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: :
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MASON CAPITAL L.P. and MASON MANAGEMENT LLC, :
: :
Claimants, :
: :
and :
: :
THE REPUBLIC OF KOREA, :
: :
Respondent. :
- x

HEARING ON PRELIMINARY OBJECTIONS, Volume 3

Friday, October 4, 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 9:30 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 SABANOGULLARI

Assistant to the Tribunal:

MR. MARCUS WEILER

Court Reporter:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

APPEARANCES:

On behalf of the Claimants:

MS. CLAUDIA T. SALOMON
MR. MICHAEL A. WATSULA
MR. JON WALTON
MS. LAURA VAZQUEZ
Latham & Watkins, LLP
885 Third Avenue
New York, New York 10022
United States of America

MS. SOPHIE J. LAMB, QC
MR. BRYCE WILLIAMS
Latham & Watkins, LLP
99 Bishopsgate
London EC2M 3XF
United Kingdom

MR. DONG-SEOK (JOHAN) OH
MR. JOHN M. KIM
MS. JISUN HWANG
KL Partners
7th Floor, Tower 8,
7 Jongro 5 gil, Jongro-gu,
Seoul
Republic of Korea 03157

Interpreter:

MS. WANSOO SUH

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. CHANGWAN HAN
MR. DONGHWAN SHIN
MS. SUJIN KIM
Ministry of Justice
Government of the Republic of Korea

MR. SANGJIN PARK
MR. KYUNGSUNG YOO
Ministry of Health and Welfare
Government of the Republic of Korea

MR. PAUL FRIEDLAND
MR. DAMIEN NYER
MR. SVEN VOLKMER
MR. SURYA GOPALAN
White & Case, LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States of America

MR. SANGHOON HAN
MS. JI HYUN YOON
MR. RICHARD JUNG YEUN WON
Lee & Ko
Hanjin Building
63 Namdaemun-ro Jung-gu
Seoul 04532
Republic of Korea

Interpreter:

MR. CHI-HYUN AHN

C O N T E N T S

P R O C E E D I N G S

PRESIDENT SACHS: So, I think we are all set. Good morning, ladies and gentlemen. This is Day 3 of the Hearing on Preliminary Objections, and we will now move on with the expert testimony of Professor Kwon.

PROFESSOR JAE YEOL KWON, CLAIMANTS' WITNESS, RESUMED

PRESIDENT SACHS: So, counsel, please proceed.

MR. HAN: Thank you, Mr. Arbitrator.

CONTINUED CROSS-EXAMINATION

BY MR. HAN:

Q. Good morning, Professor Kwon. Did you have a good night's sleep last night?

A. Not really.

Q. Could you please refer to Paragraph 53 in your Opinion Report?

A. Yes.

Q. You cite here that the purpose of the Foreign Investment Registration is of administrative purposes to regulate whether the foreign investor abides by the regulations; is this correct?

A. Yes, that is correct.

Q. Could you please explain what you mean by a "limit" that is referred to here.

A. I believe that, in the case of the foreign investor, as far as my understanding in Korea, I think the

trend of these investors are collected every day and that this information is disclosed to the public. And also, it is related to a foreign exchange, et cetera, as well, and this is to see whether the limitations pertaining to the foreign investors is abided by.

So, my understanding is that this is a regulation for administrative purposes.

Q. So, pursuant to Article 168 in the Capital Markets Act, this cites that there are sometimes some limitations on the ceiling of how much shares foreign investors can hold, so the limit here--this is also referred to this "limit" regarding foreign investors?

A. Yes, that is correct.

Q. So, for example, let's say there is a regulation for Company A that cites the maximum level of shares that a foreign investor can hold in this company is 50 percent. That means that the Cayman Fund cannot exceed the 50 percent shares for this Company A; is this correct?

A. This is a very subordinate regulation, so I haven't really reviewed this in detail, but I think that maybe it would be different, depending on the form of the or the type of foreign investor. And this is what I'm assuming, but I'm not sure since I have not looked into this in detail.

And the reason why I say this is because, when we

look at the Capital Markets Act, Articles 9 and 16, it refers to a foreign entity, et cetera, which I think means that there are many different types, and that is why I think maybe this is the case.

Q. Are you purporting to say that when it comes to the Cayman Fund that this ceiling for foreign investors may not apply?

A. I have not been able to think as far out to that extent.

Q. Then, are you saying that the Cayman Fund is not subject to applying this limit on shares and also is not subject to applying the share limit for public corporations in Korea?

A. I have not reviewed this in detail, so it is difficult for me to answer. The reason for this is that the review that I did was focused on the Expert Opinion provided by Professor Hyeok-Jeon Rho pertaining to Korean companies, and, therefore, I was not able to look into that part in detail.

Q. Please refer to Paragraph 26 in your Expert Opinion.

A. Yes.

Q. You cite that, pursuant to the Capital Markets Act, there are limitations set for the level of shares that a foreign company can hold for specific companies.

Do you see that?

A. Yes.

Q. Could you refer to Paragraph 50.

A. Yes.

Q. You also testified that the FSC, together with its related authority, the FSS, uses this registration requirement to ensure that aggregate for foreign shareholding limits in certain designated companies are not exceeded.

Do you see that?

A. Yes.

Q. Is this content what you personally wrote?

A. Yes, that is correct.

Q. So, you testified previously that you had written your Opinion within the scope of arguing against Professor Rho's opinion, but here it seems that you have reviewed and wrote specifically on this; is this correct?

A. What I was trying to say is that I did not review in detail to look into specifically what cases and what specific situations.

Q. So, I would like to ask one simple question in concluding this.

So, the Cayman Fund, are they subject to the share limitations for foreign entities pursuant to the Capital Markets Act or not?

A. Yes, they are subject to this regulation.

Q. I would like to go back to the first question that I asked you earlier briefly.

So, Professor Kwon, if the Capital Markets Act regarding this limitation applies to the Cayman Fund, then if there is a limitation for foreign investors that they can only hold up to 50 percent of shares for Company A, then this means that the Cayman Fund cannot hold more than this percentage; is this correct? For Company A. Is this correct?

A. Are you referring to Article 167 of the Capital Markets Act?

Q. Article 168.

A. Are you asking me if Company A can hold 50 percent of shares for a different company, whether Cayman Fund can do the same?

Q. I assumed that you were very well aware of this Clause, so I did not explain, but if I may explain a little further, when we look at the Articles of Incorporation for public corporations, it is set that there is a limitation to the amount of shares a foreigner or a foreign entity can acquire or own. And let's say in the case of Company A that there is a limit that is set saying that foreign investors cannot hold more than 50 percent of the shares. This is an assumption that I'm proposing to you, so this is

an example that I'm asking you about.

A. Oh, yes. If that is the case, I believe that the limitation would apply.

Q. So, when you say that this applies, this limitation applies, you're saying that the Cayman Funds also would not be able to hold more than 50 percent of the shares; correct?

A. Yes.

Q. So, you're saying that up to 50 percent, they would be able to hold?

A. Yes, I believe so.

Q. Pursuant to the Capital Markets Act, if an investor holds more than 5 percent of a publicly listed company, they must report as a major shareholder; correct?

A. Yes, that is correct.

Q. If the Cayman Fund--this is an assumption--Cayman Fund has more than 5 percent of the Samsung Shares, then the Cayman Fund would have to report that it is a major shareholder, that they hold a lot of Shares; correct?

A. Based on my understanding, the need to report for when one holds as a major shareholder is because it may have an impact on the management rights of the company that is to be invested in; and, therefore, I think this is needed.

Q. My question was not asking whether there was a

need to do so. My question was asking whether the Cayman Fund, if they have more than 5 percent of the Samsung Shares, which is a publicly listed company, that they would have the obligation to report as a major shareholder or they do not have to do this?

A. I believe they would have to.

Q. Professor Kwon, aren't you of the opinion that the Cayman Fund--ownership of the Samsung Shares cannot be attributed to the Cayman Fund and that it would be attributed to the internal members of the Cayman Fund?

A. That is correct.

Q. So, then, you are saying that if the ownership of these Shares are attributed to members of this fund who we do not know who they are, regardless, the Cayman Fund, if they have more than 5 percent of the Shares, that they would have to report this as a major shareholder; is this correct?

A. Yes, that is correct.

Q. Professor Kwon, you are of the opinion that there should be a distinction between the exercising of shareholder rights and the attribution of ownership of the shareholder rights; and, therefore, the exercise of shareholder rights should be only given to those who are listed in the Shareholder Registry. Is this correct?

A. No. That is not true.

Q. Then, can a shareholder that is not listed on the Shareholder Registry exercise shareholder rights?

A. Yes, it is possible.

Q. Could you please refer to Paragraph 48 in your Opinion.

A. Yes.

Q. I am just asking about the content of the paragraph in your Opinion Report. You write that a transfer of company shares cannot be validly asserted against the company unless the relevant transferee's name and address are recorded in the Shareholders Registry of the company. Is this what's written there?

A. Yes.

Q. Then, so let's say there's a third party. Can this party exercise shareholder rights, and this third party may be different from the actual titleholder of the shares in the Registry?

A. Yes, it is possible.

Q. For example, if this party is not listed as a shareholder, in the Shareholder Registry, how would this party be able to participate in a Shareholder Meeting and exercise its rights?

A. So, if I may explain a little bit on this--and I would like to refer to the Supreme Court Decision referred to in R-10, and this would be Page 9 in the Korean

translation, and this is Number 6 on this page.

And I think there is a similar sentence somewhere else, but if I just refer to Number 6 here, it writes "unless there is a special circumstance," so this means that there could be an extension.

So, if I read a little below that, it talks about a case where the Shareholder rights may be exercised different from the Registry, and it cites that, in the event that there is an unfair delay in the recording or in the name of the Registry, then this can be rejected. And, in this case, these extreme exceptions will be accepted.

Q. Now I would like to rephrase my question.

So, you talked about very specific circumstances. What I'm--the example that I'm giving is referring to a publicly listed company who has tens and thousands or thousands of Shareholders. And if the Shareholder Registry was done completely then, in this case, is it only the Shareholder that is listed on the Registry the one that can exercise the Shareholder rights, or would a third party not on the Registry also be able to exercise Shareholder rights?

A. I think what you are mentioning is what should be applied in principle. However, if I think about a hypothetical situation, for example, the name may be on the actual Registry of a publicly listed company, but let's say

this person has deceased. Then, in this case, this person would not be able to exercise its Shareholder rights, although they are on the Registry. And because this is a situation that should not occur, should be avoided, that is why--I think opportunity should be given to the inheritor of the Shareholder rights.

Q. So, I would like to ask a final question on this topic, and I mentioned--premised this earlier, that unless there is a very specific situation, let's say it is a natural person who is the Shareholder or it is a normal entity and a normal publicly listed company, and there is a Shareholder Registry. Would it be possible for a shareholder that is not listed on the Shareholder Registry to exercise Shareholder rights? And I'm talking about not an extreme situation, but a regular situation.

A. As you mentioned, if a shareholder's name is listed on the Registry of the publicly listed company, then that Shareholder would be able to exercise its Shareholder rights. But, if the Cayman Fund does not have the legal capacity to have rights, then I think that this is comparable to the situation where the Shareholder is deceased.

Q. Professor Kwon, in 2015, when there was discussion on the merger between Samsung C&T and Cheil Industry, are you aware that the Cayman Fund voted against this?

A. In fact, I became aware of this in the process of writing my expert opinion.

Q. At any rate, the Cayman Fund, in exercising its Shareholder rights, opposed this merger?

A. Yes.

Q. Pursuant to what you have said, if the Cayman Fund does not have the legal capacity to have rights, how could it have exercised its Shareholder rights and voted against this, against the merger?

A. I believe that the Cayman Fund does not have the legal capacity to have rights and, therefore, cannot carry out legal--exercise legal action. However, if there is somebody that where this Shareholder rights can be attributed to, then I believe that, through this person, the legal capacity to have rights exist. Therefore, a legal act can be carried out.

Q. So, are you saying that, Professor Kwon, that in the Shareholder Meeting, when there was a vote on this merger, the GP, who is not even listed on the Registry, suddenly appears and exercised its Shareholder rights?

A. I am not aware of the details of the process. This is something that I've heard for the first time.

Q. CER-3, Paragraph 4--Paragraph 47.

I would like to read what you have written in your Opinion Report.

You have written that, because it is impossible to look at all of these--many ownership relationships, that Shareholder Registry is developed in order to manage this in a uniform way.

A. Yes. And this is my belief.

Q. So, what you're saying is that in the Samsung Shareholder Meeting, although you're not aware of the specific process that a GP suddenly appeared, a GP that was not listed in the Shareholder Registry suddenly appears, and exercised the Shareholder rights of the Cayman Fund; correct?

A. As I have written in my Opinion Report, that is only the opinion that I am presenting from an academic perspective, and I have not received any specific information about the case or how this happened. When it comes to the Mason Case, I became only aware of this through what was in the press.

Q. Could you please refer to Paragraph 12 in your Opinion Report.

Here, you write that you have been provided with the four listed in the following; correct?

A. Yes.

Q. Have you reviewed these documents and read the documents and reviewed them?

A. Yes, but as I have stated in Number 13, I have

reviewed them, but what I focused on in my review was Professor Rho's opinion and also the issue at hand pertaining to Corporate Law, and that was--it was--my focus was limited to that.

Q. You mentioned that you became aware of the Cayman Fund opposing their merger through information from the press; correct?

A. So, pertaining to the Cayman Fund and the process of the merger, I became aware of this, as I mentioned, through the press and, as I mentioned earlier, in the process of writing my Expert Report.

Q. A while ago, Professor Kwon, you mentioned that, in terms of the Cayman Fund opposing the merger in the Shareholder Meeting, that you were aware of this fact, but you did not know about the process in detail; is that correct?

A. That is correct. As I mentioned earlier, I'm not aware of whether a GP came directly or not.

Q. So, this is my last question on this, Professor Kwon. You mentioned that it is your belief as an academic that the Shareholder Registry has the purpose and is developed in order to handle the shareholder-related issues in a uniform way; correct?

A. Yes.

Q. Then, if that is the case, in a Shareholder

Meeting, can somebody that is not recorded as the Shareholder in the Shareholder Registry--for example, the Cayman Fund, so somebody else other than the Cayman Fund that is not registered can exercise voting rights as a shareholder?

