OPUS₂

Elliott Associates, L.P. v Republic of Korea

Day 5

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Opus 2 - Official Court Reporters

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1	Friday, 19 November 2021	1	Now, sir, was the threefold classification of State
2	(9.00 am)	2	organs that you told the tribunal about yesterday
3	PROFESSOR SUNG-SOO KIM (continued)	3	a classification that was suggested to you by others and
4	Cross-examination by MR PETROCHILOS (continued)	4	you were asked whether you could support it?
5	(Evidence given through an interpreter)	5	A. No, it's fully my work.
6	THE PRESIDENT: Good morning. It's the fifth day of the	6	Q. Thank you, sir. You testified that this threefold
7	hearing. Welcome to all.	7	classification is supported by what you call a plain
8	Any issues to be raised in terms of housekeeping,	8	reading of the Constitution. But this plain reading
9	Mr Petrochilos?	9	that you told us about is not one that, for example, the
L0	MR PETROCHILOS: Thank you, Mr President. It's not an issue	10	Constitutional Court has ever set forth in a decision.
L1	of housekeeping, but it's a related issue. It's an	11	Am I right about that?
L2	issue about the integrity of the transcript . Yesterday	12	A. The Constitutional Court of Korea has never instructed
L3	Professor Kim said something which he then directed our	13	on this threefold classification of government or State
L4	interpreter, having regretted what he said, not to	14	organs. That is the conclusion that I reached
L5	translate, as he said, so that it would not be in the	15	personally as a scholar based on Article 96 of the
L6	transcript .	16	Constitution as well as the Government Organization Act
L7	I now know what the witness said, it was a personal	17	that central administrative agencies that are
L8	comment directed at me. So I will not insist on it	18	established either by the Government Organization Act or
L9	being in the transcript. But it will be easier,	19	other individual Acts form one of these threefold
20	I respectfully suggest, sir, for all of us concerned if	20	government $$ State organs is, I believe, the inevitable
21	the witness be directed not to try to self -edit again	21	conclusion to be reached based on the Korean
22	and if our interpreters interpret what he says as	22	Constitution as well as Korea's positive law.
23	literally as possible.	23	Q. Thank you. You referred yesterday, Professor, to public
24	THE PRESIDENT: It is already on the record already, because	24	law professionals . Let us look at a document or a text
25	the hearing is being recorded, as I understand it. That	25	which I think emanates from public law professionals,
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1	was at least what we indicated in PO1. So it is on	1	subject to your views, of course.
2	record.	2	Can I ask you to turn to tab 45 of the documents you
3	MR PETROCHILOS: I'm grateful for that indication,	3	have been given. I believe it's in volume 2. This is
4	Mr President. I simply meant it as a way to move	4	exhibit SSK -54 . $\{G4/32/1\}$, page 1.
5	forward without any interruptions.	5	A. Would there be a Korean version of this available on the
6	THE PRESIDENT: Understood. Maybe just by way of a reminder	6	screen? $\{G4/32K/1\}$.
7	to everybody including Professor Kim that this hearing	7	Q. It has been done, as far as I can tell.
8	is being recorded, so whatever you say is part of the	8	So this is an extract of the Online Administration
9	record. So when you yesterday tried to cancel what you	9	Dictionary issued by the Korea Association for Public
LO	had said, please note that it is anyway on record	10	Administration. Let me pause here. Professor, is this
L1	because of the recording. I understand it was	11	a body of what you called yesterday public law
L2	interpreted simultaneously. Okay, very good.	12	professionals? Yes or no?
L3	Mr Turner, anything on the Respondent's side?	13	THE INTERPRETER: I'm trying to find the organisation, the
L4	MR TURNER: No housekeeping from us, sir.	14	Korean version of the organisation you've just mentioned
L5	THE PRESIDENT: So we'll go on, Dr Petrochilos.	15	on the Korean version of it.
L6	MR PETROCHILOS: Thank you, Mr President.	16	MR PETROCHILOS: It must be at the very top
L7	Good morning, Professor Kim. Thank you for	17	THE INTERPRETER: On the very top it only says "online
L8	continuing to be with us. Let me ask, and I think	18	administrative studies, electronic or online
L9	I know the answer to this question, but it's good to	19	dictionary". The institution that is the source of this
20	have it in the record: did you draft the expert reports	20	is not indicated on this Korean document.
21	yourself? I know they reflect your opinion, but my	21	MR PETROCHILOS: Madam, thank you for this. Let me see i
22	question is about whether others took the pen in	22	I can help.
23	drafting them or suggested wording to you.	23	This is an exhibit of Professor Kim's. So perhaps
24	A. No, not at all .	24	Professor Kim could tell us.
25	Q. Thank you, good to have that.	25	A. For me this appears to be an association or society of

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1	administrative law, not public law.	1	A. Here I read in the text actually an autonomous
2	Q. The administrative law is part of public law.	2	administrative organisation law or Act which refers to
3	A. (In English) Public administration — association for	3	the law that provides for the local autonomous
4	public administration $-$ not association for public law.	4	government organisations.
5	THE INTERPRETER: So to clarify, to correct the previous	5	Q. All right. We will come to see that.
6	translation, what he said was that it appears to be an	6	Can we go to the third paragraph, please:
7	association $$ a society of public administration, not	7	"The law on administrative organisation in the
8	public administration law.	8	supra-narrowly-defined version includes only the laws
9	MR PETROCHILOS: Thank you. Now, this is the entry,	9	regulating the administrative entities and agencies as
10	Professor, which is titled the "Law of Administrative	10	prescribed in the laws on national administrative
11	Organisation". It starts in the first paragraph with	11	organisation this scope excludes the portion
12	these words:	12	regarding the laws on autonomous administrative
13	"The law [on] administrative organisation refers to	13	organisation from the laws on administrative
14	the totality of laws pertaining to the organisation of	14	organisation in the narrowly defined version."
15	administrative entities . In other words, it refers to	15	Let me put a full stop here and ask the Professor.
16	law that determines administrative [agencies']	16	The evidence he gave to the tribunal yesterday about
17	establishment [abolition] composition, authorities,	17	entities being regulated and falling under the
18	and relationships with other administrative [agencies]."	18	Government Organization Act follows that which this
19	If we then come to the second paragraph:	19	paper describes as the supra—narrowly defined version.
20	"The law on administrative organisation may be	20	That's correct, isn't it?
21	divided by the scope of coverage into the law on	21	THE INTERPRETER: Counsel, I am very sorry, but I'm not able
22	administrative organisation in the broadly-defined	22	to actually identify the part of the passage that you
23	version, the law on administrative organisation in the	23	had read. I actually thought you had already read that
24	narrowly—defined version and the law on administrative	24	passage with the supra $-$ narrow because that's $$
25	organisation in the supra—narrowly—defined version."	25	THE PRESIDENT: He was referring to the fourth, not the
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1	Then it continues:	1	third paragraph.
2	"The law on administrative organisation in the	2	MR PETROCHILOS: It is the paragraph which is the fourth
3	broadly—defined version includes laws regulating	3	paragraph in the text.
4	administrative agencies' establishment, changes,	4	THE INTERPRETER: I was a bit confused because the word
5	abolition, composition, authorities, and relationships	5	"autonomous administrative organisation" does not appear
6	with other administrative agencies"	6	on the third paragraph, and that is why I thought he had
7	I pause here. Then we come to the third paragraph:	7	read already the fourth paragraph because his previous
8	"The law on administrative organisation in the	8	question was about the autonomous administrative
9	narrowly—defined version includes only the laws	9	organisation .
10	regulating the administrative entities and agencies as	10	MR PETROCHILOS: Forgive me. As I have it in the English
11	prescribed in the laws on national administrative	11	translation that was provided by Professor Kim, the
12	organisation and the laws on autonomous administrative	12	second sentence of the fourth paragraph includes the
13	organisation."	13	words "the laws on autonomous administrative
14	Let me pause here and ask you a question.	14	organisation".
15	Forgive me, madam. Mr President, perhaps as the	15	THE INTERPRETER: Yes, it does. Yes. Yes, it does.

"autonomous administrative organisation". As you told us yesterday, the NPS is an autonomous administrative $\ensuremath{\mathsf{NPS}}$

organisation; that's correct, isn't it?

MR PETROCHILOS: Thank you, Professor.

Professor was looking at the authentic text on his

screen, we don't need to have all of this translated

THE PRESIDENT: Can you perhaps indicate the paragraphs that

Dr Petrochilos read and he can read those on his own.

Now, my question. We just read the words

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into the record.

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exclusively defines State organs in the administrative

sense is based on what this text here defines as the

supra-narrowly defined version of administrative

THE INTERPRETER: Counsel, so let me point that out to the

Professor and then do you mind posing your question

MR PETROCHILOS: So my question was: the view that you

Organization Act is the Act which exhaustively and

testified to the tribunal yesterday that the Government

MR PARK: It is in the middle of the Korean.

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again?

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- 1 organisation law.
- 2 A. What we need to be careful here is that in full context
- 3 the administrative organisation that is being referred
- 4 to here in this document that you have pointed me is
- 5 actually discussing administrative organisations in the
- scope of the State, local governments and other 6
- 7 administrative organisations, whereas yesterday the
- testimony I provided regarding State organs -- yesterday 8
- 9 the testimony I provided regarding the government
- 10 organisation being threefold was limited to the state
- 11 administrative organisation that is based on Article 96
- 12 of the Constitution, the Government Organization Act and 13
- 14 Q. Thank you, Professor. Let us now turn to look at your 15 writings on the topic. Can I ask you to turn to the
- 16 document under tab 30, which I believe you will find in
- 17 volume 2. This is exhibit C-699. It's a paper by
- 18 Professor Kim published in the Pusan National University
- 19 Law Review in 2017. {C/699/1}.
- 20 A. Yes

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- 2.1 Q. I'm just identifying it for the record, Professor. It
- 2.2 is entitled "Governance Democratic Legitimacy and
- 2.3 Administrative Accountability Under the Administrative 2.4 Organization Law".
- 25 If we go to page 5, please, it's page 5 of the

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- Korean text and the second page of the PDF on our screen 1 2 in the English translation. $\{C/699/2\}$
 - Professor, you may wish to refresh your memory as
 - I'm reading this into the record. It says this: "In general, administrative organisation law refers to the legal establishment of the creation, abolition,
 - composition, and authority of entities that exercise administrative authority (ie administrative institutions) as well as the relations among
- 10 administrative institutions . Despite these abstract
- 11 definitions of the administrative organisation law,
- 12 because administrative organisations exist in various
- 13 forms, such as national administrative organisations,
- 14 local administrative organisations, public institutions,
- 15 etc. and each organisation's organisational and
- 16 operational principles differ significantly from one
- 17 another, providing a singular definition of the 18 administrative organisation law applicable to all these
- 19 organisations would be difficult." 2.0
- Now, let me establish one thing so that we're clear 21 between us. 'Public institutions' in this text includes 2.2 entities such as the NPS and KAMCO. That's correct, 23

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24 A. Correct.

isn't it?

