a  
3 Partner includes General Partner and Limited Partner.

4           Now, elsewhere in the Agreement, there are  
5 specific references just to the Limited Partner, so where  
6 it's just intended to refer to Limited Partners, the term  
7 "Limited Partner" is used. Here it's talking about a  
8 Partner's economic interest, and it very expressly says  
9 that it's to be expressed as a percentage equal to the  
10 balance in the Capital Account of such Partner. Again, the  
11 term "Partner" is used, divided by the aggregate balance in  
12 the Capital Accounts of the Partners at any given time.  
13 It's very clear in this particular case it was intended  
14 that the General Partner would have a Capital Account, the  
15 Limited Partner would have a Capital Account, and that very  
16 clearly makes the allocation between them.

17           And then going on to this contribution point, it's  
18 not a concept that is familiar, under Cayman Law, for in  
19 addition to the remuneration that someone gets as a GP, for  
20 somehow a contribution of expertise or whatever, to be  
21 given a value, that's not going to appear on a balance  
22 sheet. There's reference in here to an in-kind  
23 contribution by a General Partner, but that would have to  
24 have a monetary marketable value such as contributing  
25 securities, contributing shares, real estate into the

1 Partnership. Someone's expertise that they bring as a  
2 General Partner is recognized by the remuneration in the  
3 LPA. It's not an additional contribution that the LPA  
4 makes. It's a service provided by the SPV, and it's  
5 remunerated by that. And of course, it's absolutely true,  
6 if they make a profit and if that goes above the Net Losses  
7 then there's going to be remuneration based on the  
8 Incentive Allocations provisions.

9 THE WITNESS: (Mr. Lindsay) That's quite an  
10 important point in relation to remuneration.

11 PRESIDENT SACHS: Yes.

12 THE WITNESS: (Mr. Lindsay) The entire investment  
13 funds industry, the pool of investment managers would be  
14 horrified to hear the Incentive Allocation described as  
15 "remuneration." The Incentive Allocation is--

16 (Overlapping speakers.)

17 PRESIDENT SACHS: Ms. Reynolds--

18 THE WITNESS: (Mr. Lindsay) It is not  
19 remuneration. It's an equity interest. It is taxed on the  
20 basis that it is--on the basis of capital appreciation and  
21 capital gains. It is not, in any sense, a fee or  
22 remuneration. And if it were described as such, it would  
23 undermine a significant element of international tax  
24 structuring.

25 The whole point of this arrangement is that it is

1 an equity interest, and this is the allocation by the  
2 Partnership of entitlements to share in the equity, it is  
3 not--and the General Partner's entitlement is in exchange  
4 for its contribution to the Partnership. To call that  
5 "remuneration" or to call it a "fee" or to call it  
6 something of that nature would undermine a fundamental  
7 aspect of tax structuring.

8 PRESIDENT SACHS: Ms. Reynolds, short reply?

9 THE WITNESS: (Ms. Reynolds) By "remuneration," I  
10 mean it is what it is paid for the job that it does, the  
11 service that it provides. There is also a separate  
12 Investment Manager in this structure, which irrespective of  
13 performance--

14 PRESIDENT SACHS: We know that.

15 THE WITNESS: (Ms. Reynolds) --gets a fee. What  
16 we're talking about here is how the General Partner gets  
17 money into its Capital Account, and one of the ways is by  
18 Incentive Allocation. One of the ways is by an allocation  
19 of profits and loss, but it's determined in accordance with  
20 the economic interests which is as a proportion of the  
21 Capital Accounts.

22 PRESIDENT SACHS: What about the tax on capital  
23 gains argument? Is that correct?

24 THE WITNESS: (Ms. Reynolds) I'm not really  
25 looking at that. What I'm looking at--

1           PRESIDENT SACHS: Is it correct? I mean, is the  
2 payment under the Incentive Allocation subject to capital  
3 tax gains?

4           THE WITNESS: (Ms. Reynolds) Absolutely not  
5 something either of us would be advising on because that's  
6 not a Cayman question.

7           PRESIDENT SACHS: Mr. Lindsay just alluded to it.

8           MS. SALOMON: He would know that.

9           THE WITNESS: (Mr. Lindsay) I'm not a tax advisor,  
10 but it is a significant and material point. I can't tell  
11 you what the rate of capital gains is but it is better than  
12 income, and that is the reason why, instead of simply  
13 engaging a separate Investment Manager and paying an  
14 Investment Manager a fee, a structure is set up in order to  
15 ensure that everybody is involved and shares in the equity  
16 of the piece.

17           THE WITNESS: (Ms. Reynolds) But an Investment  
18 Manager has been engaged in this matter, are engaged and  
19 they're engaged at the feeder level. So, this isn't a case  
20 where this is instead of an Investment Manager. Let's make  
21 that clear.

22           BY MS. SALOMON:

23           Q. To be clear, there is an Investment Manager, we  
24 will get to how the Investment Manager's compensated and  
25 the role of the Investment Manager in relation to the

1 General Partner, but what we're talking about here is the  
2 interest of the General Partner.

3 Mr. Lindsay, the words--

4 PRESIDENT SACHS: Ms. Salomon, could we take  
5 this--ask the question?

6 ARBITRATOR GLOSTER: I've got a question for both  
7 of you, please. On Clause 4.01, of the Partnership  
8 Agreement, if you could both look at that. Which says:  
9 "Each Partner shall make an initial Capital Contribution in  
10 cash or in kind with the consent of the General Partner."  
11 And also there are provisions that in 4.02 for additional  
12 Capital Contributions. And also when we get to new  
13 Partners at Clause 6.01, there are new Partners that can  
14 come in with minimum initial Capital Contributions. And  
15 then at 6.02, new General Partners and clearly envisaging  
16 the possibility of Capital Contributions.

17 Obviously, you're just here speaking as experts  
18 about the law and not what factually happened in this case,  
19 as I understand your role, but if we're looking at the  
20 interest of a Partner, it's clear under this Agreement--is  
21 it clear under this Agreement that a Partner can make an  
22 initial general Capital Contribution in cash or in kind?

23 THE WITNESS: (Ms. Reynolds) Yes. I would say "in  
24 kind" has to be something with value, something that you  
25 could monetize and value, so--and it happens. Typically,

1 if it were to happen, it would have to be something like a  
2 share or something with a marketable value.

3 ARBITRATOR GLOSTER: What about services?

4 THE WITNESS: (Ms. Reynolds) It's not known--never  
5 in my experience or my colleagues' experience have we seen  
6 a General Partner say that they--I suppose sometimes it's a  
7 de minimis nominal. The GP would normally give a nominal  
8 one dollar Capital Contribution to satisfy it that way, but  
9 we've never heard of it being valued as a Capital  
10 Contribution to a Partnership that they've given services.

11 THE WITNESS: (Mr. Lindsay) I'm quite surprised,  
12 and from my personal perspective, I'm concerned by that  
13 answer.

14 So, Walkers is a Partnership, an ordinary  
15 Partnership, in which I have a Capital Account and a  
16 beneficial interest.

17 I have contributed no capital to that Partnership.  
18 I contribute my services.

19 THE WITNESS: (Ms. Reynolds) So I should clarify.  
20 He's misunderstanding what I'm saying.

21 I'm not saying that it wouldn't be considered the  
22 nominal Capital Contribution. I'm saying you wouldn't,  
23 then, put a value on it and say, "Right, I've got  
24 50 percent of the Partnership" when a Limited Partner has  
25 put in a million.

1 I'm saying if--there are Partnerships where you  
2 would all say, "Right, because of our knowledge and  
3 expertise, we've all contributed, and that's our  
4 contribution."

5 THE WITNESS: (Mr. Lindsay) I will finish the  
6 point.

7 So--and my--the contribution by me over a period  
8 of time, if my services entitles me to a certain beneficial  
9 interest and that's what we agree as Partners, that is the  
10 way in which we will value my contribution, and that's my  
11 beneficial interest determined by what we agree is the  
12 value of my contribution.

13 In a very similar way here, the Partners agree  
14 what the value of the General Partner's contribution is.  
15 The value of the General Partner's contribution is the  
16 Incentive Allocation.

17 Now, you can't determine that on Day 1 because we  
18 don't know whether the General Partner has been successful  
19 in fulfilling its part of the bargain. But if the General  
20 Partner is successful, then we all agree that there is a  
21 value to its contribution, and that is how we calculate the  
22 value of that contribution.

23 PRESIDENT SACHS: If I may follow up your  
24 question, would you technically describe this as a  
25 contribution in kind?

1 THE WITNESS: (Mr. Lindsay) That is--

2 PRESIDENT SACHS: "Contribution in kind" is a  
3 commonly used term in corporate law.

4 So would you say what you just said, namely  
5 that--and what you said in Paragraph 17 of your  
6 Supplementary Expert Report, namely that the Partnership  
7 Agreement simply delays the determination of that value--

8 THE WITNESS: (Mr. Lindsay) Yes.

9 PRESIDENT SACHS: --until such time as the value  
10 is demonstrated and then applies that value, if any, to the  
11 General Partner's Capital Account.

12 So, would you say this is contribution in kind  
13 and--

14 THE WITNESS: (Mr. Lindsay) That's exactly what it  
15 is.

16 PRESIDENT SACHS: --law, is that your position?

17 THE WITNESS: (Mr. Lindsay) That's exactly what it  
18 is. It's a contribution by the General Partner of  
19 something other than a particular asset.

20 PRESIDENT SACHS: The words in time as regards to  
21 the determination of its value?

22 THE WITNESS: (Mr. Lindsay) Yes.

23 PRESIDENT SACHS: Would you agree with that  
24 concept?

25 THE WITNESS: (Ms. Reynolds) I would say that the



1 Incentive Allocation is paid based on a specific formula,  
2 and if the Partnership performs and they make up the Net  
3 Losses, then yes, there is a payment under the Incentive  
4 Allocation at 4.06 that goes into the General Partner's  
5 Capital Account.

6 It's not under 4.01. It's under 4.06 that the  
7 Incentive Allocation is paid.

8 ARBITRATOR GLOSTER: Can I ask--sorry.

9 ARBITRATOR MAYER: Sorry.

10 ARBITRATOR GLOSTER: No, you go.

11 ARBITRATOR MAYER: This contribution in kind, how  
12 is it reflected apart from the Incentive Allocations which  
13 prove that that General Partner is efficient and good and  
14 works well? Does it appear somewhere in the Capital  
15 Account of the General Partner, apart from what is  
16 reflected in a way in these Incentive Allocations? Is  
17 there a figure anywhere?

18 THE WITNESS: (Mr. Lindsay) It's not possible to  
19 record it in the Capital Account of the General Partner  
20 until it's been earned because you don't know what that  
21 number is going to be. So it may be zero, it may be a  
22 hundred. It's impossible to say.

23 At the point that you make a determination, it's  
24 then recorded in the General Partner's Capital Account.  
25 But as is usual in these circumstances, the General Partner

1 would then withdraw that allocation from its Capital  
2 Account because the General Partner's economic position is  
3 different from the Limited Partner's economic position in  
4 the sense that the Limited Partner's essentially invested  
5 into the offshore part of the structure, a U.S.  
6 tax-exempt-type entities, and it's important, I think, to  
7 understand this context a little bit.

8           They are pension funds, endowment funds, people  
9 who have significant sums of money to invest but have no  
10 personal capacity to manage that, and they require that  
11 money to be managed over a significant period of time,  
12 which is why they would leave their investment in the  
13 Partnership.

14           The General Partner, on the other hand, will have  
15 mortgages and school fees and salaries and things of that  
16 nature to pay and so at that point of the determination,  
17 withdraws the money standing to the benefit of its Capital  
18 Account, but that doesn't determine, in any sense, what its  
19 beneficial interest is. That is just a point at which it  
20 can withdraw the benefit of its beneficial interest.

21           The Capital Account of the General Partner from  
22 time to time has no bearing on the determination of its  
23 Incentive Allocation.

24           THE WITNESS: (Ms. Reynolds) I think Mr. Lindsay  
25 might be conflating the concept of the sponsor or the

1 manager entity and the General Partner. The General  
2 Partner won't have any additional mortgages--

3 THE WITNESS: (Mr. Lindsay) Well, the General  
4 Partner has Shareholders who established the General  
5 Partner for the purposes of making a profit.

6 THE WITNESS: (Ms. Reynolds) It's an SPV.

7 But I think the question was, is there anything  
8 that appears on the Capital Account balance other than the  
9 Incentive Allocation, and the only way that you populate  
10 the Capital Account balance is by 4.06.

11 THE WITNESS: (Mr. Lindsay) Yes. In retrospect,  
12 but not in advance.

13 ARBITRATOR MAYER: I'm not sure I see the  
14 difference between both of you on this point.

15 THE WITNESS: (Ms. Reynolds) I think I agree. I  
16 don't think there's an issue here.

17 I think what we're both saying is that the General  
18 Partner is paid an Incentive Allocation or a percentage of  
19 the profits and that goes into the Capital Account and that  
20 is their economic interest in the Partnership or their  
21 beneficial interest. That's how you identify it.

22 BY MS. SALOMON:

23 Q. Mr. Lindsay, is that--

24 THE WITNESS: (Mr. Lindsay) Sorry, that's not  
25 right.

1           The Capital Account--and perhaps I've not  
2 explained myself particularly clearly.

3           The Capital Account of the General Partner is not  
4 relevant to the determination of the General Partner's  
5 beneficial interest. The General Partner's beneficial  
6 interest is determined by reference to the performance of  
7 the Partnership as a whole.

8           If the Partnership performs, then amounts are  
9 credited to the General Partner's Capital Account and  
10 almost immediately withdrawn, but the beneficial interest  
11 in the--of the General Partner is its entitlement to that  
12 amount. It is not an amount set out in a Capital Account.  
13 It's not determined by reference to a Capital Account.

14           From the General Partner's perspective, its  
15 Capital Account balance is irrelevant to the determination  
16 of its beneficial interest.

17           ARBITRATOR GLOSTER: Could I ask a question?

18           PRESIDENT SACHS: Certainly.

19           ARBITRATOR GLOSTER: I think I'm understanding  
20 what your respective positions is on this--are on this  
21 point, but can I just see if I've got it.

22           You, Mr. Lindsay, are saying that the General  
23 Partner's beneficial interest is defined by his legal  
24 entitlement under the incentivization provisions and is not  
25 defined by what he happens to leave in his Capital Account

1 by way of cash at any time.

2 THE WITNESS: (Mr. Lindsay) That's correct.

3 ARBITRATOR GLOSTER: He may choose to leave it in  
4 there, he may choose to draw it out. You say, as I  
5 understand it, that normally General Partners draw out the  
6 monies they've made, but it doesn't have to do that.

7 THE WITNESS: (Mr. Lindsay) That's correct.

8 ARBITRATOR GLOSTER: You, on the other hand,  
9 Ms. Reynolds, are saying that you've defined the beneficial  
10 interest not by reference to the entitlement but by  
11 reference to what is actually standing to the credit of the  
12 Capital Account at any time.

13 THE WITNESS: (Ms. Reynolds) And I would say  
14 that's throughout the Agreement. Whenever--and if there's  
15 any entitlement to money or to distribution, on  
16 termination, on allocation of profit and loss, whatever  
17 context we're talking about, it goes back to this concept  
18 of calculating what the respective Capital Accounts are.  
19 Without that, you cannot determine who's owed what under  
20 the Partnership.

21 ARBITRATOR GLOSTER: So are you saying, as I  
22 understand it--and this is where I'm having  
23 difficulty--you're saying that there is an absolute  
24 identity in 2.12 between a Partner's interest and a  
25 Partner's economic interest?

1 THE WITNESS: (Ms. Reynolds) Their beneficial  
2 interest and their economic interest, what are they going  
3 to get out of this.

4 ARBITRATOR GLOSTER: No, no. I'm talking about  
5 legal--no, legal gets complicated.

6 Beneficial interest, how do define the beneficial  
7 interest? Do you define it as what a General Partner is  
8 entitled to under the terms of the Agreement, or do you  
9 define it as what is actually in the Capital Account at any  
10 time?

11 THE WITNESS: (Ms. Reynolds) If you mean by  
12 "beneficial interest" what are they entitled to monetarily,  
13 it depends on what we're talking about.

14 ARBITRATOR GLOSTER: No, I'm not saying that. I'm  
15 saying as a matter of equity law, Partnership Law, what is  
16 their beneficial interest? How do you describe their  
17 beneficial interest?

18 THE WITNESS: (Ms. Reynolds) Well, it may be that  
19 we're talking about cross-purposes because when I'm  
20 talking--

21 ARBITRATOR GLOSTER: Well, we may be. That's why  
22 I'm worried.

23 THE WITNESS: (Ms. Reynolds) Yes. I think I'm  
24 talking about economically what are they entitled to.

25 ARBITRATOR GLOSTER: Well, I'm--

1 THE WITNESS: (Ms. Reynolds) And if you're talking  
2 beneficially as a concept--

3 ARBITRATOR GLOSTER: It's different, isn't it--

4 THE WITNESS: (Ms. Reynolds) --then every Partner  
5 is entitled to have the assets of the Partnership  
6 administered in accordance with the Partnership Agreement,  
7 it's entitled to make sure there's proper custody of those  
8 assets, but what I'm talking about is what are they  
9 entitled to economically, what are they going to  
10 benefit--in that sense, a beneficiary.

11 ARBITRATOR GLOSTER: Okay. Well, can I see  
12 whether you agree with the proposition that in terms of how  
13 one articulates or defines as a matter of law a beneficial  
14 interest that won't necessarily be the same as his cash  
15 entitlement at any one time? Because his cash entitlement  
16 in the Capital Account--while it's actually there--may not  
17 reflect what has still got to come in, fees from clients,  
18 recoveries--

19 THE WITNESS: (Ms. Reynolds) But he won't be  
20 entitled to that, necessarily. So it's a bit difficult, I  
21 think. I'm looking at economically what someone is  
22 entitled to, and all of this has gone to that.

23 Now, there are beneficial interests of a right to  
24 have the Partnership conducted properly, but in terms of  
25 what someone is entitled to, monetarily, in this

1 Partnership Agreement is pretty clear, and that's the  
2 economic interest.

3 ARBITRATOR GLOSTER: Okay. Thank you.

4 THE WITNESS: (Mr. Lindsay) It is absolutely  
5 clear. I wonder whether you're having the same difficulty  
6 I'm having in following this line, but it is absolutely  
7 clear from the Agreement what the General Partner is  
8 economically entitled to. It's economically entitled to  
9 the Incentive Allocation. That is its beneficial interest,  
10 in the sense that we're using that term here.

11 ARBITRATOR GLOSTER: What about on a winding up of  
12 the Partnership? What happens--this particular  
13 Partnership?

14 THE WITNESS: (Mr. Lindsay) I understand. So--and  
15 I deal with that in my evidence. I'll just explain the  
16 point.

17 ARBITRATOR GLOSTER: Yes.

18 THE WITNESS: (Mr. Lindsay) We all agree that you  
19 have to look to the context of the particular transaction,  
20 that's what the authorities say, and so we look at the  
21 context of this transaction. If the Partnership is to be  
22 wound up in the ordinary course because of--not in  
23 insolvent circumstances; it's just decided to wind up the  
24 Partnership. The way in which that works, as a practical  
25 matter in respect of all Cayman Islands funds that are



1 registered with the Cayman Islands monetary authority as  
2 mutual funds, which this is, is that the assets are  
3 realized, the Limited Partners are compulsorily withdrawn  
4 from the Partnership. At that point of withdrawal, you  
5 then conduct the exercise of allocating the profits as  
6 between the General Partner and the Limited Partners in the  
7 ordinary course.

8           Those monies have been allocated and paid out.  
9 And at the point that there are no assets and liabilities,  
10 the Partnership is de-registered as a mutual fund and then  
11 permitted to be wound up. You can't be wound up whilst you  
12 continue to be registered as a mutual fund.

13           THE WITNESS: (Ms. Reynolds) But the assets are  
14 distributed in proportion to the Capital Accounts.

15           ARBITRATOR GLOSTER: Is that agreed?

16           THE WITNESS: (Mr. Lindsay) No, that's not  
17 correct.

18           If there were to be an insolvent winding up, one  
19 in which the General Partner was not in control, then at  
20 that point, the assets--a liquidator would come in, realize  
21 whatever assets they were, and effect a distribution.

22           In those circumstance, it's extremely unlikely the  
23 General Partner is going to have an Incentive Allocation.  
24 So that's not a meaningful scenario here.

25           But if we look to the particular context of this

1 Partnership and the way in which it would proceed, it would  
2 be unconscionable for a General Partner simply to allow the  
3 Partnership to become wound up and for the assets to be  
4 distributed in that way, if it had an entitlement to an  
5 Incentive Allocation.

6           What it would always do in circumstances where it  
7 had been resolved to wind up the Partnership--and bear in  
8 mind, that is a resolution of the General Partner unless  
9 there is an insolvency--the General Partner controls the  
10 entry into winding up, unless it's insolvent, the General  
11 Partner would then always effect the withdrawal of the  
12 Limited Partners so that it can calculate at that point its  
13 Incentive Allocation, take its Incentive Allocation, and  
14 then wind up the Partnership.

15           THE WITNESS: (Ms. Reynolds) So, the procedure for  
16 winding up is governed by 10.04, and it doesn't allow any  
17 interim provision. I mean, I accept what Mr. Lindsay says,  
18 that in certain circumstances there is an ability, mid-year  
19 or mid-point, to reflect the Incentive Allocation. That's  
20 if there's a withdrawal, if there's a termination--sorry,  
21 if there's a withdrawal or a separate Capital Contribution,  
22 then that period gets contracted and you look at the  
23 Incentive Allocation that's accrued.

24           But in the process of a termination, that's the  
25 10.04 in the procedure you'll see at the top of Page 23, or

1 at the bottom, the remainder cash and securities are paid  
2 out in proportion to their then respective Capital Accounts  
3 after taking into account transactions up to the date of  
4 and related to the liquidation of the Partnership.

5 Now, it's quite possible, and how I see it  
6 regularly happen, if someone petitions to wind up. Now, if  
7 someone petitions to wind up, there's no possibility of  
8 doing what Mr. Lindsay's talked about, and busy getting  
9 everyone out to change the period that you're looking at.

10 If someone petitions to wind up, you stop at that date, and  
11 if that comes in and a liquidator comes in when an order is  
12 eventually made.

