

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

PCA Case No. 2018-55

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In the Matter of Arbitration Between: :

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

Claimants, :

and :

THE REPUBLIC OF KOREA, :

Respondent. :

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HEARING ON PRELIMINARY OBJECTIONS, Volume 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 SABANOĞULLARI

Assistant to the Tribunal:

MR. MARCUS WEILER

Court Reporter:

MR. DAVID A. KASDAN

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C O N T E N T S

	PAGE
WITNESSES:	
PROFESSOR JAE YEOL KWON (resumed)	
Continued cross-examination by Mr. Han.....	431
Redirect examination by Mr. Kim.....	454
CLOSING ARGUMENTS:	
ON BEHALF OF THE RESPONDENT:	
By Mr. Friedland.....	456
By Mr. Nyer.....	471
By Mr. Han.....	484
By Mr. Nyer.....	487
ON BEHALF OF THE CLAIMANTS:	
By Ms. Lamb.....	488
QUESTIONS FROM THE TRIBUNAL.....	517

P R O C E E D I N G S

1
2 PRESIDENT SACHS: So, I think we are all set.
3 Good morning, ladies and gentlemen. This is Day 3 of the
4 Hearing on Preliminary Objections, and we will now move on
5 with the expert testimony of Professor Kwon.

6 PROFESSOR JAE YEOL KWON, CLAIMANTS' WITNESS, RESUMED

7 PRESIDENT SACHS: So, counsel, please proceed.

8 MR. HAN: Thank you, Mr. Arbitrator.

9 CONTINUED CROSS-EXAMINATION

10 BY MR. HAN:

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

13 A. Not really.

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

16 A. Yes.

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

21 A. Yes, that is correct.

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

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

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

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

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

13 A. Yes, that is correct.

14 Q. So, for example, let's say there is a regulation
15 for Company A that cites the maximum level of shares that a
16 foreign investor can hold in this company is 50 percent.
17 That means that the Cayman Fund cannot exceed the
18 50 percent shares for this Company A; is this correct?

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

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

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

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

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

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

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

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

22 A. Yes.

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

1 Do you see that?

2 A. Yes.

3 Q. Could you refer to Paragraph 50.

4 A. Yes.

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

10 Do you see that?

11 A. Yes.

12 Q. Is this content what you personally wrote?

13 A. Yes, that is correct.

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

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

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

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

1 A. Yes, they are subject to this regulation.

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

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

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

13 Q. Article 168.

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

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

1 an example that I'm asking you about.

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

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

8 A. Yes.

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

11 A. Yes, I believe so.

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

15 A. Yes, that is correct.

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

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

25 Q. My question was not asking whether there was a

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

6 A. I believe they would have to.

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

11 A. That is correct.

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

18 A. Yes, that is correct.

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

25 A. No. That is not true.

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

3 A. Yes, it is possible.

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

6 A. Yes.

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

13 A. Yes.

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

18 A. Yes, it is possible.

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

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

1 translation, and this is Number 6 on this page.

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

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

12 Q. Now I would like to rephrase my question.

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

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

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

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

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

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

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

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

5 A. Yes.

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

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

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

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

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

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

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

5 A. Yes. And this is my belief.

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

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

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

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

22 A. Yes.

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

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

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

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

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

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

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

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

24 A. Yes.

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

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

6 A. It is not possible.

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

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

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

17 A. Yes, that is correct.

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

20 (Interpreter confers with the Witness.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 A. No, they cannot.

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

15 A. Yes, I would think so.

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

19 A. Yes.

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

22 A. Yes.

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

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

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

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

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

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

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

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

23 (Overlapping speakers.)

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

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

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

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

11 MR. HAN: Yes, thank you.

12 BY MR. HAN:

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

17 A. Okay.

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

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

24 Q. Yes.

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

1 question that was asked previously.

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

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

5 BY MR. HAN:

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

9 A. Yes, it's correct.

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

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

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

17 A. Yes.

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

21 A. Yes.

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

25 A. Yes.

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

3 A. Yes, that is correct.

4 (Pause.)