2.5 Q. Secondly, you say in this paper that the law on

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

- 1 water management committee -- commission.
- Q. Perhaps I have missed something in the title of the 2
- 3 paper. Perhaps we can turn to page 1 of the exhibit and page 1 of the Korean text $\{C/699/1\}$.
- 5 The paper refers to the Administrative Organization
- 6 Law which is the Act that you have been telling us about 7 yesterday as a very important statute in Korea.
- 8 A. You mean --
- 9 (In English) No, no, no, not at all.
- 10 Q. It is not at all very important as a statute in Korea or
- 11 is it not at all important in this paper? I'm trying to
- 12 understand your answer.
- 13 A. Well, this paper that we're looking at has nothing to do
- with the threefold government organisation structure 14
- 15 that we discussed vesterday or in this case. This paper
- 16 actually deals with National Water Management Commission
- 17 which is a type of representative government agency that
- 18 is governed under the Framework Act on National Water
- 19 Management.
- 2.0 $\ensuremath{\mathsf{Q}}.$ Thank you. We have your answer.
- 21 I'm still on the topic of that which you call in 2.2
- this paper a singular definition.
- 23 Let us be clear on one point for the discussion 2.4
- going forward. You told us yesterday that the concept 2.5 of State organ that international law has is not used in

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1		Korean law. I believe this is at page 142, line 25 to	1	mind showing that on the screen just for accuracy's
2		page 143, line 1 of the transcript $\{Day4/142:25\}$.	2	sake?
3		So you I believe are using the concept	3 (. No difficulty at all . It's tab 12 in volume 1, exhibit
4		guk-ga-gi-gwan which has been rendered in the English	4	$\{C/88/6\}$ we are looking at page 6 in the exhibit.
5		version of your report sometimes as State organ and	5	I believe in the Korean version it's page 3. $\{C/88K/3\}$
6		sometimes as governmental agency. I'm correct about	6	So article 26, paragraph 1, as we have it in the
7		that?	7	English translation in the official compilation, is in
8	Α.	Is it correct that you've actually posed me two	8	paragraph 1 saying this:
9		questions? The first one was that it is difficult to	9	"All citizens shall have the right to petition in
10		singularly define administrative organisation law, that	10	writing to any governmental agency under the conditions
11		was one question.	11	as prescribed by Act."
12	Q.	That was not one question. That was not a question at	12	And so the $$ forgive me, madam $$ and so the wo
13		all . My only question is whether I am right in	13	"agency" here in the authentic Korean text is
14		understanding that you use in the English version of	14	guk-ga-gi-gwan; that's correct, isn't it?
15		your reports the term "State organ" to refer to the	15 A	. So yes, it does say here "guk-ga-gi-gwan" in the Korea
16		concept in Korean law of guk-ga-gi-gwan. It's	16	version of Korea's Constitution.
17		a yes—or—no question.	17	To comment on this shared official English version
18	A.	Would you mind showing me a part of my report where	18	that the parties have been using, even though, as you
19		I use that term?	19	have just told me, it says "governmental agencies", my
20	Q.	Certainly. If we come to your first report, sir, which	20	personal opinion would be perhaps 'governmental organs'
21		is SSK -1 , in the record it is G2/1 page 21, for example.	21	would have been a better wording of that English
22		Paragraph 11 is a better paragraph. $\{G2/1/6\}$ So this is	22	version .
23		in your binder, tab 1 in volume 1. You have your full	23	If I may add my opinion regarding this article and
24		report.	24	your suggestion, even though, yes, it says
25		If you turn to page 4 at paragraph 11 which is now	25	"guk $-$ ga $-$ gi $-$ gwan" in the Korean version of Constitution
		13		15
1		on your screen, you will see it says:	1	Article 26, paragraph 1 which you say reads "government
2		"State organs under the Korean legal system are	2	agencies", the Article 26, paragraph 1 says that any
3		classified into three categories"	3	national has the right to submit a petition in writing
4		This was your threefold categorisation yesterday.	4	to this governmental agency as stipulated in law, and
5		And it says state organs in sub—paragraphs (a), (b) and	5	the law that is mentioned here takes form in the
6		(c) and what I wanted to be clear on is that here the	6	Petition Act of Korea.
7		authentic text in Korean uses the term "guk-ga-gi-gwan"?	7	So if you go to the Petition Act of Korea, it
8	Δ	Correct.	8	actually specifies a very wide scope of agencies or
9		Thank you. Now, correct me if I am wrong, Professor,	9	bodies that are — that receive or must receive or
10	φ.	this is the term, guk—ga—gi—gwan, that consists of two	10	people can submit petitions to, including the State,
11		words. It's a composite word. And so "guk-ga" means	11	local autonomous government, as well as organisations,
12		state or nation, as I understand it, and "gi-gwan" means	12	legal corporations, the subordinate institutions under
13		agency. That's correct, isn't it?	13	these legal corporations, as well as private parties,
14	А	The latter part of that word of course may mean an	14	private persons that have either been commissioned,
15	,	agency, but I would say that the word "organ" would	15	entrusted or delegated power by State or local
16		actually refer to a larger scope because the word	16	government agencies.
17		"agency" would correspond more towards the	17	So I would suggest that the best way of
18		administrative agency in the sense of a haengjeong	18	understanding the accurate meaning of guk—ga—gi—gwan
19		cheong which is the other Korean word we've been	19	governmental agency/organ mentioned in Article 26,
20		discussing, whereas organ would actually be a broader	20	paragraph 1 of the Korean Constitution, would be to
21		concept that would include the agency.	21	carefully examine not only the constitutional article
22	O.	Thank you. So the term "guk—ga—gi—gwan" is also used in	22	itself, but also the Petition Act that practice —— that
23	٩.	Article 26 of the Constitution; that's correct, isn't	23	is based on that constitutional article. And the
24		it? The right of petition?	24	Petition Act actually prescribes a very wide scope of
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bodies and institutions that are subject to this

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

- 1 petition and I would like to add a few more comments.
- 2 Q. Professor, we will come to look at the Petition Act
- 3 later, I hope. So my question was a little more
- 4 limited. I'm grateful for your answer.
- Can we please turn to Article 111, which is page 23, 5
- 24 of the pdf in the English text, and 11 in the Korean 6 text {C/88/24}.
- 8 THE INTERPRETER: Are we still on the Constitution?
- 9 MR PETROCHILOS: Yes, madam.
- 10 Q. Is that the Constitutional Court section?
- 11 A. Indeed. Professor, can I direct your attention to 12 Article 111 paragraph 1:
- 13 "The Constitutional Court shall have jurisdiction
- over the following matters.' 14
- 15 And then paragraph 4:
- "Competence disputes between ..." 16
- 17 I pause here. I don't want to say the English term
- 18 because I'm not interested in the English term. What
- 19 follows in Korean is guk-ga-gi-gwan; is that correct?
- A. Yes, it does say between guk-ga-gi-gwan. 20
- 2.1 Q. Thank you. Can I ask that we turn now to page 17 of the
- 2.2 document which is 18 of the English pdf $\{C/88/18\}$. 2.3 I trust we will find the Korean version as well. It's
- 2.4 article -- just above Article 86 which I have in mind.
- Thank you.

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

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- 21 each executive ministry shall be determined by Act."
- 2.2 A. Yes.
- 23 Q. This executive ministry that we read in English in
- 2.4 Korean it is Bu; is that correct?
- 2.5 A. Yes, it says "Haengjeong gak Bu".

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

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

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

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

- 19 Q. Thank you. Since we have the Constitution before us. 20 can we look at Article 97, please. It's still on your 2.1 screen. I hope it's still on your screen in the Korean 22 version as well.
- 2.3 A. So that's the Board of Audit and Inspection?
- 2.4 Q. That is correct. And it says this:
- "The Board of Audit and Inspection shall be

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- established under the direct jurisdiction of the President to inspect and examine the settlement of the revenues and expenditures of the State, the accounts of the State and other organisations specified by Act and the job performances of the executive agencies and public officials ."
- I pause here.
 - Madam, forgive me. You don't need to translate that because the Professor can see it.
 - The term "executive agencies" here, Professor, reads in the Korean authentic -- correct me if I am wrong -haengjeong gi-gwan; is that correct?
- 13 A. Yes, correct, he confirms.
- 14 Q. Thank you. And you testify in your reports that the NPS 15 is subject to the jurisdiction of the Board of Audit and 16 Inspection?
- 17 A. Of course.
- 18 Q. Thank you. I'm changing on to something slightly 19 different .
- 2.0 You say that local governments are to be 21 characterised as State organs within your conception of 2.2 what a State organ is; that is correct?

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

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

- 3 Q. Well, I'm asking for the Professor's opinion on why
- 4 local governments are not characterised as State organs
- in his conception, to which he said "absolutely not". 5
- So what is the reason why not? 6
- 7 A. Then can we go to Constitution Article 107?
- Q. Yes, we can indeed, and 107 is at page 23 of the English 8 9 $pdf \{C/88/23\}.$
- 10 A. Excuse me. 117
- 11 Q. I would have thought that's what you want. That is at page 26 of the English pdf on the same exhibit, which is 12 13 exhibit C-88 {C/88/26}.
- 14 A. Well, here we are looking at chapter 8, Korea
- 15 Constitution, which is about local government autonomous
- 16 local government, and we're looking at Article 117
- 17 thereunder. Even though Korea as a State is not
- 18 a Federation, similar to Germany, and even though Korea
- 19 is therefore a single State, Korea does recognise local
- 20 autonomy. It provides local governments within Korea
- 2.1 the right to manage its own finances, its own
- 22 legislation, as well as its own administration, and this
- 23 local autonomy provided to local governments are
- 2.4 actually a very important part of the Korean
- 25 Constitution. The Korean Constitution recognises the

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

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

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

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

government entities are a separate legal personality. 19

- Q. Thank you, Professor. Again, shifting gears to 2.0 something slightly different, still in the Constitution, 21 Article 34, please, page 8 of the English pdf, and
- 2.2 page 4 of the Korean text. $\{C/88/8\}, \{C/88K/4\}.$
- 23 Yes, Article 34?
- 24 Q. Yes. indeed.

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2.5 A. I'm looking at it.

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Q. I'm starting at paragraph 2:

"The State shall have the duty to endeavour to promote social security and welfare."

If we turn to the next page, please $\{C/88/9\}$, paragraph 5:

"Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act."

Now, Professor, let me ask you, this is an important question, and it's a question of public law. The State funds the national pension programme through the pension fund, as you know, which is administered by the NPS.

If the NPS manages the fund poorly and the fund doesn't have the necessary resources to pay out the pensions that it needs to pay, can the State say these were all decisions taken by the NPS? We don't have money to pay out pensions this year. Some people will not be paid

Can the State say that or is it a duty of the State to fund the pension system?

A. Well, of course such a situation should not occur preferably, but since, as you have posed me a hypothetical, if that does occur, primarily it would lie with the NPS and the NPF which are the entities

identified under the National Pension Act to provide the finances for the national pension programme to be liable for that situation.

I do understand that you have pointed me to Article 34, paragraph 2 of the Constitution, which says that the State has the obligation to -- I would like to emphasise the word "endeavour" to provide for social security and welfare, and there is this word expression "endeavour" used with -- so the expression "endeavour"

So if the State faces a situation where the National Pension Fund has been depleted, it says under the Constitution that the State would need to endeavour to continue to provide, which means that at that point I would assume that the Korean State would consider its overall fiscal situation and consider other fiscal needs that the State needs to provide for, such as not only the pension programme, but other welfare programmes, education, national defence, and because of the word "endeavour" I would think that after considering its fiscal situation and other programmes it needs to fund with it, if possible the State would provide additional financing to the NPS if its financial situation, fiscal situation, at that point allows.

So it would not be a simply legal issue because,

first of all, the expression "endeavour" is used in the Constitution. At that point in the situation that you suggest I would assume that various government organs, including the Ministry of Economy and Finance, Ministry of Welfare, would get together and consider and discuss the situation and that would actually create quite a political process in addressing the issue.

So I would not agree with your reading that because of Article 34, paragraph 2 of the Constitution, if the National Pension Fund is suddenly depleted, the State would be obligated to immediately support or supplement that fund regardless of its other fiscal needs and conditions. That would be an extremely simplistic view and reading of the Constitution because it's not only an issue of the Constitution, but also it would be a very serious political process, I think, at that point if that situation actually occurs.

Q. Thank you. Professor, thank you for this very full

Let me ask the question in simple terms, if I may. Look at paragraph 5, please, of Article 34. Now that you have Article 34, paragraph 5, in mind, my question to you is: if the National Pension Fund is for some — God forbid —— reason depleted, can the government say: we have no liability to fund State pensions; yes or no?