13 ARBITRATOR GLOSTER: I wasn't putting the  
14 question, I think, on the basis of an insolvent winding up.  
15 If we're talking about a solvent dissolution and there are  
16 still monies/receivables to come in, what happens in those  
17 circumstances?

18 THE WITNESS: (Ms. Reynolds) Then you're at the  
19 top of Page 23.

20 ARBITRATOR GLOSTER: Yes.

21 I mean, does the potential for a receivable--let  
22 us say there is money to come in from a foreign investment,  
23 which has not yet been received--

24 THE WITNESS: (Ms. Reynolds) No.

25 ARBITRATOR GLOSTER: --does that get posted to the

1 Capital Account or not?

2 THE WITNESS: (Mr. Lindsay) Sorry, that's wrong.

3 THE WITNESS: (Ms. Reynolds) Only if you do it the  
4 way that Mr. Lindsay said. But that's not what this is  
5 providing for. If you follow the procedure set out in the  
6 Limited Partnership Agreement and it's wound up, you look  
7 at the proportion in the then Capital Accounts.

8 Now, there are other places in the Limited  
9 Partnership Agreement which allows mid-year contributions  
10 and withdrawals to have an impact on whether Incentive  
11 Allocation is drawn and allocated. It doesn't happen in a  
12 termination in the ordinary course.

13 ARBITRATOR GLOSTER: Let's say--and I'm not  
14 talking about this case, but let's say there's an  
15 outstanding lawsuit, the part--everybody resolves on  
16 dissolution. There's an outstanding lawsuit, and monies  
17 are still to flow in. How is that dealt with? And let's  
18 say that triggers the incentive payment, how is that dealt  
19 with in posting to the Capital Contribution?

20 THE WITNESS: (Mr. Lindsay) So, at the point you  
21 make your determination, so you decide--the General Partner  
22 decides--unless somebody petitions the Partnership to wind  
23 up, let's all understand the General Partner absolutely  
24 controls the process, so it makes the determination to wind  
25 up the Partnership. It then calculates what people's

1 entitlement would be to profits and losses and its own  
2 Incentive Allocation.

3           There is always, and that occurs at the end of  
4 end-year, for withdrawal halfway through the year, at any  
5 point that it makes such determination, contingent  
6 liabilities and contingent assets will be taken into  
7 account, and there will be an adjustment to the extent that  
8 those contingencies are either realized or not realized.

9           ARBITRATOR GLOSTER: Thank you. I understand.

10           Ms. Reynolds, do you want to say anything else on  
11 that?

12           THE WITNESS: (Ms. Reynolds) Well, distributions  
13 of anything coming in is dealt with in 4.09, and again, it  
14 follows the procedure that fractions are used, and the  
15 defined term for "fractions," if one looks at the  
16 definition at 2.04: "For the purposes of making  
17 allocations to any Capital Account for any valuation period  
18 shall mean the fraction, the numerator of which shall be  
19 the amounts of the Capital Account's Opening Capital  
20 Balance, such Valuation Period, and the denominator of  
21 which shall be the Account of all Opening Capital Balances  
22 of the Partnership's Valuation Period."

23           It doesn't provide for anything here that would  
24 indicate that you get to--

25           THE WITNESS: (Mr. Lindsay) Again, we need to

1 understand the context of this Partnership. Section 4.09  
2 starts by saying: "The General Partner generally does not  
3 intend to make distributions to Limited Partners." This is  
4 a hedge fund. Hedge funds never make distributions to  
5 Limited Partners unless they are set up for a particular  
6 strategy of being an income fund, which is to provide  
7 regular returns to retirees or people of that nature.

8 In no other--in no circumstances would this  
9 Partnership ever make a distribution in accordance with the  
10 provisions of 4.09. That is an extremely unlikely  
11 scenario. The far more likely scenario and the far more  
12 usual scenario and the one that is universally adopted,  
13 unless there is an insolvency, is that Limited Partners are  
14 withdrawn, the accounts are determined, and then the  
15 Partnership is wound up.

16 There is no circumstance in which this Partnership  
17 would ever make a distribution pursuant to the provisions  
18 of Section 4.09.

19 MS. SALOMON: Can we take a break now?

20 PRESIDENT SACHS: It seems like a good point to  
21 have our morning break.

22 Thank you, David, for having endured this longer  
23 than expected.

24 We continue at 11:30.

25 You're still under expert testimony, so we would

1 ask you not to speak to your respective Appointors.

2 THE WITNESS: (Mr. Lindsay) Understood.

3 PRESIDENT SACHS: See you in 20 minutes.

4 (Brief recess.)

5 PRESIDENT SACHS: So, Mrs. Salomon, please  
6 proceed.

7 MS. SALOMON: Thank you.

8 BY MS. SALOMON:

9 Q. Ms. Reynolds, it's right to say that the General  
10 Partner has sole control over the business of an Exempt  
11 Limited Partnership; correct?

12 A. (Ms. Reynolds) Correct.

13 Q. Mr. Lindsay?

14 A. (Mr. Lindsay) Yes, that's correct.

15 Q. And, Ms. Reynolds, the Limited Partner has no  
16 control whatsoever over the business of the Partnership;  
17 correct?

18 A. (Ms. Reynolds) Correct.

19 A. (Mr. Lindsay) Yes, that's correct.

20 Q. And, in fact, the Limited Partner is specifically  
21 prohibited from taking part in the business of the  
22 Partnership or else it would lose its limited liability  
23 status; correct?

24 A. (Ms. Reynolds) Correct.

25 Q. Mr. Lindsay?

1 A. (Mr. Lindsay) Yes, that's correct.

2 Q. And that means the Limited Partner has no right or  
3 authority to direct the General Partner in business matters  
4 under this Partnership Agreement; correct?

5 A. (Ms. Reynolds) Has no authority to direct, no.

6 Q. Okay. And, Mr. Lindsay?

7 A. (Mr. Lindsay) Yes, that's correct.

8 Q. Okay. And just to be clear, then, the General  
9 Partner is the only entity which can acquire assets as part  
10 of the business; correct? Ms. Reynolds?

11 A. (Ms. Reynolds) On behalf of the Partnership,  
12 that's right.

13 Q. Yes.

14 Mr. Lindsay?

15 A. (Mr. Lindsay) Yes.

16 Q. Indeed, the General Partner is the only entity  
17 which can make management decisions regarding an asset once  
18 it has been acquired; isn't that true?

19 A. (Ms. Reynolds) Well, the General Partner can  
20 delegate and appoint agents.

21 Q. But the Limited Partner cannot make management  
22 decisions regarding an asset once it's been acquired;  
23 correct?

24 A. (Ms. Reynolds) Correct.

25 Q. And, Mr. Lindsay?



1           A.     (Mr. Lindsay) That's correct. General Partner can  
2 delegate, but the delegee would be exercising the General  
3 Partner's authority.

4           Q.     Okay. And we'll come back to that issue. Just to  
5 wrap up this point, if, for example, the General Partner  
6 owns shares in its capacity as General Partner in an Exempt  
7 Limited Partnership, the General Partner is the only entity  
8 which can decide how to vote on those shares; correct?

9           A.     (Ms. Reynolds) Subject to delegation, but yes.

10          A.     (Mr. Lindsay) The delegation doesn't affect the  
11 General Partner's ability to decide--the delegation doesn't  
12 affect the General Partner's control of that  
13 decision-making process. The General Partner is the only  
14 person.

15          Q.     The only person who can--

16          A.     (Mr. Lindsay) Exercise a vote in shares owned by  
17 the Partnership, yes.

18          Q.     And the General Partner is the only entity which  
19 can make the decision to sell an asset; isn't that correct,  
20 Ms. Reynolds?

21          A.     (Ms. Reynolds) Yes.

22          Q.     And, Mr. Lindsay?

23          A.     (Mr. Lindsay) Yes, the General Partner is the only  
24 person with that authority.

25          Q.     And, Ms. Reynolds, do you know the reason why a

1 General Partner formally delegates or may formally delegate  
2 some of its operational responsibilities to an investment  
3 manager?

4 A. (Ms. Reynolds) As a matter of practicality, there  
5 is often a manager involved, which will have conduct of the  
6 day-to-day business, of the management of the affairs and  
7 assets of the Partnership or fund whatever entity it is.

8 Q. Mr. Lindsay, is it simply a matter of practicality  
9 or are there other reasons why a General Partner may  
10 formally delegate some of its operational responsibilities  
11 to an investment manager?

12 A. (Mr. Lindsay) No. A general partner engages an  
13 investment manager because of the regulatory landscape in  
14 which investment funds are operated, so in most  
15 jurisdictions outside of Cayman, an investment manager  
16 would be a regulated entity and that an investment manager  
17 is engaged to assist in advising the general partner in  
18 investment decisions is meaningful to the general partner's  
19 ability to raise money in jurisdictions where it is  
20 necessary, so have a regulatory--a regulated person  
21 involved in that structure.

22 So, rather than regulate each individual fund, for  
23 example, in the United States, the SEC would regulate the  
24 investment manager. In Cayman, the position is--can be  
25 slightly different in that individual funds are regulated,

1 but the engagement of a regulated investment manager is an  
2 important part of the overall regulatory landscape of the  
3 fund.

4 Q. And pursuant to that delegation, that is if a  
5 General Partner formally delegates some of its operational  
6 responsibilities to the Investment Manager, the Investment  
7 Manager is merely an agent for the General Partner;  
8 correct, Ms. Reynolds?

9 A. (Ms. Reynolds) Yeah. There will be a contractual  
10 relationship between the General Partner or in this case,  
11 as I understand it, looking at the terms of the LPA, the  
12 manager seems to be appointed at the feeder level.

13 Q. Mr. Lindsay?

14 A. (Mr. Lindsay) Yes, there's a relationship between  
15 the Fund and the Investment Manager for a variety of  
16 procedural and administrative matters.

17 Q. And the Investment Manager is an agent, then, of  
18 the General Partner?

19 A. (Mr. Lindsay) To the extent the Investment Manager  
20 acts in respect of the Partnership, it acts as an agent to  
21 the General Partner.

22 Q. I'd like to turn to Schedule 1 of Mr. Lindsay's  
23 Supplemental Expert Report. That's at Page 13. I'd have  
24 both experts review the Schedule.

25 Mr. Lindsay, could you walk us through these three

1 examples and why you have provided these examples and then  
2 give Ms. Reynolds the opportunity to comment.

3 A. (Mr. Lindsay) Certainly. So, the examples that  
4 we've provided at Schedule 1 are intended to illustrate in  
5 quite simple terms the way in which the value of individual  
6 assets affects the beneficial interest of the General  
7 Partner in the Partnership.

8 So, in example one, we have a situation where the  
9 General Partner invests a hundred dollars in three  
10 different assets. Each of those assets performs remarkably  
11 well, generating a profit of \$75 and the General Partner  
12 receives an Incentive Allocation then of \$15. In the  
13 ordinary course, you would hope that all of your assets  
14 were profitable, and that's what would happen if they were.  
15 There is a net increase of 75, and the General Partner's  
16 Incentive Allocation is calculated by reference to that net  
17 increase, not by reference to the value of any particular  
18 asset.

19 That's meaningful when we look to example two,  
20 where one of the assets has performed less well in the  
21 second year of the investment. So whilst Assets A and B  
22 continue to perform, Asset C loses a significant part of  
23 its value. That means the General Partner receives no  
24 Incentive Allocation in respect of the stellar performance  
25 of Assets A and B because the aggregate change in Net Asset

1 Value is diminished, so the performance of one asset  
2 affects the General Partner's notional interest in the  
3 other two assets is what that example is intended to  
4 illustrate.

5           When we get to example three, example three  
6 illustrates a similar point that continues year on year.  
7 So, in example three, Assets A and B and new Asset D have a  
8 particular value, and overall the Partnership is  
9 profitable, which means that Limited Partners will be able  
10 to share in that ability. But because there is a residual  
11 loss suffered by the Partnership from previous years, the  
12 General Partner's ability to share in that profit is  
13 limited.

14           What that's intended to illustrate is that when it  
15 comes to any loss suffered by the Partnership, the first  
16 person to suffer, to incur that loss is the General  
17 Partner; because of the overall loss of the Partnership,  
18 the General Partner's allocation is diminished, and the  
19 last person to benefit from the Partnership's subsequent  
20 profitability is the General Partner, so that the person  
21 most at risk from that loss in the first instance is the  
22 General Partner.

23           Q. Ms. Reynolds, do you agree with that description  
24 of how the Incentive Allocation would be calculated and the  
25 risk that the General Partner bears in connection with any

1 individual investment?

2 A. (Ms. Reynolds) I agree with each of the three  
3 examples. I would say that the--how the losses and profits  
4 are allocated at the very first step before you get to  
5 Incentive Allocation, is the allocation between the Capital  
6 Accounts of the profits and losses, and so, if there are  
7 losses in a year, 4.06(a), first of all, that's where  
8 there's going to be some allocation of losses between the  
9 Capital Accounts to the extent there's anything in the GP's  
10 Capital Account. If there isn't, then, of course, you'll  
11 go on to the next step, but there's a first step to this,  
12 and that is 4.06(a).

13 A. (Mr. Lindsay) That allocation is, pardon me, if  
14 you read the Agreement, that is simply an interim  
15 allocation because we don't know until the end of the  
16 particular period what the overall performance will be for  
17 the Relevant Period; and so, it's impossible until you get  
18 to the end of the year to determine what the General  
19 Partner's Incentive Allocation would be. And at the time  
20 that you do make that determination either because there's  
21 been a withdrawal or you've come to the end of the Fiscal  
22 Year, those interim allocations are then adjusted for the  
23 final and proper allocation of those profits and losses.

24 Q. I now want to switch to a different topic. Thank  
25 you for the explanation.

1           A.     (Ms. Reynolds) Sorry, could I just clarify, the  
2 Incentive Allocation is calculated on the amount that goes  
3 into the LP's Capital Account, just to be clear on that,  
4 under 4.06(b), how you get Incentive Allocation is based on  
5 what goes into the LP's Capital Account from the first  
6 step, so there's a number of steps. I mean, maybe we can  
7 deal with that in more detail later, but how you get to  
8 Incentive Allocation is by looking at what's gone to the  
9 Limited Partners' Capital Account as part of the 4.06(a)  
10 process.

11           Q.     Mr. Lindsay, is that correct?

12           A.     (Mr. Lindsay) I confess, I'm not sure what point  
13 is being made. I can't comment on whether it's correct or  
14 not. I don't understand what distinction is being drawn  
15 by--

16           A.     (Ms. Reynolds) Perhaps it would be helpful to look  
17 at 4.06(a).

18           A.     (Mr. Lindsay) Yes.

19           A.     (Ms. Reynolds) So, Net Profits and Net Losses for  
20 a Valuation Period, and that's defined, shall be  
21 preliminarily allocated among the Capital Accounts in  
22 proportion to their respective opening capital balances  
23 such Valuation Period, and then you go on to (b): With  
24 respect to each Capital Account of the Limited Partner as  
25 of the end of each Fiscal Year, there shall be allocated to

1 the Capital Account of the GP as its Incentive Allocation  
2 20 percent of one, the Cumulative Net Profits preliminarily  
3 allocated to such Capital Account as such Limited Partner  
4 pursuant to Section 4.06(a). That's why I say 4.06(a) has  
5 to come before 4.06(b).

6 A. (Mr. Lindsay) Yes, there's a preliminary  
7 allocation, and then there's an adjustment at the end of  
8 the year when you make a determination based on  
9 performance.

10 A. (Ms. Reynolds) So, I'm just saying, you can only  
11 get the Incentive Allocation once you've gone through (a).  
12 I think it's a relevant step.

13 Q. Mr. Lindsay, please clarify.

14 A. (Mr. Lindsay) I don't understand--again, I don't  
15 understand what point is being made. There is a  
16 preliminary allocation throughout the course of the year  
17 for profits and losses accrued, and at the end of the year  
18 there is an adjustment. That--it seems relatively  
19 straightforward. I'm not sure.

20 A. (Ms. Reynolds) I'm just simply clarifying that  
21 Incentive Allocation is calculated based on what has been  
22 received by that preliminary allocation by the LP.

23 Q. Right.

24 Moving on, when anyone, be it a Pension Fund,  
25 university, or someone else decides to have Mason purchase



1 assets and give cash to Mason to do so, this is based on  
2 Mason's reputation as a fund; is that right, Ms. Reynolds?

3 A. (Ms. Reynolds) Yeah, there will typically be an  
4 offering document which might be relevant as well, but  
5 you're talking about becoming a shareholder in the feeder  
6 fund, which is part of the group.

7 Q. Yes.

8 And Mason's reputation or any hedge fund's  
9 reputation is a key component of the investor making a  
10 decision to invest its money with Mason?

11 A. (Ms. Reynolds) One might assume.

12 Q. And not only would someone consider Mason's  
13 reputation, but also its performance; isn't that true?

14 A. (Ms. Reynolds) Yes.

15 Q. Mr. Lindsay, is that your understanding?

16 A. (Mr. Lindsay) The performance is the key aspect of  
17 their reputation that people would consider.

18 Q. So, if there are significant losses and no profit  
19 has been made, pension funds, universities may decide not  
20 to invest with Mason and, indeed, if they have already  
21 invested with Mason, they may decide to withdraw; isn't  
22 that true?

23 A. (Ms. Reynolds) It seems a factual question. I  
24 don't disagree with it.

25 Q. Mr. Lindsay?

1 A. (Mr. Lindsay) Yes, that's correct. That's the way  
2 in which the industry ordinarily works.

3 Q. And the industry works that if an investment firm  
4 has significant losses, that fact becomes known in the  
5 broader market; isn't that true, Ms. Reynolds?

6 A. (Ms. Reynolds) Yes.

7 I mean, typically, it would be known how (a)--it's  
8 available to search on-line, say.

9 Q. Mr. Lindsay, that's your understanding, the impact  
10 of losses or the fact that an investment firm has had  
11 significant losses becomes known in the industry?

12 A. (Mr. Lindsay) Yes. It's--the industry is  
13 remarkably small considering the value of the assets and  
14 the management particularly with regard to tax-exempt  
15 investors which tend to be a relatively limited pool of  
16 investors, and they speak regularly, and that the  
17 performance or not of the investment managers is the main  
18 topic of conversation.

19 Q. So, you agree that significant losses with respect  
20 to an asset can affect Mason's reputation in the market;  
21 correct, Ms. Reynolds?

22 A. (Ms. Reynolds) Well, whether a specific asset  
23 would will depend on what else is in the portfolio. It may  
24 be a drop in the ocean, but it's going to be the overall  
25 performance, yes.

1 Q. And, Mr. Lindsay, what's your response?

2 A. (Mr. Lindsay) Yes, if a fund incurs significant  
3 losses, then it has an adverse effect on its reputation in  
4 the market.

5 Q. Okay. Now, if there is loss to an asset held by  
6 an Exempt Limited Partnership, only the General Partner can  
7 bring a claim with respect to that loss; correct,  
8 Ms. Reynolds?

9 A. (Ms. Reynolds) Yes.

10 Q. And Mr. Lindsay?

11 A. (Mr. Lindsay) Yes, that's correct.

12 Q. If the General Partner recovers in any litigation  
13 or arbitration it has brought in its capacity as General  
14 Partner of an Exempt Limited Partnership, can it keep the  
15 full amount of its recovery or does it need to distribute  
16 the Award in the same manner as it would any other asset,  
17 Ms. Reynolds?

18 A. (Ms. Reynolds) Yes. It's not beneficially  
19 entitled to the entirety of the proceeds. It's going to  
20 account for it in the way that it has to under the LPA for  
21 any other income.

22 Q. Mr. Lindsay?

23 A. (Mr. Lindsay) That's correct. Any award in any  
24 proceeding brought in its capacity as General Partner is an  
25 asset to the Partnership. It's applied in accordance with

1 the provisions that would apply to any asset of the  
2 Partnership.

3 Q. And to clarify, Ms. Reynolds said it's not--it  
4 mean the General Partner--acting in its capacity as General  
5 Partner of an Exempt Limited Partnership bringing  
6 litigation or arbitration, she said that it is not  
7 beneficially entitled to the entirety of the proceeds. Can  
8 you respond to that statement?

9 A. (Mr. Lindsay) Well, the General Partner is in the  
10 same way as any other asset, if the General Partner were to  
11 receive an award in any litigation brought in its capacity  
12 as General Partner, that asset would form part of the  
13 assets that the General Partner holds for the benefit of  
14 the Partnership as a whole, and it would be--it would run  
15 through the same process as any other asset. So, it would  
16 be applied to the overall Net Profit or Net Loss of the  
17 Partnership, and the Partners, the Limited Partner and the  
18 General Partner, would be able to share in the proceeds of  
19 that asset in the way provided for in the Partnership  
20 Agreement.

21 As a consequence, if all of the activities of the  
22 Partnership in that year, including the relevant litigation  
23 the Partnership made a profit, the General Partner would  
24 receive its Incentive Allocation, all the profit would be  
25 applied to it and any communicative Net Loss in the

1 aggregate.

2 Q. So, if an asset, for example, lost \$200 million  
3 but the General Partner in a litigation or arbitration was  
4 only awarded 20 percent of that--so that would be  
5 \$40 million, 20 percent of \$200 million--in reality, it may  
6 only recoup \$8 million; correct? Assuming it would be  
7 entitled to an Incentive Allocation, and that's the only  
8 asset in the Fund?

9 A. (Ms. Reynolds) Sorry, you started the question by  
10 saying they would be awarded 20 percent. What do you mean?  
11 You mean by the Tribunal?

12 Q. Yes.

13 So, in a hypothetical situation in which there is  
14 a litigation in arbitration, and it is shown that the asset  
15 lost \$200 million but the General Partner's only awarded  
16 20 percent--

17 A. (Ms. Reynolds) Sorry, is there a reason why it  
18 would be awarded 20 percent?

19 Q. --just assume--

20 A. (Ms. Reynolds) Okay.

21 (Overlapping speakers.)

22 Q. Please.

23 Yes. In a hypothetical situation, where the  
24 General Partner is only awarded 20 percent because it has  
25 asserted that it only has--it is entitled to--let me just

1 rephrase my question for the Court Reporter.

2 I want you to assume that an asset has lost  
3 \$200 million.

4 A. (Ms. Reynolds) A Partnership has lost 200 million?

5 Q. The asset has lost \$200 million.

6 And the General Partner brings a litigation or  
7 arbitration in its capacity as General Partner of an Exempt  
8 Limited Partnership, and for whatever reason, the Award is  
9 only 20 percent of that loss, so in this circumstance it  
10 would be \$40 million, which is 20 percent of \$200 million.