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

6 A. Yes.

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

10 A. Yes.

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

13 A. Yes.

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

18 A. Yes.

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

22 A. Yes, I believe so.

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

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

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

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

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

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

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

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

1 A. Yes.

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

8 A. Yes, I believe so.

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

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

15 Are you aware of this?

16 A. Yes.

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

20 A. Yes, I'm aware.

21 MR. HAN: No more questions.

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

25 Any questions in redirect that would be triggered

1 by the cross-examination?

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

5 PRESIDENT SACHS: Yes.

6 REDIRECT EXAMINATION

7 BY MR. KIM:

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

12 A. Yes, that is correct.

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

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

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

25 BY MR. KIM:

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

5 A. No, it cannot.

6 MR. KIM: I have no further questions.

7 PRESIDENT SACHS: Thank you, Mr. Kim.

8 Do we have questions?

9 ARBITRATOR MAYER: No.

10 ARBITRATOR GLOSTER: No, I don't.

11 PRESIDENT SACHS: We have no further questions.

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

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

19 THE WITNESS: Thank you.

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

22 (Witness steps down.)

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

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

1 second with my co-counsel?

2 PRESIDENT SACHS:

3 MR. FRIEDLAND: Yes, certainly.

4 (Pause.)

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

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

9 MR. FRIEDLAND: Yes.

10 PRESIDENT SACHS: Very good.

11 (Brief recess.)

12 PRESIDENT SACHS: Sorry for the delay.

13 Respondent, the floor is yours for the Closing
14 Argument.

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

17 (Pause.)

18 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 "It's absolutely true to say the GP cannot look to
22 an asset and say because of my indivisible interest, I'm
23 100 percent interested in that particular asset."

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

1 beneficial interest in the Partnership?"

2 Reynolds: "I would say no."

3 Lindsay: "No, it doesn't."

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

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

15 Reynolds: "Exactly."

16 Lindsay: "That's correct, yes."

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

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

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

8 And the same notion of proportionate capital
9 balance, Capital Account balance, as used elsewhere in the
10 LPA to determine how assets are allocated between the
11 Partners. Section 4.06 talks about Net Profits and Losses
12 being allocated in proportion to Capital Accounts. Section
13 4.09 says the distributions are to be made in accordance
14 with each Partner's fraction, which means each Partner's
15 proportion of Capital Account balance, and Section 10.04
16 says that if the Partnership is wound up, assets are
17 distributed in proportion to the Partner's then respective
18 capital accounts.

19 Now, Reynolds's approach actually could give the
20 GP a greater beneficial interest than Rolf Lindsay's
21 approach. Rolf Lindsay's view, as we're about to get to,
22 is that the GP's beneficial interest is only the Incentive
23 Allocation. In theory, under Rachel Reynolds's view of the
24 LPA, the GP could have much more than a conditional
25 20 percent interest, depending upon what was in its Capital

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

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

7 So, you see with me:

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

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

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

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

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

19 "A couple of hundred thousand dollars?"

20 "If at all."

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

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

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

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

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

16 So, on Mason's own case, the GP had at most a
17 20 percent beneficial interest in the possible profit that
18 Mason expected to make or says it expected to make from the
19 Samsung Shares. On Mason's own case, the GP's standing and
20 legal entitlement could be no more than 20 percent of the
21 amount claimed.

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

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

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

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

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

18 "Roughly."

19 So, this means that the Partnership had to recoup
20 that 720 million before the GP could earn an Incentive
21 Allocation. So, even if the Partnership had earned the
22 \$200 million profit from Samsung, as Mason alleges in its
23 Notice of Arbitration it should have earned in 2015, the GP
24 still would have gotten zero Incentive Allocation in 2015.