A. I would not say it would have absolutely no liability ,
 but I also think the premise of your question is
 incorrect.

Well, the reason why I said the premise of your question is incorrect is because if you do read paragraph 5 that you have pointed me to, it says that the State should protect the citizens that have —— that are not able to provide their own —— provide for their own livelihood due to disability, disease, old age and other various reasons which has actually nothing to do with the National Pension Programme, the National Pension Programme which would be closer to paragraph 2 of Article 34 of the Constitution, there's actually a benefit that is paid to subscribers to the National Pension Programme, that have paid their contributions on a monthly basis.

So the State's obligation regarding paragraph 5 is actually supported by other bodies of law such as the elderly protection law, the child protection law, as well as the basic livelihood protection laws of Korea. So under those laws, if a Korean citizen finds him or herself unable to provide his or her own livelihood, under these laws the State would provide protection, but that would be separate from the National Pension Programme.

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- Q. Thank you, Professor. Moving on to something slightly
 different, let us look now at the case of the Bank of
 Korea. You have considered the Bank of Korea in your
 reports.
- 5 A. Do you mind showing the part of my report that I deal 6 with?
- 7 Q. We will do all of that in order. Let us turn to the Act 8 on the Bank of Korea. It's exhibit C-534, volume 2 of the binder, at tab 29 $\{C/534/1\}$.
- 10 A. I'm looking at it.
- 11 Q. So this is the Bank of Korea Act. Let me ask you to 12 turn to the first page of the Act in the English text 13 $\{C/534/2\}$. Thank you.

I start with Article 2, juristic personality. I'll read it out, Professor, in English, and you may wish to read the authentic Korean text:

"The Bank of Korea shall be a special juristic person without capital."

Now, your evidence is that -- your expert opinion is that the Bank of Korea is not a State organ guk-ga-gi-gwan under Korean law. That's correct, isn't it?

23 A. Correct.

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Q. And you say that because of this reason that we justread, that it is a separate legal person?

A. That is one of the reasons. What is more important is the fact that Bank of Korea, like many other central banks, essentially needs to maintain its independence, especially as it enforces or implements monetary policies as well as interest rate policies of Korea, and that is why it is critical that the Bank of Korea remains free from various political influences.

So rather than it being significant in the fact that it recognises Bank of Korea having its own legal personality, the importance is in the fact that the independence of the Bank of Korea from the government and the State is provided for here.

Currently Korea is going through a run—up to a presidential election, and various candidates wanting to become President are mentioning various programmes that they propose that would probably require State resources. And against such movement, political movement, the government, for example the Ministry of Economy and Finance, as well as the —— economy of finance needs to provide a check and balance against these attempts to drain Korea's financial resources, and the Bank of Korea would also need to maintain its independence, reach its own decisions, for example regarding currency issues, so as to prevent excessive inflation by random issuing of currency.

So I would say that it would be too naive a view to say the Bank of Korea is not a State organ because it has its own legal personality, given the reasons why it is provided with a separate legal personality. It is similar to the Federal Reserve Board in the US, having separate powers from the US Government for the same reasons.

Therefore, my view of Article 2 of the BoK Act is that it is not an article that actually seeks to create the legal personality of the BoK, but actually it's an article that confirms and affirms such independence of a central bank.

- Q. Thank you, Professor. Do I have it right that the Bank
 of Korea, because it has separate legal personality,
 cannot be designated as a central administrative agency;
 yes or no?
- 17 A. (In English) Yes. Yes, yes.

(Interpreted) Yes, correct. It is not a central administrative agency, nor is it a public institution that is designated by the Minister of Strategy and

- Q. Thank you. Can it be designated I'm not saying
 whether it should but can it be designated as
 a public institution?
- 25 A. My view is that it cannot.

So to answer your question once again I would say that it cannot be designated as a public institution and I would say that even though public institutions are provided —— are entities that have their separate legal personalities, and are granted certain scope of independence and autonomy, as we discussed at quite length yesterday, public institutions or entities that are designated as public institutions are subject to a certain degree of supervision and oversight by, for example, the competent minister.

So if we assume a situation where the BoK is designated as a public institution , it would probably be then put under the supervision of the Ministry of Economy and Finance, and, for example, in that case, if the minister wants to have interest rates lowered because he actually thinks that there is a need to boost up the economy, the question is —— serious question is whether, for example, the Bank of Korea and the Finance and Currency Commission under it that oversees the monetary policies would be able to maintain its independence free of such political —— such supervisory pressure coming down from the minister.

The fact that the Bank of Korea is not a part of the State organ, nor has been designated as a public institution, is actually the expression of the

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1	collective intelligence of the Korean people who see it
2	critically important to maintain independence in the
3	operation of its central bank.

- 4 Q. Thank you, Professor.
- 5 A. And so there is no need or room for further discussion of that issue.
 - Q. Thank you, Professor, for this very full answer.

Can I move on, please, with the Act. Let us look at Article 1, which is the purpose of the Bank of Korea. It is -- I read from paragraph 1-- to contribute to the sound development of national economy through price stabilisation through the establishment and execution of efficient monetary and credit policies.

I pause here. Would you characterise price stabilisation and the efficient monetary and credit policies as an activity which —— I'm using the terms of your report —— is generally one that is governmental in nature?

A. Yes, generally that would apply, but I do feel the need
 to provide additional explanation about the overall
 Korean legal framework, starting from the Constitution.

The Constitution does place with a State various tasks, mandates that the State needs to perform. These are public mandates and tasks, including welfare, economic growth, as well as stable inflation.

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Even though these are public tasks and State tasks that the Constitution places with the State, the question of how to go about and perform these tasks are then to be stipulated in laws.

For example, if we take public education, which I believe you will agree is a very important State task, that is required by the State -- by the Constitution.

The question is how to go about and perform this education service to its people as required. It could be through a State school system or it could be through a private school system. It could be either/or both, and so that would actually be then determined at the law level

So because education is an important public task, the legislation, legislative body would go about and provide for how to implement that State task, whether it's through the national school law or through a private school law or either/or both. So there will be flexibility at the law level of how these State and public tasks placed with the State is performed.

The same would go to the currency and the -- the currency and the inflation policies that you've mentioned. That is also an example of an important State task, and whether to go about performing that as directly by the State organ or through a public

institution or by an entity that is independent, and 2 either a State organ or a public institution is 3 something that is determined by the Consitution and 4 legislative body which actually originates its powers 5 from the people, because Korea is a country that recognises that the source of the State power lies with 6 7 the people, and because there is no way for the people 8 to perform or realise their power directly, that is why 9 Korea provides for a legislative body, the National 10 Assembly, and it is always through the decisions of the 11 legislatures that this is stipulated by law.

12 Q. Thank you, Professor. I have your answer.

I am asking you questions about the Bank of Korea Act. I will be grateful to you if you answer my questions based on this specific Act to which I'm directing you for now.

- 17 A. Back to -- yes, back to the Bank of Korea, what was your question about the Bank of Korea Act?
- 19 Q. Exactly my point.

Let's pick it up again from Article 1. Professor, I have not asked you a question. I suggest that you please look at Article 1.

Article 1 says that:

"The purpose of this Act is to contribute to the sound development of national economy by establishing

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the Bank of Korea and seeking the price stabilisation through the establishment and execution of efficient monetary and credit policies."

I'm stopping here and my question to you is this: is this an activity which is governmental in your view; yes, no, or would you prefer not to take a view?

- A. It is governmental.
- 8 Q. Thank you. I want to direct your attention to
 9 Article 4, paragraph 2, which is still on the same page
 10 in the English version. {C/534/2}. It says this:
 11 "The Bank of Korea shall value the market mechanis

"The Bank of Korea shall value the market mechanism in performing its monetary and credit policies."

I want you to have this provision in mind as we turn to look at another provision now which is at page 21 of the pdf, Article 68. Can we also have the Korean text up, please? $\{C/534/21\}$

Article 68 says this. As you are reading the Korean text, I'm reading for the record the English text:

"The Bank of Korea may sell, buy, lend, and borrow the following bonds in open markets on its own account in order to implement monetary and credit policies as determined by the monetary policy committee."

Then if we come to paragraph 3.

"Other marketable securities determined by the monetary policy committee."

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1		Pausing here, now that you've looked at the	1	MF	R PETROCHILOS: Thank you, sir.
2		provision, Professor Kim, is this selling, buying,	2		Professor, you're ready?
3		lending and borrowing bonds a governmental activity in	3	A.	Yes.
4		your view; yes, no, or would you prefer not to express	4	Q.	I'm shifting gears on to something else. We will now
5		a view?	5		discuss about quasi government public institutions.
6	Α.	I do agree that at a broad sense, in a broad sense, it	6		Can I ask that you turn to exhibit $C-278$ which is in
7		is indeed a governmental activity, but I would not agree	7		volume 2 of your materials. $\{C/278/1\}$. Now, this
8		if you are trying to therefore then lead on to the	8		document is a press release issued by the Ministry of
9		connection that this is a government agency.	9		Economy and Finance. 24, forgive me for that. It's
10	Q.	Thank you, sir. Can we now turn to page 25 of the	10		tab 24 in volume 2.
11		English pdf text $\{C/534/25\}$, Article 82. This is about	11	A.	Yes.
12		foreign exchange activities and it says:	12	Q.	So this is a press release issued by the Ministry of
13		"The Bank of Korea may perform the following	13		Economy and Finance at the end of January 2018.
14		business after obtaining authorisation from the Minister	14		It's issued by the Director of System Planning in
15		of Strategy and Finance:	15		the Department of the Public Policy Bureau. And as you
16		"1. Foreign exchange business and foreign currency	16		will see in the box which follows under the heading, the
17		holdings;	17		heading of the document is "Designation of Public
18		"2. Receiving deposits from foreign financial	18		Institutions for 2018". You will see that:
19		institutions, international financial organisations,	19		"The Ministry of Economy and Finance finalised the
20		foreign governments and their agencies, or the United	20		designation of public institutions for 2018 through
21		Nations;	21		deliberation and decision by the Public Institution
22		"3. Selling and buying precious metals."	22		Management Committee"
23		Now that you've looked at this, is this kind of	23		Let me ask you: do you know if this Public
24		business or activity, as it's described here,	24		Institution Management Committee has criteria which they
25		governmental activity, yes or no, or would you prefer	25		follow in designating an entity as a public institution
		37			39
1		not to express a view?	1		and thereafter in classifying it in one of the several
2	Α.	Broadly, once again, this would be governmental	2		categories of public institutions?
3		activity . The government needs to operate a monetary	3	Α.	Well, I don't know exactly, and I do not think this was
4		policy. A State cannot forsake its monetary policy. So	4		addressed in my report, but if I try to answer your
5		the monetary policy has to be implemented and these are	5		question within the knowledge, the broad knowledge that
6		activities necessary to implement a government's	6		I have of this, my understanding on how, under the Act
7		monetary policy.	7		on the Management of Public Institutions, the Committee
8		So yes, this would be a government activity, but	8		designates or releases public institutions is as
9		once again I would not agree if you're attempting to	9		follows . Broadly they are classified on the number of
10		then say that because of this, the BoK is either	10		employees $-$ which demonstrates an institution's size $-$
11		a government institution or a State institution .	11		and whether an institution's own revenues are over 85% ,
12	MI	R PETROCHILOS: I'm grateful, Professor. Forgive me,	12		that is, the ratio of its $\operatorname{self}-\operatorname{generated}$ revenues. I do
13		Mr President. Now this would be a convenient time for	13		not know precisely.
14		a break for me, if it is convenient for the tribunal.	14	Q.	No, forgive me. Forgive me. We have the answer so far
15	TH	HE PRESIDENT: Yes, it is. It's very good timing, 10.30.	15		on record. Professor, my question was: do you know if
16		We have going on for an hour and a half. So let's break	16		this committee has criteria? Is the answer to that
17		for 15 minutes. Professor, I should remind you, you're	17		question "I do not know exactly"?
18		still under examination. So I would ask you not to	18	A.	I don't know exactly, correct.
19		speak with anybody about your testimony. Thank you very	19	Q.	Thank you. Did you care to find out if this committee
20		much.	20		has criteria?
21		We will resume at 10.45.	21	A.	Well, I have already answered and why are you stopping
22	(10	0.31 am)	22		me from answering the question? Because I was about to
		(A short break)	23		describe the criteria .