A. It is not possible.

Q. If that is the case, then the Shareholder Meeting pertaining to the merger that is the issue at hand, the voting rights would have been carried out by the Cayman Fund; right?

A. Being--having to answer a question about a fact that I'm not very well-aware of, I'm put in a difficult position, but I guess so.

Q. So, Professor Kwon, if one opposes--if a shareholder opposes a merger, then they are able to exercise the right to acquire or sell shares; correct?

A. Yes, that is correct.

Q. And only the Shareholder who holds or owns the shares would be able to exercise this right; correct?

(Interpreter confers with the Witness.)

Q. That holds, so only the Shareholder that holds the shares would be able to exercise this right; correct?

A. Yes, that is correct. Yes, the Shareholder--those who hold the shares.

Q. If the Cayman Fund, let's assume, exercises its

rights, who would this payment of the sell or purchase of the Shares go to?

A. If the Cayman Fund is the accounting entity, then it would go to the entity whose name is at the accounting entity, and the Fund would first go there, and then--directly. And then, after that, I think it would go to whoever has the legal capacity to hold rights.

Q. Does that mean that the payment for the sell or purchase of these Shares does not go to the Shareholder that is listed on the Shareholder Registry but the accounting entity?

A. At any rate, it would be paid to the accounting entity, but I think that who, in actuality, gets this or has this payment, I think, is a different issue.

Q. Could you explain what you mean by "accounting entity"--"accounting subject" or "entity"?

A. I believe that the accounting entity has been created for convenience purposes such as statistic purposes and also administrative purposes as part of the purpose of regulation in the Capital Markets Act.

Q. I'll ask a simple question: Is the name of the person or the entity in the Shareholder Registry the same as the accounting entity, or could they be different?

A. I haven't thought about this in depth, but if there is a case where a trust was given, unless it's this

situation, I think that it would be the same, but this is the first time I am encountering this, so I'm not sure.

Q. Let's assume that the Cayman Fund received dividends for the Samsung Shares. In that case, who would be receiving this dividend?

A. I believe that it would be paid to the members of the Cayman Fund.

Q. So, Professor Kwon, are you saying that when a company pays out its dividend that it would pay out to those that are not listed on the Shareholder Registry?

A. So, are you asking whether Company A, in paying out its dividends, whether it pays out to an entity that is not listed on the Shareholder Registry?

Q. Yes. So, I would like to briefly explain. So, you acknowledge that the Cayman Fund is the name that is listed in the Samsung Shareholder Registry. In the event that this company pays out its dividend, then is it possible for them to pay out and transfer the money to an entity other than the Cayman Fund which is not listed on the Shareholder Registry?

A. So, I think I would have to talk a bit more about the accounting entity. The dividend would be paid to the accounting entity, and the rest would be resolved depending on the internal relations within that entity, and I don't think there would be an obligation for a company to

transfer that payment to an internal member transcending the accounting entity, and I don't think this should happen.

Q. I would like to explain very simply again. Let's say I am a shareholder of Samsung Electronics, and let's say Samsung Electronics is paying out its dividend, would it be possible for them to pay out the dividend, to not myself, who is listed as the Shareholder in the Shareholder Registry, but transfer that money, the dividend money, to my family?

A. No, they cannot.

Q. And, therefore, if the dividend was received, the Samsung--the Cayman Fund would have received the dividend from Samsung; correct?

A. Yes, I would think so.

Q. So, when it comes to dividend, it would be rights of a shareholder; in other words, they have the right to obtain a profit for the Shares. Correct?

A. Yes.

Q. So, the Cayman Fund received the profit by owning the Shares.

A. Yes.

Q. You're of the opinion, as written in your Opinion Report, that the ownership of the Shares do not--cannot be attributed to the Cayman Fund, and although it is not clear

what the relationship is internally, that it would belong to internal members.

A. Yes. I am not well aware of the Cayman Law, and I'm not in a position to be knowledgeable of this, but I believe that there would be some entity or somebody who would have the ownership of these Shares.

Q. If that is the case, there would be a situation where the internal members of the Cayman Fund changed; in other words, there are some coming in and some going out.

A. If the Fund is an open type, then I believe this would be possible.

Q. Let's assume that, based on your reasoning, that the ownership of the Shareholder rights is attributed to A, who is an internal member, but because of some internal circumstance, this changes to B?

MR. KIM: Mr. President, I would like to interject for one moment.

Mr. Han is clearly asking Professor Kwon about questions of Cayman Law in terms of how a Cayman-exempted Limited Partnership works and scenarios under which internal members of a Cayman Fund may change. That is clearly not the area of expertise of Professor Kwon.

(Overlapping speakers.)

MR. KIM: Can we wait for the translation, please.

MR. HAN: Yeah, Professor Kwon's argument is based

on that the owners of the Shares are attributed to some members within Cayman Fund. As you can see, his statement in Paragraph 68, he states that ownership of Shares in Samsung C&T would lie in some other funds members, according to funds internal legal reason, so his argument is based on this Cayman Fund internal structure.

PRESIDENT SACHS: Right, so far as you relate to the structure, it's all right, but don't go any further as regards Cayman Law because that's not his expertise, obviously.

MR. HAN: Yes, thank you.

BY MR. HAN:

Q. So, I would like to ask my question unrelated to the Cayman Law and about the internal--and limit my questions to the internal relations of the Fund that you have mentioned.

A. Okay.

Q. As you mentioned earlier, if the members, internal members have changed from A to B, then does that also mean that the ownership of the shares has been transferred from A to B?

A. You're asking about within the internal fund; correct?

Q. Yes.

MR. KIM: Mr. President, I think this is the same

question that was asked previously.

PRESIDENT SACHS: Yes, but you may proceed and then move, perhaps, to the next point.

MR. HAN: Okay. Yes, Mr. President.

BY MR. HAN:

Q. Professor Kwon, when shares are traded on the securities market, it is subject to the real--Act on Real Name and Confidentiality; is this correct?

A. Yes, it's correct.

Q. Therefore, any trading that occurs on the Stock Exchange must be traded in the real name; correct?

A. I think I would have to repeat what I have said earlier: I am not an expert on the Act on Real Name Financial Transactions and Confidentiality.

Q. Could you refer to Page 138 in R-14. This would be Article 311.

A. Yes.

Q. It states here that: "Any person who is stated in an Investor's account book, and the depositor's account book shall be deemed to hold the respective securities."

A. Yes.

Q. The depositor's account book here would refer to the entity that has been--that is trading or investing through the Stock Exchange; correct?

A. Yes.

Q. And here it states that shall be deemed--they shall be deemed to hold the respective securities; correct?

A. Yes, that is correct.

(Pause.)

Q. Could you please refer to CLA-61--62.

A. Yes.

Q. So, this is a document that you have submitted, and this is the guidebook for foreign investors that was published by the Financial Supervisory Services; correct?

A. Yes.

Q. This FSS is the agency or entity in Korea that supervises financial matters; correct?

A. Yes.

Q. And, as you mentioned earlier, within the content of supervision and limitations, it also includes the limit to which a foreign entity may hold shares for certain entities; correct?

A. Yes.

Q. Then it would mean that the Financial Supervisory Services would have to know which foreign Shareholder holds shares and how much they--how much shares they hold?

A. Yes, I believe so.

Q. So, Professor Kwon, let's say that there is a name of the Registry of a shareholder and that name--and also the name that they use in registering as a foreign investor

and entity is not the entity where the Shareholder ownership would be attributed to, and it's different.

In that case, how would the supervisory authority be able to know which foreign company hold--is the Shareholder and how much shares they hold?

A. I don't think that a program which has the purpose of administrative purposes and regulatory purposes would have an impact on the judicial issue of ownership.

What I'm trying to say is that I don't think that we can view a regulatory matter in the same line as the judicial meaning of "ownership."

Q. So, then, what you're saying is that even if it is not a shareholder listed on the Shareholder Registry and the ownership is attributed to somebody else, that this person who does not have ownership of the Share but is listed on the Registry would actually be the subject of such limitations and regulations; correct?

A. Yes. So, what you're saying, that it would--the regulations would apply to a third party that is not listed on the Shareholder Registry, and my answer would be yes.

Q. So, what you're saying is that, from the regulatory, financial regulatory or supervisory authorities, that they would not supervise based on the internal relationships but what is listed on the Registry; correct?

A. Yes.

Q. If that is the case, whatever the relationship is externally--in other words, whatever the relationship is internally amongst the Shareholder, regardless of this, the third party or a financial supervisory authority would regulate based on looking at who is listed on the Shareholder Registry?

A. Yes, I believe so.

Q. Thank you, and this would be--this will be my last question.

So, the document that you have submitted, Professor Kwon, the foreign investor guide that is drafted by the Financial Supervisory Services, is a 90-page document.

Are you aware of this?

A. Yes.

Q. Are you aware that nowhere in this document does the word "the legal capacity to have rights or legal personality" appear?

A. Yes, I'm aware.

MR. HAN: No more questions.

PRESIDENT SACHS: Thank you very much, Counsel. Thank you also for having stayed within the time allocated to you.

Any questions in redirect that would be triggered

by the cross-examination?

MR. KIM: Mr. President, if I may, I just have one question. I think I can finish the redirect in just a minute or so, if that's okay.

PRESIDENT SACHS: Yes.

REDIRECT EXAMINATION

BY MR. KIM:

Q. Professor Kwon, during your cross-examination yesterday and today, you were asked many questions about legal capacity, exercise of Shareholder rights and this morning, about Shareholder limits under Korean Law.

A. Yes, that is correct.

Q. I just want to make sure that the Tribunal understands your Opinion correctly and that your Opinion is reflected properly in the Transcript.

If an organization, such as the Cayman Fund in this case, does not have any legal personality or a legal capacity to have rights, can it somehow be converted into a legal entity with a capacity to have rights under Korean Law simply based on the fact that the definition of "foreign corporation," et cetera, under the Capital Markets Act includes overseas funds or associations?

MR. KIM: I'm sorry, the trans--the interpretation was not accurate. I will repeat the question.

BY MR. KIM:

Q. Can a Cayman Fund without any legal personality be converted, not if it is converted, but can it be converted into a legal entity with a legal capacity to have rights under Korean Law?

A. No, it cannot.

MR. KIM: I have no further questions.

PRESIDENT SACHS: Thank you, Mr. Kim.

Do we have questions?

ARBITRATOR MAYER: No.

ARBITRATOR GLOSTER: No, I don't.

PRESIDENT SACHS: We have no further questions.

We thank you, Professor Kwon, for your testimony, and we thank you, Interpreter, for what we thought was a very good translation, even though there was a misunderstanding during the last question, whether it was--can be or was converted.

All right. This ends your expert testimony. I wish you a better sleep tonight.

THE WITNESS: Thank you.

PRESIDENT SACHS: And you're now released. You may leave the room.

(Witness steps down.)

PRESIDENT SACHS: So, we will obviously continue with the Respondent's closing.

MR. FRIEDLAND: Before we break, can I have one

second with my co-counsel?

PRESIDENT SACHS:

MR. FRIEDLAND: Yes, certainly.

(Pause.)

MR. FRIEDLAND: We don't need a half an hour. We can begin the closing at any time.

PRESIDENT SACHS: So let's say 11:00? Quarter of an hour?

MR. FRIEDLAND: Yes.

PRESIDENT SACHS: Very good.

(Brief recess.)

PRESIDENT SACHS: Sorry for the delay.

Respondent, the floor is yours for the Closing Argument.

MR. FRIEDLAND: I'll present our "no standing"--I'll wait a second.

(Pause.)

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. FRIEDLAND: So, I will present our "no standing" and "legal deficiency" objections; Damien Nyer will then present our "no investor" objection, and as part of that, Sanghoon Han will present the Korean law portion of that "no investor" objection.

So, I'm going to discuss first the nature of the claim that the GP can bring on its own behalf in view of

the fact that the GP holds the Partnership assets on trust; and that discussion will consider in particular what we've heard about indivisibility. And that discussion will lead to the subject of the Incentive Allocation. And my discussion of the Incentive Allocation will be mostly about the evidence that we now have about the Incentive Allocation both for 2015 and for subsequent years.

And that discussion will, in turn, lead me to consider the question of jurisdictional or standing evidence versus merits evidence, and in particular I'll consider whether it's enough at this stage for there to be an unproven, even disproven conditional entitlement to an Incentive Allocation in some unstated year after 2015.

I'll then discuss briefly Mason's allegations about lost hours and reputational harm. I'll then consider the question if the GP can't bring a claim for the alleged losses on the Samsung Shares, who can?

I'll then consider how the observations that we can make about no standing apply to our legal deficiency objection, and I'll comment on the applicability of the Chorzów doctrine in that context.

I won't discuss our reading of Article 1116 or Occidental or the other cases. You know our position, and it's my understanding from the questions you've raised during the last few days and from the guidance you gave us

yesterday that you prefer that I discuss the issues I've now identified.

As a preliminary, some formal note, there were statements made in the opening by Claimants' counsel about Korean court rulings. I believe that there were some unintentional mischaracterizations of those court rulings, and the record must reflect and it now does reflect the Republic of Korea's objections to those mischaracterizations.

So, what can the GP claim being a trustee on its own behalf for alleged lost value of Partnership assets. I'll start with an assumption--to bring a claim on its own behalf, as Mason says it's doing, the GP needs to have a beneficial interest. If not, none of this really needs to be discussed.

So, the question is how can the GP as Trustee of the Partnership assets have standing to bring a claim for alleged losses in relation to the Samsung Shares? In its Counter-Memorial, Mason had an answer to this question, and its answer was: The GP had an indivisible beneficial interest in the entirety of the Partnership assets, including the Samsung Shares and, therefore, could claim for the entirety of the alleged losses relating to the Samsung Shares.

Now, we had understood--and I said this in my

opening--that Mason had changed its position with its Rejoinder submission, and this was because Rolf Lindsay, in his Second Report, distinguished indivisibility from the extent of a Partner's beneficial interest. But it's also true, as Mr. Sachs noted yesterday, that in its Rejoinder at Paragraph 123, Mason continued to assert that the GP had a right to claim on its own behalf as quoting the legal and beneficial owner of the Samsung Shares, so that preserved or seemed to preserve the argument that the GP has an indivisible beneficial interest in the entirety of the Partnership assets.

And although I said in my opening that based on the expert testimony submitted to that point, it seemed that the indivisibility notion was irrelevant to an inquiry as to the GP's beneficial interest, we found it prudent, as you know, to address the indivisibility notion this week with the Experts, and we've done so, and their testimony has been entirely clear.