11 In reality, if a General Partner is entitled to a  
12 20 percent Incentive Allocation, it would only be able to  
13 recoup \$8 million; isn't that true?

14 A. (Ms. Reynolds) So, I think that skips a step. So,  
15 how it would work is, the money would come in, and as with  
16 any other income, it would be preliminarily allocated  
17 between the two Capital Accounts.

18 Now, in a case typically you would expect the LP  
19 to have more than the GP, so the majority of that is going  
20 to be allocated in accordance with the proportions to the  
21 LP and then a percentage of what goes to the LP, 20 percent  
22 of that, if the rest of the portfolio has performed, if the  
23 Cumulative Unrecovered Net Losses have been recovered and  
24 you go back up to the high watermark, and in that scenario,  
25 yes, 20 percent of that at that stage then goes by way of

1 Incentive Allocation.

2 Q. So, if the only asset is the proceedings from a  
3 litigation or arbitration taking your steps, then if the  
4 General Partner is awarded only 20 percent of the loss,  
5 then it would only be entitled to 20 percent of what it is  
6 awarded, which would be \$8 million in my scenario; isn't  
7 that right?

8 A. (Ms. Reynolds) I would need to see the Capital  
9 Accounts because I'd need to see what proportion they have.  
10 If you're telling me that the LP has 100 percent of the  
11 Capital Accounts, then yes, that scenario works, I think,  
12 just doing it off the top of my head.

13 Q. Mr. Lindsay?

14 A. (Mr. Lindsay) In that scenario, \$8 million  
15 represents the highwater, what the General Partner would be  
16 able to receive, that may be reduced to the extent the  
17 Partnership hasn't performed particularly well in respect  
18 of its other assets. But if there were only one asset,  
19 then that mathematics works, if there are other assets then  
20 that \$8 million may be reduced forever.

21 A. (Ms. Reynolds) And of course fees and expenses and  
22 costs both at the feeder level and loss level need to be  
23 taken into account.

24 A. (Mr. Lindsay) Yes, that's correct.

25 MS. SALOMON: No further questions.

1 PRESIDENT SACHS: Thank you, Ms. Salomon.

2 So, we go to the Respondent in cross.

3 MR. VOLKMER: Thank you, Mr. Chairman.

4 CROSS-EXAMINATION

5 BY MR. VOLKMER:

6 Q. Good morning, Ms. Reynolds, Mr. Lindsay. I will  
7 be asking you a few questions on behalf of Respondent.  
8 Starting--picking up on where we just left off, not a  
9 question about specific numbers, but as a general matter,  
10 would the Limited Partner benefit from an award of damages  
11 in this arbitration, and if so, how?

12 A. (Mr. Lindsay) Are you directing that to me?

13 Q. Either can answer first.

14 A. (Mr. Lindsay) Well, the Partnership would benefit  
15 from an award of damages. In the sense that the profits of  
16 the Partnership would be increased as to whether there was  
17 a Net Profit or Net Loss at the end of the Relevant Period  
18 would depend on the other performance, but this would  
19 certainly go towards the benefit of the Partners. As to  
20 its allocation between the Partners, that depends on the  
21 performance of the Fund overall.

22 A. (Ms. Reynolds) Yes, I would expect if the Limited  
23 Partner had the majority of the economic interest,  
24 according to the Capital Accounts, then the Limited Partner  
25 is going to get the majority of whatever is recovered.



1 Q. Mr. Lindsay, would you agree with that?

2 A. (Mr. Lindsay) No, you can't--you can't delineate a  
3 particular asset in that way. So, this is the point that I  
4 illustrated at the start of the evidence.

5 So, if there are 10 assets, until the point at  
6 which the asset is realized, the share of each of the  
7 Partners in those assets is indivisible. But the way in  
8 which people actually share in the assets to the point of  
9 realization is--may be different for each of the assets.  
10 One Limited Partner may receive, as it happens, 100 percent  
11 of the income, say, with a particular asset. But let's  
12 assume for the moment that the Partnership is under water.  
13 The General Partner's benefit from a particular piece of  
14 litigation that brings the Partnership back into profit  
15 would be disproportionate to its 20 percent. It would  
16 benefit to a greater extent than it would otherwise  
17 benefit. And so, it depends entirely on the financial  
18 status of the Partnership at the relevant time as to  
19 whether one particular asset has that benefit.

20 Q. Now you mentioned that the--

21 A. (Ms. Reynolds) I'm not sure I followed the fact  
22 that it could be disproportionate. Do you mean  
23 disproportionate to--I didn't follow that bit, what it  
24 would be disproportionate to?

25 A. (Mr. Lindsay) If one assumes all other things

1 being equal, that profits are divided on an 80:20 basis,  
2 and circumstances where the Partnership's performance  
3 year-on-year is profitable and continued to be profitable  
4 by reference to the previous year and there is no Incentive  
5 Allocation--sorry, there is no Cumulative Net Loss in the  
6 Partnership, then each asset that earns a profit, each of  
7 those assets would be--the profit from each of those assets  
8 would be apportioned on an 80:20 basis, but in  
9 circumstances where the Partnership has a Cumulative Net  
10 Loss because the profits would go to eliminating that  
11 Cumulative Net Loss, the allocation it's not 80:20 in terms  
12 of the profit. It depends entirely on the financial status  
13 of the Partnership at any given time. And when the  
14 Partnership, particularly if a Partnership is--has Net  
15 Losses from this or other assets, then the proportion of  
16 those allocations is not 80:20, and the effect could be--it  
17 could be anything, depending on the nature of the  
18 Partnership, and its profit or loss position at the time.

19 A. (Ms. Reynolds) But it would actually go, in that  
20 scenario where it's under water it's got Cumulative and  
21 Recovered Net Losses, it's going to go to--the majority is  
22 going to go to the Limited Partner. And I think we're just  
23 using the scenario that you just said, the hypothetical,  
24 which is only a single asset. I think that's what  
25 Mr. Volkmer said, that we were contending in that

1 situation, as I understand it, the LP would get--

2 A. (Mr. Lindsay) In circumstances of a single asset,  
3 then yes, the General Partner's beneficial interest would  
4 be 20 percent of profits, but...

5 Q. All right. Then we can move on to another topic  
6 or a related topic, the Incentive Allocation. We've  
7 already heard testimony about the conditions that are  
8 applicable to the Incentive Allocation, and we will get to  
9 that in a minute, but leaving aside the conditions for now,  
10 I think it is agreed that the Incentive Allocation is  
11 20 percent of the net profits that are preliminarily  
12 allocated to the Limited Partner's account. Is that agreed  
13 so far?

14 A. (Ms. Reynolds) Yes.

15 Q. Mr. Lindsay?

16 A. (Mr. Lindsay) Yes.

17 Q. And I think Mr. Lindsay, you said that the  
18 Incentive Allocation is the beneficial interest of the  
19 General Partner, so I would just like to understand your  
20 position on that.

21 MS. SALOMON: I don't think that was his  
22 testimony.

23 BY MR. VOLKMER:

24 Q. Maybe you want to clarify that point, first.

25 A. (Mr. Lindsay) The right to receive the Incentive

1 Allocation is the General Partner's beneficial interest.

2 Q. Okay. So, the rights to the Incentive Allocation  
3 is the beneficial interest.

4 So, is it your position then that the General  
5 Partner has a 20 percent beneficial interest in the profits  
6 that are preliminarily allocated to the Limited Partner's  
7 account?

8 A. Presuming the Partnership to be profitable  
9 year-on-year, the General Partner's interest is to receive  
10 20 percent of the profits earned by the Partnership  
11 overall, yes.

12 Q. And if the Partnership is not profitable?

13 A. (Mr. Lindsay) If the Partnership is not profitable  
14 in any particular year, then the General Partner would not  
15 receive an Incentive Allocation.

16 Q. And it would not have a beneficial interest in  
17 that sense, in that scenario?

18 A. (Mr. Lindsay) No, that's a complete  
19 misunderstanding of the nature of the beneficial interest.  
20 The beneficial interest is the General Partner's right to  
21 share in profits. The beneficial interest may be worth  
22 more or less in any particular year. In the same way that  
23 a Limited Partner's interest--if the Partnership made no  
24 profits, then the Limited Partner's beneficial interest is  
25 similar. If all of the assets were lost, then everybody's

1 beneficial interest would become worthless, but that is not  
2 the same thing as saying it does or doesn't have a  
3 beneficial interest.

4 Q. Ms. Reynolds, do you have any comments?

5 A. (Ms. Reynolds) If you're talking about what is  
6 economically what they're going to get out of it, then I  
7 would say it's based on the Capital Accounts. It depends  
8 on the sense in which you're asking it, but if you're  
9 asking what the value is or the amount, then it's based on  
10 that allocation.

11 Q. Thank you.

12 Now, going back to a hypothetical--I will try to  
13 keep this simple--on the Incentive Allocation, assuming  
14 that in 2015, the Limited Partner made a profit of  
15 200 million on the Samsung Shares but suffered a loss of  
16 300 million from the rest of the portfolio. In that  
17 situation, would the General Partner receive 20 percent of  
18 the profits from the Samsung Shares?

19 A. (Mr. Lindsay) No. You determine, as we've  
20 discussed, by reference to the overall value of the  
21 Partnership. So, similarly, if one asset, one asset has  
22 lost value and other assets have gained, then you look at  
23 the overall performance of the piece. But because the  
24 calculation is done cumulatively on a year-by-year basis,  
25 losses in respect of one asset doesn't just affect the

1 ability to share beneficially in other assets for that  
2 year. They continue to effect the ability to share  
3 beneficially in assets year-on-year.

4 A. (Ms. Reynolds) Yes. I mean, Mr. Lindsay gives  
5 some very helpful examples to show that you can't just look  
6 at any one asset to determine that question. You've got to  
7 look at the entirety of the portfolio. So, if the whole  
8 thing, even if you've made money on Samsung but everything  
9 else had gone badly, there's not going to be any Incentive  
10 Allocation paid.

11 Q. And just one other hypothetical, still on the same  
12 point: Assuming the same 200 million profit from the  
13 Samsung Shares and now let's assume that the rest of the  
14 portfolio is also profitable, let's say 300 million, but  
15 their uncovered Net Losses from previous years of  
16 720 million. In that scenario, would the GP receive any  
17 Incentive Allocation?

18 A. (Mr. Lindsay) It wouldn't receive an Incentive  
19 Allocation in that year, no, because of the overall  
20 performance of the Partnership.

21 Q. Thank you.

22 Ms. Reynolds?

23 A. (Mr. Lindsay) But, just to be clear, that is not  
24 the same as saying it has no beneficial interest in the  
25 assets of the Partnership. The beneficial interest is in

1 the performance of the assets of the Partnership over a  
2 period of time as a whole.

3 A. (Ms. Reynolds) But this is an interesting--sorry.

4 A. (Mr. Lindsay) No.

5 A. (Ms. Reynolds) This is an interesting point. The  
6 beneficial interest being an entitlement to potentially  
7 receiving Incentive Allocation. If you've got that  
8 scenario and you've got 720 million losses, what does the  
9 beneficial interest to receive an Incentive Allocation bite  
10 on? There is not going to be any Incentive Allocation, so  
11 there is no beneficial entitlement to Incentive Allocation  
12 in that scenario, so that's where I think this beneficial  
13 interest point is relevant.

14 A. (Mr. Lindsay) Sorry, that's a slightly bizarre  
15 characterization.

16 The General Partner's beneficial interests is its  
17 ability to share in whatever profits of the Partnership  
18 happen to be over a period of time. If the Partnership  
19 suffers significant losses in respect of any particular  
20 period, that has a significant meaningful material adverse  
21 effect on the General Partner's beneficial interest, and so  
22 in that sense, the General Partner feels the effect of that  
23 loss, and it affects its ability to generate income--to  
24 generate returns in respect of its beneficial interest, not  
25 only for that year but for many years to come. That is not

1 the same thing as saying the General Partner has no  
2 beneficial interest. It simply has--the effect of that  
3 loss has a very significant effect on the value of the  
4 General Partner's beneficial interest, and that, I think,  
5 is meaningful to the idea that the General Partner has  
6 suffered loss and is at risk in the transaction. That's  
7 sort of the key point.

8 A. (Ms. Reynolds) So, I wasn't saying there wouldn't  
9 be a beneficial interest. What I was saying is there  
10 wouldn't be a beneficial interest in relation to that  
11 particular asset because there was never going to be any  
12 hope for earning Incentive Allocation because of the  
13 720 million of losses, you're never going to get with  
14 200 million above the necessary watermark in order to earn  
15 Incentive Allocation, so it doesn't exist. That is the  
16 point.

17 A. (Mr. Lindsay) There is never a beneficial interest  
18 specifically calculated in respect of any particular asset.

19 A. (Ms. Reynolds) I agree with that.

20 A. (Mr. Lindsay) The beneficial interest is  
21 calculated by reference to the performance overall of the  
22 portfolio. Assets that perform poorly have an adverse  
23 effect on the beneficial interest, so the General Partner  
24 suffers a detrimental effect to the value of its beneficial  
25 interest. It doesn't somehow lose its beneficial interest.



1 It doesn't somehow have no beneficial interest. The  
2 Partnership continues as a going concern over a period of  
3 time. What the General Partner makes from its investment,  
4 if time and expertise over that period of time is  
5 determined by reference to the performance of the  
6 Partnership over that period of time, each individual asset  
7 adversely--adversely affects the value of the General  
8 Partner's beneficial interest, but it does not affect  
9 whether or not there is a beneficial interest.

10 Q. Okay. So, Mason argues that, but for the  
11 Respondent's conduct in this case, the Samsung Shares would  
12 have increased in value in 2015. With the information that  
13 you currently have, are you able to assess whether the GP  
14 would have earned an Incentive Allocation in 2015 if the  
15 Samsung Shares had increased in value?

16 A. (Mr. Lindsay) No.

17 A. (Ms. Reynolds) No.

18 Q. And what type of documents or information would  
19 you have to receive to make that kind of assessment?

20 A. (Mr. Lindsay) That's an assessment as to--an  
21 assessment as to whether the General Partner has or hasn't  
22 earned an Incentive Allocation, is only capable of being  
23 done by reference to the accounts of the Partnership. But  
24 that is not--but that's not a meaningful assessment for the  
25 topics that we've been asked to consider this morning which

1 are whether the General Partner has a beneficial interest  
2 and what is the nature of that interest. We're talking  
3 about what is the value of that interest, and that's a  
4 completely--that's a question of, if quantum, which I  
5 understand this Hearing not to have any meaningful--unless  
6 I misunderstood yesterday's submissions.

7 Q. Ms. Reynolds, do you have any questions--any  
8 comments on the documents that would be necessary for that  
9 kind of assessment?

10 A. (Ms. Reynolds) Well, I thought your question  
11 actually was whether--sorry, was your question whether we  
12 would have enough information in order to determine whether  
13 they would have earned any Incentive Allocation for the  
14 particular year--

15 Q. Right.

16 A. (Ms. Reynolds) --just based on knowing what the  
17 Samsung Shares, what it could have been--

18 Q. Yes.

19 A. (Ms. Reynolds) --the answer is no. And without  
20 the accounts, it's not possible to determine that.

21 Q. Okay. Then still staying on the Incentive  
22 Allocation, if we can have a look at Section 4.06(b) of the  
23 Limited Partnership Agreement, and we see here the  
24 calculation for the Incentive Allocation--

25 A. (Mr. Lindsay) Yes.

1 Q. --which is, in general terms, the Cumulative Net  
2 Profits off the LP minus certain expenses, and then over  
3 Cumulative Net Losses, so effectively also subtracting any  
4 Net Losses that--

5 A. (Mr. Lindsay) Yes.

6 Q. --over those years.

7 If at the end of that calculation the figure is  
8 positive, what does the GP receive?

9 A. (Mr. Lindsay) If that comes to a positive number,  
10 the General Partner receives 20 percent of the profit.

11 A. (Ms. Reynolds) Receives an Incentive Allocation,  
12 yes.

13 Q. Okay. If that figure is negative, what happens?

14 A. (Mr. Lindsay) Then the value of its beneficial  
15 interest is, for that year, is negative.

16 A. (Ms. Reynolds) Yeah, it doesn't turn an Incentive  
17 Allocation.

18 A. (Mr. Lindsay) Yes.

19 Q. Okay. Is there any scenario in which as a result  
20 of this calculation the GP would ever lose money, would  
21 ever be out of pocket?

22 A. (Mr. Lindsay) Well, the General Partner expends  
23 its resources in performing its functions. That comes at a  
24 cost to the people that own the General Partner. So what  
25 it loses is any income from its business. It has spent

1 two, three years working hard to ensure that the assets of  
2 the Partnership are invested, and it receives nothing for  
3 the expenditure of its work. So it has lost that part of  
4 its contribution. It has lost what it has contributed to  
5 the Partnership, which is its skill and expertise and  
6 getting up every morning and going into the office.

7 A. (Ms. Reynolds) Well, except that, I think, that  
8 that day-to-day work is done by a manager entity, and the  
9 manager entity is remunerated with approximately whatever  
10 percentage of the assets irrespective of performance, and  
11 the people who are doing the day-to-day work are  
12 remunerated, and they are remunerated irrespective of  
13 profit or loss.

14 ARBITRATOR GLOSTER: Could I be clearer? Are you  
15 giving expert evidence in that last answer as to law, or  
16 are you giving what you know about the facts of this case?

17 THE WITNESS: (Ms. Reynolds) Not about the facts  
18 of this case. I'm giving it in every hedge fund will have  
19 an investment manager, and in this particular one, I see  
20 that there's reference to management fees payable at the  
21 feeder level.

22 ARBITRATOR GLOSTER: Okay. So, it's not exactly  
23 expert--your expert views on the law.

24 THE WITNESS: (Ms. Reynolds) I was responding to  
25 Mr. Lindsay's comment that he's spent time and et cetera.

1 THE WITNESS: (Mr. Lindsay) But that is what the  
2 General Partner loses. It--its business is to generate  
3 Incentive Allocations. It spends a year engaged in that  
4 business. If it fails to generate an Incentive Allocation,  
5 then that is a year of lost work.

6 BY MR. VOLKMER

7 Q. Then, on a last topic, I'm coming back to the  
8 discussion of indivisibility.

9 Does the notion of "indivisibility" determine the  
10 amount of a Partner's beneficial interest in the  
11 Partnership?

12 A. (Ms. Reynolds) Do you mean quantum?

13 Q. Yes.

14 A. (Ms. Reynolds) I would say no.

15 A. (Mr. Lindsay) No, it doesn't. That's the  
16 whole--that is the point of indivisibility.

17 So, to the extent that two or three assets perform  
18 especially well and the General Partner feels buoyed by the  
19 idea that it will share in the upside of those assets, it  
20 has, until the point that you conduct the calculation of  
21 the Net Profit at the end of the year, it has notionally an  
22 indivisible interest in the upside of those assets. If one  
23 asset, then, performs particularly badly, then the General  
24 Partner loses the benefit of the stellar performance of the  
25 other assets.

1 Q. Right.

2 So, does the notion of indivisibility help us to  
3 determine if a Partner has, for example, 1 percent  
4 beneficial interest or a 99 percent beneficial interest?

5 A. (Mr. Lindsay) No.

6 A. (Ms. Reynolds) No.

7 MR. VOLKMER: We have no further questions.

8 PRESIDENT SACHS: Thank you.

9 QUESTIONS FROM THE TRIBUNAL

10 ARBITRATOR MAYER: I have two questions which  
11 relate to the law and the Agreement.

12 The first question starts with Article 33(3) of  
13 the law, and have a look at it. It says: "A Limited  
14 Partner may bring an action on behalf of an Exempted  
15 Limited Partnership if any one or more of the General  
16 Partners with authority to do so have, without cause,  
17 failed or refused to institute proceedings."

18 And then, if we go to the Agreement, we have  
19 Article 3.01, which says: "The Limited Partners shall have  
20 no part in the management, control, or operation of the  
21 Partnership," et cetera, "and shall have no authority to  
22 act on behalf of the Partnership in connection with any  
23 matter except as provided in Sections 10.01 and 12.01,"  
24 which is not, I think, relevant here.

25 So, my question is: There seems to be a

1 contradiction, is it really one, and if it's a  
2 contradiction, was it possible for the Agreement to deprive  
3 the Limited Partner of a right which it has under the law?

4 THE WITNESS: (Ms. Reynolds) So, may I?

5 ARBITRATOR MAYER: Yes, please.

6 THE WITNESS: (Ms. Reynolds) So this refers to an  
7 ability to bring a derivative action, and the same would  
8 happen with the Company. The Directors normally,  
9 obviously, have the power to bring actions on behalf of the  
10 Company, but in certain limited circumstances, a  
11 shareholder of that company can bring an action on behalf  
12 of the Company.

13 Now, that's not the Shareholder bringing it  
14 itself. That's not the Shareholder purporting to suddenly  
15 become a director. It's simply the Court allowing the  
16 Shareholder to bring the action against third parties to  
17 recover loss, and this really just puts that into a  
18 statutory context.

19 So it's simply saying that there are certain  
20 circumstances where because of the GP's conflict or because  
21 it's acting improperly, an LP can still go after the loss.  
22 It has to be a derivative action under the statute.

23 THE WITNESS: (Mr. Lindsay) Again, that's not  
24 quite right--sorry.

25 ARBITRATOR MAYER: So it--that's what the law

1 says, but apparently that's not what the Agreement says.  
2 It doesn't mention it at least.

3 So is your understanding that, in fact, it  
4 applies, although it's not mentioned, or--

5 THE WITNESS: (Ms. Reynolds) Yes, I would say it  
6 would apply because in normal context, there would be a  
7 common law right to apply to the Court to do this, and this  
8 puts it--this allows in those exceptional circumstances for  
9 a Limited Partner to do it.

10 But because this is the Limited Partner doing it  
11 on behalf of the Partnership, and it's permitted to do it  
12 on behalf of the Partnership, it wouldn't be the same as  
13 the Limited Partner itself taking on management of the  
14 Partnership.

15 THE WITNESS: (Mr. Lindsay) It is a--sorry--it's  
16 a--

17 ARBITRATOR MAYER: Mr. Lindsay, yes?

18 THE WITNESS: (Mr. Lindsay) That's not the reason  
19 for that provision in the law at all.

20 A derivative action would be a Partner taking part  
21 in proceedings as the General Partner because the General  
22 Partner is ordinarily a Party to the proceedings.