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 $\ensuremath{\mathsf{Q}}.$ If the Professor knows that there are criteria that have

been published in a document, that is what my question

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(10.46 am)

THE PRESIDENT: Okay, let's resume, Dr Petrochilos.

1		is . And so what I'm asking you, Professor, is: did you	1		a public institution and implement strict management
2		care to investigate whether this committee has published	2		evaluation such as having at least one person within the
3		or adopted written criteria , a set of criteria , for	3		public corporation/quasi government body management
4		making these designations? That is my question.	4		evaluation group participate in the evaluation.
5	Α.	So if your question is whether —— if I exerted efforts	5		"The Financial Services Commission will report its
6		to investigate such criteria, my answer would be no.	6		implementation performance to the PIMC and the PIMC will
7	Q.	Thank you. We have, I believe, some indication of the	7		designate the Financial Supervisory Service as a public
8		criteria if we turn to page 2 of the English text. I'm	8		institution in 2019 if the implementation results are
9		not sure where it is on the Korean document. It is	9		unsatisfactory ."
10		a bullet point which starts with the words "in this	10		Professor, having seen these observations here or
11		PIMC" which means the committee, the Public Institution	11		conclusions by the PIMC, it seems to me $$ disagree if
12		Management Committee. Can you find it, madam, and	12		you will $$ that the designation of an entity as
13		direct the Professor's attention to it? $\{C/278/2\}$	13		a public institution serves to align the operation of
14	TH	HE INTERPRETER: So it would be, I think, the following	14		that entity with good public administration, good
15		page in the Korean version, the second page.	15		practices and public supervision; do you agree or
16	MI	R PETROCHILOS: I think it is the third indented paragraph	16		disagree or do you not care to take a view?
17		indicated by a little square; can you see that?	17	A.	I do not think I dealt with this topic in my expert
18	A.	So it's about the hiring corruption, employment	18		report. I also understand the intentions of your
19		corruption?	19		questions. This being a government public press
20	Q.	Correct. So as you are reading it in Korean, I'll read	20		release, I do not believe that it would contain false
21		it for the record. So it says this:	21		information so I would also agree that the designation
22		"In this PIMC, there was an opinion that the	22		or release of an entity with a public institution may be
23		Financial Supervisory Service, which was subject to	23		for such purposes.
24		recent criticisms by the Board of Audit and Inspection	24	Q.	Thank you, Professor.
25		of Korea for employment corruption and lax management,	25		Let us turn, please, to page 6 of the English text
		41			43
		71			40
1		should be designated as a public institution ."	1		$\{C/278/6\}$. I can't help you with what exactly it is in
2		Let me pause here so we're on the same page.	2		Korean. It's 7 in the Korean text. {C/278K/7}.
3		Sir, the Financial Supervisory Service, Professor —	3		Sir, what you see here, and I think the same
4	Α.	Yes, I have finished that bullet point.	4		document was traversed with Professor Lee yesterday,
5	Q.	Very well. The Financial Supervisory Service is an	5		what you see here is a number of entities which are
6		entity, indeed a special legal person, under the	6		classified by certain categories. I would like us to go
7		Financial Services Commission. That's correct, isn't	7		through the categories briefly together.
8		it?	8		So on the top left—hand side we have market—type
9	Α.	It is a special legal person without capital.	9		public corporations, immediately following, quasi-market
10		Under the supervision of the Financial Services	10		type public corporations, and immediately thereafter we
11	٦.	Commission; correct?	11		have fund management—type quasi—government bodies, of
12	А	Yes, broadly correct.	12		which we have 16.
13		Very well. Let's continue with the text:	13	Α	Yes.
14	٩.	"Upon considering the fact that discussion on	14		And then if we turn to the next page, please $\{C/278/7\}$,
15		re—organisation of the financial supervisory regime will	15	۷.	both in the English and in the Korean version, we have
16		progress in earnest from this year, it was decided that	16		bodies which are described as delegated execution
17		such designation would be deferred.	17		quasi—government bodies.
18		"However, the Financial Services Commission and the	18	Δ	Yes. I'm looking at it.
19		Financial Supervisory Service will establish a plan"	19		Thank you. Now, having described that, can we go to the
20		Are you with us, Professor, "will establish a plan":	20	Ų.	quasi—government bodies that we were looking at on
					-
21		" to eradicate employment corruption and improve	21	۸	page 6 again, please $\{C/278/6\}$. So the fund management type you are referring to.
22		the observations made by the Board of Audit and	22	Α.	so the rund management type you are referring to.

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"Perform management disclosure to the level of $$42$\,$

Inspection of Korea regarding inefficient organisational

the third entry includes two entities, I believe under $$44$\,$

Let me ask -- I'm looking at the third entry. So

Q. The fund management type, indeed.

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 $management \ \dots \ and$

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

- 1 nuclear reactors, is a government affair to be performed 2 by a public institution.
- 3 Q. Thank you. Let's look a few lines down, please. This
- is now the penultimate designation, under the FSC, which
- 5 we now know is the Financial Services Commission. So we
- have two bodies listed there, two juridical persons: the 6
- 7 Korea Asset Management Corporation and the Korea Housing
- 8 Finance Corporation. The Korea Asset Management
- 9 Corporation is the entity we spoke about briefly
- 10 yesterday called KAMCO.
- 11 Sir, we know the NPS doesn't have any capital. Do 12 you know if KAMCO has capital?
- 13 A. I think I have already said several times that I'm not very familiar with KAMCO. 14
- 15 Q. Very well. I'm moving on then to something else which
- 16 is about voting in respect of the merger. So perhaps we can take down that exhibit because it may distract the 17 18 witness which is not helpful.
- 19 Sir, voting rights for shareholders of a company 2.0 derive from their ownership of shares. That is correct,
- 21 isn't it? A. Correct.

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- 23 Q. And as you acknowledge in your reports, the Korean
- 2.4 courts have ruled that the ownership in the shares that
- 25 are held in the National Pension Fund vests in the

1 State, not in the NPS, which merely administers the

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- 3 A. Would you mind showing me that court decision?
- 4 Q. I'll be very happy to. We can pick up the two decisions
 - on the issue first at tab 22 in volume 2. This is
- exhibit C-252. $\{C/252/1\}$. 6
 - THE INTERPRETER: I think you have the wrong exhibit.
- MR PETROCHILOS: C-252 in both the English and the Korean 8
 - version. As I say, tab 22 in volume 2, madam.
- THE INTERPRETER: Yes, I have found it. 10
- MR PETROCHILOS: Does the Professor have it in front of him? 11
- 12 A. Yes. I'm only at the first page. Is there —— can you
- 13 show me the part of the decision that says what you have
- 14
- 15 Q. I will be coming to that. First I need to identify the 16 document

17 So this is a District Court decision, as you can 18 see, in a case involving the National Pension Service,

- 19 the NPS, against the mayor of a city. This is
- 2.0 a decision issued on 25 August 2015.

21 If we turn to the second page $\{C/252/2\}$, you will

22 see the facts are very simple under letter B. It says: 23 " Plaintiff NPS acquired 86% of the outstanding ...

2.4 shares ... issued by Seoul Beltway Corporation ... out

2.5 of the National Pension Fund on June 29, 2011."

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1 If we can turn to the third page, $\{C/252/3\}$ in the Korean heading it is section 2, subsection A, sub 2

subsection 1. Here it describes the claims of the

plaintiff NPS and here is what the NPS said:

5 "The National Pension Fund belongs to the State, and 6

Plaintiff NPS simply conducts management and operation 7 of the National Pension Fund entrusted by the Minister

8 of Health and Welfare. Therefore, since the subject 9

taxable article was acquired by the State, it 10

constitutes a non-acquisition-taxable item pursuant

11 to ... the ... Local Tax Act."

12 This was the argument, sir, of the NPS. If we can 13 turn to page 4 of the English text $\{C/252/4\}$ which is 14 part of the judgment, I'm looking at section C,

15 subsection 2, if it helps situate this in the Korean

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- 17 A. Yes, I'm looking at that part.
- 18 Q. Thank you, sir.

19 The question identified by the court is whether the 20 entity that acquired the subject shares is the State.

- 21 And I would like us to turn to the second consideration
- 2.2 given by the court which is on page 5 $\{C/252/5\}$.
- 23 Yes, I'm looking at that part.
- 24 Q. Very well. It starts at this paragraph numbered 2 as

25 follows:

1		"While plaintiff NPS manages and operates the	1	MR PETROCHILOS: Yes, that is correct, madam, thank you.
2		National Pension Fund upon entrustment by the Minister	2	So I'll start again:
3		of Health and Welfare, the accounting of plaintiff NPS	3	" Plaintiff 's duties to manage and operate the
4		and that of the National Pension Fund are separated (see	4	National Pension Fund were entrusted by the Minister of
5		articles 42-45 of the National Pension Act)"	5	Health and Welfare, the entity responsible for managing
6		Can the Professor read it? Can you see it, sir?	6	and operating the Fund under Articles 25 and 102 of the
7	A.	Yes.	7	National Pension Act and Article 76 of the Enforcement
8	Q.	I continue:	8	Decree of the Act. Even if [the] Plaintiff"
9		" and just like the government budget, the Fund	9	The plaintiff, sir, is the NPS in this case:
10		is subject to administration and control of the	10	" exercises the voting rights for the subject
11		Government and the National Assembly in respect of its	11	shares in practice, as the legal effect of such duties
12		operation plans as demonstrated by the President's	12	is attributed to the State being represented by the
13		approval, report to the National Assembly, submission of	13	Minister of Health and Welfare, it is appropriate to
14		the to the Minister of Strategy and Finance"	14	conclude that the entity that acquired the subject
15		And then it says:	15	shares is the State."
16		"See article 107 of the National Pension Act"	16	So these are the judgments that you asked me to show
17		And so on. And here is the final sentence of this	17	to you, but I think you acknowledge in your reports
18		paragraph:	18	these holdings, the effect of which is that the owner of
19		"It is thus appropriate to conclude that the	19	shares in the National Pension Fund is not NPS but the
20		National Pension Fund belongs to the State even though	20	State.
21		it is being managed and operated by Plaintiff NPS with	21	A. Yes. As you have just explained, that is what this
22		a separate juristic personality."	22	says. But I would like to add the explanation to that
23		Paragraph 3:	2.3	and that is that this question $$ the matter at issue in
24		"The entity that acquired the subject shares shall	24	these two cases was when the NPS, the service, acquired
25		be identified based on who holds the right, ie to whom	25	shares in the market. That activity then was imposed
		49		51
1		the effects of acquisition of the subject charge are	1	local tayes, not State tayes, but local tayes by the
		the effects of acquisition of the subject shares are	2	local taxes, not State taxes, but local taxes by the
2		attributed. In light of the above—described legal	3	local government, and you've just read through the key
		nature and management and operation environment of the	4	points of both the first instance and the second
4		National Pension Fund, it is appropriate to conclude		instance decisions, and the key point of those decisions
5		that the subject shares acquired by the Fund belong to	5	is that even though it was the NPS that acquired the
6		the State."	6 7	shares through the NPF, the fund, that the ultimate
7		Professor, I think it's fair to you that we look		ownership of those shares belonged with the State. And
8		very quickly at the appellate judgment so you have both.	8	the same wording is repeated in both the first instance
9		This is exhibit $C=262$, which is at tab 47, volume 2.	9	as well as the appellate decision, that the ultimate
10		{C/262/1}	10	ownership of the shares belonged to the State and not to
11		So this is the same case at the appellate level.	11	the NPS.
12		The judgment was issued on 9 March 2016, as you can see	12	This is purely a tax discussion, a tax debate, and
13		on the first page. We have the reasoning on —— at least	13	not an issue that is in any way connected with the
14		in the English version, on pages 2 and 3 $\{C/262/2-3\}$.	14	question of whether the NPS or the NPF is a State organ
15		Can we go, please, to page 3 {C/262/3} in the English	15	or not. This was a court decision that examined the
16		text. It is under the heading "Judgment".	16	question of whether the taxes should follow the famous
17		Let me read the judgment.	17	principle of substance over form. So even though in
18		We're still on A.	18	form it was the NPS that conducted these transactions,
19	Q.		19	in substance that ultimately belongs to the State, is
20		{C/262K/3}	20	what the court had found, according to the State,
21		So here is what the court said:	21	substance over form principle of taxing.
22		" Plaintiff 's duties to manage and operate the	22	So once again, even though the transaction is
23		National Pension Fund were entrusted by the Minister of	23	performed by the NPF/NPS, the ultimate ownership of that
24		Health and Welfare"	24	belongs to the State. But this has no bearing upon the

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question of whether the NPS is a State organ or not.