If you come with me to Slide 1, Mr. Lindsay testifying:

"It's absolutely true to say the GP cannot look to an asset and say because of my indivisible interest, I'm 100 percent interested in that particular asset."

And then later: "Does the notion of indivisibility determine the amount of the Partnership's

beneficial interest in the Partnership?"

Reynolds: "I would say no."

Lindsay: "No, it doesn't."

So, there's agreement that indivisibility is, after all, irrelevant to a General Partner's beneficial interest. Stated another way, it's irrelevant to a determination of what the GP can claim on its own behalf.

Now, the Experts also agree that we're to look to the LPA to determine each Partner's entitlement or beneficial interest. If you look with me on Slide 2, this is a question from Dame Elizabeth in the context she's saying: "Is it right that property is held on trust for the benefit of the GP and the LP in accordance with their entitlement under the relevant Partnership deed?"

Reynolds: "Exactly."

Lindsay: "That's correct, yes."

Now, there's a disagreement between the experts as to how under the LPA one determines beneficial interest. I'm going to take you somewhat briefly through that, but I'm going to take you through it. It's a disagreement that doesn't matter, as I'll explain.

Rachel Reynolds says that LPA Section 2.12 tells us what each Partner's beneficial interest is, and you'll recall well it's the section that defined Partnership Interests, and it expresses each Partnership's--each

Partner's economic interest, which, as I mentioned, is probably a better way to express what beneficial interest is trying to connote. It expresses each Partner's economic interest in terms of the Partner's proportionate Capital Account balance, and you remember this. And the definition applies to both Partners, not just to the LP, as Rachel Reynolds explained.

And the same notion of proportionate capital balance, Capital Account balance, as used elsewhere in the LPA to determine how assets are allocated between the Partners. Section 4.06 talks about Net Profits and Losses being allocated in proportion to Capital Accounts. Section 4.09 says the distributions are to be made in accordance with each Partner's fraction, which means each Partner's proportion of Capital Account balance, and Section 10.04 says that if the Partnership is wound up, assets are distributed in proportion to the Partner's then respective capital accounts.

Now, Reynolds's approach actually could give the GP a greater beneficial interest than Rolf Lindsay's approach. Rolf Lindsay's view, as we're about to get to, is that the GP's beneficial interest is only the Incentive Allocation. In theory, under Rachel Reynolds's view of the LPA, the GP could have much more than a conditional 20 percent interest, depending upon what was in its Capital

Account relative to what was in LP's Capital Account.

But we now know now why Mason doesn't like that approach. It's because we know now from Satzinger that the GP had nothing or virtually nothing in its Capital Account at the time of the alleged FTA breach in July 2015, and that's on Slide 3.

So, you see with me:

"Well, of this 6.1 billion," that means the total capital in the Partnership accounts, "the GP would have a Capital Account."

"It would be a rounding error." It would be a rounding error?"

"Essentially, yeah. A couple hundred thousand dollars would be their balance."

"Now, in January 2015, Mr. Satzinger, was there anything in the GP's Capital Account?"

"I don't remember specifically. It could be a couple of hundred thousand dollars."

"A couple of hundred thousand dollars?"

"If at all."

And this was true not only for 2015, but before then, too. Satzinger explained that the GP removed every year from its Capital Account whatever Incentive Allocation had been there.

So, while Rachel Reynolds's view of the LPA in

theory could allow Mason to show a substantial beneficial interest, in fact here this leads to zero beneficial interest, given that the GP had virtually had nothing in its Capital Account and Mason has chosen not even to show you the Capital Accounts.

Now, for Rolf Lindsay, for reasons I confess I don't entirely follow, the Capital Accounts are irrelevant, and the GP's beneficial interest is its Incentive Allocation, and he said this repeatedly and unequivocally, and I'll give you one example here on Slide 4:

"It is absolutely clear from the Agreement what the GP is economically entitled to. It's economically entitled to the Incentive Allocation. That is its beneficial interest, in the sense we're using that term here."

So, on Mason's own case, the GP had at most a 20 percent beneficial interest in the possible profit that Mason expected to make or says it expected to make from the Samsung Shares. On Mason's own case, the GP's standing and legal entitlement could be no more than 20 percent of the amount claimed.

And where do we stand on the 20 percent? The Experts agree that the GP's right to an Incentive Allocation is not an absolute right. It's also not a free-standing right to 20 percent of whatever profits the

LP might have made from Samsung Shares. The GP's right is subject to conditions that have nothing to do with the Samsung Shares' performance. It's agreed by the Experts that the GP doesn't get an Incentive Allocation when accumulated losses have exceeded the profits, and Satzinger told us irrelevantly that the Partnership suffered losses of about $720 million in 2014. That's on Slide 6--5. No--oh, yeah, I skipped a slide, I see here. Yeah, I skipped a slide on 5, where Lindsay is saying that: "The GP's beneficial interest is determined by reference to the performance of the Partnership as a whole". Sorry about that, and now I go on to 6.

This is Satzinger saying--the question is: "I also understand that the Fund was down about 12 percent that year, in 2014?"

"Answer: That's about right, yeah."

"Question: $720 million. Loss in 2014, roughly?"

"Roughly."

So, this means that the Partnership had to recoup that 720 million before the GP could earn an Incentive Allocation. So, even if the Partnership had earned the $200 million profit from Samsung, as Mason alleges in its Notice of Arbitration it should have earned in 2015, the GP still would have gotten zero Incentive Allocation in 2015.

So, on the undisputed record before you, the GP's

beneficial interest under Mason's view of what is beneficial interest amounted in 2015 to zero, and 2015 is the Valuation Date for the loss alleged in the Notice of Arbitration. And we don't need to speak theoretically about a conditional entitlement to an Incentive Allocation in 2015 that may not yet have been activated but still may be. We know, the evidence is in, and it's undisputed: The Incentive Allocation was zero for 2015, regardless of the performance of the Samsung Shares.

And it's not as if Mason has offered evidence for its entitlement to an Incentive Allocation in 2015, and we're arguing that its evidence isn't enough. The debate about how much is fairly needed at this bifurcated stage doesn't arise in our context. Mason hasn't tried to prove the GP's entitlement to an Incentive Allocation. Incentive Allocation is not even mentioned in the Notice of Arbitration. Mason's own witness on cross definitively disproved an entitlement to the Incentive Allocation for 2015, and these are standing facts that are to be resolved at this "bifurcated objection" stage, and these standing facts can easily be resolved based on what you have.

Now, there's a suggestion in the Rolf Lindsay Report about lost Incentive Allocations for years after 2015.

But first, it's not claimed or even mentioned in

the Notice of Arbitration.

Second, it's not mentioned by either of Mason's fact witnesses.

Third, the facts to date make it entirely unlikely that the GP would have earned an Incentive Allocation in 2016, given the $720 million hole.

Fourth, Mason has the records now for 2016, 2017, and 2018, and has submitted nothing. Mason hasn't tried to prove an entitlement in subsequent years. There's not a debate about whether their evidence is enough now and maybe they should have more later. That's not a debate that arises under our context. There's a total failure of proof of an entirely speculative, remote, and unclaimed loss of an Incentive Allocation for future years.

It's impossible for me to imagine its standing could be based on this.

Now, Mason has mentioned two new categories of alleged loss relating to the Samsung Shares: It's the time that Mason says the GP spent researching and managing its investment in the Samsung Shares, and it's the GP's reputational loss. Now, we're frankly unsure whether these are introduced to show damages or to show contribution and risk related to the investor debate. I'll assume for the purposes of my discussion that these are alleged damages items.

Now, to the extent Mason is claiming the hours spent researching and managing its Samsung investment, this time was spent not by the GP but by the Investment Manager. Satzinger confirmed that "the Investment Manager employs all employees in the [Mason] group," including the team that researched the Samsung investment.

Slide 7--well, very brief, and the Investment Manager employs all the employees in the Mason Group? Yes. There is no evidence that the GP incurred any costs in relation to the alleged research and management of the Samsung investment.

As to reputational harm, first, any harm suffered would have been suffered by the Mason Group, not by the GP itself. There is no basis in the records that supposed that outside investors would have had any notion of Mason's corporate structure, or care. Garschina himself didn't know or care.

Second, there is no reputational harm alleged in the Notice of Arbitration.

Third, it is respectfully absurd to imagine that an investment-treaty claim is going to proceed on the basis of alleged reputational harm. I can't imagine that Mason would want that or proceed with that.

Can the LP bring a claim? If the GP can't claim under the FTA for the alleged loss in the value of the

Samsung Shares because of a lack of beneficial interest, who can? Stated another way, if the GP can claim only its allegedly lost Incentive Allocation can anyone claim for the alleged loss in the Share value?

Two responses:

First, to the extent that the GP cannot claim under the FTA for someone else's loss, that doesn't create an inequity that needs to be explained or justified either by the Tribunal making its ruling or by the Party raising an objection, that the LP, a Cayman entity, doesn't have rights under the FTA between the U.S. and Korea doesn't violate any fairness principle. There is no general right to make an investment-treaty claim that requires a tribunal to find an alternative forum to justify a ruling that the claim before it fails under the Treaty invoked.

Second, the LP may, in fact, be able to bring a claim on its own behalf and not on behalf of the Partnership in other jurisdictions or under a treaty that would protect the LP, and the LP might, in principle, bring a claim on its own behalf under either/or both of two theories:

First, by claiming to the extent of its beneficial interest in the Samsung Shares, its beneficial interest, we know, is a predominant one. As we know from Occidental and other cases, beneficial owners have standing under treaties

to bring claims, irrespective of legal ownership, but it wouldn't have to be a treaty claim. It might have a right before some national courts.

And, second, the LP might claim as an investor in the Cayman Partnership the allegation would be that the Partnership suffered harm and that the LP suffered harm as an investor in the Partnership. Under international law, nothing prevents the LP from pursuing claims in respect of alleged losses arising from the LP's own beneficial interest. The circumstance that there's currently no Cayman Korea FTA doesn't change as principle. Maybe tomorrow there will be. And again, the LP wouldn't necessarily be limited to a treaty claim. Maybe it can bring a claim in Korea.

One point is for certain: International law doesn't permit U.S. entities to bring claims for the benefit of Cayman entities under treaties that protect only U.S. entities.

Now, the same deficiencies in Mason's case on the GP's beneficial ownership that caused a standing defect also caused a legal deficiency. To the extent that Mason is claiming a loss that isn't the GP's, the GP's claim fails under the Chorzów dictum. It's our next slide--I'm not going to read it again--this principle is particularly relevant whereas here the alleged injury was suffered by a

Cayman entity not protected by the FTA.

Now, to the extent the GP is claiming for its own alleged losses, meaning the Incentive Allocation, the legal deficiency is of a different nature: It's a failure of proof. Under the FTA Article 11.20.6, you are mandated to decide our "legal deficiency" objection.

Now, there might be a hundred ways that Mason could have tried to adduce evidence of the GP's beneficial interest in an effort to stave off a ruling. Mason chose none of those hundred ways. It hasn't produced the Capital Accounts or the financials, its own CFO testified that the Partnership lost about 720 million in 2014, preventing any Incentive Allocation in subsequent years.

Under this record, to argue, as Mason seems to be arguing, that it's premature to decide anything, would frustrate the purpose of the Preliminary Objection phase. The failure of proof here doesn't require a sensitive balancing of the evidence adduced to date against the evidence that you consider might be needed at this stage. Mason hasn't tried to prove the GP's Incentive Allocation.

So, that completes my prepared comments on the "no standing" and "legal deficiency" objections, and Mr. Nyer will then now discuss our "no investor" objection.

PRESIDENT SACHS: Thank you, Mr. Friedland.

Mr. Nyer, please.

MR. NYER: Thank you. Good morning.

I will give just a few words on the standard. The Tribunal knows our position on the Investor and Investment standard, and then I will spend most of my time considering what we've learned this week from the testimony and the documents we've looked at.

If you follow me to the first slide, we've set out again the definition of "investor" under the FTA. You are familiar with this definition. We have drawn your attention to the language that is bolded and underlined on the slide, that the investor is an enterprise of a Party in this case that attempts "to make, is making, or has made an investment."

Now, we heard during Claimants' opening an attempt to dismiss this language as being merely an attempt to expand the temporal scope of the Treaty. And while this explanation may work for the reason that the Treaty speaks of attempts to make, is making, in the present tense, or has made in the past, that explanation does not account for the use by the drafters of the Treaty of the verb "make." And our submission is that you have to give meaning to this verb "make." The drafter could have used the word "hold" and noted that an investor is any enterprise of a party that holds an investment, but that is not the verb that they chose, and they chose it deliberately.

The implication of this verb, in our submission, is that you can fairly read this definition of "investor" as importing the characteristics of investments that are listed in the definition of the "investments." In other words, you could read this definition of "investor" as being an enterprise of a party that attempts to commit or is committing or has committed capital and other resources, and you can also read this definition as being an investor, as an enterprise of a party, that attempts to assume risk has assumed risk or is assuming risks, and so forth. And that provides you the link that Claimant has challenged between the definition of investments--characteristic of an investment and the definition of an "investor".

Second preliminary comment on the standard. There is a lot of debate between the Parties as to the existence of a durational requirement that would be implied by the inherent meaning of the term "investment". Now, we heard again from Claimants in opening that Respondent is relying mostly on cases interpreting the ICSID Convention, including the Salini test and so forth, and it is just not true, we have listed cases during our own opening that are non-ICSID cases, UNCITRAL cases, Romak versus Uzbekistan is one of them, Italy and Cuba is another one, but more fundamentally, we did not hear anything in opening on the implication of the term "commits," a commitment of capital

and resources, which we say imports in the Treaty a notion of duration.

Now, leaving the standard and thinking about what we've learned this week, what have we learned, and starting with the requirements of a contribution of capital and resources? Well, we've learned, and if you follow me to the next slide, Slide 11, that no cash had been contributed by the General Partner; and, as of May 2014, that is the date at which Claimants say that they started purchasing the Samsung Shares, there was no cash contributed by the General Partner, so no cash contribution.