23 Now, in an ordinary Partnership, any of the  
24 Partners might bring an action on behalf of the Partners in  
25 respect of any matter, but they're precluded from the law



1 here from taking any part of the conduct of the  
2 Partnership's business. And if they do proceed in that  
3 way, then they lose their status as--of limited liability.

4           What the purpose of Section 33(3) and (4) is  
5 intended to do is to provide circumstances where Limited  
6 Partners faced with no other alternative, because they're  
7 not shareholders of the General Partner, they can't take a  
8 derivative action on behalf of the General Partner  
9 against--in respect to the Partnership assets. So, a  
10 derivative action is not available to them in those  
11 circumstances.

12           It enables them as a group of beneficiaries in  
13 circumstances where the General Partner has refused to take  
14 action without cause, and only in those circumstances, to  
15 then pursue their beneficial interest on behalf of all of  
16 the Partners. And it provides specifically that if it does  
17 so, if a Limited Partner does so in that scenario, it  
18 doesn't, then, lose--although it would be taking part in  
19 the conduct of the business, that is a very specific  
20 circumstance in which it would not lose its limited  
21 liability status.

22           ARBITRATOR GLOSTER: Mr. Lindsay, I don't see  
23 you're saying anything different from Ms. Reynolds.  
24 Ms. Reynolds is saying in these circumstances where the  
25 General Partner is not doing what he should--

1 THE WITNESS: (Mr. Lindsay) Yes.

2 ARBITRATOR GLOSTER: --the Limited Partner can  
3 bring an action, a derivative action, on behalf of the  
4 Partnership. But I don't see that you're disagreeing with  
5 that.

6 THE WITNESS: (Mr. Lindsay) It's not a derivative  
7 action.

8 ARBITRATOR GLOSTER: Why not? Why isn't it on  
9 behalf of the Partnership if, for example, the--if a  
10 Partnership should be suing a third party, an Investment  
11 Manager or any third party, why isn't it a derivative  
12 action on behalf of a Partnership?

13 THE WITNESS: (Mr. Lindsay) A Partnership is not a  
14 thing. It's not a person. So, ordinarily, the only person  
15 entitled to bring any proceeding relating to the  
16 Partnership, or to be the Respondent in any proceeding  
17 relating to the Partnership, is the General Partner. And  
18 so a derivative action would be a derivative action of the  
19 General Partner, not of the other Partners. There is no--

20 ARBITRATOR GLOSTER: Okay.

21 THE WITNESS: (Mr. Lindsay) It probably comes to  
22 the same thing, but it is--but the reason for that clause  
23 is to preserve the limited liability status of Limited  
24 Partners in circumstances where the General Partner is  
25 frustrating their beneficial interest.

1 THE WITNESS: (Ms. Reynolds) But as 33(3) says,  
2 it's doing it on behalf of the Partnership. It's the  
3 equivalent of a Shareholder doing it on behalf of the  
4 Company.

5 And one of the points made in Mr. Lindsay's Expert  
6 Report, and maybe we don't need to get into it, but one  
7 point I wanted to clarify was that it is possible to bring  
8 it in the name of the Partnership, and that's provided for  
9 in the Grand Court rules. You do bring it in the name of  
10 the Partnership, and this entitles the LP to do that, bring  
11 it in the name of the Partnership to recover for the  
12 benefit of the Partnership.

13 All it's saying is that it's not doing it for  
14 itself.

15 THE WITNESS: (Mr. Lindsay) Yes. The High Court  
16 rules do entitle you to bring an action in the name  
17 of--when you are a Claimant or Respondent to name the firm.  
18 The High Court rules don't alter the status of any party  
19 under the law or under the statute. That is simply a  
20 convenient device in the same way that recording the name  
21 of the Limited Partner in a Share Register is a convenient  
22 device because it allows you at a glance to understand the  
23 relationships that then persist.

24 But the law is quite clear. The Claimant in any  
25 proceeding is the General Partner, and the Respondent in

1 any proceeding is the General Partner.

2 ARBITRATOR MAYER: Coming back to my question--

3 THE WITNESS: (Mr. Lindsay) Yes.

4 ARBITRATOR MAYER: --my question is: Does this  
5 Article 33(3), which is, I think, clear to the extent one  
6 understands how you can act on behalf of someone who does  
7 not exist as a person, but leaving that aside, does that  
8 provision apply or is it excluded in the Agreement?

9 THE WITNESS: (Mr. Lindsay) It's probably both.  
10 So it creates a contractual prohibition on a Limited  
11 Partner from taking a course of action, but it doesn't  
12 preclude a Limited Partner in those circumstances where the  
13 General Partner has failed to take action from proceeding.

14 It may be liable for breach of contract, but the  
15 law probably supersedes that. There are sections of the  
16 law that are not subject to the provisions of the  
17 Partnership Agreements and can be altered by the provisions  
18 of the Partnership Agreement.

19 ARBITRATOR MAYER: Ms. Reynolds, do you agree?

20 THE WITNESS: (Ms. Reynolds) Yes. I was going to  
21 say, throughout the Partnership law, there are a number of  
22 sections which are expressly subject to the Limited  
23 Partnership Agreement. This isn't one of them. This,  
24 therefore, trumps, and, therefore, it would be possible,  
25 notwithstanding it's not mentioned in the LPA.

1 ARBITRATOR MAYER: Thank you.

2 So I'm coming to my second question, which is on  
3 the law. It's on Article 16(1). Page 13. I'm only  
4 interested in a few words in this provision. I write what  
5 is important--I read, sorry: "Any rights of property, all  
6 property, of every description of the Exempted Limited  
7 Partnership"--and I skip some words--"shall be held or  
8 deemed to be held by the General Partner in accordance with  
9 the terms of the Partnership Agreement."

10 I'm intrigued by these words "held or deemed to be  
11 held," because if they are held--now, either they're held  
12 or not held. If they are held, not necessary to say that  
13 they are deemed to be held. If they are not held, what  
14 does it mean that they are deemed to be held? What's the  
15 consequence? What the reason for that expression?

16 THE WITNESS: (Ms. Reynolds) The reason for that  
17 expression is because--and it's held. The words are "upon  
18 trust as an asset," and the reason for that is because  
19 sometimes in parts of the world or in other context, the  
20 Partnership will be named as the owner, or there may  
21 be--because of the confusion of the particularities of this  
22 particular legislation, and the equivalent in the U.S. is a  
23 separate legal entity, for example, it may be that the  
24 Partnership is named as the holder of an asset; and, in  
25 those circumstances, it's deemed to be held on trust.

1 ARBITRATOR MAYER: Mr. Lindsay?

2 THE WITNESS: (Mr. Lindsay) Yes, that's correct.  
3 It's to deal with circumstances where assets might be  
4 recorded that don't reflect the position under Cayman  
5 Islands law. So where assets are recorded, where the  
6 ownership of assets is recorded in a matter that is  
7 inconsistent with this provision of the law, the law says  
8 that, regardless of the way in which you've recorded those  
9 assets, this is what Cayman Islands law regards the  
10 relationship of the third parties to the assets to be.

11 THE WITNESS: (Ms. Reynolds) One caveat to that is  
12 I would say this doesn't purport to interfere with foreign  
13 law determination of ownership. It's simply saying as a  
14 matter of Cayman Law how you determine--

15 ARBITRATOR MAYER: No, it's understood that it is  
16 under Cayman Law. Thank you.

17 No other question.

18 PRESIDENT SACHS: All right. Thank you very much.

19 This brings us to the end of your expert witness  
20 testimony. We thank both of you. That was very  
21 interesting and helpful to the Tribunal, and in particular  
22 we also noted some further points of agreement, but there  
23 still remains some areas in which you have different views;  
24 and ultimately, it will be up to us to decide on them.

25 Thank you very much.

1                   (Witnesses step down.)

2                   PRESIDENT SACHS: We will have our lunch break.  
3 Let's see. We had one hour, so let's--shall we resume at  
4 1:30? Yeah? Okay. Good.

5                   (Whereupon, at 12:26 p.m., the Hearing was  
6 adjourned until 1:30 p.m., the same day.)

AFTERNOON SESSION

PROFESSOR HYEOK-JOON RHO, RESPONDENT'S WITNESS, CALLED

PRESIDENT SACHS: All right. Good afternoon, Professor Rho. I understand you understand English, but you prefer to testify in Korean; is that correct?

THE WITNESS: (In English) Yes.

THE WITNESS: (Through Interpreter) Yes, that is correct, sir.

PRESIDENT SACHS: Okay. But perhaps--I have seen your impressive CV. Perhaps if you could help us a little bit, when you feel that you understood the question in English, maybe there's not always the need for a translation, but it's up to you. You must feel comfortable in your situation here as an expert on behalf of the Respondent; and, as such, I would ask you to read the statement that is in front of you. So, could you please read the statement.

THE WITNESS: Yes, sir.

I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT SACHS: I now turn to you, Interpreter, because also for you there is a declaration.

THE INTERPRETER: Yes, sir.

PRESIDENT SACHS: On the table. And would you



1 please read it aloud.

2 THE INTERPRETER: I solemnly declare that I will  
3 interpret accurately, completely, impartially and in  
4 accordance with my best skill and judgment.

5 PRESIDENT SACHS: Thank you very much.

6 Now, we will start with the presentation, and the  
7 floor is now yours.

8 MS. SALOMON: I think, Mr. Chairman, if we may, we  
9 have a question with regard to the appropriateness of a  
10 presentation again in this context.

11 PRESIDENT SACHS: Oh, okay. Is there again a  
12 misunderstanding or...

13 MS. SALOMON: We do believe there is a  
14 misunderstanding in this context, that there was--these are  
15 legal experts. The Parties had discussion with regard to  
16 what the Procedural Timetable in examination of experts  
17 would be, and there was a discussion that there would be  
18 cross-examination, but there was no expectation or  
19 discussion that there would be presentations, so we set  
20 forth what the approach would be with regard to the Experts  
21 in our response to the Agenda, and we addressed those  
22 issues on the pre-hearing telephonic conference, and again  
23 presentations were not included, so we considered the  
24 approach that the Parties set forth to be the agreed-to  
25 approach for this Hearing rather than what might otherwise

1 be options at an evidentiary hearing.

2 PRESIDENT SACHS: I turn to the Respondent.

3 MR. HAN: Yes.

4 It is clear under the Procedural Order that the  
5 Expert shall make a presentation up to 30 minutes, and  
6 nothing has been agreed or discussed with the Claimant as  
7 to whether we need to change that order, so that's why we  
8 are here. Professor Rho has prepared a presentation under  
9 the agreed Procedural Order.

10 PRESIDENT SACHS: Then what about Professor Kwon?  
11 Has he prepared something?

12 MS. SALOMON: No. He has not prepared a  
13 presentation because that wasn't discussed in the context  
14 of the procedures for this Hearing, and so we expected  
15 limited direct, as--to the extent there is any biographical  
16 information, and there would be examination.

17 PRESIDENT SACHS: So, that mirrors the discussion  
18 that we had earlier with respect to the Cayman Islands law  
19 experts. We have a situation where there seems to be a  
20 misunderstanding.

21 I see Mr. Nyer raising his hand.

22 MR. NYER: If I may, the situation is materially  
23 different than what arose in the context of the Cayman  
24 experts. The Parties did not agree in any way, shape or  
25 form to modify the format of the examination of the Korean

1 law experts. There was no discussion of a hot tub as was  
2 agreed with respect to the Cayman Law experts.

3 The Procedural Order that was rendered at the  
4 beginning of this arbitration is very clear, that the  
5 Expert in that case, Mr. Rho, shall be entitled to make a  
6 short presentation up to 30 minutes to the Tribunal.

7 And I think there is also a basic due process  
8 consideration here, given that Mr. Kwon had the last word  
9 in writing, and Professor Rho should get a chance to  
10 respond to some of the arguments that have been raised by  
11 Professor Kwon.

12 MS. SALOMON: We would submit that there's a very  
13 different context in which the Procedural Order Number 1  
14 set out the opportunity for presentation of experts, and  
15 that may be technical or damages experts here. These are  
16 legal experts. Both Parties dealt with--submitted reports  
17 addressing questions of law, and we will submit this  
18 presentation is akin to essentially another brief to which  
19 we certainly haven't had the opportunity to address.

20 PRESIDENT SACHS: Yes, I think we will need a  
21 moment to discuss this and come back in a few minutes,  
22 okay? Thank you.

23 Very sorry for that.

24 ARBITRATOR GLOSTER: Could we have a reference to  
25 the Procedural Order?

1           PRESIDENT SACHS: It's Number 1, I think, isn't  
2 it?

3           ARBITRATOR GLOSTER: Is it? Number 1.

4           (Tribunal conferring outside the room.)

5           PRESIDENT SACHS: All right. Now, we deliberated  
6 on the issue, and the Tribunal refers to Section 7(iii) of  
7 Procedural Order No. 1, which provides that the provisions  
8 set out in relation to witnesses apply mutatis mutandis to  
9 the evidence of experts, and here we can read that the  
10 Expert shall present a summary of their findings not  
11 exceeding 30 minutes. Unless the Parties agree otherwise,  
12 we note that there was no agreement to the contrary, and  
13 experts are being mentioned here without excluding legal  
14 experts. Therefore, we would admit the presentation.

15           On the other hand, in order to balance the  
16 interests of the Parties in connection with this incident,  
17 we would propose to Claimants either to decide that  
18 Mr. Kwon will be examined without giving a presentation or  
19 if you prefer that Professor Kwon also be given the  
20 opportunity to make a presentation, that we postpone his  
21 testimony until tomorrow morning, that we would start with  
22 him, so giving him the opportunity to make a presentation.  
23 If you then feel that the time left for your preparation of  
24 your Closing Arguments is too short, we could envisage to  
25 postpone the Closing Arguments to the afternoon so that

1 there is a buffer allowing you to prepare reflecting the  
2 testimony, the expert testimony, of Mr. Kwon if it were to  
3 be given only on Friday morning.

4           So, these are the two options that the Tribunal  
5 submits to you, considering the interests of the Parties,  
6 we would think this is a fair solution to this incident  
7 which, to some extent, may be the result of a  
8 misunderstanding, and you don't have to tell us right now  
9 which option you would prefer. We would continue with the  
10 Expert testimony of Professor Rho, but following his  
11 testimony, you will let us know how we should proceed with  
12 respect to the expert examination of Professor Kwon.

13           MR. KIM: Thank you, Mr. President.

14           I think we can articulate our position now. We do  
15 not have any intention to have a separate presentation for  
16 Professor Kwon, but I would like to point out that, as  
17 Mr. President correctly stated, this should be--the  
18 presentation that we're about to hear should be a summary  
19 of evidence that has already been presented. If there is  
20 anything that is to be presented--that will be presented in  
21 this upcoming presentation that has not already been  
22 included in Professor Rho's previous Expert Report or based  
23 on any legal authorities that were not included as part of  
24 his previous Expert Report, Claimant strongly objects based  
25 on lack of fairness. We have not had a chance to--we did

1 not expect to have this presentation today, and we are not  
2 prepared necessarily to cross him on those matters of law  
3 because we don't know what his views or opinions are on  
4 those new legal authorities.

5 So, to the extent that the presentation is limited  
6 and, if we may, we can assist the Tribunal to point out  
7 what may be new and what may not be new depending on what  
8 comes out during the course of the presentation, but we  
9 would respectfully request that anything in today's  
10 presentation should be limited to Legal Authorities and  
11 content that was already provided in his previous report.

12 PRESIDENT SACHS: Thank you. That seems to be a  
13 fair point.

14 I would presume, Professor Rho, that, indeed, the  
15 handout that you submitted and the content of your  
16 presentation that is to follow will be limited to arguments  
17 and material that are already in the record. If this is  
18 not the case, please, Claimants red-flag so that we note  
19 the point, and we will then deal with such points, if any,  
20 at the end of the cross-examination so as to eventually  
21 give Claimants the right to reflect and continue a  
22 cross-examination possibly tomorrow morning, but we will  
23 see whether this is necessary once we have seen how many  
24 red flags, if any, there are, and to what they relate.

25 Would this cover the incident?

1 MR. HAN: Yes. Thank you, Mr. Arbitrator. Yes,  
2 we agree to this approach.

3 PRESIDENT SACHS: Also from your side, Claimants?

4 MR. KIM: Yes, that's fine.

5 I'd just like to point out, though, that as the  
6 Tribunal is aware, there were a number of additional Korean  
7 Legal Authorities that were submitted without any sort of  
8 background or explanation as to what Respondent's position  
9 is with regard to those authorities.

10 So, to the extent that we are limiting the scope  
11 of today's presentation, we believe that it would be fair  
12 to also exclude any explanations on those new--any new  
13 legal authorities that have been submitted prior to--just  
14 immediately prior to this Hearing since we don't know  
15 Professor Rho's views and, therefore, have not been able to  
16 prepare any sort of cross-examination on those.

17 So, in the same manner, we would ask that that  
18 apply as well.

19 PRESIDENT SACHS: Okay. Fair enough. I think  
20 whenever you feel that we have reached such a point, please  
21 let us know, and then we will deal it ad hoc, according to  
22 the situation.

23 So, I think this closes this debate.

24 Professor Rho, we would now invite you to give us  
25 your presentation.

1 MR. KIM: I'm sorry, Mr. President, but counsel  
2 took back the presentation materials pending your--oh, we  
3 got them back. I'm sorry.

4 (Pause.)

5 PRESIDENT SACHS: Please, Professor Rho.

6 DIRECT PRESENTATION

7 THE WITNESS: Good afternoon. I'm Dr. Rho,  
8 Professor at Seoul National University School of Law. And  
9 my area of expertise is Commercial Law and Capital Markets  
10 Act. I obtained my Ph.D. at the Seoul National University  
11 back in 2003. Before I became Professor at Seoul National  
12 University School of Law, I served as Army prosecutor and  
13 attorney and a judge.

14 It is my pleasure to speak about Korean law in  
15 front of a number of experts.

16 I'd like to talk about two topics in respect of  
17 foreign investing in Korea as a capital market, the scope  
18 of foreign entities' legal capacity to have rights, and the  
19 legal principle of determining share ownership under  
20 Korea's Corporate Law.

21 Let us move on to Slide Number 2.

22 Before delving into the issue of foreign entities'  
23 legal capacity, let me touch upon the general aspects of  
24 legal capacity under Korean law and a group of substantive  
25 domestic acts under status of foreigners collectively known



1 as the so-called "Alien Law."

2 MR. HAN: We have some technical problems, and the  
3 slide is not showing on the screen right now.

4 (Pause.)

5 THE WITNESS: Allow me to continue.

6 General Legal Capacity under Korean law refers to  
7 a general capacity to be a subject of rights and  
8 obligations.

9 MR. KIM: Mr. President. We object to that. This  
10 subject matter is not covered in Professor Rho's Expert  
11 Report.

12 PRESIDENT SACHS: Okay, noted, but nevertheless  
13 please proceed.

14 THE WITNESS: (In English) Okay.

15 (In Korean) Still, as such, a General Legal  
16 Capacity is not uniformly applied to all situations. In  
17 other words, a General Legal Capacity can be restricted or  
18 expanded in scope, depending on the specific area or the  
19 characteristics of the entity. Such capacity can be  
20 referred to as "Special Legal Capacity." Professor Kwon,  
21 the Claimants' Korean law expert, also said the following  
22 in his expert opinion: Even if a foreign organization does  
23 not have legal capacity under the laws of the place of its  
24 establishment or is a type of organization that is not  
25 recognized to have legal capacity under Korean law, it may

1 still be subject to a certain Korean statute that extends  
2 their application to cover foreign organizations in order  
3 to carry out the legislative purpose of the statute in  
4 question. As such, even where an entity does not have a  
5 General Legal Capacity, it can be subject to certain  
6 statutes obtaining the aforementioned Special Legal  
7 Capacity.

8 If I may take you to the next slide, for example,  
9 an unincorporated body with no General Legal Capacity can  
10 hold a legal capacity to be a Party to registration or  
11 litigation or have legal capacity for tax.

12 Further, foreigners are compared with Koreans have  
13 limited legal capacity such as for suffrage. This clearly  
14 shows that the principle of "General Legal Capacity" is not  
15 uniformly applied to all areas of law.

16 Next slide, please.

17 MR. KIM: Mr. President, this slide introduces  
18 law, legal concepts not only under Korean Law, but what is  
19 referred to as Alien Law. Clearly, this has not been  
20 covered in Professor Rho's report.

21 PRESIDENT SACHS: Noted.

22 Please proceed.

23 THE WITNESS: Allow me to move on to the Alien  
24 Law, known as the Conflict Law, the Private International  
25 Law determines which substantive law to apply to a domestic

1 issue where two or more substantive statutes can be  
2 applied, and this is detected in the upper diagram on the  
3 slide. In contrast, the Alien Law refers to a substantive  
4 domestic act that regulates international issues as opposed  
5 to domestic ones; where a relevant Alien Law is available,  
6 such law can be applied without relying on the Conflict  
7 Law. Therefore, to the extent there is an Alien Law  
8 providing relevant provisions, the Article 16 of the  
9 Private International Law on General Legal Capacity does  
10 not need to be relied on.

11 Next slide, please.

12 Examples of Korean Alien Laws include the  
13 Article 57 of the Civil Procedures Act and the Article  
14 168(1) of the Capital Markets Act, the relevant provisions  
15 of which are shown on the slides.

16 Next, please.

17 Professor Kwon argues that the article of the  
18 Private International Law even governs all of foreign  
19 corporations' legal relations in Korea. Such proposition  
20 begs the question of why other Private International Law  
21 articles such as Articles 15 and 19 are not taken into  
22 account. As such, a uniform application of the Private  
23 International Law would end up defeating the purpose of  
24 Korean Alien Laws intended to govern foreigners and foreign  
25 organizations in specific areas. Where there is a relevant

1 Alien Law applicable such as in this arbitration case,  
2 applying such Alien Law without resorting to the Private  
3 International Law would be the only way to explain why such  
4 Alien Law exists in the first place.

5 Next slide, please.

6 And next I would like to talk about the intention  
7 of foreign investment related statutes under the Capital  
8 Markets Act. The Capital Markets Act and its Enforcement  
9 Decrees are designed to properly regulate foreign  
10 investment. Such provisions are typical Alien Law statutes  
11 in that they were originally intended for foreign  
12 investment at the time of creation. Here are the three key  
13 provisions on foreign investment under the Capital Markets  
14 Act. Allow me to draw your attention to the slides:

15 First, the concept of foreign corporation, et  
16 cetera. The foreign corporation, et cetera, referenced  
17 here includes organizations with no legal personality such  
18 as fund and association.