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THE INTERPRETER: So this is B, parenthesis 2?

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1	In terms of the transaction, the NPF fund is not $$	
2	does not have a legal personality . The NPS is	
3	a corporation, and therefore has a legal personality,	
4	but the fund does not have a legal personality.	
5	So the fund itself could not be the actor of the	
6	activities or be the owner of the shares, and so if	
7	there are any fruits born of the activity , that fruit	
8	would belong to the fund, but ultimately through the	
9	fund the State, because the NPF, the fund, is classified	
10	as general State property.	
11	So once again this was a court decision that was	
12	based on the tax principle of substance over form, and	
13	there $$ which is also very $$ it's a very well-known	
14	principle under German law, which is observation which	
15	is in German, even though I will not use the German	
16	term, is known as the economic observation principle.	
17	Q. Thank you, sir.	
1.8	So we analyse the implications so we understand the	

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

of these shares, for example whether to accept or not to accept a merger of the company in which it holds shares, the NPS is exercising a public duty entrusted, as the court says here, entrusted by the Minister of Health and Welfare under articles 25 and 102 of the National Pension Act. Do you agree with me? A. Well, I do not dispute the fact that it has been

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

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

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

2.0 THE PRESIDENT: You want to elaborate. I'm sure you will 21 have an opportunity with the counsel for the Respondent. 2.2 So please go on.

23 MR PETROCHILOS: Sir, this is not a public law question that 2.4 I'm going to ask you, so feel free to say you don't take 25

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a view or you don't want to answer.

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

A. Are you referring to a trustship? 6

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

10 Q. Yes. Yes. indeed.

11 A. So it's --

12 Q. That is what you call it?

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

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

17 Thank you.

18 Mr President, that concludes my cross-examination. THE PRESIDENT: Thank you, Dr Petrochilos. Mr Bhat, do you 19 20 have questions in redirect?

2.1 MR BHAT: Mr President, with your permission, if we could 22 request a two-minute recess to confer with my colleagues? 2.3

2.4 THE PRESIDENT: Let's take five minutes so we can use it for 2.5 other purposes as well.

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1 (11.30 am)

2 (A short break)

3 (11.34 am)

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THE PRESIDENT: Yes, Mr Bhat.

Re-examination by MR BHAT MR BHAT: Thank you, Mr President. Just one question,

Mr President. If I can request that page 52 of the [draft] transcript be put on the screen, line 22.

There was a question there from counsel opposite.

"Question: So we analyse the implications, so we understand the implications of this substance over form with which I agree, we have now seen that the owner of the shares in legal terms is the State and the NPS exercises $\,--\,$ I can direct you to your screen again, the court says duties to manage and operate the National Pension Fund, given -- this is my question to you. Given that the NPS is not the owner of the shares, when it votes in respect of these shares, for example whether to accept or not to accept a merger of the company in

2.0 which it holds shares, the NPS is exercising a public

21 duty entrusted, as the court says here, entrusted by the 2.2 Minister of Health and Welfare under articles 25 and 102

23 of the National Pension Act. Do you agree with me?"

2.4 And the response by Professor Kim:

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

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

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

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

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

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

19 THE INTERPRETER: That's Article 102.

20 A. So may I answer?

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

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

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

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

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

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

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

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

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

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

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

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

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

1	example, the fund to take $$ to make risk taking	1	Ministry of Health and Welfare, and its function is $$
2	investments if necessary, and to actually make	2	and I'm going to put it in the most neutral possible
3	investments that may appear in the market to involve	3	ways $$ to decide in certain cases on how the voting
4	some uncertainty, but the fund believes or the NPS	4	rights of shares held by the fund will be exercised, how
5	believes would bring long-term profits.	5	those voting rights would be exercised in certain cases.
6	So actually this $$ because the principle of	6	Now, on the basis of this information, which I ask
7	profitability is of great importance, this requires the	7	you to take as a hypothetical case if you don't agree
8	NPS to actually go about its fund management with an	8	with these facts, do you believe that the
9	accurate insight into the global capital markets that is	9	Experts Voting Committee is a State organ or a part of
10	superior than, for example, the market analysts.	10	a State organ under your views about what a State organ
11	So my last question that I would like to pose is	11	is under Korean law?
12	whether this activity is exercise of government powers	12	A. Yes, thank you for that question.
13	or it's a private $$ it's a commercial activity.	13	First of all, is it correct that my understanding is
14	MR PETROCHILOS: Mr President, I don't believe I asked that	14	correct that the Expert Committee is under the Fund
15	in the segment that my friend pointed out to the	15	Operation Committee which is then in turn under the
16	witness, but as I say, I'm entirely in your hands.	16	Ministry of Health and Welfare?
17	THE PRESIDENT: Yes, it was a question about the fund's	17	MR GARIBALDI: I'm not an expert to testify on that matter.
18	activities . So broadly it was about the same topic.	18	There are many people who know much more about this than
19	Any further questions?	19	I do.
20	MR BHAT: Nothing further from us, Mr President. Thank you	20	My understanding is that it is established within
21	very much.	21	the Ministry, but I may be wrong on that.
22	Further cross—examination by MR PETROCHILOS	22	If there is a document that will answer this
23	MR PETROCHILOS: Mr President, can I please ask, with your	23	question, the parties can point us to it.
24	permission, the witness, Professor Kim told us that he	24	MR PETROCHILOS: It's relatively straightforward to do so,
25	spoke to the NPSIM. This is line 21 of page 59.	25	sir . Give us a minute. I think it's the NPA.
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1	I believe this is new information.	1	Sir, it may be helpful if you want to see the
2	I would like to ask him $$ I'm putting this to you,	2	organigram of the Ministry to look at Figure 4 of the
3	Mr President, and you can tell me if this is agreeable	3	CK Lee report, the first CK Lee report. Otherwise, the
4	to you —— I would like to ask him whether he had this	4	legal texts would say which committee prepared what.
5	discussion with the NPSIM in the course of this case.	5	They are already in the cross—examination binders and we
6	A. No, that was not the case. As a future pensioner	6	can put them up as well.
7	myself, I have great personal interest in the national		MR GARIBALDI: I think the most useful thing would be
8	pension. So I have asked a person that I know.	8	something that the witness can see and read.
9	MR PETROCHILOS: I'm grateful, Mr President. That clarifies		MR PETROCHILOS: Very well. Can we then put up, please,
10	it.	10	Figure 4 of $$ I'm directing myself to Opus, my friends
11	THE PRESIDENT: Thank you very much. There will be	11	at Opus — it's $\{F1/1/1\}$, and we are looking at page 6.
12	questions from the tribunal.		THE INTERPRETER: I have just taken the liberty of showing
13	Questions from THE TRIBUNAL	13	Professor Kim the part of Professor Lee's presentation
14	MR GARIBALDI: Professor Kim, are you familiar with the	14	that has the diagram, and he has confirmed that, yes,
15	Experts Voting Committee, or also called the Special	15	indeed ——
16	Voting Committee, on the exercise of voting rights?		MR PETROCHILOS: Forgive me, it's page 33 exactly in the
17	A. I heard testimony and discussions about that topic	17	English text. {F1/1/33}
18	yesterday here in this room, but that was not a topic	18	Does this assist the tribunal?
19	that I was asked to opine on in my expert report.		MR GARIBALDI: Yes.
20	MR GARIBALDI: I understand. My question is going to be		A. So it seems that through this chart we have been able to
21	related to your general expertise as an administrative	21	confirm that the Expert Committee, the Voting Expert
22	law expert.	22	Committee, does belong under the Minister of Health and

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Welfare, but in between there is the Fund Operation

and the Fund Operation Committee has its basis in the

Committee between the Minister and the Expert Committee,

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As I understand it, and I stand to be corrected, is

that the Experts Voting Committee is a body of

individuals which is created within the ambit of the $% \left(1\right) =\left(1\right) \left(1\right)$

1	National Pension Act.	1	Expert Committee has any grounds in there.
2	I do understand that the question that I have been	2	If there is actually $$ if the Expert Committee is
3	posed by the arbitrator is whether this Expert Committee	3	covered, then it would be part of the government
4	consists a State organ, according to my criteria.	4	organisation. But if it is not. Then it would not be
5	I'm very sorry to once again ask for the screen to	5	part of the government organisation that I understand.
6	be switched, but I would have to refer to Article 2,	6	I think the latter is most likely at this point,
7	paragraphs 3 through 5 of the Government Organization	7	even though I have not gone through the exercise of
8	Act to give you a certain answer, even though at this	8	looking through all of the ordinances.
9	layer it does look clear that the Expert Committee	9	For example, there is a possibility that the Expert
10	belongs to the administrative organisation, the State	10	Committee has its grounds in enforcement rules of the
11	administrative organisation, but please can somebody	11	operation regulation of the $$ or administrative rules.
12	show me Article 2 of the Government Organization Act.	12	These enforcement rules or administrative rules are
13	Actually, can someone put up the amended Government	13	bodies of provisions that are adopted by entities for
14	Organization Act, the more recent one that's been	14	their internal purposes alone, without any delegation
15	updated?	15	provided by superior laws.
16	MR BHAT: I believe that's SSK -53 . ${G4/31/1}$	16	And so in that case most likely the Expert Committee
17	A. So this is the updated version. Can we look at	17	would be classified as something that we have been
18	Article 2, paragraph 7.	18	referring to as a representative administrative agency
19	So the reason why I have guided you towards	19	in which case it would not be part of the central
20	Article 2 of the Government Organization Act $$ well,	20	administrative agency hierarchy that I have in mind.
21	first of all , it says in $$ I think it was paragraph 2	21	MR PETROCHILOS: Mr Garibaldi, may I seek to help by just
22	that the Bu, Cheo and Cheong, the Ministries and the	22	putting up the Act? It's C-77 under tab 9 in the
23	Cheong shall be set forth or established by law.	23	cross-examination materials, and the English page is 42
24	And then we have the following paragraphs. After we	24	$\{C/77/42\}$, Article 103, paragraph 1 of the Act.
25	skip the entire body of paragraph 2, and go down further	25	I think it answers your question, sir .
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1	to $$ not the subparagraphs, but the paragraph 6 and 7,	1	A. So Article 103 would be about the Fund Operation
2	we go through.	2	Committee.
3	THE INTERPRETER: So, we're still on the English page, we're	3	I was just pointing out paragraph 1
4	still on the paragraph 2. So these items are —— these	4	subparagraph 1 of Article 103, which sets forth about
5	items are under paragraph 2. He has actually requested	5	the adoption of the Fund Operational Guidelines. And so
6	for paragraphs, I think, 6 and 7.	6	the operation guideline, if my understanding is correct,
7	(Interpreted) That goes through the very details of	7	is to be adopted, promulgated, by the operation
8	under which Ministry what subsidiary agencies or	8	committee, the Fund Operation Committee. My
9	affiliate agencies which are Bo—jo—gi—gwan or	9	understanding is that the Voting Expert Committee has
10	Bo-jwa-gi-gwan are to be established, and some are to be	10	its grounds in the Voting Guidelines.
11	established by the ordinance or decree of the Department	11	Also, if my understanding is correct, the
12	or Minister or ordinance or decree of the	12	Article 103, paragraph 1, subparagraph 1, which the
13	Prime Minister, or some are to be created or established	13	Claimant's counsel has pointed out, provides for the
14	by the decree of the President.	14	operational guidelines which provides for the IM, the
15	So there are these ministries identified as well as	15	NPSIM and the Investment Committee that we have talked
16	the decrees of different Ministers, Prime Ministers, or	16	about yesterday.
17	the President that are to be used to establish other	17	My understanding is that the Voting Expert Committee
18	entities .	18	is actually grounded in the Voting Guidelines which my
19	So to answer your question, Mr Garibaldi, in order	19	understanding, if it is correct, would be
20	to answer a question of whether the Expert Committee is	20	an administration or administrative rule which, as