And if you follow me to the next slide, we also know that--it's a point that Mr. Friedland has touched on in his part of the opening, we also know that the General Partner was regularly, every January of each year, withdrawing from its Capital Account whatever performance fee the Incentive Allocation it would have earned in previous years. And we know that as a matter of fact for 2014 Mr. Satzinger testified that any amount that would have been earned as performance fee for 2013 would have been substantially withdrawn in January of 2013--2014, sorry. And then we've also heard that whatever was left was essentially a rounding error, if anything was left.

Now, what does that mean for you and as you consider the question of contribution? Well, it means

that, when the Claimants started purchasing the Shares, the Samsung Shares--and they say that they started purchasing in May 2014--we will come back to that--there was no capital owned or virtually no capital, capital owned by the GP in the Partnership.

Now, that brings us to the question of a potential contribution in kind, and the text of the Treaty speaks of commitment of capital or resources.

Now, the contributions in kind that have been identified by Claimants are mostly the time spent by the team of analysts at Masons investigating and analyzing Samsung Electronics and Samsung Group, and we've set up on the Slide 13 an excerpt from the Rejoinder.

Now, even if you were to consider time spent considering whether and when to purchase and sell the Shares, who constitutes a contribution and an Investment by itself, we know--and we've learned from the witnesses--that this time was not spent by the General Partner.

Mr. Garschina pretended not to know who was employing the staff of the Mason Group, but Mr. Satzinger confirmed--and we have that again on Slide 14--confirmed that all of the Investment Manager, all of the employees are employed by the Investment Manager.

Now, the Investment Manager is an entity known as Mason Capital Management, LLC. It's not the GP. It's a

Delaware company, and it's a company that could have been potentially a claimant in this case for its lost resources and time, but it's not a party to this arbitration.

Now, this discussion and the failure to show any contribution, whether in capital or in kind, by the GP brings us back to the "origin of capital" debate that we discussed during our respective openings. And we heard from Claimants the example of a loan, and the example was, imagine a party has borrowed money, and with the borrowed money purchases shares, it would defy logic that the banker was the party that was really committing capital, and that would be the proper claimant. Well, that is not our scenario. That is not our case. A party that borrows money from a lender to buy shares buys those shares on its own behalf and at its own risk, and that is, we say, a material distinction when you look at the origin of capital.

And if you follow me to Slide 15, this is precisely what the Gaëta and Guinea Tribunal has held. The Tribunal in that case acknowledged the debate about the origin of capital as understood as the source of an investment, but then went on to hold: "The Investor must in particular show that it made the investment payment on its own behalf. In other words, even if the Investor received funds from third parties, it must actually assume

risk and demonstrate that it has done so."

And this leads us to the discussion of the second characteristic of an "investment" that is at issue in this case, and that is the assumption of risk.

Now, our position is that we have capital invested or invested and committed to the purchase of the Samsung Shares. Mason, the General Partner, simply had no skin in the game. It was playing with other people's money. It couldn't have lost any money, and we know if you follow me to Slide 16--that's the slide that we have seen in opening--that it was also, for all purposes, insulated from all trading and Partnership losses arising out of error of judgment and so forth.

Now, Mr. Lindsay mentioned during his testimony yesterday, claimed that, really, the first person to suffer from a loss incurred by the Partnership, and the person most at risk, he mentioned, from a loss incurred by the Partnership, is the General Partner. Now, that seems a bit rich as a comment because the first person to suffer from a loss is the person that lost money; and, in that case, it would be the Limited Partner.

Which brings me to the third characteristic of an "investment" that we say cannot be shown in this case, and that is duration, and if we turn to duration, we've heard, and we looked at that Report from Cliffwater Associate, a

Due-Diligence Report on Mason that mentioned that the time horizon of Mason was shorter than its peers and was on average three to nine months. And we spent some time this week over the past couple of days considering the potential intended duration of the holding of the Samsung Shares.

And starting with the representations that were made by Mr. Garschina in his Witness Statement--and I'm on Slide 17--I think we realize that those representations were not entirely forthcoming. Mr. Garschina explained that essentially Mason intended to keep those Samsung Shares tight through the restructuring, and as they would appreciate in value through the restructuring. That is a great investment idea that they had identified.

And he also told you in his Witness Statement, Second Witness Statement--First Witness Statement--and we're on Slide 18--he explained that the General Partner, on his instruction, started investing in Samsung Electronics in May 2014. He acknowledged that at that time about swaps and then closed out those swaps and acquired a direct interest.

And then he told us in the next paragraph that, by June 2015--that is the time immediately after the announcement of the intended Cheil merger--Mason's direct investment in Samsung Electronics had grown to about KRW 133 billion.

Now, we've realized, I think, this week that his statement was not entirely accurate. We've realized that Mr. Garschina left out of his written testimony and the fact that the General Partner over that period, between May 2014 and June 2015, had been trading in and out of Samsung Electronics.

We've also realized that, by June 2015, the General Partner had been selling its Samsung Electronics' position for several months, and we will come back to this in a second.

But essentially, the General Partner had halved its position in Samsung Electronics by June 2015.

Now, we've also realized something which may or may not be material--that would be for you to decide--that the swaps that are mentioned in this paragraph, Paragraph 16 of Mr. Garschina's statement, are essentially a contract that the General Partner entered into with Goldman Sachs.

Now, how that could qualify as an investment in Korea is a question that is not answered, and you have the language regarding the swap on Slide 19.

Now, given Mr. Garschina's representation, I think we can spend a little bit more time looking at the trading records. And if you follow me to Slide 20, you'll see here Demonstrative Exhibit Number 1, which was shared with

Claimants yesterday, and we've plotted on this slide the purchases and sells of Shares in Samsung Electronics.

The green bars are purchase orders, and the red bars are sells. The blue line shows the cumulative amount, number of Shares, and you will see the solid red line, vertical red lines, dated May 26, 2015, this one shows the announcement of the merger vote--of the proposed merger, and the line dated July 17, 2015, shows the actual merger vote.

PRESIDENT SACHS: And the June 4, 2015, stands for...?

MR. NYER: And the June 4th, 2015--I will ask you to keep that date in mind, June 4th, but you're right; you see there is a purchase of Shares in Samsung Electronics on that date, and we'll come back to it.

Now, what you can see from this slide is first, starting from the left, you will see the swaps, and the GP bought certain amounts of swaps and then sold them, liquidated its position. So it bought them on May 20th, 2014, and liquidated its position by August 8. By August 11, it started buying again, this time started buying the Shares themselves, direct investment in the Shares.

And then you will see that by October 10th, the blue line goes to zero and the shareholding, the

holding--the position had been liquidated by then.

And then the GP proceeds over the next couple of months to rebuild its position in Samsung Electronics.

And then you will see that, as of April, the GP starts to sell and continuously sell until June.

Now, from a layperson perspective, it does look like someone is trading in and out and opportunistically around events and opportunities. Mr. Garschina, in his evidence on Wednesday, tried to explain away those movements as a potential optimization of his trades.

Now, there might be an optimization, but what we see here is probably more consistent with taking profits after certain events, and what I would submit we see on this slide is a clear intent to liquidate the position as of April 2015.

But more fundamentally, what we heard from Mr. Garschina was that he would--he or his Partner, Mr. Martino, would make very clear to the traders, "Go ahead, I want to be--I want to own this stock. Go ahead and optimize and--but I want to be in the stock." Well, there should be documents showing those specific instructions by Mr. Garschina or Mr. Martino to the traders in the Mason group, and we haven't seen those documents.

Now, if you follow me to the next slide, which is Respondent's Demonstrative Exhibit Number 2, we've plotted

the activities regarding the Samsung C&T Shares, and as much of the timeline--the previous timeline we looked at was run over a period of 15 months with several trading in and out. This one is even shorter. This one runs from April to August 2015.

And it is a good example, we submit, of how the General Partner and Mason were trading around specific events, identifying events that would potentially unlock value and trading around them.

You will note that there was a short purchase prior to the merger announcement, and Mason held the Shares in SC&T for about a week, and then there is a large series of purchases starting on June 4th following the merger announcement.

And again, I'll ask you to keep the June 4th date in mind for a minute.

Now, Professor Mayer asked a discerning question of Mr. Garschina during his examination, and you brought him to the statement Mr. Garschina makes in his Witness Statement, that the ratio at which the merger--the Exchange ratio at which the merger was being offered was plainly and obviously unfavorable to the SC&T Shareholders. And if that was the case, why would Mason want to invest in C&T, and buy in C&T? And we've learned what the reason was.

If you follow me to the next slide, we have

testimony from Mr. Garschina in answer to a question that Dame Gloster put to him. It is pretty clear that Mason was anticipating that the merger would be rejected, and that one way or another, the SC&T Shares would have appreciated.

And if you read this quote, Mr. Garschina explains:

"My thinking was firmly of the view that if the deal was voted down, either the security would trade up on its own because Shareholder's right would have been affirmed, or they would come back with a higher offer," meaning Cheil would up its offer to buy SC&T.

"In either case, I thought that the lynchpin for value creation or destruction was the Shareholder vote."

Now, in light of the trading record that we've looked at, I would submit that we all know what Mason would have done if the merger vote had, indeed, been voted down, and the Share had appreciated as a result, as Mason was anticipating at the time, they would have sold their shareholding and made a profit on it.

Now, the next slide, Slide 23, we have similar reasoning in the record, an e-mail exchange between an analyst at Mason and Mr. Garschina explaining, essentially, this rationale for purchasing Shares around the merger.

And I've asked you to keep in mind the date of June 4th, the date on which the GP, after selling the

Samsung Electronics Share for several months, started buying again, the date on which the GP bought the SC&T Shares. And what we know from the record--and we know it from the documents on Slide 24, and we also know it from the Notice of Arbitration--it's not a disputed fact--is that on June 4th, 2015, the very day when the GP all of a sudden stopped selling out of its position in Samsung Electronics and all of a sudden bought into SC&T was the day Elliott Management announced that it would oppose the merger, but it had built up a significant position in SC&T, 7.1 percent. And you can--that data point is available in the document C-9, which is referred on the slide.

Elliott Management, a notoriously aggressive activist hedge fund in the U.S.--they are the guys who took on Argentina, the other guys who have been suing the Congo on failed bonds and so forth. They're an activist fund known for shaking the tree when they take a position in a company. They announced that they had taken a significant position in SC&T, and they announced on June 4th that they would oppose the merger.

And what that meant--what that meant is that the chances of the merger being voted down at that point increased dramatically. Dramatically. And we would submit that, on this record, it seems pretty clear that Mason was trying to ride on the coattails of Elliott with respect to

the SC&T merger.

Now, I want to finish on this topic with one point: There's no presumption of jurisdiction. Mason bears the burden of proving that the GP made an investment. If you agree that an investment means an investment--an investment means a commitment over time, that there is such a thing as a "duration" requirement implied by the inherent meaning of the term "investment" and by the term "commitment," this means that if, on the face of the evidence, you remain in doubt today or after deliberation, after your studying the file, you remain in doubt as to whether Mason intended to hold those Shares for the long term, as they claim in their Notice of Arbitration or in their pleadings, or whether they were simply trading around short-term events.

If you remain in doubt as to that point, the Claim should be dismissed for lack of jurisdiction and non-existence of an investment.

I now pass on to my co-counsel, Sanghoon Han, to cover the Korean law point.

PRESIDENT SACHS: Thank you, Mr. Nyer.

Mr. Han, please.

MR. HAN: Thank you.

I'm concerned that Claimant is trying to create the perception that Respondent Korean Law argument are

based on formalities and not substance. The perception is that Respondent is trying to avoid its Treaty responsibilities by relying upon formalities. However, this is a misconception.

In the next 10 minutes or so, I will explain why.

The Claimant is trying to evade the fundamental ownership principle under Korean Law by using an ambiguous single provision of the Korean Private International Act. This is simply incorrect.

It is clear from the Korean Law perspective that the Cayman Fund is the only owner of the Samsung Shares under the Capital Market Act and Real Name Financial Act in Korea. This is even more apparent considering the submitted investment registration form in which the Cayman Fund admitted that it seeks to make profits through investing in Korea.

It is also unsurprising that Professor Kwon, the Expert Witness for Claimant, has clearly articulated that Cayman Fund is subject to application or obligation under the Capital Market Acts in Korea.

Let's move to the next slide.

The Claimant argues that Cayman Fund did not own the Samsung Shares in Korea pursuant to Cayman Law or its internal structure. But here, Professor Kwon clearly articulates that the Cayman Fund did acquire and dispose of

the Samsung Shares in its own name in the Korean Stock Market.

If the Claimant is trying to allege that the undisclosed GP owned the Samsung Shares, then it means the buyer who bought the Samsung Shares from the Cayman Fund would have bought the Shares from nobody or someone who did not own them at all.

Claimant insists that the Cayman Fund, who did not own the Samsung Shares, purchased and disposed of the Samsung Shares. This is completely inconsistent under Korean Law.

Under the Capital Market Acts and the Real Name Financial Transaction Acts in Korea, only Shareholders in the Shareholder Registry shall be deemed to own the Samsung--shall be deemed to own the respective Shares. As such, regardless of the internal structure or internal contract of the Cayman Fund, only the Registered Cayman Fund itself was the owner of the Samsung Shares.

Yesterday, you already saw the slide regarding the Samsung's Shareholder Registry, and we do not intend to show this document to you again. But this document clearly show that the Cayman Fund came to Korea and registered its name as the owner of the Samsung Shares in Korea. And as Professor Kwon, the Expert Witness of Claimant correctly confirmed, only the Registered Shareholder can exercise the

Share rights in Korea. Accordingly, only the Cayman Fund, not the GP, may exercise any of share right with respect to the Samsung Shares.

Now, the conclusion is quite simple: Regardless of formalities, under Korean Law, the Cayman Fund was the owner of the Samsung Shares and the only entity who could exercise Shareholder rights.

Thank you.

PRESIDENT SACHS: Thank you, Mr. Han.

MR. NYER: And maybe just as a wrap-up of where that leaves us on the "no investment" objection.

We have, as you know, two no investment--"no investor" objections. One is the fact that the GP did not make an investment, and the second one is that even if you were to consider the Samsung Shares and the acquisition of the Samsung Shares by the GP could constitute an "investment," the GP does not hold or own that investment, those Shares; that the Korean Law parts argument that Mr. Han just developed goes to, admittedly, mostly to the question of whether there was direct control or ownership of those Shares.

But for the explanation--the reason explained during our Opening Statement, we think that Mason cannot be heard to argue that the GP indirectly controlled the Shares, owned and controlled the Shares in Samsung through

its control, alleged control or ownership, of the Cayman Fund. And we've set out the reasons for that in our Opening Statement, but part of them are the misrepresentations that were made at the time of the Investment application.