19 Second, the requirement for Investment  
20 Registration. The Capital Markets Act provides that a  
21 foreign investor should identify its legal status through  
22 Investment Registration before making investments.  
23 Accounting entity in this context refers to the beneficiary  
24 of economic interest. The requirement for accounting  
25 entity is intended to disclose the ultimate beneficiary of

1 profit in trading as opposed to trading in someone else's  
2 name.

3           Last but not least, limits on the number of shares  
4 that can be acquired. The Capital Markets Act places a  
5 limit on foreign investor's shareholding in certain Korean  
6 companies on the premise that foreign corporations, et  
7 cetera, can acquire shares.

8           Let me apply the legal capacity and the Alien Law  
9 discussed so far to the issues in this arbitration.  
10 Foreign investment-related provisions of the Capital  
11 Markets Act are Alien Law statutes, and thus those statutes  
12 are directly applied to foreign corporations, et cetera.  
13 Even where a foreign entity does not have a General Legal  
14 Capacity pursuant to the law of its place of establishment,  
15 such entity can be bestowed with legal capacity to the  
16 extent that such entity is subject to the Capital Markets  
17 Act. Such application of the Act can deter foreign  
18 entities' abusive acts such as a foreign entity denying all  
19 of its acts after having participated in the Korean capital  
20 market as a player by claiming that it does not have legal  
21 capacity pursuant to the law of its place of establishment.

22           Next slide.

23           The application filed by the Cayman Fund brings  
24 clarity to the substance of this arbitration case. The  
25 application for Investment Registration was filed in the

1 name of the Cayman Fund and the Fund was classified as  
2 "corporation" in the "investor" classification field.

3 Next slide.

4 In addition, Mason Capital Limited was listed as  
5 the 100 percent owner of the Fund. The application was  
6 filed pursuant to the Capital Markets Act by the Cayman  
7 Fund, which was classified as foreign corporation, et  
8 cetera, under the same act.

9 The application makes the argument nonsensical  
10 that, since the Fund did not have a General Legal Capacity  
11 pursuant to the law of its place of establishment, it was  
12 not subject to the statutes applicable to a foreign  
13 corporation, et cetera, under the Korean capital market and  
14 did not have any rights or obligations.

15 Next slide, please.

16 Next, let me touch upon share ownership under  
17 Korean Law. The topic of share ownership has come up quite  
18 often in Korean case law, especially in connection with  
19 transactions in someone else's name. The Korean Supreme  
20 Court regards the issue of share ownership in connection  
21 with transactions in someone else's name as the issue of  
22 determining whom each Party recognized as the counter-party  
23 to the transaction.

24 Let me take an example. As is shown in the upper  
25 diagram, let's imagine B makes an internal agreement with A

1 that B would subscribe for a company access new shares in  
2 the name of A. In this scenario, the Supreme Court would  
3 recognize Company X and a Titleholder A as the Parties to  
4 the subscription agreement and determine that their shares  
5 belong to A. If Company X is not aware of the internal  
6 arrangement, their shares cannot belong to B. That's  
7 because only when there are very exceptional circumstances  
8 such as the Company acts being made aware of and approving  
9 the arrangement between A and B would the Supreme Court  
10 hold that the shares belong to B.

11 For more information, please refer to the ruling  
12 submitted as R-12.

13 Even though the Court Decision is about new shares  
14 subscription, the same logic is applied to transfer of  
15 existing shares. Let us imagine that D, behind the scene a  
16 fund provider internally agrees with C, that as shares held  
17 by Y would be purchased in the name of C. In this case,  
18 too, absent special circumstances, i.e., the counter-party  
19 Y being made aware of and approving such internal  
20 arrangement, the shares naturally belong to C.

21 In another case, where exercise of shareholder  
22 rights was at issue, the Supreme Court dealt with a new  
23 share subscription and purchase of existing shares in an  
24 identical manner as demonstrated in the ruling submitted as  
25 R-10.

1 Next slide.

2 As regards Listed Securities in particular like  
3 the ones in this arbitration, it should be deemed that the  
4 Shares belong to the titleholder, not to the undisclosed  
5 third party. Let me tell you why: First of all, at  
6 trading and Listed Securities is subject to the requirement  
7 for using real name, and individual looking to trade Listed  
8 Securities has to open an account with a brokerage firm in  
9 their own name, the individual's real name has to be  
10 verified in the process pursuant to the Act on Real Name  
11 Financial Transactions and Confidentiality.

12 MR. KIM: Mr. President, I would like to put on  
13 the record that there's no mention of so-called "Real Name  
14 Act" in Professor Rho's Expert Report.

15 PRESIDENT SACHS: Noted.

16 THE WITNESS: What I just mentioned is included in  
17 the ruling of the Supreme Court submitted as R-10.

18 According to this ruling, when it comes to Listed  
19 Securities, the titleholder would be the owner of the  
20 Shares. This has been made clear by a Concurring Opinion  
21 in a Supreme Court's en banc ruling. In this Court case,  
22 the Supreme Court held that, I quote, "the stocks purchased  
23 by a securities company on a securities market exchange are  
24 stored in the transaction account of the titleholder of the  
25 account, and since such stored stocks belong to the



1 customer who is the principal consignor, the titleholder of  
2 the account is the Shareholder of the concerned stocks,  
3 even if there is a person who provides Funds to the  
4 titleholder of the account, and that is in principle merely  
5 a question of an agreement between the titleholder and the  
6 Fund provider."

7           In addition, shares in listed companies are traded  
8 on the Exchange's massive settlement system. Under the  
9 system buy and sell orders for Listed Securities are  
10 collected and settled on a batch basis. Such a system  
11 makes it very unlikely for a transferor of shares to  
12 recognize and approve the undisclosed third party, leading  
13 to the shares belonging to the titleholder.

14           Next slide.

15           MR. KIM: Mr. President, I would like to note that  
16 there is no record of Article 311 of the CMA in Professor  
17 Rho's Expert Report.

18           PRESIDENT SACHS: Noted.

19           THE WITNESS: Further, the Article 311,  
20 Paragraph 1, of the Capital Markets Act applicable to  
21 Listed Securities stipulates that the individual listed in  
22 the account roster of investors or the account roster of  
23 depositors is deemed to possess the securities. All things  
24 considered, there is no denying that the Shares belonged to  
25 the titleholder of the securities.

1 Next slide.

2 As shown in the slide, the Cayman Fund was listed  
3 as Shareholder in the Shareholder Registries of Samsung C&T  
4 and Samsung Electronics. Given the Shares in question are  
5 Listed Securities, the Shares do not and should not belong  
6 to any entity other than the Cayman Fund.

7 In closing, let me sum up.

8 It is inappropriate to argue that an entity does  
9 not have any rights or obligations in respect of the Alien  
10 Law provisions of the Capital Markets Act simply because it  
11 does not have legal capacity under the law of its place of  
12 establishment. Jurisprudence set forth in the Commercial  
13 Law and the stock-trading provisions of the Capital Markets  
14 Act such as that the Shares in question belong to the  
15 Cayman Fund, the titleholder.

16 Thank you for your attention.

17 PRESIDENT SACHS: Thank you very much, Professor  
18 Rho.

19 I note for the record that you raised four red  
20 flags.

21 MR. KIM: Okay.

22 PRESIDENT SACHS: The first one relating to the  
23 concept of legal capacity. The concept seems to be  
24 captured in the two Articles that we see on Page 5 and  
25 which are extracts of laws or acts that are part of the

1 record, according to this page, namely R-20 and R-14.

2 Second, the Alien Law.

3 MR. KIM: Mr. President, before you proceed, if I  
4 may?

5 PRESIDENT SACHS: Yes.

6 MR. KIM: Specifically, the objection was the  
7 distinction or supposed distinction between what  
8 Mr. Rho--Professor Rho describes as a General Legal  
9 Capacity and a Special Legal Capacity. That is not  
10 presented in Professor Rho's Report or in any of the Legal  
11 Authorities that were accompanying his Report.

12 PRESIDENT SACHS: Okay. Thank you for the  
13 precision.

14 The third point, then, is the Real Name Act  
15 mentioned in R-10. But as you say not in Professor Kwon's  
16 Report.

17 And the fourth point is CMA Article 311(1), the  
18 deemed ownership.

19 MR. KIM: Right.

20 PRESIDENT SACHS: Mentioned, it seems in R-14 but  
21 as you say, not in Professor Kwon's report?

22 MR. KIM: With respect, if I may correct the  
23 President, it's "deemed to hold," not "deemed ownership."

24 PRESIDENT SACHS: Deemed to holding. You are  
25 right.

1 MR. KIM: Yes. Thank you.

2 PRESIDENT SACHS: So we note these points and you  
3 will tell us at the end of the cross-examination what you  
4 request in respect of these parts, whether you are  
5 satisfied with the result of the cross-examination.

6 MR. KIM: Okay. At the end of the  
7 cross-examination, if I may, I will confer with my  
8 colleagues and then let you know for sure.

9 PRESIDENT SACHS: Fair enough.

10 MR. HAN: Mr. Arbitrator, I would like to point  
11 out the points that the Claimant raised. First, as you  
12 correctly pointed out, the legal capacity concept, the very  
13 first issue that Claimant raised, was heavily discussed in  
14 the Paragraph 17 of Professor Rho's response. Professor  
15 Rho is further explaining the concept of legal capacity  
16 under Korean Law.

17 And for the second issue, application of Alien Law  
18 was the issue whether Korean Law can be applied to Cayman  
19 Fund shareholding in Korea.

20 And for the third issue, the Real Name Act is part  
21 of the Supreme Court Decision in R-10 that we have already  
22 submitted. For the last part, CMA Act Article 311 will, of  
23 course, as you can see the exhibit number is part of R-14  
24 that Respondent has already submitted.

25 Thank you.

1           PRESIDENT SACHS: Yes, this overlaps to some  
2 extent with what I said.

3           Okay. That's on the record, and I think now we  
4 proceed to cross-examination.

5           MR. KIM: Thank you, Mr. President.

6                                   CROSS-EXAMINATION

7           BY MR. KIM:

8           Q. Professor Rho, good afternoon.

9           A. Good afternoon.

10          Q. My name is John Kim, and I'm acting as counsel for  
11 Claimants in these arbitration proceedings.

12          A. I see.

13          Q. I will be asking you some questions today about  
14 Korean Law.

15          A. Okay.

16          Q. If you have any trouble understanding my questions  
17 or would like the question repeated, please let me know.

18          A. I will. Thank you.

19          Q. I see that you have the Hearing Bundle in front of  
20 you.

21          A. (In English) Yeah, yeah.

22          Q. I may ask you from time to time to turn to a  
23 particular tab or page in the binder.

24          A. Yes, I--yes, but please understand that since I'm  
25 not familiar with handling this Hearing bundle, I might

1 take some time to get to the page or Tab you are pointing  
2 me to.

3 Q. I fully understand. And if you need any help, we  
4 will have someone to assist you.

5 A. Thank you.

6 Q. Professor Rho--

7 PRESIDENT SACHS: Sorry to interrupt you, but will  
8 we receive a similar binder, or is this--

9 MR. KIM: That's just the Hearing Bundle.

10 PRESIDENT SACHS: Okay, but--

11 MR. KIM: I'm not referring to--it's a new binder.

12 PRESIDENT SACHS: It's a new binder? We have two  
13 volumes. These two?

14 MR. KIM: Those are the two.

15 PRESIDENT SACHS: Okay. Go ahead.

16 BY MR. KIM:

17 Q. Professor Rho, at Paragraph 10 of your Expert  
18 Report, it states that you have been provided with copies  
19 of Respondent's Memorial on Preliminary Objections and  
20 Claimants' Counter-Memorial.

21 A. Yes, that is correct.

22 Q. Did you have a chance to read and study these  
23 submissions?

24 A. I simply skimmed through the submissions, so I'm  
25 not sure how much I can remember regarding these

1 submissions.

2 Q. Okay. But would it be safe to say that you're  
3 generally familiar with the arguments that are being made  
4 by the Parties in this arbitration?

5 A. My area of interest was the ones related to Korean  
6 Law. And when I look at some records, I tend to focus on  
7 those records related to Korean Law.

8 Q. Okay. So, you must have reviewed Professor Kwon's  
9 Expert Report?

10 A. Yes, I read Professor Kwon's Report.

11 Q. And just for completeness, did you have a chance  
12 to read the Parties' expert reports regarding Cayman Law?

13 A. I'm not here to give evidence in regards to Cayman  
14 Law, and I didn't have a chance to carefully look at these  
15 expert reports on Cayman Law.

16 Q. Okay. Let me just give you a brief summary of the  
17 Cayman Exempted Limited Partnership that is the  
18 subject--that has been a topic of discussion in this  
19 arbitration.

20 A. (In English) Can you hold on a second?

21 (In Korean) Could you please explain to me why I  
22 need to listen to explanation on the Cayman Law?

23 Q. One of the questions, Professor Rho, before this  
24 Tribunal is which law should govern the Cayman ELP? Cayman  
25 Law or Korean Law?

1           A.     Throughout my presentation, I have been consistent  
2 that the Alien Law under the Korean Law should be  
3 applicable to the matters in this arbitration case, and I  
4 do not see why I need to answer questions which are  
5 premised that the Cayman Law should be the governing law in  
6 this arbitration case.

7           Q.     Professor Rho, I haven't asked you a single  
8 question about Cayman Law.

9           A.     Please understand, I thought--get an explanation  
10 on Cayman Law would be based on the premise that the Cayman  
11 Law should be applicable to this arbitration case.

12          Q.     So, Professor Rho, is it your view that, even when  
13 reviewing issues of Korean Law, in these preliminary  
14 proceedings, it is not necessary at all to understand the  
15 characteristics of a Cayman ELP? Is that your position? I  
16 mean, is that your opinion?

17          A.     To my understanding, the matters at hand in this  
18 arbitration is who--whom the Samsung Shares belong to and  
19 who owns the Samsung Shares.

20                 If this arbitration is solely about the internal  
21 decision-making process of the Cayman Fund and who holds a  
22 governance of the Cayman Fund, then, of course, the Cayman  
23 Fund would be governed by the Funds--governed by the law of  
24 the Fund's place of establishment.

25          Q.     But, in the course of preparing your Expert Report



1 and your presentation earlier today, based on the responses  
2 that you have given, is it correct to state that you did  
3 not put any consideration into the type of organization  
4 that the Cayman ELP may be under the laws of its  
5 establishment?

6 A. As I mentioned in my expert opinion, the Cayman  
7 Fund does not have a legal personality pursuant to the law  
8 of the Fund's place of establishment. Having said that,  
9 under Korean Law, the Cayman Fund has a representative, and  
10 under--under a specific statute such as Corporate Tax Act  
11 and other statutes as shown in a ruling related to the  
12 Corporate Tax Act, it is my understanding that the Cayman  
13 Fund is something of substance, which can be the subject of  
14 rights and obligations.

15 Q. Professor Rho, I will get to the Corporate Tax Act  
16 later, but for now I would like to discuss the Act, Korea's  
17 Act on Private International Law which can be found at  
18 CLA-54.

19 A. Are you referring to Article 15 on the screen?

20 Q. On the screen, Professor Rho, you will see  
21 Article 16 of the Act.

22 A. Yes, I'm aware of that.

23 Q. And in the first line of Article 16, you'll see,  
24 and I quote--that you will see, and I quote: "Corporations  
25 and other organizations shall be governed by the applicable

1 law of the establishment thereof."

2 Do you see that?

3 A. Yes. If I may restrict--if I may restrict my  
4 comment to legal capacity, the provision you just  
5 referenced deals with General Legal Capacity.

6 MR. HAN: Professor Rho, please take--please refer  
7 to the Korean original instead of translation on the  
8 screen.

9 THE WITNESS: Sorry, I may take a while.

10 Yes, I'm on it.

11 BY MR. KIM:

12 Q. So, I'm just looking at the LiveNote, Professor  
13 Rho, in your response, you said in response to my question:  
14 "The provision you just referenced deals with General Legal  
15 Capacity"?

16 A. Yes.

17 In my class on Corporate Law, I touch upon the  
18 Korean Alien Laws, and I'm aware there are specific Alien  
19 Law statutes applicable, then this provision you referenced  
20 does not need to be relied upon. That is, the provision is  
21 not a one-size-fits-all solution, and the provision cannot  
22 solve on every issue.

23 Q. So, Professor Rho, notwithstanding the clear  
24 language of Article 16 of the Act, it is your view that the  
25 application of this Article 16 may be limited?

1           A.     This is not just my personal opinion.  And there  
2 are Alien Law provisions included in the Corporate Law, and  
3 it is a widely accepted view that under, as such, Alien  
4 Law, are provisions whether or not a foreign entity has--a  
5 legal personality has no relevance.

6           And the intention of the Alien Law statutes is to  
7 protect traders working under domestic market in trades  
8 that is occurring in Korea.  And if an entity claims it  
9 does not have legal capacity pursuant to the law of its  
10 place of establishment, then that can defeat the purpose of  
11 the legislation of the Alien Law statutes.

12          Q.     Professor Rho, I will get to the--what you  
13 call--the "Alien Law statutes" in a minute.

14                 Can we turn to CLA-55, which is a Supreme Court  
15 Judgment, Case Number 2017Da246739.

16          A.     Can I be shown the Korean version of the ruling?

17                 MR. HAN:  It's in the same tab.  So translation  
18 goes first, and in the back there is the Korean original.

19                 THE WITNESS:  Thank you.

20                 BY MR. KIM:

21          Q.     Professor Rho, notwithstanding the opinions that  
22 you have expressed today, isn't it the Supreme Court's  
23 position--and I quote--regarding Article 16 of the Act  
24 on--Private International Law, and I quote starting from  
25 the third line of the English version:  "There are no

1 provisions that limit the application of this Article, and  
2 thus the scope of application should be seen as including  
3 all matters of legal entities such as establishment and  
4 dissolution, organization and internal relationship, rights  
5 and duties of institutions and members and legal capacity  
6 to act."

7           Isn't that what the Supreme Court has said about  
8 Article 16?

9           A.    In fact, I think the ruling by the Supreme Court  
10 in this case is simply the rephrasing of the Article 16 of  
11 the Private International Law.

12           If you take a look at the specifics of the case,  
13 the crux of the matter in this case was related to the  
14 governing law applicable to members of an association under  
15 Korean Law, and the Supreme Court pondered to what extent  
16 members of the Association had responsibility, and this  
17 issue has nothing to do with a capacity to hold shares.

18           Q.    Okay. Leaving aside for a second the fact that  
19 the passage that I just read talks about rights and duties  
20 of institutions and members and legal capacity to act,  
21 leaving that aside for a second, Professor Rho, is it your  
22 view that this Judgment--this Decision of the Supreme Court  
23 is correct or incorrect?

24           A.    The ruling deals with General Legal Capacity. The  
25 ruling does not mention anything pertaining to Special

1 Legal Capacity.

2 Q. That wasn't my question, Professor Rho. I just  
3 simply asked: Do you agree with this Decision or not?

4 A. And I think the ruling is an appropriate one for  
5 general matters as shown in this case.

6 Q. Okay. I will move on, then, to another topic.

7 Professor Rho, during yesterday's opening  
8 presentations, Respondent's counsel stated that, and I  
9 quote: "We say as a matter of Korean Law, the General  
10 Partner did not own or control the Samsung Shares because  
11 it was the Cayman Fund and not the Partner that was the  
12 Registered Shareholder of the Samsung entities at issue."

13 And that can be found at Transcript Day 1, Page  
14 48, Lines 6 to 10.

15 A. Is the Transcript you referenced included in this  
16 binder?

17 Q. No. But you can take my word that's what was  
18 said.

19 A. Would it be okay if I take this bundle off the  
20 table?

21 Q. If you take the bundle off the table?

22 A. (In English) Okay. It's okay.

23 Q. I don't understand the question.

24 A. There are two--(in Korean) what I meant to say was  
25 the two binders were taking too much of the space on the

1 table, so I prefer to have one bundle sitting on the table  
2 while the other sit on the floor.

3 MR. KIM: Mr. President, before I proceed to the  
4 next line of questioning, I have noted right in front of me  
5 that Professor Rho is referring to his internal notes that  
6 are on the table, and I would ask that all of those be  
7 removed.

8 THE WITNESS: Yes.

9 I also have my expert opinion in front of me for a  
10 smooth proceedings of this arbitration. And if you wish, I  
11 would remove my expert opinion as well.

12 PRESIDENT SACHS: Well, I think it would be fair  
13 that he keeps his expert opinion on the desk but not  
14 further notes--

15 MR. KIM: Mr. President, I was referring to his  
16 handwritten notes on the side of the Reports and on--

17 PRESIDENT SACHS: I was just saying--let me  
18 finish, please.

19 MR. KIM: I'm sorry.

20 PRESIDENT SACHS: --but not internal notes or  
21 handwritten notes, in addition to your expert opinion.

22 THE WITNESS: Am I allowed to take notes of  
23 questions I'm receiving in order to help with my  
24 understanding about the questions?

25 PRESIDENT SACHS: Yes, you are.

1 MR. KIM: Did we get Professor Rho an excerpt of  
2 the Transcript?

3 BY MR. KIM:

4 Q. Do you still need that?

5 It's on the screen.

6 A. To my understanding--to my understanding, the  
7 Samsung Shares belonged to the Cayman Fund, the  
8 titleholder, so the argument put forward by the  
9 Respondent's counsel during their opening remarks  
10 corresponds to my position.

11 Q. That wasn't exactly my question. Maybe I can  
12 rephrase.

13 A. Thank you.

14 Q. I would like to point to the reasoning put forward  
15 by Respondent's counsel. The reasoning based on this  
16 statement by Respondent's counsel in its opening is that  
17 the General Partner cannot own because it was the Cayman  
18 Fund that was registered as the Shareholder on the  
19 Shareholders' Registry.

20 Do you see that?

21 A. Now I understand the purpose of your question.

22 Q. So, taking this statement alone--

23 A. Am I allowed to give my answer to your question?

24 Q. Sure.

25 A. If the sole basis for this argument is that the

1 Cayman Fund is registered in the Shareholders' Registries  
2 of Samsung Shares, then I find the argument less  
3 persuasive.