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I previously described, is a set of rules that are

I assume based on a set of administrative rules, the

Voting Guidelines, then it would be classified as

adopted by a body without any delegation from superior

laws, and therefore if the Voting Expert Committee is as

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part of the government organisation as I understand,

looking through all of the Presidential decrees,

Prime Minister decrees or ordinances or Minister

I would have to go through first of all the exercise of

ordinances that extend from here and to see whether the

1	a representative administrative institution and not be	1	imposition by the NPS of pension contributions or
2	part of the central administrative agencies.	2	premiums or in other ways rejecting an application for
3	MR GARIBALDI: Well, it seems that we cannot resolve this	3	pension benefits if someone believes that he is entitled
4	issue because you have not studied the point and so you	4	to pension benefits, applies for it, but the pension
5	are speaking in terms of possibilities .	5	service rejects that. Those two, for example, would
6	But it looks as though in your opinion, whether the	6	constitute a disposition and a person may file an
7	Experts Voting Committee is a State organ or part of	7	administrative process claiming that such a disposition
8	a State organ depends on this analysis of delegation,	8	is unlawful and seeking its revocation.
9	and does not depend on the functions it performs; is	9	THE PRESIDENT: I believe in one, I think it was in your
10	that right?	10	second report, you also referred to a decision of
11	A. Correct.	11	a Supreme Court.
12	MR GARIBALDI: Okay. I think that that answers my question,	12	I believe it's $$ I think it's in your first report,
13	thank you very much.	13	page 23. $\{G2/1/23\}$. It's a footnote, if I can find it.
14	THE PRESIDENT: I have one further question which is $$	14	MR PETROCHILOS: I believe it's G4, Mr President, 18. I say
15	deals with something that you were not asked about.	15	that for our friends at Opus. And it's in the binders
16	In both of your reports you discuss the question of	16	that the Professor has.
17	whether certain acts taken by an administrative agency	17	THE PRESIDENT: I think it's SSK-3 or SSK-2. I think it's
18	are dispositions or whether they are not dispositions.	18	the same. I just couldn't find it now. It's a footnote
19	I understand there is a disagreement between you and	19	in one of your reports. Professor, you may remember
20	Professor Lee as to whether the exercise of voting	20	whether it's in your first or in your second report.
21	rights constitutes a disposition under Korean law, and	21	A. Sir, this is not a Supreme Court, but a Constitutional
22	maybe $$ this is not the question yet, but you may want	22	Court decision.
23	to translate already.	23	THE PRESIDENT: Yes, it's a Constitutional Court. $\{G4/18/1\}$
24	THE INTERPRETER: I think, sir, the translation is being	24	Give me a second. Yes, I think it's page 23 of your
25	provided simultaneously.	25	first report, and it's footnote 81. It's

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1 THE PRESIDENT: Apologies.

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So I understand you don't necessarily agree. It seems you and Professor Lee don't agree on whether exercise of voting rights constitutes a disposition under Korean law, but it seems to me that you do agree where disposition is defined you both refer to the -just a second -- Administrative Litigation Act, and maybe we can look at that.

It's C-135, Article 2.1. Professor Lee says that this defines the term "disposition" and the same definition is apparently also available or included in the Administrative Appeals Act which is $C-128 \{C/135/2\}$. We now see that on the screen.

Article 2.1. and we understand -- I understand that you both agree that if an administrative act or an act of an administrative agency falls within the definition of a disposition under this provision, there can be a -a citizen may file an administrative litigation in accordance with this Act; is that your understanding as well?

21 A. Well, yes. So the condition would be if the act 2.2 constitutes a disposition within the realm of the 23 National Pension Act, an example of what constitutes 2.4 a disposition would be. For example, looking towards 25 Article 25, paragraph 1 of the National Pension Act, the

it addresses the management of other State properties

a Supreme Court of Korea decision.

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MR BHAT: It's SSK-3, members of the tribunal.

THE PRESIDENT: SSK-3. {G2/1/25}.

We don't necessarily need to go into this court decision now. This is a decision from 2000. My question to you simply is: is this an elaboration on the provision that we were just looking at or is this another way of looking at -- what is the legal basis for the court's decision here? They are referring to the State Property Act and they also discuss what "disposition" means $\{G2/4/1\}$ in this particular decision, but they are not referring to the law that we are $\,--\,$ that we were looking at just a while ago.

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The Administrative Litigation Act. We understand that this is not an administrative litigation because it's a decision taken by the Supreme Court. So what is the legal basis for the court's understanding what a disposition is in this decision?

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A. Mr Chairman, I very much appreciate your question because your question bears upon a very important topic.

The reason why I cited this court decision as part of my report is the following: because even though it does not directly reference the National Pension Act, it does address the management of the Fund in the fact that

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1 that are classified in the same group as the National 2 Pension Fund 3 As I've already explained, under the Korean State 4 Property Act, there are two large types of State 5 property. One is the administrative property. The second is -- was described as general property which 6 used to be referred to as miscellaneous property in the 8 2000s. There was a change in nomenclature since. 9 So in this court decision, when the court refers to 10 miscellaneous property, that is actually the previous 11 name that was used to refer to general property under 12 which the National Pension Fund currently belongs. 13 The administrative property, which is the first type 14 of State property, is defined as State property that is 15 used directly by the State for administrative purposes. 16 So these would be, for example, items and goods that are 17 used, and that administrative property, State property, 18 is then subdivided into four categories. THE INTERPRETER: The Professor has given me these four 19 20 category names. I'll try to provide my layman

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translation of them, but I'm not certain that they would

(Interpreted) So the four sub-categories of the

first type of State property — administrative property — would be properties for official use, properties for

correspond to the authoritative English names to it.

 $\begin{array}{ll} \mbox{public use, properties for government enterprises, and} \\ \mbox{lastly , properties for preservation} \, . \end{array}$

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

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

a disposition, and that is the finding being provided here.

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

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

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

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

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

17 Thank you very much, Professor Kim. That concludes18 your examination.

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

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

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

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

Professor Lee's presentation before we go for lunch. We

are flexible. I'm afraid if we break for lunch now, we

25 have to wait for food for quite some time.

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THE SECRETARY TO THE TRIBUNAL: Mr President, if I may 1 briefly intervene. Given that we started earlier than 2 3 foreseen on the schedule, we have actually forewarned the hotel that they should be ready to set up lunch at 5 1230 so we're right on time as far as the hotel is 6 THE PRESIDENT: Let's break for lunch then and we will 7 8 resume at 1.30. Thank you. 9 (12.29 pm) 10 (The short adjournment)

11 (1.30 pm)

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

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

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

19 PROFESSOR SANG—HOON LEE (called)

20 (Evidence given through an interpreter)

21 THE PRESIDENT: Good afternoon, Professor Lee.

22 THE WITNESS: Good afternoon.

23 THE PRESIDENT: Welcome. You have been called as an expert witness in this hearing and for that purpose you are

25 expected to express your opinion in accordance with your

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1	sincere belief. For that purpose I would ask you to	1	available in Korea. The only option that we have is to
2	read the statement or the declaration of an expert	2	vote against the merger at the general shareholders
3	witness that you should have in front of you, please.	3	meeting.
4	THE WITNESS: I solemnly declare upon my honour and	4	It may sound like a simple sentence, but I would
5	conscience that my statement will be in accordance with	5	like to walk you through how this works in Korea. So
6	my sincere belief.	6	merger, merger ratio in Korea, and the Commercial Act
7	THE PRESIDENT: Thank you very much, sir. I understand you	7	and the FISCMA, Financial Investment Services and
8	will be making a presentation instead of a direct	8	Capital Markets Act are going to be explained to you in
9	examination. So the floor is yours, please.	9	detail . Next slide, please.
10	Presentation by PROFESSOR SANG-HOON LEE	10	First I would like to explain to you about the
11	PROFESSOR SANG-HOON LEE: Members of the tribunal and the	11	concepts of the merger and merger ratio. A merger is
12	counsel of the both parties, good to see you. I am	12	a transfer of the entire assets, liabilities and
13	Professor Lee Sang-hoon of Kyungpook National University	13	operations of the non-surviving entity to the surviving
14	School of Law.	14	entity by issuing shares of the surviving entity to the
15	Today's expert opinion will be shared with you	15	shareholders of the non—surviving entity.
16	through the PowerPoint slides that I have prepared.	16	This is of course covered by the commercial law of
17	On slide 1 I would like to walk you through my	17	Korea, but then I believe this is applicable to any
18	professional curriculum vitae first , to help you	18	activities that are happening worldwide with relation to
19	understand my career.	19	the M&A.
20	Since 2013 I have spent nine years at the Ministry	20	I would like to draw your attention to the target of
21	of Government Legislation as a member of the Statutory	21	the merger. So the assets, liabilities and the
22	Interpretation Deliberation Committee and for two years,	22	operations of the non—surviving entity would be the
23	between 2013 and 2015, I worked at the Korea Development	23	target and in fact the shares are something that are
24	Institute, with is a Korean think—tank.	24	provided as something in return.
25	Here I served as an expert legal adviser and I have	25	So in Korea other than the shares, bonds can also be
	There is served as an expert regar dayser and i have	20	co in the care and the shares, points can also p
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1	provided my advice on matters of corporate law and	1	paid out as something in return.
2	finance. And since 2018 I am serving as a member of	2	The shares are being issued at a certain proportion.
3	advisory committee, as part of the Presidential	3	The merger ratio in effect is the number of shares of
4	Commission on Policy Planning. And since 2019 I have	4	the surviving entity to be issued for one share of the
5	been serving as the Financial Supervisory Service which	5	non-surviving entity.
6	serves a similar purpose to the US SEC.	6	And the merger entity $$ merger ratio is not just
7	I am a member of the Financial Dispute Mediation	7	a vague concept. It is in fact based on the Korean
8	Committee, and Financial Supervisory Service's financial	8	Commercial Act.
9	disputes can be categorised as broadly involving three	9	If you look at the Article 523 of the Commercial
10	categories: the Capital Markets Act, Insurance Act, and	10	Act, it requires any merger agreement to identify how
11	the Bank Act. I came here as an expert in the field of	11	many shares in the surviving entity will be issued for
12	the Capital Markets Act.	12	each share held by shareholders of the non—surviving
13	And since 2019 I have been serving at the Fair Trade	13	entity.
14	Commission and I am giving feedback and the advice on	14	And for the company to meet this requirement, the
15	the conglomerates evaluation.	15	companies have to calculate the value and then identify
16	And quite recently I started to work with the	16	the merger ratio.
17	Ministry of Justice as an adviser to the Ministry of	17	Next slide, please.
18	Justice on corporate M&A law.	18	Then I would like to explain to you about how the
19	Slide 2.	19	merger ratio is calculated. On this point, in the
20	So this content may be slightly long and boring, so	20	Commercial Act, we do not have any special stipulations
21	I would like to give you the conclusion first .	21	that is within the Commercial Act, but then across the
22	So the content of today's presentation will be this.	22	world I believe that the common method of calculating
23	I am going to be looking at the M&A merger ratio and	23	the merger ratio is as follows.
24	then when the shareholders are feeling that the merger	24	It is in four different steps.