Thank you.

MR. FRIEDLAND: So, that completes our prepared closing remarks.

PRESIDENT SACHS: Thank you very much.

We will now have a break of 15 minutes, a little bit more, and move on at 12:20.

MS. LAMB: Thank you.

PRESIDENT SACHS: Okay. Who will deliver the closing?

MS. LAMB: I will.

PRESIDENT SACHS: You will, Ms. Lamb.

(Brief recess.)

PRESIDENT SACHS: Ms. Lamb, are you ready?

MS. LAMB: Thank you, yes.

Am I good?

COURT REPORTER: Yes.

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

MS. LAMB: Members of the Tribunal, the General Partner of Mason, a U.S. investment firm, is indeed a protected U.S. investor who has made a qualifying

investment over which this Tribunal has jurisdiction. What the Hearing this week has put beyond any doubt is the very real, substantial, valuable input Mason's U.S. founders, specifically Mr. Garschina, Co-Managing Member of the U.S. GP. And without that U.S. piece, without the GP, the reputation of the Fund and its founders themselves Co-Managing Members of the GP, without the GP, there would be, in fact and law, no clients, no investments, no business at all.

The decisive business critical know-how, the intellectual capital, the control, the decision-making all came from the U.S. GP, the Party who, in fact and law, has made a qualifying investment.

Now, the fact that Mason's business is, in the ordinary course, structured across or through different entities with different legal characteristics is by no means extraordinary. It mirrors the structures and legitimate assumptions of the entire industry, contrary to the bare insinuations that have been made by Respondent's counsel and repeated by its Korean legal consultant Mr. Rho, there was nothing nefarious, deliberately misleading or secretive in any of that. Still less was it a device to somehow facilitate tax evasion.

Now, Mr. Garschina specifically confirmed that Mason has one pool of capital and one investment strategy.

It split across two parallel funds, one U.S. and one offshore, the latter to complement the tax status of Mason's clients, or some of them. The Cayman Fund, as we know, is used in particular by U.S. tax-exempt clients, which include major pension and endowment funds, universities and so on, and these parallel forms have different--these parallel funds have different corporate forms that make the same investments, take the same risks, and share the same expectation of gain.

The U.S. Fund, as we know, had its own separate legal personality and faces no preliminary challenges in these proceedings. The ELP has no separate personality. The GP of the ELP does, indeed, have separate legal personality, and it is the correct Claimant in these proceedings. Had the Cayman Fund, too, been structured as a company with separate personality, a subsidiary of its U.S. founders, there, too, could have been no challenge. The U.S. founders could have made claims in respect of their indirect investment.

So, the real question here is whether use of a particular structure unique to Cayman Law but not to this industry, shuts out and deprives of international legal protection not just this investment, but, by extension, all other investments made in the hedge fund, private-equity industries which use this structure.

Now, in our respectful submission, that would be a bold conclusion to draw, particularly at the Preliminary Objections stage, and certainly one which would have considerable and very far-reaching consequences. And as such, we respectfully suggest that the Tribunal would need to have the very highest degree of confidence that this was the outcome intended by the Treaty Parties, a conclusion that you should be most reluctant to draw, in our view, given, Number 1, that the words the Treaty Parties, in fact, chose to use do not admit this. The limitations and requirements urged on you by the Respondent simply do not appear in the text at all.

Number 2, given that the underlying facts in the prior Awards cited by Respondents in the contexts of beneficial ownership do not mirror at all the special facts presented by the Cayman ELP and the joint ownership nature of the Shares in this case.

Number 3, a further reason why the Tribunal should be reluctant to draw that conclusion, there are prior awards which do consider the special status of General Partners, and they affirm jurisdiction and standing.

And Number 4, insofar as the challenge is premised on general principles of international law those principles, in fact, support the theory of full reparation for which we contend, and they recognize that this must

follow where, as here, the Claimant enjoys those rights most associated with ownership, especially management and control of an investment, and where it is exposed to the obligations that a real owner would be.

Now, where a claimant/investor exhibits those particular qualities of ownership, the interest of a third party without those particular qualities more akin to a contractual third-party creditor or those interests are not to be taken into account and not to be deducted for the purposes of the Claimants' claim, and we say that is very clear from the findings of the Annulment Committee in Occidental following on from the Chorzów Factory Case. Certainly, they do not present jurisdictional or standing impediments, and I'll come on to explain why we say that is the case.

So, the General Partner is a protected investor under the treaty, and it has made a qualifying investment. The very same jurisdictional standing objections that are made in this case have been rejected in the only cases with direct analogies to this one.

As to the making of the relevant investment, Mr. Garschina told you that he, himself, made the decision, was its architect. The General Partner acquired the Shares. It was the only entity legally capable of concluding that transaction; and, under the law applicable

to the Cayman Fund, the General Partner was the legal owner of the investment.

The Shares were, indeed, recorded in the name of the Fund. There was nothing wrong with that. It was not misleading. Indeed, so common is that practice, we are told by Mr. Lindsay, that the ELP Law in the Cayman Islands was amended to put on a statutory footing the ownership status of assets indeed recorded in the name of an ELP. And specifically, that those reside in the General Partner through whom the Partnership acts, who itself has full legal title and its own interests in the Investment; indeed, an indivisible beneficial interest in all of the assets of the Fund.

The GP is not a disinterested nominal owner of someone else's property, and that makes this co-ownership relationship quite distinguishable from the beneficial ownership cases on which the Respondents rely.

Members of the Tribunal, the fiction of the Respondent's case was really exemplified just now in closing. It was said by Korean counsel that the Cayman Fund, and I quote, "came to Korea and registered its name as an investor." Well, that simply could not have happened as a matter of fact or law. The Fund doesn't exist. The Fund, therefore, has no offices. It cannot perform any functions at all. All that has happened is that shares

have been registered in the name of a fund, as is quite common practice, and the law applicable to that act and that entity and that relationship tells us what the consequences and, indeed, that the General Partner has legal title.

So, the General Partner can safely be considered to have made the Investment for the purposes of the Treaty for at least three reasons:

Number 1, because legally that is the right conclusion. That is what happened.

Number 2, because the source of the capital, whether from the LPs or indeed otherwise, but specifically in the case of capital contributed by the Limited Partners is irrelevant for jurisdiction, and you have in front of you a case that considered that very fact pattern. It's the Eiser Case at C-78.

Thirdly, in addition, the GP did make its own contribution to the Investment. It's that very considerable know-how, goodwill, planning, the analysis, the decision-making, that culminates in the investment expertise and strategy in which clients choose to invest on which the entire industry is premised, and to which the market ascribes real value, in this case specifically, 20 percent of relevant fund performance. Without the GP, there would and, indeed, could have been no investment.

Now, the law recognizes, as the Tribunal will know, that contributions can be made other than through capital. They can be made in kind, they can be made through resources, and, indeed, they can be made through the contribution of know-how.

Similarly, the law recognizes that when one is seeking to identify an investment, the exercise is a holistic one. We're looking at the entirety of the evidence, the entirety of the acts, and this focus on all of the steps, all of the activities, all of the contributions, all of the decision-making--the totality of the experience. Here, it began years before Mason, in fact, began to build its position in Samsung.

Now, in the two cases in which GP structures as such have been considered by investment tribunals, those tribunals had no difficulty at all in finding the qualifying features of an investment. This again is a slide we used slightly amended from our opening, but the facts are on all fours with this case, and in both cases the Tribunal assumed jurisdiction over the General Partner. In both cases, it could be said that the Limited Partner would obtain an advantage from that. This was neither a jurisdictional objection or a standing impediment.

Duration, the long game. Well, here, it is said by Korea that this constitutes an additional jurisdictional

requirement. You know our position on that. We say that it's not. It's not in the Treaty. It's not a requirement. But it doesn't matter because the facts show us conclusively that this was, indeed, a long game.

Firstly, as described by Mr. Garschina, the potential for real value creation depended not just on the merger vote. That was the first step to unlocking value. It was contingent on successful implementation of a number of reforms both internal to Samsung and in the wider legal-regulatory governance space. Indeed, the restructuring process at Samsung is so complex that, in fact, it continues to this day.

The trading pattern characterized by the Respondent as short-term speculation or going in and out was nothing of the sort. These were sophisticated interim steps taken to build the desired position over time and at the right price, and that process of optimization, as identified and confirmed by Mr. Garschina, is precisely what hedge funds do and how they achieve their performance.

And the slides that Respondent has shown you in closing are actually, we would say, helpful to our case, not harmful to our case, so I'd ask you to look again at Slides 20 and 21. Perhaps you still have the hard copies to hand. I think they don't have their own internal numbering, but perhaps if you find Slide 19, you'll know to

flip over one more page.

So, what is said by Respondent is that Slide C-20--this is the slide entitled "Mason's SEC Trades"--shows them getting out of or exiting their position in Samsung. And, of course, the relevant date range there you can see between the two parallel red lines. But if you flip over and look at precisely that same date page on Slide 21, just further to the left, again, it's the time period between the two red lines, what you, in fact, see is an enormous surge in the parallel position, and the reason for this was that the position was being taken as a proxy for acquiring the position in Samsung, and it was simply removing one position to obtain more favorably a position through proxy means. This is the classic optimization.

But what really matters, Members of the Tribunal, is that, at the relevant date, the Claimant was, indeed, the legal owner of Shares totaling--Shares whose value then was USD 114 million, indisputably an investment, indisputably an investment to which the Claimant had legal title under applicable law.

Mr. Garschina also told us that the Investment was motivated by real signals that Korea was beginning to open up to foreign involvement in Korean corporations, and we heard from him that Samsung itself very much welcomed those

insights, that know-how, that knowledge, that interaction. But not only was the positive trajectory that was anticipated utterly thwarted by very serious criminality at the highest levels of Government, it seems ironic, to say the least, in our submission, that the claim is being brought under a treaty, the very purpose of which was to encourage and facilitate foreign investment, yet every conceivable, technical and fictitious objection is being raised to deny it protection, despite these egregious facts.

Ownership or control, these are key words in the Treaty, and you will know our position, and it's that the General Partner had both legal ownership and beneficial ownership and control. We take control first.

The GP indisputably controlled the Investment. It had absolute dominion over all investments. It acted in all material ways as an owner because it enjoyed all material rights of ownership, and the LP did not. And this is particularly relevant when we come on to consider the Occidental Case in a few moments.

Now, we say that legal ownership is sufficient. In fact, we would say it would be extraordinary if you were to decline jurisdiction in the face of irrefutable proof of legal ownership of $114 million's worth of Shares. The GP is the legal owner under Cayman Law. Both experts

confirmed as much in their written reports. And Cayman Law is applicable, and it is decisive on the question of legal capacity of the Fund and ownership of any asset registered in the name of the Fund.

As to the asserted additional requirement of beneficial ownership, we say it simply isn't a jurisdictional or standing requirement, and you have our cites for that, the Douglas commentary, the Saba Fakes Case, and von Pezold Case, there are others. So, how then to recognize, to reconcile those cases and the cases on which Respondent relies and, indeed, our own case.

Slide 7 is a chart you may recall from our opening. These are the cases relied upon by Respondent, and you do not have to decide that any of those cases were wrong. They are simply different fact pattern cases. They are not commonly held property cases. Simply put, they have different facts, and those Claimants did not have the special interests and rights and, indeed, dominion over the relevant investment enjoyed by this General Partner.

Now, when the Respondent first articulated its objections, it was to say that the General Partner lacks standing to bring a claim because it was alleged to be only a nominal owner of the Investment; and, in that way, if you will, it was disinterested. It was a representative bringing a claim for someone else. And a case in point was

said to be Blue Bank, but that case involved a bare trustee, indeed a professional trustee, with no skin in the game, a postbox, if you will, acting on an execution-only basis with no interest of its own in the Investment, truly a representative claim. This GP could not be further removed from a Blue Bank trustee. This GP indeed, had both legal and beneficial interests. Its beneficial interest was an indivisible one in all of the assets of the Fund.

One might take the example of a fund that also owns works of modern art, the Partners own a Picasso. They have indivisible rights in the Picasso. They can't point to, respectively, 20 percent of the Picasso, 80 percent of the Picasso, say that bit's mine, I own that bit. They both own all of it. The monetization of that may happen at some future point and may be split other than equitably between them. But until that point, they both have an interest in all of it that cannot be divided.

Now, the Respondent put its case, indeed, on the basis of beneficial ownership, but that has now morphed somewhat into a concept of economic interest. Now, we would say that that, in a sense, is quite different. We've demonstrated our beneficial ownership. It is, indeed, in all of the assets. We are co-beneficial ownerships with the Limited Partner. Our economic interest consists of the legal entitlement to an Incentive Allocation, and the

methodologies to be employed to value that economic interest from time to time, and in particular what its value would have been absent the Respondent's illegal conduct is a matter we say for exploration, evidence and, indeed, expert assessment at the quantum stage.

Suffice to say, before I return to the damages objection, that its economic value is not represented by what the GP might happen to have, leave or remove from its Capital Account for whatever reason at whatever time.

The GP is not, therefore, a trustee in any traditional sense because it retains an interest, and it is a co-owner alongside another party, and in this case it's another Mason entity. The assets are on trust indeed. For the GP is not a bare trustee and it is not disinterested in the trust property. By definition, it is not a nominee.

Likewise, it is not acting on behalf of someone else. This is confirmed in Mr. Lindsay's Second Report, Paragraph 5: "The General Partner does not act in the name of the Fund; it acts in its own name and its own capacity as General Partner. It's the proper and the only Claimant in respect of the totality of the Partnership interests. Only the GP can bring a claim."

Contrary to what the Respondents have submitted today, the LP cannot, in fact, bring its own claim, not on treaty grounds, not because of nationality, but because its

applicable law says it has no capacity to bring that claim, and that is clear from the ELP Law, and it's clear from the Partnership Agreement. It does not have those rights. It may have those rights in a case of General Partner misconduct, but it does not otherwise have those rights.

The final point of distinction, Members of the Tribunal, with at least some of the cases on this chart is that this is not a case that involves a transfer of the General Partner's interest to a third party, to an external third party. There has been no transfer, there has been no splitting of the legal and beneficial title between Party A and Party B. Other cases such as Occidental, Impregilo, Blue Bank indeed, they have this clean split, this clean distinction between legal and beneficial title. This is a co-ownership case, which is quite different.