4 Q. Sorry, one clarification. One clarification.

5 When you say "less persuasive," do you mean  
6 "incorrect"?

7 A. What I meant to say was, since the Samsung Shares  
8 are listed as securities, the Fund is listed in the  
9 Registry of Shareholders, also the Shares of Samsung  
10 belongs to the Fund.

11 Q. Professor Rho, if I may, can I ask you a general  
12 question of Korean Law?

13 A. Yes, of course.

14 Q. In your expert opinion, does registration as a  
15 shareholder in a Shareholders' Registry conclusively  
16 determine share ownership as a matter of Korean Law? "Yes"  
17 or "no."

18 I'm not talking about this case.

19 A. Do I need to answer questions that are not  
20 relevant to this arbitration case?

21 Q. Professor Rho, I asked you a general question of  
22 Korean Law. You are here as a Korean Law expert. I think  
23 it's an easy question.

24 PRESIDENT SACHS: Please answer the question.

25 THE WITNESS: (In English) Yeah, yeah, of course.



1           (In Korean) Conceptually speaking, as you had  
2 mentioned, it is possible that there can be a separation  
3 between a share ownership and the titleholder in the  
4 Shareholder Registry.

5           BY MR. KIM:

6           Q.    Thank you.

7           But going back to my question, and I will read  
8 again from the LiveNote: "In your expert opinion, does  
9 registration as a shareholder in a Shareholders' Registry  
10 conclusively show share ownership as a matter of Korean  
11 Law? 'Yes' or 'no'."

12           "It's a very simple question."

13           MR. HAN: Professor Rho, before you answer, when  
14 you pause for the translation, please take time and answer  
15 the question. So when you pause, please let the  
16 Interpreter know that you will proceed after the  
17 translation.

18           THE WITNESS: I see.

19           Allow me to give you my answer to your earlier  
20 question.

21           When I just started my career as an attorney, a  
22 senior attorney of--a senior attorney I was acquainted with  
23 advised me not to answer "yes" to questions including  
24 phrases like "never," "decisively," or "conclusively." And  
25 if the question includes the word "conclusively," it would

1 be wrong to give my answer "yes."

2 BY MR. KIM:

3 Q. So, is your answer "no"?

4 A. And I think that is the answer you want to hear.

5 Q. I'm not--I'm just waiting to hear your answer,  
6 that's all, but we can move on.

7 A. Yes.

8 Q. In terms of Foreign Investment Registration,  
9 likewise, isn't it also true that that is not determinative  
10 of share ownership, just like a Shareholders' Registry?

11 A. There can be some difference between a Foreign  
12 Investment Registration and the Shareholder Registry.

13 Simply put, a Foreign Investment Registration  
14 bears all the hallmark--bears all the hallmarks of  
15 regulation.

16 If a foreign investor does not register themselves  
17 as part of a Foreign Investment Registration, the foreign  
18 investor cannot start making investment in the first place.  
19 And if the foreign investor makes a misrepresentation in  
20 their application for a registration, that could lead to  
21 the revocation of the registration and that could also  
22 subject the foreign investor to administrative measures,  
23 including sanctions and being ordered--being ordered to  
24 take corrective actions.

25 Q. Professor Rho, my question was about ownership.

1           A.     So, if an investor made misrepresentation in their  
2 application for Foreign Investment Registration, that means  
3 the Applicant shouldn't have made investment in the first  
4 place; and, as such, a violation could subject the foreign  
5 investor to corrective action, and it will be impossible  
6 for the Investor to continue to own their shares.

7           Q.     You say "shouldn't have," but let me give you a  
8 hypothetical scenario.

9                     Let's say there is a foreign party who registers  
10 through this regime and acquires listed shares in a Korean  
11 company. And I will put to you that that foreign party is  
12 the owner of the shares, for the purpose of this  
13 hypothetical, but later on it is found that the  
14 registration either erroneously, negligently, or otherwise,  
15 was filled out improperly.

16                    While I understand, Professor Rho, that in such  
17 case there may be certain implications or even maybe  
18 sanctions, isn't it true that that has no effect on  
19 ownership rights?

20           A.     And as I mentioned earlier, the sanctions are  
21 administrative sanctions. Theoretically speaking, such  
22 administrative sanctions have no impact on the legal  
23 ownership.

24                    Having said that, in reality, the Party would be  
25 subject to a number of sanctions, and considering the

1 FSS's--considering the Financial Supervisory Service's very  
2 strict standards for the capital market, it will be  
3 impossible for a Party to continue to own their shares.

4 Q. Professor Rho, if a Foreign Investment  
5 Registration were to be suspended, am I correct to  
6 understand that that means that the Party's ability to  
7 trade on the Korean Stock Market would be suspended?

8 Is my understanding correct?

9 A. Foreign Investment Registration is the  
10 prerequisite for foreigners to make investment. With the  
11 cancellation or suspension of the Foreign Investment  
12 Registration, the Party no longer engages in routine  
13 trading.

14 Q. I agree.

15 But based on my hypothetical, if I am already the  
16 owner of Shares and I am no longer--and I will quote, "no  
17 longer able to engage in routine trading," isn't it natural  
18 that I will remain the owner of those shares?

19 A. That is why I said that that is theoretically  
20 possible, and a loss on books is not the same as loss in  
21 reality. And considering the substantive characteristics  
22 of the capital market, the Party would not be able to  
23 continue to own the shares.

24 Q. This will be my last line of questioning on this  
25 matter, but Professor Rho, you said "theoretically

1 possible," but if you turn to R-17 in your binder--and I'll  
2 wait. And I would ask you to look for Article 6-13,  
3 Paragraph 2.

4 A. (In English) R-7.

5 Q. R-17.

6 A. Was it R-17?

7 THE INTERPRETER: And which page are you referring  
8 to?

9 MR. KIM: Article 6-13, Paragraph 2.

10 BY MR. KIM:

11 Q. Have you found it?

12 A. Yes, I'm on it.

13 Q. What you just described, Professor Rho, as  
14 "theoretically possible," in Paragraph 2 of Article 6-13,  
15 it states that: "The Governor of the FSS may cancel or  
16 suspend in case of a number of enumerated cases,  
17 including"--and I point to subparagraph (1)--"any of the  
18 facts specified in subparagraph--Paragraph (1) is  
19 discovered after the registration of investment."

20 Do you see that?

21 A. And the provision stipulates that any of the  
22 following included in Paragraph 1. So are you referring to  
23 the Paragraph 1 or subparagraphs under Paragraph 1?

24 Q. All I'm referring to, Professor Rho, is that,  
25 isn't it abundantly clear that a Party can acquire shares

1 after registration and then after certain defects in the  
2 registration are discovered after becoming the owner, and  
3 in such case, the only implication is that the registration  
4 is canceled or suspended? In other words, it has no impact  
5 on ownership rights?

6 That's my question.

7 A. And in my opinion, to answer that question, we  
8 don't have to bother to take a look at the Article 6-13  
9 under the regulation on financial investment business. We  
10 can simply take a look at the principle of the Civil Code.  
11 And under the Civil Code, this paragraph is administrative  
12 provisions, and the Civil Code stipulates that the effect  
13 of ownership cannot be taken away.

14 And as I mentioned earlier, the civ--but I'm not  
15 talking about the--a Civil Code and not taking away the  
16 legal effect. My answer wasn't limited to whether the  
17 Party can continue to own their shares and continue to  
18 remain as a shareholder.

19 Q. Okay.

20 COURT REPORTER: Can we take a break soon?

21 MR. KIM: I was going to suggest the same.

22 I think maybe Professor Rho might want a break.  
23 Would that be okay?

24 COURT REPORTER: And the Interpreter, too.

25 MR. KIM: And--oh, that's a given.

1           PRESIDENT SACHS: Do you still have a question  
2 now, or--

3           MR. KIM: I'm more than happy to take a break, if  
4 that's okay with the Tribunal.

5           PRESIDENT SACHS: Okay. Then let's have a break  
6 now.

7           It's 20 minutes--shall we say 20 to 4:00? 20 to  
8 4:00? Yeah? 20 to 4:00.

9           Professor Rho, you're still under expert  
10 testimony, so we would ask you not to speak to anyone.

11          THE WITNESS: (In English) Shall I stay here?

12          PRESIDENT SACHS: You may walk around, have a  
13 coffee or whatever, but not talk to them. Thank you.

14          (Brief recess.)

15          PRESIDENT SACHS: All right. Can we move on?

16          BY MR. KIM:

17          Q. Professor Rho, during your presentation earlier  
18 this afternoon, you spoke about what we've referred to in  
19 Korea as a "legal capacity to have rights,". Although I  
20 murdered the German pronunciation yesterday, in Korean,  
21 I'm quite confident that it is "kwon li neung reok."

22          A. Yes. You pronounced "kwon li neung reok"  
23 correctly.

24          Q. Thank you.

25                 In your Expert Report at Paragraph 17 you provided

1 examples and mentioned that non-existing fictitious persons  
2 or the deceased do not have a legal capacity to have rights  
3 under Korean Law.

4 Do you recall that?

5 A. Yes. And as I mentioned earlier, that portion  
6 refers to the "General Legal Capacity."

7 Q. So, in terms of a General Legal Capacity, a  
8 fictitious or dead person cannot have a General Legal  
9 Capacity to have rights; is that what you're saying?

10 A. Yes. Fictitious persons and the deceased cannot  
11 have General Legal Capacity.

12 Q. And in case of organizations, would you agree with  
13 me that, unlike natural persons, an organization or  
14 association may or may not have a legal capacity to have  
15 rights, depending on the relevant laws and its internal  
16 regulations?

17 A. Yes. Unlike General Legal Capacity, the scope of  
18 special legal capacity of an organization or association  
19 can be determined in a specific area, depending on the  
20 relevant statutes and the characteristics of the  
21 organization or association.

22 Q. So, in Korea, there are some organizations or  
23 associations that have and some that do not have a legal  
24 capacity to have rights; isn't that correct?

25 A. Yes, that is correct.



1 Q. And if an organization or association does not  
2 have a legal capacity to have rights, isn't it correct that  
3 such organization or association cannot be the owner of  
4 property, including shares?

5 A. It is not an accurate proposition that an entity  
6 without General Legal Capacity cannot own any type of  
7 assets.

8 Q. I'm sorry, can I correct the translator? I  
9 believe the word "not" was not included in his response,  
10 unless I heard incorrectly. I believe that the response  
11 was it is an accurate proposition, and then he was going to  
12 expand further.

13 PRESIDENT SACHS: Interpreter, can you confirm?

14 THE INTERPRETER: Since I have a short memory  
15 span, can I ask the Witness, please, to repeat his answer?

16 PRESIDENT SACHS: Yes.

17 THE WITNESS: It is not an accurate proposition  
18 that an organization without General Legal Capacity cannot  
19 own any type of assets. For example, an unincorporated  
20 entity can have a capacity to register real estate.

21 BY MR. KIM:

22 Q. How about shares?

23 A. As I mentioned earlier, if there is no applicable  
24 Korean Alien Law, an organization without legal personality  
25 cannot own shares under Korean Law.

1 Q. Professor Rho, you referred to "Alien Law," but  
2 I'm talking about a Korean organization or association.

3 Then, in such case, isn't it true that an  
4 association or organization without a legal capacity to  
5 have rights cannot own shares under Korean Law?

6 A. And if an organization or association without  
7 legal personality is a Korean corporation, then such  
8 organization cannot own shares in its own name.

9 Q. Thank you. I agree, but I just want to confirm:  
10 Are there any exceptions to that rule?

11 A. To that end, we have to refer to a specific  
12 special act, and my earlier answer was limited to Korean  
13 corporations and organizations under their Korean Corporate  
14 Act.

15 Q. Professor Rho, can we turn to Paragraph 17 of your  
16 Expert Report.

17 A. Yes, I'm on it.

18 Q. Starting from the second sentence of Paragraph 17,  
19 you state as follows: "Therefore, anyone who is a subject  
20 of rights may become a shareholder, and there is no special  
21 requirement on shareholder qualifications."

22 Do you see that?

23 A. Yes, I do.

24 Q. And further on in that sentence, you articulate an  
25 exception, and I quote: "With the exception of those who

1 do not have the legal capacity to hold rights under Korean  
2 Law."

3 Do you see that?

4 A. Yes.

5 Q. And do you also see the very last sentence in that  
6 paragraph which states, and I quote: "Korean Law does not  
7 distinguish between Koreans and foreigners; the same  
8 applies to foreign shareholders."

9 Do you see that?

10 A. Yes, I do.

11 Q. Professor Rho, a few days before the commencement  
12 of these hearings, Respondent submitted a new legal  
13 authority which was referred to in the opening and stated  
14 it would be discussed by the Experts. One of those is  
15 R-25, and I would like you to turn to that.

16 And while you're finding it, I will just note  
17 that, as the title suggests, this--the title is the  
18 "Commentaries" on the Commercial Act."

19 A. Yes, I found it.

20 Q. I would like to point out--I'm sorry to--

21 MR. KIM: John, can we just leave it on the  
22 original for now without--the next page, the next page  
23 without the enlargement. Yes.

24 I would like to point out to the Tribunal that the  
25 page that is currently on the screen was the original form

1 of R-25 submitted by Respondent, and I will point out the  
2 relevance of that in a minute.

3           Would you like to translate that?

4           (Interpreter complies.)

5           BY MR. KIM:

6           Q.   Respondent's counsel submitted this Legal  
7 Authority or excerpt from the Commercial Act, Article 621,  
8 titled "Status of Foreign Company."

9           Professor Rho, is this related to what you have  
10 referred to as General Legal Capacity and Special Legal  
11 Capacity in your presentation earlier today?

12          A.   Yes. This can be called related to the extent  
13 that legal capacity is mentioned.

14          Q.   Professor Rho, in the first sentence--and I'll  
15 read the first few words of Article 621, it states: "In  
16 applying other Acts, a foreign company," and I will stop  
17 there.

18                Do you see that?

19          A.   Yes, I'm seeing it.

20          Q.   And unlike Article 16 of the Act on Private  
21 International Law that we discussed earlier, which refers  
22 to corporations and other organizations, isn't it correct  
23 that Article 621 of the Commercial Act only applies to  
24 foreign companies?

25          A.   Yes. This provision is quite often mentioned

1 during the course of the Corporate Act; and, because of  
2 that, I'm well aware of this provision. And having said  
3 that, it's a shame that there is little distinction between  
4 "corporation" and a "company" under Korean statutes.

5 And even though the term "foreign company" is used  
6 in this provision, there is a prevailing school of thought  
7 that, whether or not the organization in question has legal  
8 personality has no relevance.

9 MR. KIM: Mr. President, I would like to point out  
10 that on this page, you will see at the bottom of the page  
11 "Translation Omitted." A number of days ago, we submitted  
12 an English translation of the immediately following  
13 paragraph, and there has been some back and forth between  
14 counsels as to the accuracy. I believe that in the hearing  
15 binder there is Claimants' English translation as well as  
16 Respondent's English translation.

17 But for the sake of today's cross-examination,  
18 without accepting the accuracy, acknowledging the accuracy  
19 of Respondent's English translation, I will proceed based  
20 on their translation.

21 PRESIDENT SACHS: Okay. Noted.

22 MR. KIM: I will just wait until the part that was  
23 initially translated--I mean omitted but is now on the  
24 screen.

25 Actually, okay. It's on the screen now.

1 BY MR. KIM:

2 Q. Professor Rho, the first sentence of the part that  
3 was initially--intentionally omitted reads: "Whether a  
4 foreign company has, in general, legal capacity or not is  
5 an issue to be decided by the law of the country of the  
6 Company's establishment (lex personalis)." Would you agree  
7 that this is consistent with Article 16 of the Act on  
8 Private International Law?

9 A. As I mentioned earlier, it seems that this  
10 provision is based upon General Legal Capacity.

11 Q. I just noticed that this is our Claimants'  
12 translation, and after I said--I told the Tribunal that we  
13 will use Respondent's translation, so I'll wait for the  
14 Respondent's translation to come up.

15 The next sentence, Professor Rho, addresses what  
16 you have referred to as "General Legal Capacity" and a  
17 "Specific Legal Capacity" in Korea.

18 Do you see that?

19 A. Yes.

20 Q. And I acknowledge that at the end of the second  
21 sentence it states, "may have Specific Legal Capacity in  
22 Korea," may have the words: "may have Specific Legal  
23 Capacity in Korea." I acknowledge that.

24 And do you see that?

25 A. Yes.

1 Q. But I would put to you, Professor Rho, that the  
2 important part of this sentence is the first part of the  
3 sentence, which reads: "The extent to which a foreign  
4 company whose General Legal Capacity is acknowledged  
5 pursuant to the law of the country of its establishment."

6 Do you see that?

7 A. There is some confusing discrepancy between the  
8 original Korean text and the English translation. Could  
9 you please repeat your question?

10 Q. Professor Rho, this is Respondent's translation.

11 A. (In English) Oh, I know.

12 (In Korean) The parts you are referring to, is it  
13 a foreign company whose General Legal Capacity is  
14 acknowledged pursuant to the law of its place of  
15 incorporation?

16 Q. Let me ask you a simple question: Isn't it clear  
17 that this only applies to, and I quote, "a foreign company  
18 whose General Legal Capacity is acknowledged pursuant to  
19 the law of the country of its establishment"? Isn't that  
20 clear?

21 A. I'm afraid that is the wrong interpretation.

22 (Overlapping speakers.)

23 A. Can I offer my explanation?

24 The interpretation that the Article 621 is only  
25 applicable to foreign companies whose legal capacity is

1 acknowledged pursuant to the law of its place of  
2 establishment is not consistent with a prevailing school of  
3 thought.

4           The proposition that the Article 621 is applicable  
5 whether or not a foreign company has a legal capacity  
6 pursuant to the law of its place of establishment is  
7 included in my textbook, and that proposition has been  
8 widely accepted in the legal community.

9           Q.    Professor Rho--

10                   (Overlapping speakers.)

11           A.    So, I think the following is the correct  
12 interpretation of the portion.

13                   Where a foreign company is acknowledged to have a  
14 General Legal Capacity pursuant to the law of its place of  
15 establishment, that company's Specific Legal Capacity will  
16 be determined based upon the Korean Law. The provision is  
17 not meant to exclude companies who do not have the legal  
18 personality pursuant to the law of their place of  
19 establishment.

20           Q.    Professor Rho, I will remind you that this Legal  
21 Authority, which is an official commentary on the  
22 Commercial Act, was put forward by Respondent, not  
23 Claimant, and that this translation was also prepared by  
24 Respondent's counsel. And in my view, a plain reading  
25 while I understand that that is your opinion or



1 interpretation, in my view, a plain reading both in English  
2 and Korean is clear, and that this only applies to, and I  
3 quote, "a foreign company whose General Legal Capacity is  
4 acknowledged pursuant to the law of the country of its  
5 establishment." That's what it says.

6 A. I'm not saying that the counsel's interpretation  
7 is incorrect. The provision in question is vaguely worded.  
8 Because of that, even the best interpretation could leave  
9 room for a difference in opinion.

10 MR. HAN: Mr. Arbitrator, now Claimant is trying  
11 to confirm the interpretation of the translation with the  
12 preface of--with the Expert rather than asking for his  
13 interpretation of the Korean original text of the  
14 commentary book.

15 MR. KIM: Mr. President, I stated that it is my  
16 view that--and I reminded the Parties and the Tribunal  
17 that, first of all, this is Respondent's translation; and  
18 second, that in my view, that this English wording is  
19 consistent with the Korean original, and I put that to  
20 Professor Rho.

21 PRESIDENT SACHS: And I think we've covered the  
22 point.

23 MR. KIM: Okay, I agree.

24 PRESIDENT SACHS: We could move on.

25 BY MR. KIM:

1 Q. Professor Rho, earlier today, when you were  
2 talking about special treatment under certain acts, and I  
3 believe that you mentioned this not only in your  
4 presentation today but also in your Expert Report, you  
5 covered as far as I can recall three acts: The Capital  
6 Markets Act, the Corporate Tax Act, and the Civil Procedure  
7 Act. I would just like to deal with these very quickly, if  
8 I may.

9 A. Yes.

10 Q. Can we look at Article 168 of the Capital Markets  
11 Act, which can be found at R-14.

12 A. I found it.

13 Q. Okay. Professor Rho, as you will see, the title  
14 of this Article is "Restrictions on Foreigners' Trading of  
15 Securities and Exchange-Traded Derivatives."

16 Do you see that?

17 A. Yes, I do.

18 Q. And, based on this Article in--you don't have to  
19 turn to it now--but in Paragraph 19 of your Expert Report,  
20 you conclude that because the definition of "foreign  
21 corporation" includes funds or associations created and  
22 supervised or managed in accordance with the statutes of a  
23 foreign country," you conclude that, and I quote, "even  
24 where a fund or partnership does not have the legal  
25 capacity to hold rights or to own shares pursuant to the

1 place of establishment of the fund or partnership," you  
2 state that Korean Law does not take into account such  
3 arrangements.

4 A. Yes, that is correct.

5 Q. I would like to recall what we have discussed  
6 today. Article 16 of the Act on Private International Law  
7 provides that foreign corporations shall be governed by the  
8 laws of its establishment.

9 We've also confirmed that for what you called--I  
10 know you mentioned it was only Korean companies, but for  
11 Korean companies, a person or organization without a  
12 General Legal Capacity to act--and I'm deliberately using  
13 your own words--cannot own shares. And notwithstanding  
14 that a Korean organization without legal capacity to own  
15 shares cannot own shares. It appears that it is your view,  
16 based on Article 168 of the Capital Markets Act, that  
17 somehow a foreign corporation without legal capacity can  
18 own shares under Korean Law. Is that true?

19 MR. HAN: Professor Rho, do not answer the part  
20 especially about the Claimant said "we've also confirmed"  
21 part.

22 THE WITNESS: The FSS--regarding that portion, the  
23 FSS had some concerns regarding "corporations, et cetera,"  
24 in connection with Alien Laws. It seems that the counsel  
25 is referring to reverse discrimination, provisions set

1 forth in the Capital Markets Act have their purpose of  
2 regulation.

3           When it comes to domestic investment done by an  
4 association in Korea, the members of such association can  
5 be identified and confirmed by the regulators, and that's  
6 why there is no need to acknowledge trading done in the  
7 name of the association. But there is no way for the  
8 regulators to identify and confirm the members of foreign  
9 corporation, and that is why there is--that is why there is  
10 a need to allow foreign organizations without a legal  
11 personality to conduct transactions in the name of the  
12 association, and that is why there is a need to regulate  
13 such foreign associations.