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

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

10 And it's not as if Mason has offered evidence for
11 its entitlement to an Incentive Allocation in 2015, and
12 we're arguing that its evidence isn't enough. The debate
13 about how much is fairly needed at this bifurcated stage
14 doesn't arise in our context. Mason hasn't tried to prove
15 the GP's entitlement to an Incentive Allocation. Incentive
16 Allocation is not even mentioned in the Notice of
17 Arbitration. Mason's own witness on cross definitively
18 disproved an entitlement to the Incentive Allocation for
19 2015, and these are standing facts that are to be resolved
20 at this "bifurcated objection" stage, and these standing
21 facts can easily be resolved based on what you have.

22 Now, there's a suggestion in the Rolf Lindsay
23 Report about lost Incentive Allocations for years after
24 2015.

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

1 the Notice of Arbitration.

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

4 Third, the facts to date make it entirely unlikely
5 that the GP would have earned an Incentive Allocation in
6 2016, given the \$720 million hole.

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

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

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

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

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

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

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

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

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

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

5 Two responses:

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

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

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

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

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

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

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

1 Cayman entity not protected by the FTA.

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

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

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

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

24 PRESIDENT SACHS: Thank you, Mr. Friedland.

25 Mr. Nyer, please.

1 MR. NYER: Thank you. Good morning.

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

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

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

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

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

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

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

12 And if you follow me to the next slide, we also
13 know that--it's a point that Mr. Friedland has touched on
14 in his part of the opening, we also know that the General
15 Partner was regularly, every January of each year,
16 withdrawing from its Capital Account whatever performance
17 fee the Incentive Allocation it would have earned in
18 previous years. And we know that as a matter of fact for
19 2014 Mr. Satzinger testified that any amount that would
20 have been earned as performance fee for 2013 would have
21 been substantially withdrawn in January of 2013--2014,
22 sorry. And then we've also heard that whatever was left
23 was essentially a rounding error, if anything was left.

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

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

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

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

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

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

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

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

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

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

1 risk and demonstrate that it has done so."

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

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

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

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

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

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

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

21 And then he told us in the next paragraph that, by
22 June 2015--that is the time immediately after the
23 announcement of the intended Cheil merger--Mason's direct
24 investment in Samsung Electronics had grown to about KRW
25 133 billion.

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

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

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

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

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

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

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

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

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

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

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

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

1 holding--the position had been liquidated by then.

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

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

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

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

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

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

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

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

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

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

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

25 If you follow me to the next slide, we have

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

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

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

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

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

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

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

1 Samsung Electronics Share for several months, started
2 buying again, the date on which the GP bought the SC&T
3 Shares. And what we know from the record--and we know it
4 from the documents on Slide 24, and we also know it from
5 the Notice of Arbitration--it's not a disputed fact--is
6 that on June 4th, 2015, the very day when the GP all of a
7 sudden stopped selling out of its position in Samsung
8 Electronics and all of a sudden bought into SC&T was the
9 day Elliott Management announced that it would oppose the
10 merger, but it had built up a significant position in SC&T,
11 7.1 percent. And you can--that data point is available in
12 the document C-9, which is referred on the slide.

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

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

1 the SC&T merger.

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

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

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

21 PRESIDENT SACHS: Thank you, Mr. Nyer.

22 Mr. Han, please.

23 MR. HAN: Thank you.

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

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

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

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

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

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

21 Let's move to the next slide.

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

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

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

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

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

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

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

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

8 Thank you.

9 PRESIDENT SACHS: Thank you, Mr. Han.

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

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

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

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

6 Thank you.

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

9 PRESIDENT SACHS: Thank you very much.

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

12 MS. LAMB: Thank you.

13 PRESIDENT SACHS: Okay. Who will deliver the
14 closing?

15 MS. LAMB: I will.

16 PRESIDENT SACHS: You will, Ms. Lamb.

17 (Brief recess.)

18 PRESIDENT SACHS: Ms. Lamb, are you ready?

19 MS. LAMB: Thank you, yes.

20 Am I good?

21 COURT REPORTER: Yes.

22 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Thirdly, in addition, the GP did make its own
18 contribution to the Investment. It's that very
19 considerable know-how, goodwill, planning, the analysis,
20 the decision-making, that culminates in the investment
21 expertise and strategy in which clients choose to invest on
22 which the entire industry is premised, and to which the
23 market ascribes real value, in this case specifically,
24 20 percent of relevant fund performance. Without the GP,
25 there would and, indeed, could have been no investment.