So, that brings us on, then, to Occidental and the annulment decision in particular. That's RLA-21. The Tribunal will be familiar with the underlying fact pattern, but in very simple terms, there was an outright transfer by the Claimant/Investor Occidental for value to an unrelated third party. That party, for the purposes of this slide, AEC, that party had all the rights and obligations, privileges of an owner, but a device was used to avoid applicable law, and in particular the governmental permissions that would have been required to effect this

arrangement, and that device involved Occidental remaining nominally, if you will, on the record. But Occidental had no real interest in the 40 percent that it had transferred.

So, when it came to looking at Occidental's loss and an appropriate measure of compensation, it was right to conclude that Occidental had already, in essence, been compensated for that 40 percent. It had sold it to someone else, and it had received value for it.

But perhaps more significantly for this case, the Committee identified the indicia of a real owner, and this is to be distinguished, apparently, from a contractual creditor. So, some of this clear from the slide. I want to take you just to another couple of paragraphs in the Decision too.

So, at 198, what we learned from the Annulment Committee is that, in this Farmout Agreement that effected the transfer, as regards what was being transferred, it was the ownership of 40 percent in the complete bundle of rights and obligations which formed Occidental's legal position under that contract, and not just certain rights deriving from them. In the Decision itself, 212 through to 215 but significantly at 213, the Annulment Committee made what we consider to be a very significant point, that OEPC and AEC could have structured their relationship as a "cash against future oil transaction," as a simple sales

agreement, where AEC agrees to pay an uncertain price (equivalent to a percentage of the expenditure in the block) and receives an uncertain quantity of oil in the future; it's like an earn-out.

And in the Annulment Committee's decision, this paragraph appears under the heading "AEC is not a creditor," so a distinction is being made between what is described, so the arrangement that is identified at Paragraph 213, its contractual creditor, the right to participate in future uncertain profits, and that's to be contrasted from the situation where, in effect, all the rights and privileges of ownership lie with the third party. And in our submission, that is why there is no jurisdiction standing issue in this case, and that is why the Tribunal's decision, should it decide to reject the Preliminary Objections, will be, indeed, consistent with the Decision in Occidental.

A further reason why the Occidental Decision which, of course, builds in that strong line of reasoning and that strong principle from the Chorzów Factory Case, is that the Chorzów Case, of course, contains that seminal decision on the measure of damages that are appropriate for internationally wrongful behavior.

Full reparation, reparation which wipes out all of the harmful effects of the illegal act.

Now, the LP, the Limited Partner's contractual interests are relevant here; and, as I've said, they distinguish this Claimant's position from that of Occidental.

More significantly, if the Tribunal discounts the General Partner's Award to 20 percent of actual loss, ostensibly to reflect its "beneficial interest," all that will not provide the General Partner even with full compensation, and that is because the General Partner will have to account contractually to the Limited Partner for 80 percent of it, and both Cayman Law experts agreed that that was the case.

So, far from this being the case which risks unjust enrichment of the Investor, on the Respondent's theory, it would be a case of under-compensation even for the General Partner's "interest."

Now, in the two General Partner cases that we have in the record, it didn't seem to be a factor for those tribunals that ultimately the Limited Partners might share in the fruits. That did not feature in the reasoning, it was not expressed as a concern, so the ultimate fate, we would say--the ultimate fate--of the fruits in this case similarly should be irrelevant. Other examples where the ultimate fate of the fruits of the Award are not relevant are, for example, where the Claimant/Investor itself has a

parent or ultimate beneficial owner who is a third State national or even a host State national. And that would be a situation in which, if you will, an unprotected Treaty Party was deriving a benefit from the fruits of the Award.

A further reason why the ultimate destination, if you will, ultimate fruits are not relevant to the Tribunal's analysis, is that it would create jurisdictional or standing objections on the Respondent's theory whenever, for example, an international lender was in the background or even, say, a Litigation Funder outside of the Treaty Party's geography. It would deprive a good number of bona fide investments from protection, taken to its logical conclusion.

So, the damages objection, as such, or for all of the reasons I've given we say that the preliminary objections based on beneficial ownership whether expressed as jurisdictional or standing requirements must fail, and that their dismissal would not place the Tribunal into conflict with the decisions of other tribunals. In reality, the Respondent's objection is not a legal one; they have not, we say, met their burden of demonstrating that our claim is legally deficient, that we haven't identified a loss capable in law of being protected and compensated. Their objection in reality is that evidentially we haven't put forward yet a full case on

quantum. It's counting the number of references to "proof." "Failure to prove" isn't "supported by proof." Burden is to prove. Burden is to establish. We heard it again in closing. That time will come, but for now the Claimant only needs to articulate a legally recognizable loss, one that is known to the law, not its extent and not its economic value. So, we have met our burden, and this claim is in no way manifestly lacking or manifestly flawed as a matter of law.

We have a loss that is capable of legal protection. We have an interest in the performance of the Fund, and that interest is enshrined in a contract. The quantification of its value will depend in the event on the ultimate theory of damage, or theories, which we might choose to deploy. Could be lost profits, could be direct loss, loss of opportunity, an "alternative transaction" model, could be loss of clients, reputational damage and so on. All of those are categories of loss known to the law. That analysis might take into account past performance, peer performance, market performance, any number of potential future scenarios. We might even, as I've said, use an "alternative transaction" model, but all of that is for a quantum stage, the quantification stage. It does not, by any stretch, negate the legal sufficiency of the pleaded claim.

To be clear, when we get to that stage, it will not be the case that our beneficial ownership or, indeed, our economic ownership is defined by what is in the General Partner's Capital Account from time to time. In our submission, that is obvious from the Agreement read in its totality.

It has been confirmed by Mr. Lindsay, and it will be absurd if the Respondent's position was true because it would simply mean as, indeed, as they said, that the Claimant could have an extraordinarily large claim, larger than a 20 percent Incentive Allocation if it happened to be the date on which there was money in the account, if the claim happened to be advanced or the loss happened to be suffered on the day in which there was a large balance in the account.

Similarly, it can't be the case that the account is full on Day 1, it is removed on Day 2, and on Day 2 it said that we have nothing of value in the Partnership. It's simply an accounting exercise. It's the movement of funds from time to time. It is an arbitrary measure. It could be impacted by a technical glitch. It is not the appropriate measure of our economic interest.

The General Partner's beneficial interest had a value at all times, positive or negative. Its measurement is for the quantum phase, and it is not the case that the

General Partner has already been shown to have no loss, as is quite clear from the schedules in Mr. Lindsay's Report, a loss in Year 1 contaminates future losses and is capable of sounding and repeating and infecting as time goes by, but again, all of that will be for Expert assessment and, no doubt, hotly contested methodologies and models in the fullness of time.

So, before I conclude, perhaps just a few words on applicable law, Korean Law, interaction between Cayman and Korean Law.

With the greatest of respect to our colleagues, if the Korean Law analysis prevails, not only will it be an extreme triumph of form over substance, it will be a triumph of fiction over fact. Korea's legal expert insists on saying that the Shares are owned by an entity which doesn't exist in the law applicable to it. This is a belated argument that is utterly divorced from any kind of reality, commercial, legal, or otherwise. If true, if correct, it would throw the world of international trade and finance into chaos. There cannot be multiple owners, multiple legal owners of the same asset or, indeed, no owners of an asset. It is also a possible analysis of the Korean position. The conclusion is not, in any event, legally supportable as a matter of either international or Korean Law.

It will not, I'm sure, have been lost on the Tribunal that Korea is relying, of course, on its own law, and one might have thought that if this conclusion was so obvious and conclusive, it would have been front and center of Korea's Preliminary Objections from Day 1. Instead, it arrives belatedly towards the end of this process, new theories even being advanced on the very day of its Expert's presentation.

In our very respectful submission, that is revealing at the least with regard to the Respondent's conviction in it.

And there is, we are bound to say, a certain conceit in it because it is contrary to the written conclusions of the Respondent's Cayman expert. It was her evidence that the General Partner was the legal owner. It cannot be that the General Partner is not the legal owner under some other theory. And again, with respect, her attempt to argue that this possibility of Korean Law trumping was somehow contemplated in her Report, though she made no mention of it, was at best unconvincing.

Members of the Tribunal, there simply is no gateway for the application of Korean Law to this issue. As we understood it from opening, the genesis appears to be Rule 4 in Professor Douglas's book on investment law. That's on your Slide 11. And that rule--the principle of

that rule is that the law applicable to an issue relating to the existence or scope of property rights comprising investment is the municipal law of the host State, including its rules of Private International Law.

So, two observations:

The first, it's not the applicable rule. This is not about the existence or scope of property rights. It's about who owns property and whether the asserted owner, indeed, has any capacity. But even if we look--even if we assume for the sake of argument that this rule is applicable, it doesn't point exclusively to Korean Law. It says, "municipal law including its rules of Private International Law." And I would submit that is not controversial.

So, what do the Korean rules of Private International Law tell us? We heard a lot from both experts on Article 16, but its text, I would respectfully submit, is clear; that corporations and other organizations are governed by the law applicable--the applicable law of their place of establishment. And that mirrors, of course, the position of many other jurisdictions.

It is also the case that the Supreme Court of Korea has confirmed the exclusive nature of that Article; i.e., that it has no exceptions. It is generally applicable. That is the rule of general capacity.

Now, a rule that might have been the one to advance to the Tribunal was also in Respondent's materials, is in the record. It's Rule 8: "The law applicable to the issue of whether a legal entity has capacity to prosecute a claim before an investment tribunal is the lex societatis." So, again, in effect, the same rule that we're seeing, the Private International Law.

So, what rule tells us whether the "Fund" is capable of taking actions, capable of prosecuting a claim, capable, I would say, of owning a share? It's its law of incorporation, but it's also the answer to the question why the Limited Partner cannot assert a claim before an investment tribunal because under the Limited Partners law--the law that applies to the Limited Partner in the Fund, it is not entitled to pursue a claim, only the General Partner can pursue a claim.

There were many arguments made by the Korean--by Korea's expert about statutes which have special effect. They apply to particular circumstances, we would say with the greatest of respect, the Tax Act, the Capital Markets Act, the Civil Procedure Act. It has no bearing on the question who is the legal owner of the Shares.

We then had two arguments that are based on the relevance of registries or official forms, so the Shareholder Registry and the registration form. In our

view, the answer is pretty obvious as to both of those. The Shareholder Registry is not conclusive evidence of ownership; it could not be. Many instances in which it might be--there might be a mistake in it, there might be a fraud, so on and so forth. In any event, the Commentaries tell us that simply recording in the Shareholders' Registry the name of a purported owner does not create--does not create--a shareholding; it simply speaks to who has the right to exercise Shareholder rights vis-à-vis the company.

So it doesn't tell us who the owner is. It just tells us who, for the time being, can exercise rights vis-à-vis the Company.

So, as in many cases, the road sort of begins and ends and comes back to the Chorzów Factory case, and we would really say, urge you to consider that your guiding principle in your deliberations. It is hard to overstate, we would say, the significance of the outcome in this case. We are, in fact, talking about structures used by half a global industry; and its effects will be felt in reality, not just in this Treaty but for similarly worded treaties. So the Tribunal will need to have the highest degree of confidence the Respondent is right.

To uphold the Respondent's objections, you will need to, in our submission, read into the Treaty words and restrictions that simply are not there. There are many

examples of treaties which specifically include particular requirements, particular carve-outs. Treaty Parties know how to express their consent.

You will have to decide the prior awards confirming standing, jurisdiction of General Partners in similar fact circumstances are wrong. You will have to decide that perhaps billions, if not trillions of dollars of assets have either two legal owners or none. You will have to prefer interpretations and characterizations which don't, in our submission, reflect any sort of commercial reality, which undermine the way in which entire industries have been planned and structured, the consequences of which will ripple throughout the investment community and to those who have placed their faith in it.

Yet, the outcome for which we argue is consistent with this seminal guiding principle of full reparation. We are asking for the opportunity to receive that reparation and the chance to quantify it at an appropriate stage in the proceedings as is fair.

Full reparation is your guide. It is the reason why we can advance in these proceedings; otherwise, you are, in fact, going against the Occidental and Chorzów Decisions by ignoring the critical distinction between ownership rights and those who are more--that have rights more akin to a contractual creditor.

A ruling in Korea's favor, Members of the Tribunal, means shutting out a real investment in Korea made by real investors from the U.S. who have suffered real damage as a result of real criminal wrongdoing at the very highest levels of Government. To rule against a Party with a clear, legal title to $114 million's worth of Shares at the relevant date would be, in our submission, quite extraordinary, and we can only urge you to reject the objections for that reason.

Thank you.

PRESIDENT SACHS: Thank you very much, Ms. Lamb.

This is the end of this morning's session. And thank you for having delivered your closing arguments. The Tribunal will have questions, but I think we should have our break to prepare them, and we would suggest that we meet again...

(Pause.)

PRESIDENT SACHS: 3:00, we would say.

All right. So, see you then at 3:00.

MS. LAMB: Mr. Chairman, perhaps even off the record, might we just inquire what the Tribunal's expectations are, therefore, at 3:00?

PRESIDENT SACHS: What are your expectations?

MS. LAMB: Your expectations of us.

PRESIDENT SACHS: No, the Tribunal will wish to

pose certain questions to both of you, having heard your Closing Arguments, and having heard all the evidence during these two days-and-a-half, and we would expect this to last for an hour or so, and then we will have to discuss the further steps in the proceedings.

MS. LAMB: So, we will be having a Q&A, if I can put it that way?

PRESIDENT SACHS: Yes. Yes, that would be the term.

MS. LAMB: Thank you.

ARBITRATOR GLOSTER: I think both sides will just be grilled, won't they?

MS. LAMB: I was being polite.

PRESIDENT SACHS: All right.

(Whereupon, at 1:14 p.m., the Hearing was adjourned until 3:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT SACHS: All right, ladies and gentlemen, a short "questions and answers" session as we have announced. Do you want to go first?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR GLOSTER: I've got a question of the Respondents, please, and it relates to the Treaty, the FTA.

I'm not sure I'm clear as to the basis of your argument that there is a requirement for a Claimant to have a beneficial interest, and I'd be interested to know whether you base that on some general purpose of construction of the Treaty? I know you base it on some cases, but do you say we should imply it into the terms of the Treaty? What are your interpretation bases for making this argument?