14       Q.    Professor Rho, I would put to you that the fact  
15 that Korean regulators cannot confirm, as you mentioned, is  
16 the exact reason why Article 16 of the Act on Private  
17 International Law dictates that the laws of the place of  
18 establishment should govern. That's logical.

19       A.    I gather you have a different perspective  
20 regarding the Capital Markets Act. The Alien Law  
21 provisions under the Capital Markets Act reflect the  
22 intention of the Korean regulators to regulate foreign  
23 investors according to the method prescribed by the  
24 regulators.

25       Q.    Professor Rho, you referred to "reverse

1 discrimination." Is it your view today that the Capital  
2 Markets Act regime discriminates against foreign investors?

3 A. As I mentioned earlier, in connection with  
4 counsel's remark, Korean associations demand that they  
5 should be allowed to conduct transaction and open account  
6 in the name of the association and can be construed as  
7 "reverse discrimination."

8 Q. For the record, I didn't--for the record, counsel  
9 never said the words "reverse discrimination." My point  
10 was that it's illogical. But I will move on. I will move  
11 on to the Corporate Tax Act.

12 Professor Rho, at Paragraph 20 of your Report, you  
13 state that the Supreme Court of Korea has ruled that a  
14 Limited Partnership established pursuant to the laws of the  
15 Cayman Islands was a foreign corporation within the meaning  
16 of the former Corporate Tax Act.

17 Do you see that?

18 A. Yes. That is what I wrote in Paragraph 20.

19 Q. While I agree with you that this Court treated the  
20 Cayman Partnership--let me start again, sorry.

21 While I agree that this case relates to tax  
22 treatment under the Corporate Tax Act, isn't it true,  
23 Professor Rho, that this Court never found that the Cayman  
24 ELP, in fact, had what you call a "legal capacity to have  
25 rights" or even a "General Legal Capacity to have rights"?

1           A.    Yes.  As you have pointed out, the ruling was made  
2 based upon the premise that the entity in question does not  
3 have a General Legal Capacity.

4           Q.    And Professor Rho, can we turn to R-20.

5                   R-20 provides Article 57 of the Civil Procedure  
6 Act.

7                   Do you see that?

8           A.    Yes, I'm looking at it.

9           Q.    In fact, in your slide presentation earlier today,  
10 you referred to this in Paragraph 5 of your presentation as  
11 an example of where Korea's so-called "Alien Law" applies.

12                   Do you recall that?

13           A.    Yes, of course I do recall.

14           Q.    And do you agree with me that the title of this  
15 provision starts with the words "Special Provisions"?

16           A.    Yes, I do.

17           Q.    Professor Rho, is this an example of what you call  
18 "Special Legal Capacity"?

19           A.    As the counsel is well-aware, there is a  
20 difference between litigation capacity and legal capacity  
21 to have rights, and this is cited--of course, the provision  
22 is not related to General Legal Capacity.  The provision  
23 can serve as a clear example of Alien Law.

24           Q.    Okay.  I'm going to wrap up in five minutes, but I  
25 just want to ask one last question on this provision.

1           At the very last part of Article 57, it states:  
2 "Even where he or she does not have such capacity pursuant  
3 to the laws of his or her home country."

4           Do you see that?

5           A.    Yes.

6           Q.    And I assumed that this is what you referred to as  
7 the application of Alien Law?

8           A.    Yes. This is within the scope of Alien Laws.

9           Q.    Professor Rho, is there any similar wording under  
10 the Capital Markets Act, specifically Article 168 of the  
11 Capital Markets Act, which you rely on?

12          A.    And all of us here are legal experts. Whether or  
13 not there is express provision, an interpretation can lead  
14 us to a conclusion. It is true that there is no express  
15 provision similar to the wording under the Article 168 of  
16 the Capital Markets Act.

17          Having said that, the Article 168 is designed to  
18 be applied to foreigners, and the Article mentions  
19 foreigners' capacity to acquire shares. Arguing--simply  
20 because there is no such provision under the Civil  
21 Procedures Act, the argument that this is not Alien Law or  
22 there is no provision related to a special capacity, such  
23 argument is not appropriate.

24          MR. KIM: Mr. President, I have only two more  
25 questions, but I would ask, if possible, if we can put up

1 Professor Rho's presentation from earlier today on the  
2 screen, just two slides, the first one starting at  
3 Slide 11.

4 BY MR. KIM:

5 Q. Professor Rho, you will recall this slide from  
6 your presentation earlier today?

7 A. Yes.

8 Q. And you referred to the Supreme Court en banc  
9 decision that is referred to in the first paragraph?

10 A. That is correct.

11 Q. And in providing your thoughts or opinions on this  
12 Supreme Court case and relying on the excerpt in your  
13 presentation materials, I believe I recall you using the  
14 word the Court "held" that...

15 A. The more accurate translation of the word I  
16 actually used in my presentation would be "say" or "state."  
17 Having said that, I don't find that translation of "hold" a  
18 gross mistranslation.

19 Q. I will put to you, Professor Rho, that you did use  
20 the word the Court "held" that.

21 A. I think that is a matter of interpretation.

22 Q. Would you like to retract that statement?

23 A. I'm having a hard time understanding why this is  
24 an issue.

25 PRESIDENT SACHS: We are a little bit lost, too.



1 What's the issue now?

2 MR. KIM: I will get there. I'm having a little  
3 bit of hard time understanding why this entire slide is in  
4 English, except for two small words at the end of that  
5 paragraph, after the word "R-10."

6 BY MR. KIM:

7 Q. Isn't it true, Professor Rho, that the excerpt  
8 that you have relied on was not part of the Majority  
9 Decision in this case?

10 A. First, the reason why we have some Korean words on  
11 the slide is because while I'm in Korea, I usually enlist  
12 the assistance of my assisting students in order to prepare  
13 this kind of documentation, but here I have to prepare my  
14 own--here, I have to prepare my own material, and that is  
15 why I made this kind of mistake.

16 Q. Professor Rho, is this part of the Majority  
17 Decision or not? "Yes" or "No."

18 A. Sir, that was what I was about to address. As the  
19 counsel is well-aware, the Supreme Court's en banc ruling  
20 has both a Majority Opinion and Dissenting Opinion. Here,  
21 "kwon li neung reok" is not "Dissenting Opinion." This  
22 simply indicates that the Justices of the Supreme Court  
23 with this Concurring Opinion took a different approach to  
24 reach the same conclusion as the Majority Opinion, so this  
25 simply shows that these Justices who set forth--who

1 set--who produced this Concurring Opinion took a different  
2 route to reach the same conclusion as the Majority Opinion.

3 Q. Professor Rho, for the interest of time, is this  
4 excerpt from the Majority Opinion or not? That's all I'm  
5 asking.

6 MR. KIM: Mr. President--

7 PRESIDENT SACHS: The translation, please.

8 THE WITNESS: The reason I considered this opinion  
9 as the opinion put forward by the Supreme Court is because,  
10 as you can find out from the middle part of the slide, this  
11 opinion confirmed--this opinion confirmed the legal  
12 precedents and previous case laws.

13 MR. HAN: Mr. Chairman, we should note that when  
14 Professor Rho was making statement based on the slide, he  
15 said "this has been made clear by a Concurring Opinion in  
16 the Supreme Court's en banc ruling." It's 141352.

17 MR. KIM: Mr. President, I put a very simple  
18 question to the expert, whether or not this excerpt is from  
19 the Majority Opinion or not. It's a very simple question.

20 PRESIDENT SACHS: And Professor Rho said it's a  
21 part--I understood you saying that it's part of a  
22 Concurring Opinion.

23 THE WITNESS: (In English) Yep.

24 PRESIDENT SACHS: So, that would mean it's not  
25 part of the Majority Opinion?

1 THE WITNESS: (In English) Yep.

2 PRESIDENT SACHS: So, that would be the short  
3 answer to the question.

4 THE WITNESS: Yes, I agree, Mr. President.

5 MR. KIM: My apologies. I thought I would be able  
6 to end that one in one question, but it took a little bit  
7 longer than I thought. I just have one last question on  
8 Slide 12 of the presentation this morning.

9 BY MR. KIM:

10 Q. Professor Rho--and I promise this will be the last  
11 question because I think it's quite easy--on the second  
12 line of the quoted excerpt, the words "to hold"--do you see  
13 that?--are included in that sentence.

14 A. Yes.

15 Q. In Korean, are the words "ownership" or in Korean  
16 "so you" used in this Article 311?

17 A. The word itself is not the same as "ownership."

18 MR. KIM: I have no further questions.

19 MR. HAN: Mr. Chair, thank you.

20 PRESIDENT SACHS: Redirect?

21 MR. HAN: Yes.

22 PRESIDENT SACHS: Okay.

23 MR. HAN: Before I begin, for the record, I would  
24 like to point out that R-25 is the exhibit produced by  
25 Claimant, not by Respondent.

1 PRESIDENT SACHS: Okay. Thank you.

2 REDIRECT EXAMINATION

3 BY MR. HAN:

4 Q. I would only ask three questions for redirect.  
5 Professor, thank you for your effort.

6 Can you tell us about statutes governing the  
7 trading of Listed Securities, and can you also tell us how  
8 these statutes have an impact on share ownership and the  
9 Shareholder Registry?

10 A. In order to trade in Listed Securities, an  
11 individual has to open an account with a brokerage firm.  
12 And, in Korea, the use of real name is mandated in order to  
13 prevent money-laundering. And if an individual opens an  
14 account and trades Listed Securities, in that case, the  
15 titleholder is regarded as Shareholder.

16 And second, Listed Securities are traded on  
17 massive settlement systems. As I mentioned in my  
18 presentation, since it is impossible to identify and  
19 recognize the counter-party to the Transaction, it should  
20 be deemed that the titleholder is the Shareholder.

21 And third, the Shareholder listed in the trading  
22 account will be automatically entered into the real  
23 Shareholder Register. This prevents the possibility  
24 that--this prevents the possibility that a shareholder is  
25 not listed in the Shareholder Registry due to the person's

1 mistake or laziness. And all things are considered when it  
2 comes to Listed Securities, the shares that belong to the  
3 titleholder.

4 Q. May I point you to R-17. Allow me to draw your  
5 attention to 6-13.

6 A. Yes, I found it.

7 Q. In light of this provision, what impact would a  
8 misrepresentation in the application for Investment  
9 Registration bring? Would it still be possible for the  
10 individual to acquire shares from the beginning or would it  
11 be impossible for the individual to acquire shares at the  
12 beginning?

13 A. In principle, if the individual intentionally made  
14 misrepresentation in the application, the individual's  
15 ownership of the shares would be unlawful. Such a player  
16 would be banned from participating in the capital market.

17 And I have never--I have never encountered many  
18 cases where an individual is willing to risk--whether an  
19 individual is willing to take on such risk by making  
20 intentional misrepresentations in their application for  
21 Investment Registration.

22 Q. Could you please go to CLA-61 in the bundle in  
23 front of you.

24 MR. KIM: I don't believe I referred to this in  
25 cross-examination, Mr. President. This is redirect.

1 MR. HAN: Sir, we are referring to--sir, I'm  
2 trying to refer to the C exhibit that Claimant submitted,  
3 and also that issue I'm going to address was heavily  
4 discussed and disputed between the Expert and the Claimant  
5 during the cross.

6 PRESIDENT SACHS: I'm sorry, but, I mean, it's not  
7 on the screen and I don't find it in the volume here.  
8 Before we continue, I think we...

9 (Pause.)

10 MR. KIM: Will Respondent's counsel be putting it  
11 on the screen?

12 MR. HAN: I'm not tech-savvy, so I'm going to try  
13 anyway.

14 (Comment off microphone.)

15 BY MR. HAN:

16 Q. And as the Claimant submitted the CLA-61, the  
17 Claimant had chosen to translate only a portion of the  
18 document; and please understand that the page I am  
19 referencing, it has not been translated.

20 MR. KIM: Mr. President, I object to this. The  
21 part that was omitted in Respondent's exhibit that we  
22 referred to was later updated by Claimants, and then the  
23 translations were discussed between the Parties. And you  
24 will find the additional parts, English and Korean, in the  
25 Hearing Bundle.

1           What Respondent is trying to show here is that  
2 there are parts of the translation that are omitted, but  
3 nothing has been added to the record. And he is planning  
4 on reading, based on my understanding of what his statement  
5 was in Korean, parts of the Korean-language version from  
6 these Commentaries that have not been translated into  
7 English as part of this record in this arbitration, which  
8 is completely different than how the other exhibit, the R  
9 exhibit, was dealt with.

10           PRESIDENT SACHS: Counsel?

11           MR. HAN: Sir, this exhibit was submitted only two  
12 weeks before this Hearing. And also, as you can see, this  
13 Korean exhibit is almost 90 pages long, and so even the  
14 Respondent has submitted revised excerpt translation of  
15 this exhibit.

16           We didn't have any other option but to translate  
17 only some important parts we were going to refer to at the  
18 time. But now, during the cross-examination, the important  
19 issue on this page came up, so we are trying to confirm the  
20 meaning of this Korean language, which the Claimant  
21 submitted in the Professor Kwon's Reports.

22           MR. KIM: Mr. President, if I may, if that's the  
23 case, neither the Tribunal nor the English-speaking Parties  
24 in attendance today in these proceedings will be able to  
25 see what counsel plans or is referring to. He said what,

1 two weeks, three weeks ago that was submitted? This was in  
2 accordance with the Procedural Timetable. They had plenty  
3 of time to provide an English translation.

4 In fact, the English translation of the exhibit  
5 that we pointed out today, the Respondent's exhibit, was  
6 submitted a few days, as you may recall, by application  
7 prior to these proceedings. Yet, we provided an English  
8 translation of the portions that we thought were relevant,  
9 and we had--not only that, but we discussed with  
10 Respondent's counsel whether the translation--the  
11 respective translations were acceptable, and we agreed to  
12 not agree. And, therefore--in fact, we have two English  
13 translations of the additional part that was added.

14 So, to say that they didn't have enough time when  
15 they had this commentary three weeks ago to provide  
16 additional English translations, which they were free to  
17 do, and to complain about it now and to ask questions on  
18 redirect based on excerpts of a Korean Legal Authority for  
19 which an English translation has not been provided is not  
20 fair.

21 PRESIDENT SACHS: Well, there is a procedural  
22 problem here. We can't only--work only with the--this  
23 extract. I mean, we don't know what was omitted here, and  
24 so that would not be so helpful for the Tribunal.

25 MR. HAN: Okay. Thank you.



1           And then I'm going to ask one last question for my  
2 redirect.

3           PRESIDENT SACHS: Yes, please. Go ahead.

4           BY MR. HAN:

5           Q. Let me draw attention to R-14. Please take a look  
6 at Article 168.

7           A. Yes, I have found it.

8           ARBITRATOR GLOSTER: Excuse me, is there an  
9 English translation of it? I'm looking at R-14  
10 electronically, and I don't seem to have an English  
11 translation.

12           Thank you. One is now on the screen.

13           PRESIDENT SACHS: Please proceed.

14           MR. HAN: So, the translation of R-14 has been  
15 submitted, and I think there must be a problem in putting  
16 those files into USB to the Tribunal?

17           MR. NYER: We have it on the screen now.

18           PRESIDENT SACHS: It's on the screen now.

19           BY MR. HAN:

20           Q. The Article 168 submitted as R-14, there is a  
21 provision on the acquisition of shares by foreigners and  
22 "foreign corporation, et cetera."

23           So, can you tell us why the wording is "foreign  
24 corporation, et cetera"?

25           A. It is very obvious. Foreign corporations refer to

1 organizations with legal personality.

2 By attaching "et cetera," it is stipulated that  
3 organizations without legal personality, such as funds and  
4 associations, can also own shares.

5 MR. HAN: No further questions. Thank you.

6 PRESIDENT SACHS: Okay.

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR GLOSTER: Professor Rho, please, could  
9 you look at Paragraph 11 of your expert opinion.

10 THE WITNESS: Yes, I'm on it, ma'am.

11 ARBITRATOR GLOSTER: You say you have a  
12 relationship with the Parties to the Arbitration. Are you  
13 referring there to an independent relationship with the  
14 Respondent?

15 THE WITNESS: Yes. I participated in the  
16 Commission aimed to make legislation such as the Commercial  
17 Act, the Capital Markets Act, the Fair Trade Act, and  
18 Electronic Securities Act. And due to the aforementioned  
19 expertise, I participated in a number of projects dedicated  
20 to interpretation of statutes.

21 ARBITRATOR GLOSTER: Just a second. My question  
22 is: In your Paragraph 11, you refer to "conducting various  
23 research assignments for the Respondent" and "working as an  
24 advisory member of a research group."

25 My question is: Are those assignments and

1 "working as an advisory member" paid assignments?

2 THE WITNESS: Yes. I was compensated, but my  
3 participation in those areas was conducted as part of  
4 academic activities. I would not characterize my research  
5 as the conduct of business.

6 ARBITRATOR GLOSTER: Can you tell me whether it  
7 was the Respondents who paid you for those various research  
8 assignments?

9 THE WITNESS: That is correct. Having said that,  
10 the level of compensation was reasonable.

11 ARBITRATOR GLOSTER: Thank you very much, indeed.

12 I don't know whether counsel on either side wants  
13 to ask any questions arising from my question.

14 MR. KIM: No questions from Claimants' side.

15 MR. HAN: Just one minor point on that issue.

16 In Korea, it's very common that Professors--

17 ARBITRATOR GLOSTER: No, no, I'm sorry. I asked  
18 if you wanted to ask the Expert a question, not to make a  
19 submission.

20 Could you please ask in English the question so it  
21 can get translated so I can understand it.

22 MR. HAN: Okay.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. HAN:

25 Q. Professor Rho, can you briefly explain the

1 practice in Korea how many academic Professors are engaged  
2 in the academic research work by the Korea Minister of  
3 Justice and other Korean Government Ministries?

4 A. In Korea, Professors are actively participating in  
5 legislation activities and research assignments  
6 commissioned by the Government.

7 As with many other countries around the world, the  
8 budget assigned to such research activity is not as  
9 sufficient, so the budget for a typical Government project  
10 is usually set at a very low level. And I think  
11 participating in such projects can be viewed as a part of  
12 fulfilling social responsibility.

13 MR. HAN: Can I ask one more question?

14 ARBITRATOR GLOSTER: Thank you very much.

15 MR. HAN: Can I ask one question?

16 BY MR. HAN:

17 Q. Professor Kwon, do you have any--sorry.

18 Professor Rho, do you have any knowledge that  
19 Professor Kwon, the Claimants' Expert, has done any project  
20 for the Government?

21 A. I think I have to tread very carefully here, but I  
22 think Professor Kwon is in a similar position to mine.

23 MR. HAN: No further questions.

24 QUESTIONS FROM THE TRIBUNAL

25 ARBITRATOR MAYER: One question, Professor Rho:

1 You have been taken to Exhibit R-17 by both counsel and, in  
2 particular, to Article 613.

3 You can translate that already.

4 And the question by Respondent's counsel was what  
5 happens if the Governor rejects the application, and you  
6 answered. That's Paragraph 1 in Article 613.

7 Now, Paragraph 2 reads: "And the Governor may  
8 cancel the registration or suspend its validity in various  
9 cases." So that's at the moment after the investment, and  
10 the question is: What would be the consequences of such  
11 cancellation or suspension?

12 THE WITNESS: In principle, the owner of the share  
13 would not change, and the investor would not lose their  
14 shares. But, if the Applicant was not entitled to own  
15 shares in the first place and the Applicant ends up owning  
16 some shares, then the registration can be canceled followed  
17 by very serious corrective measures.

18 So, this case is much more serious than a simple  
19 misrepresentation regarding the executive officers of the  
20 organization in the application. And if it is found out  
21 that an organization which is not entitled to owning shares  
22 ends up owning the shares, the FSS would not allow that  
23 organization to continue to own the shares.

24 ARBITRATOR MAYER: But if it's not allowed to own  
25 the shares, what happens?

1 THE WITNESS: It is not that Korea's FSS orders  
2 the organization to--it is not that Korea's FSS orders the  
3 organization to dispose of the shares. Instead, the FSS  
4 would impose sanctions on the relevant brokerage firms and  
5 the relevant executive officers and employees. And setting  
6 a bad precedent is the last thing the FSS would do.

7 ARBITRATOR MAYER: Thank you.

8 PRESIDENT SACHS: All right. Thank you, Professor  
9 Rho, for your expert witness testimony. You're released as  
10 an expert.

11 (Witness steps down.)

12 MS. SALOMON: Mr. Chairman?

13 PRESIDENT SACHS: We are a bit behind schedule.

14 MS. SALOMON: We were wondering, while it is late  
15 and we're sure the Court Reporter would need a break, we  
16 would propose if the Tribunal would permit to have a later  
17 evening today so we could, indeed, finish the Korean Law  
18 issues and then perhaps start later tomorrow morning so  
19 that the closing can be dealt with in that time period,  
20 rather than having the Korean law experts continue in the  
21 morning and then have to address closing immediately  
22 thereafter.

23 (Pause.)

24 MR. FRIEDLAND: How about a compromised proposal?  
25 How about we do one hour--continue with one hour of

1 cross-examination of Professor Kwon now and then finish  
2 with another hour tomorrow morning, and then take a break  
3 and do the opening--closings?

4 PRESIDENT SACHS: David, would that be all right?

5 MS. SALOMON: From our perspective--we're off the  
6 record?

7 THE COURT REPORTER: No, you're back on.

8 MS. SALOMON: With that proposal, we would, then,  
9 rather just prefer to stop now and start the full  
10 cross-examination in the morning. Otherwise, we're in the  
11 middle--

12 PRESIDENT SACHS: If we move on, maybe you will  
13 not need the full two hours, and maybe within--now we can  
14 capture the--

15 MR. FRIEDLAND: Well, it might be the case. We  
16 just spent a long time on our expert. I think there's  
17 going to be some parity by our Korean co-counsel.

18 PRESIDENT SACHS: Sure. I understand.

19 I think we should proceed for an hour, have a  
20 break now, 10 minutes--or 15 minutes.

21 So let's resume at 5:35, and we will stop at  
22 around 6:35. All right?

23 Thank you very much, Professor Rho.

24 (Brief recess.)