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The first step is to calculate the total $\ensuremath{\mathsf{enterprise}}$

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ratio is unfair, there are no limits of remedies

1 value of each merging entity, and then in step 2 you 26 May 2015. So because the reference date is a day 2 would divide the enterprise value of each merging entity 2 prior to that day, the reference date becomes 3 by the number of shares in each entity. 3 25 May 2015. 4 When you do so, you will be able to derive the per 4 So the closing prices up to this point will be used share value of each merging entity, which is step 3. 5 5 for the calculation of statutory formula and the merger 6 Then step 4, you can calculate the merger ratio 6 ratio 7 based on the per share value of each merging entity, and 7 For the first element, which is the average closing 8 price for the last one month weighted by trading volume, 8 then this will result in the merging ratio. 9 But in Korea, when it comes to the listed companies, 9 for Cheil it is 153,704 Won and for the SC&T it is 10 10 there is a rule in the Financial Investment Services and 56,953 Won, and then the second element is the period 11 Capital Markets Act, and that actually lets the 11 one week in the same manner, and for Cheil the amount 12 12 was 160,678 Won, and for the old SC&T, it was companies omit steps 1 through 3 and use the trading 13 price weighted by trade volume as a substitute for 13 14 And I would like to let you look at this third 14 step 3 above. This is in fact mandatory, and this is 15 something called statutory formula. 15 element which is the closing price of the reference 16 For the non-listed companies in Korea, the 16 date, and that was for Cheil 163,500 Won and for SC&T it 17 17 was 55,300 Won. abovementioned four steps are something that are 18 followed 18 And if you look at the dates, this is -- this should 19 Next slide, please, 19 be up to 25 May, but then if you look at the last 2.0 Statutory formula is mandatory, according to the 2.0 column, it's 22 May. Why is that? Because 25 May here 21 FISCMA, and I would like to explain to you in detail how 21 was the public holiday. That is why we are using the 22 it works. 22 Friday's closing price for the third element. 2.3 It is in fact stipulated in detail in the FISCMA and 23 So after looking at these three elements, we can 2.4 2.4 come to the average price of 159,294 Won for Cheil and its Enforcement Decree The merger value for each company is obtained by 2.5 55,767 Won for SC&T. 1 calculating the average of three publicly traded closing 1 And the ratio between the two was 1 to 0.35. This prices as of the reference date, and reference date here 2 2 means that the value of SC&T was 35% of the value of 3 is the date immediately preceding the earlier of (a) the 3 Cheil shares. date the board resolution for the merger or (b) the date So in fact the SC&T was the non-surviving entity. 5 of execution of the merger agreement. 5 So for the shares held by the SC&T shareholders, for 6 And (a) and (b), these dates mostly in practice 6 each share they will be paid 0.35 shares of the new 7 7 coincide on the same date. So for the purpose of entity. 8 today's presentation, I would like to simply say that 8 Next slide. 9 9 So the FISCMA of Korea is using the statutory the reference date would be the board resolution date. 10 And I told you that the three will be averaged and the 10 formula to calculate the merger ratio, and this is 11 three elements are as follows. 11 a mandatory ratio. This is a mandatory formula, and 12 The first element is average closing price for the 12 this is in fact quite exceptional if you look at what is 13 13 latest one month, and this is weighted by trading happening around the world. volume. Then the second element is an average closing 14 14 When this law came to its existence, back in the 15 15 price for the latest one week, and this is of course days, in Korea, Chaebol groups are in fact the dominant 16 also weighted by trading volume, and the third element 16 market players. So what was intended was to prevent the 17 is the closing price on the reference date. 17 intentional market price manipulation by the Chaebols, 18 So these three elements are being averaged out to 18 and believe the people who made this law believed that

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up this way.

the market share prices are the objective representation

of the value of the company. That is why this was set

But then since the capital market experience of

limitations that it may contribute to the manipulation

Korea is limited, the statutory formula in fact came

with some certain limitations. It in fact has some

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mandatory.

give us the merger ratio and this statutory formula is

formula was applied in the following manner.

I would like to explain to you in detail

like to point out that the resolution was made on

For the merger between SC&T and Cheil, the statutory

Before I draw your attention to the table, I would

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by the Chaebols or the big market players, and I would like to explain to you about the limitations of the statutory formula.

So the period that is observed is quite short. So if there is a manipulation that is happening between the period, then it will be reflected into the statutory formula, and you cannot really correct these kind of manipulation that is happening in this period, and then the second point is quite crucial.

The merger between the affiliates happened quite commonly in Korea. And for the merger between the affiliates , you know, the statutory formula is applied to -- based on the market share prices, but then in fact these share prices are vulnerable to the influence of the controlling shareholders, or the owner groups, because they can have some control over certain information and the controlling shareholder may influence the following.

First of all, the controlling shareholder can in fact make the determination of the reference date. So the statutory formula is in fact backward looking and there is the problem.

Let me direct your attention to the earlier slide, slide 6 once again.

On 26 May there was a board resolution, and when the

board resolution was made on 26 May, the controlling shareholder already knows about the price information of the whole one—month period. That is what I call backward looking.

So when you are voting for the merger, the controlling shareholder actually has the understanding of what kind of result would come to them after the merger passes.

But then this is not something known to the other general shareholders. The merger information is in fact an undisclosed information. So -- which is only known to the controlling shareholders. So the controlling shareholders, with the amount of information that they have, they will be able to set up the date that is favourable to them, and this in fact results in the insider trading, something like an insider trading.

Let me direct your attention once again to slide 7.

So that is the problem that is coming from the fact

that this is backward looking.

If it is, for example, a forward—looking kind of an activity, then it would be quite difficult for the controlling shareholders to expect how many shares they will be able to get after the merger.

Then the second element, which is the information that is disclosed to the market.

The controlling shareholder can have an influence on the information that is disclosed to the market, the quality of the information and the timing of when the disclosure is made, and those would in fact of course affect the share prices.

And the third element, we have the one—month period before the reference date, and within that period the dividend payout and other activities that have great influence on the share price can be decided by the controlling shareholders.

The announcement related to certain dividend payouts can be made within the time period to impact the share price. This is in fact, I would say, contaminating the share price and this is not something new. What I'm saying here is not something new. This is what I said in my 2016 paper. And this is not an idea that I developed solely on my own. This idea is already covered at the American company — corporate law.

So when the controlling shareholders are exerting this kind of influence, the share price is not something that is objective. It is contaminated. That is quite well established in the field of academia.

If the merger ratio between merging companies is set up based on this distorted share prices, I believe that this is an unfair merger ratio.

And when there is an unfair merger ratio, it results in a transfer of value between shareholders of the merging companies which is harming shareholders of one company and benefiting the shareholders of the other company.

Next slide, please.

Such unfair results will need to be corrected somehow, and the actions -- the options should be given to the market players, but then this is not the case in Korea, and I would like to explain to you about why.

We have ex ante and ex post actions that are possible. So as for ex ante, I mean, the ex ante should be premised based on that there will be that action that comes afterwards. But then if you have a situation where the damages would definitely incur, then you will be able to take the action ex ante.

So the possible actions ex ante in fact are predicated upon the fact that there would be some possible actions ex post as well.

So if you look at the possible actions ex ante, the directors have to be the natural person, and you can actually take action as preliminary injunction proceedings against the directors of the company to prevent the merger from going forward, and there is another option which is to go for the preliminary

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injunction proceedings against the company to prevent the merger. $% \label{eq:company}%$

And then after the decision is made, you can take the ex post action and the first ex post action that is available would be the merger nullification proceedings and this is going in line with the earlier ex ante

So the ex ante's number 2 is paired with ex post's number 1. I mean, when the merger actually proceeds, then it would be quite difficult to unwind. That is why the players are given the option to stop the process ex ante, and then the second possible actions ex post is the exercise of a dissenting shareholder's statutory appraisal rights and I would like to walk you through each element in the next slides.

Slide 9

I would like to first explain to you about the preliminary injunction proceedings against the directors

Non—controlling shareholders will — not necessarily non—controlling shareholders, but it tends to be the case that the controlling shareholders would not pursue this path because the overall merger design is made up by them. So it's most likely that the non—controlling shareholders would follow this path.

Non—controlling shareholders have the right to obtain an injunction against directors to prevent actions that would violate laws and such. But in Korea this injunction has never been granted, and actually Elliott has taken this action, but then if it succeeded in getting the injunction, then it would have been an unprecedented case.

Why is it so difficult then? There are some legal grounds.

First of all, the company has suffered no loss. As mentioned earlier, merger is a transfer of the entire assets and liabilities and operations to the other company. And there is nothing that is leaking from the company's assets.

So there is no loss suffered by the company, so only the shareholders are bearing the loss if there is a loss

In Korea, however, when the -- when it comes to the fiduciary duty of the directors, they do not owe the -- their fiduciary duty to the shareholders. They only have the fiduciary duty to the company.

So no matter how unfair the merger ratio is, since the loss would be only coming to the shareholders, they cannot be saved by the fiduciary remedy -- fiduciary duty remedy.

This is in fact an essential part of my argument: because of this fact, it is almost impossible for the actors to win based on this suit. So when there is a conflict of interest, there would be a great distortion in the market, and only when the fiduciary duty is accepted, the statutory formula being calculated based on the unfair merger ratio is illegal , but since the fiduciary duty to the shareholders is not accepted, the unreasonable, unjust premise is not — the unjust premise is not reverted.

Now let me move on to the possibility of filing for preliminary injunction against a company, Samsung C&T.

In order to avoid significant damages or to prevent an imminent danger from taking place, shareholders have the right to obtain an injunction. The keyword here is "their rights".

So shareholders must have rights in order to see whether there are potential damages or dangers to their rights .

In the second bullet point the right to file for nullification ex post has to be acknowledged in order for an injunction relief to be granted. So that is why the key issue is whether the merger can be nullified.

But if you look at Korean courts, they generally recognise nullification only under special circumstances

and in actual court precedents there's almost no such ruling .

There's only the one precedent that is 30 years old and was a lower court decision, but that's just along the lines of once upon a time there was such a lower court case. But its value as a precedent is almost unrecognised in general practice.

And secondly, if the merger ratio has been calculated in accordance with the statutory formula, according to court precedent, it is presumed to be valid. If you want the merger ratio to be unacknowledged, you have to prove that there was criminal and fraudulent conduct.

But we're talking about an investor, a shareholder who has the burden of proof to prove that there was criminal and fraudulent conduct. Even if they could, it would probably take place mostly with the help of the police or investigatory authorities, five or ten years down the road.

So when a merger has proceeded with the statutory formula, it would be basically impossible for a shareholder to obtain an injunction or a relief on these grounds because the merger ratio is allegedly unfair.

Now let's talk about the nullification of the merger

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ex post. In the previous page I mentioned that it is difficult for a party to get their claim to seek nullification accepted by the court. So here again you have the same problem.

In the case of the SC&T case, the suit to seek nullification was not launched by Elliott, but rather by other shareholders, as can be seen in the court decision.

But in this case as well the court ruled that because the merger ratio was calculated based on the statutory formula, that makes the merger ratio valid. That is the presumption.

Compared to the ex ante procedure, there are many more limitations that apply to this ex post procedure.

For instance, it has to be filed within six months from the date when the merger had been registered, otherwise you are prohibited from filing for the nullification on new grounds.

After the merger had taken place, six months had passed before new facts were discovered, but it had passed the six—month statutory period. That is why the shareholders were unable to use this in their claim.

As I mentioned earlier, once the merger has taken place, there's a high degree of recognition regarding the status of the merger as having taken place.

Therefore, even if the merger ratio is deemed to be unfair, the court can still use its discretion to dismiss a merger nullification claim.

This is not unique in Korea, but globally there are not that many cases. In fact, almost none, in which the merger was pronounced nullified.

When you break an egg to fry the egg you can never separate the yellow and the white. That is the analogy that the corporate law experts use to say it is not easy or virtually impossible to dissolve a merger.