MR. FRIEDLAND: Yes, we believe you can derive that from the ordinary meaning of 11.16.

ARBITRATOR GLOSTER: Okay, can we go there. Can we have that on the screen. Which words or phrases are you relying on?

MR. FRIEDLAND: Yep. It's from the first--it's from the opening and the closing.

ARBITRATOR GLOSTER: I've got it at CLA-23.

MR. FRIEDLAND: It's on your screen now?

ARBITRATOR GLOSTER: Yes.

MR. FRIEDLAND: Okay. So, first, Dame Elizabeth, the Claimants, the first category, so we have two categories of claims; the second one is irrelevant, so we're in the first category; right?

ARBITRATOR GLOSTER: Yeah.

MR. FRIEDLAND: Okay. So, in the first category, the Claimant has to be submitting a claim on its own behalf. I think that reasonably implies that it's not on behalf of someone else, and that reasonably implies that it is for its own interest, its own entitlement, and this is what international law calls its own "beneficial interest."

Now, that language is reinforced by the language in 1(a)(ii), that the Claimant--that Claimant has incurred loss or damage. So, if it's the LP that has incurred loss or damage, that's not the Claimant having incurred loss or damage. Likewise, it's not a claim on behalf of the Claimant.

So, to us, Dame Elizabeth, this language--these two passages reinforce one another and state that there has to be a "beneficial interest." Now, "beneficial interest" is the international label that it's given, it has to be on its own behalf or its own loss or damage. So, it's not necessarily a teleological construction; it's an ordinary-meaning construction.

Now, as you know--and I don't think you're

inviting me to get into it--we also submit that this is an accepted principle of international law.

ARBITRATOR GLOSTER: Yeah, yeah, I know what you say on the cases. I just wanted to be clear whether we should really be looking at this Article 11.16.1 of the Treaty or whether I should go searching about in other provisions of the Treaty as well.

MR. FRIEDLAND: Well, if you should, then we've missed it.

ARBITRATOR GLOSTER: Right, okay.

MR. FRIEDLAND: But for us it's the ordinary meaning of 11.16.

ARBITRATOR GLOSTER: Right. The other--moving on to another point, I wanted to put to you the insolvency model.

Now, I'm not necessarily referring to the facts of this case, but assume a structure like the one we have here where, as we know, the General Partner and the General Partner alone can incur obligations to third-party creditors, so let's assume for the sake of argument that the General Partner incurs a liability to a bank, raises money from the bank to buy a building or some other asset for the Partnership. Assume because of horrific losses and excessive expenditure the Partnership becomes insolvent, the Exempted Partnership becomes insolvent. But, prior to

its insolvency, it has, in fact, obtained or got the benefit of a claim under the Treaty.

Now, in those circumstances, what is your submission about the interest, if any, that you say the General Partner would have in recovering in the treaty claim? I mean, the General Partner, we know, is under an obligation on its own behalf to discharge the debts and liabilities. In my hypothetical example, the assets of the Partnership or what's left of them are not sufficient to do that. However, if the claim already made--the treaty claim already made--comes home, the ship comes home, there will be enough assets to pay off the creditors of the Partnership, so the General Partner won't himself or itself have to put its own assets on the table to discharge those debts.

Now, would you say that the clear commercial economic interests of the General Partner in getting in the claim is part of its beneficial interest, is part of some equitable interest to have the assets appropriately managed so that it can discharge its own liabilities of General Partner? How do you fit in the "insolvency model" hypothetical into your analysis?

MR. FRIEDLAND: It's undeniable that the GP there has some exposure and has an exposure to discharge the debts, so the GP there would apply--

ARBITRATOR GLOSTER: Sorry, can I just add one more thing to my hypothetical, which is even if the treaty claim is brought home--I mean, there's a full recovery on it--there won't be enough to provide for the General Partner's incentivization payment, so the 20 percent has disappeared in a puff of smoke. No hope of that, but a clear commercial interest to get in the proceeds of the treaty claim to pay off the debts?

MR. FRIEDLAND: I think there's no way to deny there that the GP would have an exposure and would be obliged to apply that award to discharge its own obligations.

You know, you've come up with a hypothetical that's not our case, that's not the GP claiming in the Samsung Shares for its own interest, and, you know--I understand the logic of what you're saying, and I don't see how we can extrapolate from that to a beneficial interest in the Samsung Shares.

ARBITRATOR GLOSTER: Okay. So, are you saying that, in those circumstances, in that hypothetical, there is no claim, available claim, by the General Partner at all because he can have--sorry, it can have no interest in any surplus assets? Are you saying, in those circumstances, the claim disappears or no claim can be made?

MR. FRIEDLAND: You're leaving your insolvency

model now?

ARBITRATOR GLOSTER: No. I'm on the insolvency. What do you say is or is not the interest of the General Partner in the insolvency situation? Because it seems to me you you've either got to say there remains no interest because there is no equity interest in the surplus because there isn't any surplus, or you've got to cross something different, and I'm just interested, because it seems to me to be relevant to apply an insolvency model to the sort of situation one has with these funds.

MR. FRIEDLAND: My colleague is whispering to me something, and I'm happy to be whispered to.

ARBITRATOR GLOSTER: Take your time.

MR. FRIEDLAND: But, you know, we distinguish the situation where there's a discharge of liabilities from an allocation in the liquidation or insolvency situation of benefits.

(Pause.)

MR. FRIEDLAND: And it's clear that when we're talking about liquidation of benefits, you get it in proportion to your entitlement, and then you look at your beneficial interest, but...

(Pause.)

MR. FRIEDLAND: So, the point is being made here--and I might well ask them to articulate it if I don't

articulate it the right way, that in the scenario you're painting, there would be an award on behalf of the Partnership, and then the Partnership would pay off the Partnership's debts.

ARBITRATOR GLOSTER: What I'm asking--we know, under Cayman Law, that the Partnership--it's agreed under Cayman Law, the Partnership is not an entity as such, it's not a separate legal entity. But what I'm interested in is what you say is the interest, if any, of the General Partner in the hypothetical, and does it have an ability to claim on its own behalf under the Treaty?

(Pause.)

MR. FRIEDLAND: I think I have no further answer to make.

ARBITRATOR GLOSTER: Thank you very much.

Ms. Salomon, I don't know which of the two of you is going to be answering it, but I'd be interested to have your analysis of the insolvency hypothetical as well.

MS. SALOMON: We think that insolvency hypothetical is exactly on point because it illustrates what's wrong with Respondent's argument, that because the General Partner did not get an Incentive Allocation in 2015 it's somehow incapable of articulating a claim. That seems to go to a notion that, if it had a loss with regard to the Shares, but it also had other losses, it's essentially--has

just a compounded loss and, therefore, there is no claim, and that can't be.

If, for example, there is a loss of two with regard to the Shares and there is a loss of four with regard to other assets, one certainly would be in a better position to have negative four than negative six. And the reason is that the loss carries over to the following year under the Partnership Agreement so that the consequences of the loss are felt in future years. That carry-forward is the loss.

So, we say the insolvency model is exactly what to look at. If the only asset that the General Partner had was this claim and it recovered, then it would be entitled to the recovery of this claim, and then if--and that's the answer there. It's an exactly apt model to show the absurdity of their position.

MR. FRIEDLAND: Can I follow up on that?

So, I think the answer brings us back to what the claim is before you. The answer was just articulated entirely in light of the Incentive Allocation. That is the interest that they assert here. So, we're eliminating 80 percent, and they say they have an Incentive Allocation of something up to 20 percent, and you know the evidence before you on it. You know they got zero. We're going to get zero regardless of how the Samsung Shares performed in

2015. So, now we're talking about a prospective entitlement, in years after 2015, after the Valuation Date under Incentive Allocation, not claimed in the Notice of Arbitration, not mentioned by any of the Witness Statements, and their own fact witnesses said they're in a $720 million hole for future, so that's their claim. That's the beneficial interest they're asserting.

ARBITRATOR GLOSTER: Mr. Friedland, I know you said you didn't want to comment, but just going back to my example for a moment, if we may, my example assumes no profit incentive. Do you or do you not, or do Respondents or do they not, accept that General Partner has a sufficient interest, beneficial, equitable interest, in the insolvency hypothetical I've articulated to bring a claim or to continue with a claim, and to get a hundred percent recovery?

MR. FRIEDLAND: Right. So, one of the issues with your hypothetical, Dame Elizabeth, is that you have--you're positing a beneficial interest in the air untethered to any loss or date of loss, so it's a prospective beneficial interest that might happen over the next 10 years. They have a claimed loss here for 2015. And what's the beneficial interest that is accrued then?

ARBITRATOR GLOSTER: Okay. I think we're at cross-purposes. What I'm putting to you is, assume they're

never going to recover in respect of the incentive payment, they're never going to get that because the Partnership has deteriorated into loss.

And let's assume that they have--and I'm not talking about this case--there's a valid claim a month before the insolvency or the winding up or whatever the procedure is--the claim is started, the General Partner needs the recoveries of the claim to pay off and needs 100 percent of the recoveries to pay off the debts of the Partnership so that it doesn't have to do so. It clearly has the right as a matter of Cayman Law, to get in assets of the Partnership.

My question to you is: Do you say it does have a claim on its own behalf in those circumstances or not?

MR. FRIEDLAND: I think you've identified a situation where the GP itself was exposed to pay off all the debts.

ARBITRATOR GLOSTER: Yeah.

MR. FRIEDLAND: I think they have an interest in that hypothetical.

ARBITRATOR GLOSTER: Okay.

MR. FRIEDLAND: I do.

ARBITRATOR GLOSTER: Yeah.

MR. FRIEDLAND: How you get from that to an interest in this, I don't know.

ARBITRATOR GLOSTER: And this is an equitable interest or beneficial interest, which is it?

MR. FRIEDLAND: It sounds to me like--

ARBITRATOR GLOSTER: Or is it a legal interest with some consequences?

MR. FRIEDLAND: I don't know. I don't know. It sounds to me like a--what?--it's exposed to a loss, I don't want to give away anything by identifying whether it's a beneficial interest or an economic interest or an entitlement, but you can see I'm basically saying yes to your hypothetical.

ARBITRATOR GLOSTER: Thank you.

Ms. Salomon, Ms. Lamb, before the adjournment, said when dealing with the 100 percent-20 percent point that it was--I think she said, but I haven't checked on the Transcript--that it was agreed by the Cayman experts that any recoveries from a claim under the Treaty, whether they were 100 percent or 20 percent would have to be or would be held on trust and would be--would have to be divided in the appropriate percentages between the Limited Partner and the General Partner.

If you're right and the Claimant, on its own behalf, is bringing a claim, why would it be the case that if the Decision was that it was only 20 percent that could be recovered, that would have to go into the trust pool and

be held on trust as to 80 percent for a Limited Partner and 20 percent for General Partner?

And also, could you give me the reference, the paragraph references in the two Cayman reports which deal with this issue, just for the record.

MS. SALOMON: Yes. We will provide the reference to the evidence yesterday, where the Experts agreed.

ARBITRATOR GLOSTER: It was agreed, was it? I know--

MS. SALOMON: It was agreed.

ARBITRATOR GLOSTER: Mr. Lindsay expressed the view, but I would just like to know where it was agreed.

MS. SALOMON: And it's agreed because the language of the statute provides that the General Partner holds the asset on trust for the General Partnership, and so the issue has become, you know, is this a trust that's similar to the Blue Bank situation, the bare trust, where there is a Delegation of Authority but the Trustee holds no underlying interest in the assets.

And so, the back and forth between the Parties and the Expert had been--you know, is this a trust akin to Blue Bank or not? There is no dispute with regard to the language of the statute and the way in which the General Partner--the role of the General Partner in the Partnership. In this instance, the General Partner holds

the assets on trust for the Partnership in the context in which the General Partner is a Partner of the Partnership, so it's not holding the assets on trust for a third party. It's holding the assets on trust for itself; that's how it's framed.

And what does it hold in terms of its interest in the asset? It holds, without dispute, the legal title, and it holds the indivisible beneficial ownership and the economic interest, which is, indeed, a separate question: Is that 20 percent of the Net Profits? So, it is--and the Net Profits, as we've described, gets allocated in a context akin to an earn-out.

So, what does it hold on trust? It holds on trust the assets of the Partnership, but it's not just entitled to the 20 percent because, as the General Partner holding the assets on trust for the Partnership in which it is also a Partner, it has both the legal title and the full beneficial title--in other words, the full bundles of rights to the asset.

ARBITRATOR GLOSTER: Thank you very much.

MS. SALOMON: To respond to the question about the record for the evidence of the Parties' agreement, it's yesterday's Transcript on Page 303 from the top, where there is the response from Ms. Reynolds and then a response from Mr. Lindsay to the questions regarding that phrase "on

trust."

ARBITRATOR GLOSTER: Thank you.

And this is in the Experts' Reports, as well?

MS. SALOMON: I don't believe so.

The language Ms. Reynolds provides at the top of 303 is: "It's not beneficially entitled to the entirety of the proceeds. It's going to account for it in a way that it has to under the LPA, the Partnership Agreement for any other income."

ARBITRATOR GLOSTER: Thank you very much.

ARBITRATOR MAYER: I have the same question, so you have already answered, and I turn to the Respondent.

Assuming that the Tribunal was to consider that the General Partner can claim only for, let's say, we assume 20 percent--its 20 percent, hypothetically--interest in the loss, and so granted damages on that basis. What would become of the damages received and would have--would they have to be shared or essentially given to the Limited Partner?

MR. FRIEDLAND: Well, I have two comments. One is if, in your situation, it was identified in your Award as the Incentive Allocation that is the GP's beneficial interest, it is not clear to me that if the GP and an LP then got together that that would have to be allocated to the LP.

Now, second, what happens after your Award is an internal JV matter, or internal Limited Partnership matter in this case, and this is exactly what was addressed in the Occidental Dissent and in the Blue Bank--no, Impregilo--Impregilo Case. And I gave you those quotations in the opening. What you can do is you can make an award to the extent of the beneficial interest, in our submission, for the Claimant before you, and what that Claimant does afterwards you can't control. And you particularly don't want the situation where the money goes to an unprotected investor.

ARBITRATOR MAYER: Thank you.

Now two questions to Claimants.

MS. SALOMON: Can I just respond to your question as well?

ARBITRATOR MAYER: Yes.