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

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

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

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

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

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

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

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

1 flip over one more page.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 So, at 198, what we learned from the Annulment
16 Committee is that, in this Farmout Agreement that effected
17 the transfer, as regards what was being transferred, it was
18 the ownership of 40 percent in the complete bundle of
19 rights and obligations which formed Occidental's legal
20 position under that contract, and not just certain rights
21 deriving from them. In the Decision itself, 212 through to
22 215 but significantly at 213, the Annulment Committee made
23 what we consider to be a very significant point, that OEP
24 and AEC could have structured their relationship as a "cash
25 against future oil transaction," as a simple sales

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

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

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

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

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

5 More significantly, if the Tribunal discounts the
6 General Partner's Award to 20 percent of actual loss,
7 ostensibly to reflect its "beneficial interest," all that
8 will not provide the General Partner even with full
9 compensation, and that is because the General Partner will
10 have to account contractually to the Limited Partner for
11 80 percent of it, and both Cayman Law experts agreed that
12 that was the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 So, two observations:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Thank you.

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

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

17 (Pause.)

18 PRESIDENT SACHS: 3:00, we would say.

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

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

23 PRESIDENT SACHS: What are your expectations?

24 MS. LAMB: Your expectations of us.

25 PRESIDENT SACHS: No, the Tribunal will wish to

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

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

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

10 MS. LAMB: Thank you.

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

13 MS. LAMB: I was being polite.

14 PRESIDENT SACHS: All right.

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

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

5 ARBITRATOR GLOSTER: Yeah.

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

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

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

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

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

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

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

10 ARBITRATOR GLOSTER: Right, okay.

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

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

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

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

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

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

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

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

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

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

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

25 MR. FRIEDLAND: You're leaving your insolvency

1 model now?

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

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

13 ARBITRATOR GLOSTER: Take your time.

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

18 (Pause.)

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

23 (Pause.)

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

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

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

12 (Pause.)

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

15 ARBITRATOR GLOSTER: Thank you very much.

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

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

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

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

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

17 MR. FRIEDLAND: Can I follow up on that?

18 So, I think the answer brings us back to what the
19 claim is before you. The answer was just articulated
20 entirely in light of the Incentive Allocation. That is the
21 interest that they assert here. So, we're eliminating
22 80 percent, and they say they have an Incentive Allocation
23 of something up to 20 percent, and you know the evidence
24 before you on it. You know they got zero. We're going to
25 get zero regardless of how the Samsung Shares performed in

1 2015. So, now we're talking about a prospective
2 entitlement, in years after 2015, after the Valuation Date
3 under Incentive Allocation, not claimed in the Notice of
4 Arbitration, not mentioned by any of the Witness
5 Statements, and their own fact witnesses said they're in a
6 \$720 million hole for future, so that's their claim.
7 That's the beneficial interest they're asserting.

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

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

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

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

4 And let's assume that they have--and I'm not
5 talking about this case--there's a valid claim a month
6 before the insolvency or the winding up or whatever the
7 procedure is--the claim is started, the General Partner
8 needs the recoveries of the claim to pay off and needs
9 100 percent of the recoveries to pay off the debts of the
10 Partnership so that it doesn't have to do so. It clearly
11 has the right as a matter of Cayman Law, to get in assets
12 of the Partnership.

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

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

18 ARBITRATOR GLOSTER: Yeah.

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

21 ARBITRATOR GLOSTER: Okay.

22 MR. FRIEDLAND: I do.

23 ARBITRATOR GLOSTER: Yeah.

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

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

3 MR. FRIEDLAND: It sounds to me like--

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

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

12 ARBITRATOR GLOSTER: Thank you.

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

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

1 be held on trust as to 80 percent for a Limited Partner and
2 20 percent for General Partner?