25 PROFESSOR JAE YEOL KWON, CLAIMANTS' WITNESS, CALLED

1           PRESIDENT SACHS: So, good afternoon, Professor  
2 Kwon.

3           THE WITNESS: Yes, my name is Jae Yeol Kwon.

4           PRESIDENT SACHS: So, you are here as an expert  
5 witness on legal matters. You're a professor of law.  
6 Before you, in front of you is a statement that we ask you  
7 to read aloud, please.

8           THE WITNESS: Yes, I see it.

9           I solemnly declare upon my honor and conscience  
10 that my statement will be in accordance with my sincere  
11 belief.

12           PRESIDENT SACHS: Thank you very much, Professor  
13 Kwon.

14           And I now turn to you, Ms. Interpreter. Also you  
15 have in front of you a declaration, and would you please  
16 read it aloud.

17           THE INTERPRETER: I solemnly declare that I will  
18 interpret accurately, completely, impartially, and in  
19 accordance with my best skill and judgment.

20           PRESIDENT SACHS: Thank you very much.

21           What was the arrangement? Will there be any  
22 direct?

23           MR. KIM: Just a few introductory questions, if I  
24 may.

25           PRESIDENT SACHS: Okay.



DIRECT EXAMINATION

BY MR. KIM:

Q. Professor Kwon, for the purpose--for the benefit of the Tribunal, can you just give a brief explanation of your current position.

A. Currently, I am the Dean of the Law School of Kyung Hee University, which is located in Seoul, Korea; and also hold the position of Dean, as the Dean of the School of Law--Graduate School of Law from the same university.

I'm also active in several academic societies. For example, I'm currently the Vice President of the Korea Securities Law Association and also the Korea Business Law Association.

Q. Can you just briefly describe your expertise in Corporate Law?

A. After I graduated university in Korea, I graduate from the Graduate School at Yonsei University and obtained a Master's in Corporate Law, and then I went to study at Berkeley, where again I obtained a Master's in Corporate Law, and then I obtained my Ph.D. at Georgetown for Corporate Law as well.

So, personally I believe that I have expertise in Corporate Law.

MR. KIM: I have no further questions.

PRESIDENT SACHS: Thank you, Mr. Kim.

1 We will then proceed to the Respondent.

2 MR. HAN: Yes, thank you, Presiding Arbitrator.

3 CROSS-EXAMINATION

4 BY MR. HAN:

5 Q. Good afternoon, Professor Kwon.

6 A. Well, I've been sitting for such a long time that  
7 I'm not sure if it is such a good afternoon.

8 (Laughter.)

9 Q. I would like to ask a few questions regarding the  
10 Expert Opinion that you have drafted.

11 A. Okay.

12 Q. So, Professor Kwon, in the past you have conducted  
13 and participated in several government projects, including  
14 projects for the Ministry of Justice, for the Financial  
15 Supervisory Services, and the Financial Supervisory Board;  
16 is this correct?

17 A. Yes, that is correct.

18 Q. And you were compensated for all of them?

19 A. Yes, that is correct.

20 Q. Professor Kwon, do you have--are you a member of  
21 the Law Association and to work as an attorney in Korea?

22 A. No, I do not, but I have experience working for  
23 the Supreme Court in Korea.

24 Q. So, Professor Kwon, you do not have a Ph.D. on  
25 Korean Law; is that correct?

1           A.     I think it would be a bit ambiguous to say that I  
2 do not have a Ph.D. on Korean law because the thesis I  
3 wrote when I was at Georgetown was the U.S. legal  
4 perspective on Korean chaebols.

5           Q.     So, Professor Kwon, in your Opinion Report, you  
6 quote the Act on Private International Law quite  
7 frequently. Have you written any papers or books on the  
8 Act on Private International Law?

9           A.     As I mentioned before, my main topic of interest  
10 is Corporate Law, but when it comes to specifically the Act  
11 on Private International Law pertaining to corporates or  
12 regulations as such, I have not written any papers or books  
13 on this specific topic.

14           I would also like to add one more thing, that I,  
15 however, do have experience in lecturing on International  
16 Transaction Law, which is included as part of the Act on  
17 Private International Law, and also upon the request of the  
18 Ministry of Justice, I was a member who drafted questions  
19 for the Bar Association on the topic of International  
20 Transaction Law.

21           Q.     Pertaining to your opinion, you are of the view  
22 that when it comes to the rights of an organization, of a  
23 foreign organization, that it should be based on the  
24 establishment of the place that was established pertaining  
25 to Article 16; is this correct?

1 A. Yes, that is correct.

2 Q. If that is the case and you apply Article 16 of  
3 the Act on International Law pertaining to the legal  
4 capacity to have rights and the fact that this is based on  
5 the place of establishment, then you would also have to  
6 apply the same for Korea as well; in other words, if the  
7 entity does not--is not established based on the law in  
8 that country, that does not have legal capacity in Korea?

9 A. Yes, that is correct.

10 Q. Are there any other cases--for example, an entity  
11 may not have legal capacity based on the law of where it  
12 was established, but it does not--is not acknowledged in  
13 Korea or where vice versa, that it does not have the legal  
14 capacity according to its establishment, but it does have  
15 legal capacity in Korea?

16 A. Based on my scope of knowledge, I do not think  
17 there are such examples.

18 Q. Can you refer to Paragraph 28 in your opinion?

19 A. Yes.

20 Q. So, in Paragraph 28.

21 A. Yes, I see it.

22 Q. So, in the second line, you have written that the  
23 foreign corporation to broadly capture every possible  
24 foreign structure, et cetera, "under Korean Law but may  
25 have legal capacity under the laws of place of

1 establishment in order to achieve," and then it goes on.

2 Do you see that?

3 A. Yes, I see it.

4 Q. But when you testified, you mentioned that  
5 pursuant to Article 16 of the Act on Private International  
6 Law, that it should be based on the place of establishment,  
7 and that should apply in Korea as well?

8 A. Yes, that is correct.

9 Q. However, in this paragraph, you talk about a case  
10 where pursuant to the Korean Law, it does not have the  
11 legal capacity to have rights, but it does so have legal  
12 capacity to have rights based on the place of  
13 establishment.

14 So, you were talking about two different cases; is  
15 this correct?

16 A. That is correct.

17 Q. So, does that mean to say that you're  
18 acknowledging that when it comes to the legal capacity to  
19 hold rights that it can be different, depending on the  
20 place of establishment and Korean Law?

21 A. I think that maybe I was not very competent in  
22 expressing clearly what I was trying to convey. What I  
23 wanted to say in this paragraph was that, when we look at  
24 the purpose or the idea of the Capital Markets Act, that  
25 this can be considered--handled differently, and I think

1 that was what I was trying to express. I don't think I was  
2 trying to express specifically that legal capacity to have  
3 rights that did not exist can suddenly exist.

4 Q. So, based on your opinion, if the entity is  
5 legally--does not have legal capacity or legally--incapable  
6 in that place of establishment, that that would also be the  
7 case in Korea as well; is that correct?

8 A. I think when incompetency is referred to here, I  
9 think there can be incompetent in terms of the legal  
10 capacity to have rights, and also the incompetency in terms  
11 of the right to act, and I think it is very--it is unclear  
12 in this case. And if it is the latter where it is  
13 incompetent to act, then I think there is a way for  
14 protection pursuant to Article 15 of the Act on Private  
15 International Law.

16 Q. So, that means to say that what you're saying is  
17 that when it comes to the Act on Private International Law,  
18 Article 16, that this is applicable for the legal capacity  
19 to have rights, but not the legal capacity to act?

20 A. No, that is not the case. If I may ask to see on  
21 the screen Article 15-16 portion of the Act on Private  
22 International Law, please.

23 MR. KIM: Mr. President, if I may--and this is a  
24 request to counsel--when referring to specific statutes, I  
25 kindly ask that you refer to the CLA or R numbers so that

1 Professor Kwon can refer to them in the binder. I think  
2 he's having trouble locating them without those  
3 identification numbers.

4 MR. HAN: Will do.

5 BY MR. HAN:

6 Q. Please refer to CLA-54, please.

7 Actually, I was not asking him to turn to CLA. He  
8 was asking to see the CLA.

9 A. Yes. I have to refer to the statutes in order to  
10 respond to the question. That is why.

11 I would like to talk about two aspects: First, as  
12 you are well-aware, when it comes to the civil act, there  
13 is no statute pertaining to the protection of the legal  
14 capacity to have rights. However, when we look at the Act  
15 on Private International Law Article 15, it refers to the  
16 incompetency to act, and it's a protection statute pursuant  
17 to the civil act. Therefore, I believe that this is not a  
18 statute pertaining or regulating the legal capacity--its  
19 statute on the legal capacity to have rights.

20 And the second thing that I would like to say is  
21 that is why I wanted to refer to the Korean statute. It is  
22 because when you look at the title of Chapter II, it cites  
23 "persons," and Article 11 to Article 15 refers to "persons"  
24 whereas Article 16 refers to "legal entity" or  
25 "organization." Therefore, I believe that we have to read

1 Article 16 to be--which is about organizations, and it was  
2 put there in order to apply Article 11 to 15 to  
3 organizations.

4 Q. So, I would like to ask a very simple question;  
5 and, due to time restraints, if I would appreciate if you  
6 could also respond simply as well.

7 So, in applying Article 16 of the Act on Private  
8 International Law, you are of the view that the legal  
9 capacity to have rights is different from the legal  
10 capacity to act; is this correct?

11 A. No. What I was saying is that Article 16, which I  
12 just stated, is a statute that was put in in order to apply  
13 Article 11 to 15 to organizations as well. And, therefore,  
14 I believe that it includes the legal capacity to have  
15 rights and the legal capacity to act as well.

16 And I would also like to point out secondly that  
17 there has been a Supreme Court case decision to this  
18 extent.

19 Q. I would like to ask a question that is directly  
20 related to this case.

21 So, when it comes to publicly listed shares, they  
22 are considered to be movable asset, it is regarded as a  
23 movable asset.

24 A. Yes.

25 Q. Samsung Shares are shares issued by a Korean



1 company, and also traded in Korea; correct?

2 A. Yes, but there is one thing that I was not able to  
3 confirm, is whether, for example, if there is a certificate  
4 pertaining to the Samsung Shares, whether these such  
5 certificates can be traded overseas.

6 Q. So, if you could refer to the Act on Private  
7 International Law, which is CLA-54, Article 19,  
8 Paragraph 1.

9 A. Yes.

10 Q. When you look at that paragraph, it cites that  
11 when it comes to the rights of movable assets, that it is  
12 governed by the location of the object asset.

13 A. Yes.

14 Q. So, I would like to give another example  
15 pertaining to the Act on Private International Law. Let's  
16 say that there is a company, a Cayman Islands company, and  
17 according to Cayman Law, let's assume that a woman  
18 representative of that company cannot own shares. If that  
19 company comes to Korea and acquires shares, who do--who  
20 does these shares belong to?

21 A. You're talking about a case where a Cayman entity  
22 that does not have legal personality buy shares in Korea?

23 Q. This is not--this does not have anything to do  
24 with the legal personality. What I'm asking is: If, let's  
25 say, there is a Cayman Law that states that if a woman is

1 the head of that company, that company cannot own shares.  
2 Let's say this company comes to Korea and acquires shares.  
3 Then who does the attribution of these shares ownership go  
4 to? Who does it belong to?

5 A. Well, I believe in that case, that the Cayman  
6 company would be the acquirer of the shares, but the  
7 assumption here is that this is regardless of whether it  
8 has a legal capacity to hold rights or not.

9 Q. So, what you're saying, Professor, is that,  
10 although the Cayman--pursuant to the Cayman Law, that this  
11 company cannot acquire shares because their head is a  
12 woman, but then because they acquired their shares in  
13 Korea, then the ownership of this share belongs to the  
14 Cayman company.

15 A. That is not what I was trying to say. I don't  
16 know whether the head of an entity would determine whether  
17 shares can be acquired or not.

18 Q. What is relevant here is not whether the head or  
19 representative of the Company was a woman or not. Pursuant  
20 to the Cayman Law, the shares could not be acquired because  
21 this company had a head as a woman. However, when they  
22 came to Korea, they were able to acquire shares in Korea;  
23 therefore, these shares, ownership of the shares, belonged  
24 to the Cayman company. That's what you said; correct?

25 A. I don't know if I understood the question

1 incorrectly, but when I was hearing the question I thought  
2 that the assumption was not whether the Cayman company had  
3 legal personality or the issue of--had the legal capacity  
4 to have rights was not an issue here.

5           And also when it comes to whether the Cayman  
6 company can--and based on this assumption that that was not  
7 of an issue, that they would be able to acquire shares in  
8 Korea.

9           And also, I don't know how relevant the head or  
10 representative of the Company is in determining the right  
11 to acquire shares or not, specifically pertaining to what  
12 we are discussing.

13           Q.    Could you refer to Paragraph 32 in your opinion.

14           A.    Yes.

15           Q.    Here, you quote--you cite the act on corporate  
16 tax; is that correct?

17           A.    Yes, that is correct.

18           Q.    In this Court Decision, they considered Cayman  
19 Fund to be a legal entity and, therefore, imposed corporate  
20 tax on this entity; is that correct?

21           A.    No, that is not correct. That is not true.

22           Q.    However, clearly, when we look at Paragraph 32, it  
23 states, if it can be deemed a foreign entity based on the  
24 Corporate Tax Act.

25                    Do you see that?

1 A. So, which part are we talking about?

2 Q. So, towards the end of Paragraph 32 in your  
3 Opinion, you specifically cite this Court Decision.

4 A. I did cite this, but when we look at the Preamble  
5 of the Court Decision, what is discussed is that the  
6 assumption here is that the Cayman Fund that was  
7 established in the Cayman Islands does not have the legal  
8 capacity to have rights.

9 Q. My question regarding this Court Decision is not  
10 whether the fund that was established in the Cayman Islands  
11 is a legal entity pursuant to the Korean Law or not. What  
12 I'm saying is that the Court Decision states that the  
13 Cayman Fund is considered a legal entity and, therefore,  
14 subject to corporate tax.

15 A. Yes, however--yes, however, I think that the Court  
16 Decision--the reason for this Court Decision is simply that  
17 it was for taxation/administrative purposes that, in order  
18 to collect the corporate tax that it was considered  
19 as--viewed as a legal entity.

20 Q. Therefore, the Court found the Cayman Fund to be a  
21 foreign legal entity and, therefore, imposed the obligation  
22 to pay taxes?

23 A. Yes, but if I may add once more, that here the  
24 legal entity referred to here is different from a legal  
25 entity as to have legal capacity to have rights.

1           The reason this was viewed as a legal entity was  
2 for the purpose of imposing a corporate tax. I think this  
3 is how it should be understood.

4           Q. My question was: The Court--whether this Court  
5 Decision was deciding that the Cayman Islands needs to be  
6 imposed--have the obligation to pay taxes.

7           A. It's been a while since I have seen the full  
8 Transcript of this Court Decision, so I don't think I am  
9 aware of the facts very accurately, so I would like to take  
10 a look at the full Transcript of the Court Decision.

11           The reason why I say this is because this is the  
12 opinion that has been proposed by the Court. However, the  
13 facts may be different so that is why I would like to  
14 confirm the facts--the facts of this Decision.

15           Q. So, Professor Kwon, I will stop my questions  
16 pertaining to this Court Decision. I believe that through  
17 the Claimants' counsel that you may have an opportunity to  
18 answer any questions that he or she may have or maybe  
19 review this Decision.

20           A. Thank you.

21           Q. My next question is not related to the specific  
22 Court Decision that we just discussed, but is regarding  
23 Korean Law in general.

24           A. Okay.

25           Q. Well, if an entity is imposed of corporate tax,

1 this means that that entity carried out operations and also  
2 engaged in profit; is that correct?

3 A. Yes, that is correct.

4 Q. Professor, in your Opinion, you cited that a  
5 foreign fund or organization can be limited pursuant to the  
6 Capital Markets Act; is this correct?

7 A. Yes, that is correct.

8 Q. Does that mean a foreign fund or entity can be  
9 subject to obligations pursuant to the Capital Markets Act?

10 A. Yes, but there is an assumption I would like to  
11 emphasize pursuant to the Capital Markets Act.

12 Q. Thank you.

13 So, pursuant to the Capital Markets Act, a foreign  
14 entity that does not have the legal capacity to have rights  
15 may have an obligation but not legal capacity; is this  
16 correct?

17 A. Pursuant to the Capital Markets Act is what  
18 determines whether it can be considered to be a legal  
19 entity or not, and I think that it has to abide to the  
20 purpose of the Capital Markets Act and what this law is  
21 trying to achieve.

22 For example, if a legal entity does not have the  
23 legal capacity to hold rights or a fund does not, then it  
24 does not mean to say that this will not be considered a  
25 legal entity unless it is within the purpose of this

1 administrative act that is stipulated.

2 If I may, I would like to add one more thing?

3 Q. I would like for you to ask--to listen carefully  
4 to my question and please respond to the question that I'm  
5 asking. In my question, I never referred to the word  
6 "legal entity."

7 A. I apologize. I think I'm still suffering from  
8 jetlag.

9 Q. So, Professor Kwon, you are continuing to--your  
10 view is--continues to be that an entity that does not have  
11 the legal capacity to have rights overseas can have legal  
12 right capacity to have rights in Korea; is that correct?

13 A. Yes, that's correct.

14 Q. And you also mentioned that by--in applying the  
15 Capital Markets Act, that a foreign entity that does not  
16 have the legal capacity to have rights is still subject to  
17 imposing of taxes or a tax obligation; is that correct?

18 A. Yes, it is correct.

19 Yes, but in imposing any obligations or rights, as  
20 I mentioned earlier, pursuant to the Capital Markets Act,  
21 Article 1, it should be within the purpose of promoting  
22 fair competition and protecting investors.

23 Q. Could you refer to R-16, Page 12.

24 A. Yes.

25 MR. HAN: Just for reference, it's Page 26 in the

1 English version.

2 THE WITNESS: Page 16?

3 BY MR. HAN:

4 Q. Yes, which would be Article 13.

5 When you look at Article 13, it cites a fund or an  
6 association and supervised or managed by a foreign  
7 government, a foreign local government, or a foreign public  
8 organization.

9 A. Yes, that is correct.

10 Q. And the Cayman Funds would be categorized as a  
11 foreign fund that is established pursuant to foreign law;  
12 is that correct?

13 A. Yes, it seems so.

14 Q. The Cayman Fund registered as a foreign investor,  
15 and this is based on the Capital Markets Act; is this  
16 correct?

17 A. Yes, that is correct.

18 Q. You, Professor Kwon, you mentioned that when it  
19 comes to Article 168 of the Capital Markets Act, that this  
20 is the statute that is trying to limit the ceiling for  
21 acquisition by a foreign entity and not a statute that is  
22 permitting such--or setting a level for allowing for such  
23 acquisition, and this is what you stated in Paragraph 26 of  
24 your Opinion; is that correct?

25 A. Yes, that is correct.



1 Q. And you also mentioned in the same paragraph,  
2 referring to Article 168, that when first acquiring listed  
3 shares, that this is to be registered to the Financial  
4 Supervisory Services, and that is the--the purpose of this  
5 regulation is for this; is this correct?

6 A. Yes, that is correct.

7 Q. So, based on these two facts, I think what you're  
8 saying is that, as pursuant to Article 168, that this is  
9 not a regulation that is trying to provide permission for  
10 foreign entities to acquire publicly listed shares, but at  
11 the same time, it does allow that this is possible.

12 A. Yes, that is correct.

13 Q. So, the purpose of the Capital Markets Act is to  
14 protect investors and also to regulate the capital market;  
15 is that correct?

16 A. Yes, that is my understanding.

17 Q. Professor Kwon, are you aware that nowhere in the  
18 Capital Markets Act or the Enforcement Decree is there any  
19 word such as the "legal capacity to have rights or legal  
20 personality"? Are you aware of this?

21 A. Yes, I am.

22 I also tried to look for it, but I was not able to  
23 find. However, when we look at the Capital Markets Act and  
24 the Enforcement Decree, there are many regulations that  
25 state "foreigners" or "foreign corporations" or "foreign

1 entities, et cetera."

2 Yes.

3 Q. Are you aware that the Cayman Fund acquired Shares  
4 in Samsung Electronics and Samsung C&T?

5 A. Yes.

6 Q. So, the Cayman Funds acquired Samsung's Shares in  
7 its name and also sold in its name; correct?

8 A. Yes.

9 Q. But you are of the view that the ownership of the  
10 Samsung Shares cannot be attributed to the Cayman Fund but  
11 rather it is attributed to some members?

12 A. Yes, I think so. The reason for this is that when  
13 we look at the Capital Markets Act Article 168 and its  
14 Enforcement Decree, it does not state anything pertaining  
15 to the ownership of shares or the attribution of a share  
16 ownership.

17 And if that is the case, I believe that it would  
18 be correct to resolve this through the Act on Private  
19 International Law.

20 Q. However, at any rate, the Cayman Fund sold off its  
21 Samsung Shares, but the person who acquired the Samsung  
22 Shares acquired them from a share ownership that did not  
23 belong to the Cayman Fund.

24 A. Yes.

25 Q. And you also mentioned in your opinion when

1 selling and buying shares for publicly listed companies on  
2 the Stock Market that it is determined based on just the  
3 price, and there is no way to know whether who the other  
4 Party is.

5 A. In principle, yes. If it's public purchase, it  
6 may be different.

7 Q. However, this case does not pertain to a public  
8 purchase; correct?

9 A. Yes.

10 Q. So, the entity or person that purchased the  
11 Samsung funds from the Cayman--Samsung Shares from the  
12 Cayman Funds was not aware that the seller was a Cayman  
13 Fund.

14 Furthermore, it purchased from a Cayman Fund which  
15 it did not have the ownership for the Samsung Shares.

16 A. Yes, that is correct.

17 PRESIDENT SACHS: Would this be a good moment to  
18 have our evening break?

19 MR. HAN: Yes.

20 PRESIDENT SACHS: Thank you very much.

21 Thank you, particularly David, for having assisted  
22 us so late in the afternoon, and thank you for a very clear  
23 translation. I don't speak Korean, but your English was  
24 very clear.

25 And thank you, Professor Kwon. Your testimony

1 will be carried over to tomorrow. We are sorry that you  
2 had to wait a bit longer than we expected. This was due to  
3 a longer examination of your colleague, and so we look  
4 forward to seeing you again at 9:30 tomorrow morning here.

5           And now, off the record.

6           (Discussion off the record.)

7           (Whereupon, at 6:35 p.m., the Hearing was  
8 adjourned until 9:30 a.m. the following day.)

9

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



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DAVID A. KASDAN