MS. SALOMON: There isn't a circumstance in which the General Partner can pursue a claim only for 20 percent of an asset to the extent it can be valued in that way. The General Partner is not entitled to pursue a claim separate from its role as General Partner in the Partnership.

It's important to note that the Limited Partner has independent Directors. There's no such contractual relationship here where they have given up the opportunity.

We submit they wouldn't be able to because they would be giving up their right to the--and the Directors then would be not fulfilling their fiduciary duties to the Limited Partnership had they given up the right to pursue that claim.

To the extent there is discussion on Occidental, we can address that--

MR. FRIEDLAND: Let me just follow on that, then. We use 20 percent as a shorthand. We're talking about to the extent that you made an award of the performance fee. That is the beneficial interest of the GP, so 20 percent is a shorthand. We're not talking about 20 percent--your Award wouldn't be 20 percent of the value of the Samsung assets. Your Award, should they ever prove it, which they are very, very, very far from, would be for the performance fee.

MS. SALOMON: Let's be clear. This is not a fee. The terminology of a "fee" is a payment. And as Mr. Lindsay made clear yesterday, the Incentive Allocation is taxed as a capital gain. The only way in which the Incentive Allocation could be treated as a capital gain is if there is an increase in value of an underlying asset rather than a payment of income. And the fact that it's treated as a capital gain illustrates the point that there is an actual equity interest in the underlying asset.

So, a performance fee is essentially a pejorative term and an inaccurate term to describe the Incentive Allocations.

ARBITRATOR MAYER: My question, and I think Dame Elizabeth's question, was based on what your example that you had given with a figure of 20 percent that was the basis.

Would you also think that if the Tribunal were to grant the General Partner, the Claimant, damages for loss of reputation, that would also have to be divided, or what would be the outcome of these damages?

MS. SALOMON: Any of the damages that the General Partner has suffered in connection with its role as General Partner of the Partnership would be the damages that would be considered the loss related to this asset, so there is--to answer the question directly, there is no conceivable way in which this--the General Partner pursuing the Claim for--in its role as General Partner of the Partnership could keep any portion of the recovery other than as it must be allocated under the Partnership Agreement.

ARBITRATOR MAYER: Thank you.

I don't know if you--

MR. FRIEDLAND: Well, it seems to me the implications of that might be that there can't be

reputational harm to the GP itself claiming on its own behalf, but I will leave it at that.

ARBITRATOR MAYER: A last question.

In the Partnership Agreement, if we go to Article 3.2--

MR. FRIEDLAND: 3.02?

ARBITRATOR MAYER: 3.02, "Authority of General Partner." I won't read the relevant words because it's a very long provision.

"The General Partner shall have the power by itself on behalf"--and it is on these words--"on behalf and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnerships, and that includes, without limitation"--and then there's a list. And at the end of the list there is (n): "Commence or defend any litigation or arbitration involving the Partnership or the General Partner in its capacity as General Partner."

But it seems to me that I have understood that in this arbitration the General Partner is acting on its own behalf while in the Agreement it says "on behalf and in the name of the Partnership."

So, can you explain?

MS. SALOMON: I think, (n) envisions a variety of circumstances, for example, as was discussed yesterday, the

Partnership could be named a Party in court litigation, and that would be understood as to the implications of naming the Partnership in such context. So, if there is a litigation or arbitration in which the Partnership has been named, then the General Partner is obligated to defend such litigation or arbitration.

Here, the General Partner is pursuing the Claim in its capacity as General Partner of the Partnership, so we would submit that (n) encompasses and envisions a variety of circumstances in which the General Partner may be named as a Party, the Partnership may be named as a Party. It doesn't change the fact that the General Partner is not pursuing the Claim separately, but confirms the fact that it's pursuing this arbitration in its capacity as General Partner of the Partnership.

ARBITRATOR MAYER: But does it pursue this claim on behalf and in the name of the Partnership or in--because at the beginning of your Opening Statement, you mentioned that the Respondent had not understood your position and that, in fact, you were--the Claimant was claiming on its own behalf. So...

MS. SALOMON: Certainly.

This is explained in Mr. Lindsay's Supplemental Report, so that's CER-2 in Paragraph 7, and he states: "RR"--Rachel Reynolds--"and I agree that the ELP Law

provides that the General Partner is the only person with capacity to conduct legal proceedings in respect of the Partnership assets. RR opines that the Partnership Agreement is consistent with this principle: Authorizing the General Partner to conduct proceedings 'in the name of the Partnership.'"

And then it goes on to state: "The General Partner does not conduct proceedings in the name of the Partnership." He explain--and to--"It does so in"--

ARBITRATOR MAYER: That's Mr. Lindsay?

MS. SALOMON: Mr. Lindsay's Report.

It says: "The General Partner does not conduct proceedings in the name of the Partnership. It does so in its own name in its capacity as General Partner."

ARBITRATOR MAYER: Okay. That's what she says, but--

ARBITRATOR GLOSTER: No, I think that's what he says.

PRESIDENT SACHS: He says.

ARBITRATOR MAYER: He. Oh, sorry, he says.

But still, I have my question: Is the General Partner bringing the claim in the name and on behalf of the Partnership here?

MS. SALOMON: Our position is set out in Mr. Lindsay's Supplemental Report, Paragraph 5-B, where

it's--

ARBITRATOR MAYER: Okay. I will read it, then. Thank you.

Has the Respondent anything to--any comment?

MR. FRIEDLAND: Well, if the Claimant here is acting as--is bringing a claim as GP, which they say it is, rather than as a Mason Management LLC, that means it's acting as the Partnership trustee, and under Section 3.02(n), it's not doing that in its personal capacity. It's acting on behalf of and in the name of the Partnership.

ARBITRATOR MAYER: I have no other question.

MS. SALOMON: I think it's a--just, if I may, it's a fiction or a misnomer to state that it's in the name of the Partnership. There's no such concept here. The only way in which the General Partner can pursue the claim is in its own role. The General Partner pursuing its claim in its role as General Partner of the Partnership. It's not pursuing a claim in the name of the Partnership.

MR. FRIEDLAND: We agree with that.

ARBITRATOR GLOSTER: Yeah. Yeah.

Can I go back?

Ms. Salomon, could I just ask you, do you see a tension between, on the one hand, the General Partner acting in his capacity as General Partner, as it is

required to do under the Act and as Mr. Lindsay says--he says, as you've just pointed out in 5(b): "The General Partner acts in its own name, and in that capacity is properly the only Claimant."

I think what's--you're being--well, at least what I'm asking you about is whether there is a tension between that role as described by Mr. Lindsay and, on the other hand, the requirement of the Treaty that the General Partner should be acting on its own behalf. In other words, how do you square "acting on its own behalf," on the one hand, which we know is the requirement of the Treaty, and acting in the capacity as described in the Deed and in the Act?

MS. SALOMON: Dame Gloster, we see no tension there whatsoever because the General Partner in bringing the claim in its own behalf in its role as General Partner of the Partnership is bringing the claim in respect of the Partnership assets with regard to its own interest with--in respect of those assets.

So it is not bringing a claim on behalf of a third party. It's bringing the claim with regard to its own interests.

PRESIDENT SACHS: And what is its own interest in respect of those assets, as you've just said two times?

MS. SALOMON: The General Partner has legal title,

which is undisputed, and it has unseparable beneficial interest with regard to the assets. So that is the General Partner's interest in the Samsung Shares, is a legal title and beneficial title in interest to the Shares.

PRESIDENT SACHS: And you say "inseparable" because of your theory of indivisible property?

MS. SALOMON: And the Experts do not disagree with regard to an indivisible beneficial interest. It is Respondent who has moved away from a claim or an argument that there must be a beneficial interest and now focus on an economic interest. There is a distinction, and that distinction is highlighted in the way in which the Occidental Case recognizes that if there is a separation of legal title and beneficial interest, that is something for which a Treaty claimant cannot claim.

But if there is unity of legal interest and beneficial interest, and yet there is a separation of future economic interests, there is an express recognition that had the Agreement at issue in that case been structured in that way, it would be something that the Treaty claimant could have pursued. Indeed, it recognizes that in the languages had it structured its Agreement in that way, there would not be an issue.

And the way this is--what was described in Occidental is essentially a right, as my colleague,

Ms. Lamb, described, to future earnings with regard to energy.

So, for example, a basic way in which you have future economic interests, without calculating an Incentive Allocation, is an earn-out. That is used as a classic model in merger and acquisition agreements. Rather than having a fixed-price payment at the time of the Agreement, you have a right to future profits of some percentage. So, in essence, the seller is willing to take a lower price at the time of the Agreement with an expectation of future earnings having made a calculation of the likelihood of receiving that and maybe a potential upside.

That's the very scenario that the Tribunal--the Annulment Committee in Occidental and the underlying case was considering would have been something that would be distinct from a separation of legal title to beneficial title. In other words, a Claimant has the full bundle of rights, but not--but a recognition that future economic interests will have to go to a third party, and the Annulment Committee was clear that that--had the Parties structured their agreement in that fashion, that is not a claim on behalf of a third party that might run afoul of Chorzów, and that is exactly what we have here; and that is why there is a clear distinction between a unity of legal title and beneficial interest, which the General Partner

has when it holds the assets, and a concept of a future, distinct economic interest that gets calculated.

There is an agreement, the Partnership Agreement, that sets out how future profits will be allocated. And, in essence, the General Partner has that obligation to distribute the future--a percent of the future profit to the Limited Partner. That obligation or what may remain as, in shorthand, the 20 percent Incentive Allocation, cannot be considered to be a claim on behalf of the Limited Partner because it is an economic interest for the future. It's a very distinct concept from the full bundle of rights, and the cases relied upon by Korea do not have that circumstance.

The Parties are aligned to say look to Occidental to say the answer--what is the answer here, and the case makes the very distinction that we're referencing, and that is on all fours in this case.

MR. FRIEDLAND: Okay. The essence of what we've just heard is that there is a unity here between legal ownership and beneficial ownership. But their own expert says, and says repeatedly, there is a complete disunity here between legal ownership and beneficial ownership. He says this notion of "indivisibility" and he says explicitly the GP's beneficial interest is only its Incentive Allocation.

MS. SALOMON: To be clear--

PRESIDENT SACHS: That's Slide Number 1 of the Respondent's closing?

MS. SALOMON: Yes.

And what Mr. Lindsay is saying is that the calculation of the economic interest is distinct. The unity of the--what he has said is that the fact that the General Partner is entitled to an Incentive Allocation means that the General Partner has an indivisible beneficial interest at the time it is holding the assets. When you're asked to then calculate the economic interest, you're not measuring the beneficial interest.

So, to say that it then has--you measure the economic interest of the Incentive Allocation to make that an express, divisible 20 percent is simply wrong, and Ms. Lamb's illustration of a painting is clear. We see indivisible interest in a variety of circumstances. The most common in the United States is when married couples hold property. They each own 100 percent. Then there is a division at some point, and that, then, is when there is a calculation. But it cannot be said that they each own 50 percent when the law is clear that there is an indivisible interest.

MR. FRIEDLAND: So, to quote--may I?

PRESIDENT SACHS: Um-hmm.

MR. FRIEDLAND: I just--to quote again Lindsay, their own expert, Slide 4. Slide 4 is more on point: "It is absolutely clear from the Agreement what the GP is economically entitled to. It's economically entitled to the Incentive Allocation." That is its beneficial interest in the sense we're using that term here.

And so I guess the idea on the Picasso painting is yes, it's owned by two partners, and one is an American Partner and one is a Cayman Partner, and they each have a 50 percent interest, but on some level it's indivisible also that a tribunal empowered under the U.S.-Korea Treaty would give 100 percent to the American--even though it only owns 50 percent--it's never going to happen.

MS. SALOMON: So, let's look at the language, if we're really parsing out what Mr. Lindsay said. He said it's absolutely clear from the Agreement what the General Partner is economically entitled to. "Economically entitled to." So, it's economically entitled to the Incentive Allocation. That's its beneficial interest "comma" in the sense we're using that term here. If you're using the term "beneficial interest" to mean "economic interest," then that is how you calculate it, by referring to the Incentive Allocation, but you are being asked to look at the beneficial interest as a bundle of rights.

The whole line of questioning is in the context of

the Respondent's position of what is the General Partner economically entitled to. And even their own expert draws a distinction between the beneficial interest and the economic entitlement.

PRESIDENT SACHS: I think we've been over this before, but thank you, nevertheless, for having clarified your positions.

Any further questions?

ARBITRATOR MAYER: No.

ARBITRATOR GLOSTER: No.

PRESIDENT SACHS: So, that is the end, then, of the question-and-answer session. Thank you very much. Again, this was helpful.

We now have to discuss how to further proceed because there will be the--the proceedings will be--will continue in any event because we have a Claimant 1, obviously, who was not subject to the Preliminary Objection phase.

May we first hear Claimants, what your expectations are?

MS. SALOMON: Our expectation is that there's a determination by the Tribunal as to whether the claim brought by the General Partner may proceed, and then we move on to the next phase of the case.

PRESIDENT SACHS: Yes.

The same?

MR. FRIEDLAND: I think so.

PRESIDENT SACHS: The same.

And as long as we have not decided, the proceedings remain suspended under the rules. So we will apply our best efforts to render a decision quickly, but obviously we have to give this some thought.

I can't really say how long it will take us, but again, we will try to be efficient and give it priority.

And once we've rendered the Decision, we should have a phone call at least or a meeting in which we will discuss the further proceedings, meaning Procedural Calendar for the subsequent phase. Probably you would contact each other to prepare this so that we do possibly not need to meet in person, but at least we should have a telco to discuss this further.

Right. Is there anything else that you would like to raise?

MR. FRIEDLAND: Nothing on this side.

MS. SALOMON: Nothing on this side.

PRESIDENT SACHS: May I get back to the red flags that we had discussed yesterday. Are there any remaining concerns about those red flags?

MS. SALOMON: No issues remain with regard to those issues.

PRESIDENT SACHS: Thank you. That is appreciated.

Then we thank all of you for an efficient and professional conduct of these proceedings. We thank, of course, David for his super job; our two assistants, and the Interpreters, if they are still around--no, I don't see them.

For those who have to travel, safe journey back to your respective home countries, and we will see each other possibly in a year from now, so good luck.

MR. FRIEDLAND: Thank you.

MS. SALOMON: Thank you.

(Whereupon, at 3:55 p.m., the Hearing was concluded.)

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.

DAVID A. KASDAN