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

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

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

10 MS. SALOMON: It was agreed.

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

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

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

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

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

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

20 ARBITRATOR GLOSTER: Thank you very much.

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

1 trust."

2 ARBITRATOR GLOSTER: Thank you.

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

4 MS. SALOMON: I don't believe so.

5 The language Ms. Reynolds provides at the top of
6 303 is: "It's not beneficially entitled to the entirety of
7 the proceeds. It's going to account for it in a way that
8 it has to under the LPA, the Partnership Agreement for any
9 other income."

10 ARBITRATOR GLOSTER: Thank you very much.

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

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

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

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

12 ARBITRATOR MAYER: Thank you.

13 Now two questions to Claimants.

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

16 ARBITRATOR MAYER: Yes.

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

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

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

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

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

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

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

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

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

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

22 ARBITRATOR MAYER: Thank you.

23 I don't know if you--

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

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

3 ARBITRATOR MAYER: A last question.

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

6 MR. FRIEDLAND: 3.02?

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

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

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

23 So, can you explain?

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

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

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

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

22 MS. SALOMON: Certainly.

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

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

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

10 ARBITRATOR MAYER: That's Mr. Lindsay?

11 MS. SALOMON: Mr. Lindsay's Report.

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

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

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

19 PRESIDENT SACHS: He says.

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

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

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

1 it's--

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

4 Has the Respondent anything to--any comment?

5 MR. FRIEDLAND: Well, if the Claimant here is
6 acting as--is bringing a claim as GP, which they say it is,
7 rather than as a Mason Management LLC, that means it's
8 acting as the Partnership trustee, and under Section
9 3.02(n), it's not doing that in its personal capacity.
10 It's acting on behalf of and in the name of the
11 Partnership.

12 ARBITRATOR MAYER: I have no other question.

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

20 MR. FRIEDLAND: We agree with that.

21 ARBITRATOR GLOSTER: Yeah. Yeah.

22 Can I go back?

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

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

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

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

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

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

25 MS. SALOMON: The General Partner has legal title,

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

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

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

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

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

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

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

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

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

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

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

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

1 MS. SALOMON: To be clear--

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

4 MS. SALOMON: Yes.

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

13 So, to say that it then has--you measure the
14 economic interest of the Incentive Allocation to make that
15 an express, divisible 20 percent is simply wrong, and
16 Ms. Lamb's illustration of a painting is clear. We see
17 indivisible interest in a variety of circumstances. The
18 most common in the United States is when married couples
19 hold property. They each own 100 percent. Then there is a
20 division at some point, and that, then, is when there is a
21 calculation. But it cannot be said that they each own
22 50 percent when the law is clear that there is an
23 indivisible interest.

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

25 PRESIDENT SACHS: Um-hmm.

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

7 And so I guess the idea on the Picasso painting is
8 yes, it's owned by two partners, and one is an American
9 Partner and one is a Cayman Partner, and they each have a
10 50 percent interest, but on some level it's indivisible
11 also that a tribunal empowered under the U.S.-Korea Treaty
12 would give 100 percent to the American--even though it only
13 owns 50 percent--it's never going to happen.

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

25 The whole line of questioning is in the context of

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

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

8 Any further questions?

9 ARBITRATOR MAYER: No.

10 ARBITRATOR GLOSTER: No.

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

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

19 May we first hear Claimants, what your
20 expectations are?

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

25 PRESIDENT SACHS: Yes.

1 The same?

2 MR. FRIEDLAND: I think so.

3 PRESIDENT SACHS: The same.

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

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

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

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

19 MR. FRIEDLAND: Nothing on this side.

20 MS. SALOMON: Nothing on this side.

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

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

1 PRESIDENT SACHS: Thank you. That is appreciated.
2 Then we thank all of you for an efficient and
3 professional conduct of these proceedings. We thank, of
4 course, David for his super job; our two assistants, and
5 the Interpreters, if they are still around--no, I don't see
6 them.

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

10 MR. FRIEDLAND: Thank you.

11 MS. SALOMON: Thank you.

12 (Whereupon, at 3:55 p.m., the Hearing was
13 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