This particular court decision was appealed in 2017 and currently remains pending. But, as I mentioned, the only case in which the nullification claim was accepted was 30 years ago, and it involved a non—listed company. And because Korean courts place emphasis on the statutory formula, and, furthermore, there are strict limitations on — in terms of the new grounds on which you can file a nullification claim, so all in all I do not believe that the decision of the higher court will be any different from the court of first instance.

In other words, a shareholder's interest is basically impossible to protect through lawsuits on grounds such as fiduciary duty breach or merger nullification . In the end you have no choice but to present yourself at the shareholders' meeting and

exercise your vote against the merger. That is in fact the only practical method to protect your interest.

On the next page, now let me move on to the appraisal rights that I mentioned earlier.

A dissenting shareholder has the right to request that the company or the merged entity purchase the shareholder's shares.

This system originated in the mid 19th century for the first time in the world in the US, and since then Korea and Japan and select others have taken in this benchmark and are operating this system.

But when the dissenting shareholder and the company cannot agree on a purchase price, the Capital Markets Act states that there is an appraisal price formula which is almost similar to the statutory formula that I mentioned earlier. In fact, they're basically identical. The only difference is that the observation period is different. slightly.

And according to this law, if the shareholder objects to the appraisal price that has been determined according to the appraisal price formula, it can ask the court to determine an appraisal price, but in this case the Korean courts do not deviate from the appraisal price formula.

As a result, this appraisal price formula has the

same limitations as does the statutory formula. The only difference is that the observation period has been extended from one month to two months in the case of the appraisal price formula. So the overestimation/underestimation issues or manipulation and selective disclosure will still be reflected in the trading price and that would leave the trading price

Next page, please,

still distorted

In exercising his or her appraisal rights, the shareholder runs into certain limitations. Let me elaborate on that point.

The trading prices of the shares in listed companies are the base prices and this means the prices between shareholders in the Korea Stock Exchange, the public market.

But the appraisal rights process serves as a means of providing liquidity to a shareholder who objects to a proposed merger and wishes to exit his or her investment in the company. Therefore, the sale and purchase of shares in the exercise of the appraisal right is a transaction between the company and its shareholder.

As such, the company must pay the proportionate share of the value of the whole company, without

1 reflecting elements that might decrease the trading 1 in parentheses, the reference date being 2 price. This is from a corporate law perspective. 2 17 December 2014. 3 So these downward elements must not be reflected in 3 The date of the merger was 26 May and the two dates 4 theory, but in reality sometimes that is what happens. 4 should be identical, but you can see that in this case As for the last bullet point on this page, the the observation period has been brought up by about five 5 5 months or so. 6 appraisal price proceedings are non-contentious 6 proceedings. And because they are non-contentious 7 So during the two-month period the trading volume 8 8 proceedings, there's no process in which the two parties and the closing prices are multiplied and the total of 9 will take an adversarial approach toward identifying the 9 that multiplication is shown in the second column, and 10 10 truth, and the court is not obligated to make then you add the total trading volume. 11 a determination on the parties' legal arguments. 11 So if you divide that by the total trading volume, 12 12 So the role of the court is basically that of a real you arrive at 70,129 Won. This is the concept of the 13 estate appraiser, to use an analogy. The court only 13 weighted average closing -- weighted average trading 14 14 serves as technical appraiser early and it does not 15 correct a wrong or provide relief against a breach of 15 Moving on to the second row, which looks at the past a legal obligation or infringement. That is the 16 16 one month, using the same formula, you arrive at 17 limitation that I have been referring to. 17 67,522 Won. If you use the recent one week as the 18 The next page, please, 18 observation period, you arrive at 62,156 Won. Then on 19 So I have spoken about the general limitations and 19 the far right there are three numbers. If you take 2.0 in this Samsung C&T case the limitations that I have 2.0 a mathematical average of these three numbers, the 2.1 just mentioned are manifested themselves. 21 result is 66.602 Korean Won. 22 For instance, the court of first instance regarding 22 Next page, please. So regarding the problems inherent in this 2.3 23 the appraisal price formula simply chose to collectively 2.4 2.4 dismiss all the objections and made its determination methodology, this is what I will address on this page exactly in accordance with the appraisal price formula. 2.5 because these are the problems that were identified in 97 99 1 On appeal, the Seoul High Court made a decision that 1 the SC&T case As I have said earlier , appraisal is the process of 2 slightly increased the price and it said that other 2 3 valuation methods can be taken into consideration. 3 setting the price for a transaction between the company However, on grounds that the trading prices cannot and its shareholders, and by using the stock market 5 be discarded altogether, it simply applied the appraisal 5 trading prices, the overall value of the company is not price formula and changed the reference date to the date 6 properly reflected. That's the first problem. 6 7 7 before the listing of Cheil, which is about five months The second problem is as follows. The appraisal 8 8 prior to the original reference date. price formula has almost exactly the same problems that 9 9 I described when talking about the statutory formula. So just a reference date was changed and nothing 10 else, and as a result of this, the listing of 10 The only difference is that the observation period is 11 Cheil Industries, the court said that it could have 11 two months instead of one. During that period the 12 influenced the trading price of SC&T subsequently. 12 conflict of interest as well as the possible price 13 And another point that I would like to emphasise is 13 distortion that could have been affected by the that in reaching this conclusion, the Seoul High Court 14 14 controlling shareholder is not addressed. 15 15 said that this process is not for the purpose of The third problem is the appraisal price formula 16 examining whether the merger ratio was unfair or not. 16

does not provide any reparation as to the various wrongdoings that took place at the time.

Some might say whether the change of the reference date by about five months is a wise decision, but that in itself is highly problematic because it's so arbitrary.

By bringing up the reference date, the association or relationship between the merger and the reference date weakened because you're talking about a five month difference. This is quite a bit away from the current

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So this clearly shows the limitation of this

appraisal price formula and the claims based on it.

date and then they used the appraisal price formula

exactly as it is in the FISCMA.

On the next page shows the details from the Samsung

On the left of the chart you see the first two-month

C&T case. The Seoul High Court changed the reference

period, as I mentioned, the observation period increased

from one month to two months. So the reference date is

MR TERCEÑO: Thank you, Mr President, members of the 1 state of the company. 1 2 If you look at the court decision, it is as if just 2 Tribunal. 3 by taking out the listing of Cheil Industries, all the 3 Good afternoon, Professor Lee. My name is 4 other problems will be solved, and I do not need to 4 Joaquin Terceño and I represent the Republic of Korea, the Respondent in this arbitration . I'm going to be 5 point out that this in itself is in no way sufficient to 5 6 address the problems. 6 asking you a few questions about your report. 7 So the Seoul High Court decision in the appraisal 7 You have a copy of the report in front of you; is 8 8 price litigation only showed that the incomplete remedy that correct? 9 at best is available regarding the issues in the SC&T9 A. Yes. 10 10 merger. Q. You also have a binder that includes some other 11 11 documents that I may be bringing you to ask you some The next page, please. 12 12 Now for the conclusion. Let me summarise what questions about today. Given that it is Friday 13 13 afternoon, at the end of a long week for those in the 14 14 First of all, the merger ratio calculation system in room, I'll try to heed your warning and not allow this 15 Korea, I believe, works only if you have complete trust 15 to become long and boring, and I hope for your 16 in the statutory formula. There are various --16 assistance in that effort. 17 virtually no means of appeal. The system is built on 17 I understand you may be fluent in English, but have 18 the firm belief that the statutory formula is perfect. 18 requested to testify in Korean. So I just wanted to 19 but as I mentioned earlier, the statutory formula has 19 caution you to allow the consecutive translation to 2.0 clear limitations. In particular, when it comes to 2.0 complete before you answer the questions. That would 21 mergers between affiliates of a business group in which 21 make it easier for everyone to follow along. (Pause) 22 the interest of the controlling shareholder is involved, 22 With apologies, my understanding is he earned 2.3 23 this could lead to a high degree of distortion. a Bachelor of Law degree from Georgetown University, he 2.4 But the possibility of litigation is basically 2.4 also passed a certified public accounting exam in the US blocked off from the beginning, as I have just 2.5 State of Maine which I'm pretty sure was given in 103 1 mentioned 1 English, and spent six months working in the Washington DC office of Covington & Burling but again, 2 Having said that, in my view from a corporate law 2 3 perspective, and this is not the first time I'm making 3 we are not asking him to testify in English. I just this claim, since 2008 I have spent about 13 years want to caution him to wait for the consecutive 5 studying this problem, and my conclusion has been the 5 translation. same. Regarding mergers in which the conflict of 6 Are we ready to proceed? 6 A. I will do so. 7 7 interest with controlling shareholder is present, the 8 legal relief through the courts is very hard to come by 8 Q. Now, before we go any further, I just wanted to 9 9 So perhaps the only way for the shareholder to establish a few ground rules. 10 protect himself is to vote against the merger. But 10 First, we've got some material to go through and 11 depending on the company, this option is not available 11 I will try to put my questions to you fairly simply. If 12 always. If they have a high degree of control over the 12 you do not understand any of the questions, please do 13 13 company, it will not be easy to even take this approach. ask that they be repeated, and I in turn will ask that 14 In the case of Samsung, the shareholding of the 14 you keep your answers as short as you reasonably can. 15 collective companies was 13%. That of the controlling 15 The documents in the binder before you, you have the 16 shareholder himself was in the 1% range. That is why 16 English version first and then there's a blue sheet of 17 the voting at the shareholders' meeting was highly 17 paper and you'll find the Korean version behind the blue 18 important. This is the end of my presentation. I thank 18 sheet of paper in each tab, and I'll direct you to the

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that.

straight to cross-examination. Cross-examination by MR TERCEÑO

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Are there any supplementary questions on direct?

THE PRESIDENT: Thank you very much. So then we move

the tribunal for your time and attention.

MR CONSEDINE: No. sir.

THE PRESIDENT: Thank you very much, Professor Lee.

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is on, on the witness table? Because from where I'm

when we go to discuss documents.

look at, it is just black screen.

page in the Korean version so that you can be looking on

It also should come up on the screen in front of you

Can I just confirm with the operator that the screen

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1 I will just wait while that's addressed. The screen 2 is not currently on. 3

(Pause)

So I just wanted to confirm a couple of things by way of introduction.

You stated that you've advised various government ministries and served as an adviser to the Republic of Korea in various roles; is that correct?

- A. Yes, correct.
- Q. And you do describe these in paragraphs 5 to 7 of your witness statement. I don't think we need to go through those, but in general you seem to have provided advice in relation to public private partnerships, including with respect to infrastructure projects and including assisting with the interpretation of relevant laws and regulations; is that a fair summary? $\{F2/1/4\}$
- 17
- 18 Q. In paragraph 7 of your report you list three current 19 appointments and then state that:

"Besides the above, I am not providing any service to the Korean Government, quasi governmental organisations or local governments."

So am I right that these three that you list in paragraph 7 are the only current appointments you have related to work for the Republic of Korea?

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1 A. I'm working on various projects at the moment. So 2 I will need some time to think about what kinds of 3 projects I'm working on. I do not have any intention at all to hide anything from you, but then before I think 5 about all the work that I'm doing as I sit here, I may 6 not be able to give you an accurate answer. That is why I would like to ask you to explain to me the reason why you are asking me this question, and that will in fact 8 9 allow me to give you a better answer and more accurate 10

> On your previous question, on my paragraph 6, it may in fact mislead people to understand that I was only providing the interpretation on the relevant laws and regulations. So I would like to in fact add a little more points to that.

16 Q. Professor, excuse me, I'm sorry. I don't think for my 17 purposes it's necessary for you to add a few points. 18 Counsel on the other side may ask you to later if they 19 consider it necessary.

> I do want to point out that I'm not trying to suggest that you're hiding anything. If we can take the explanations you give in your report as expected to be accurate, that's fine. And I also will point out just so you know that it is not my place or intention to explain to you the reason for my questions, just so you

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- 1 don't spend time asking for that again.
- 2 A. Noted.

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3 Q. Thank you. If we could turn to paragraph 10 of your 4 expert report, you were asked by the Claimant to address 5 two questions. $\{F2/1/5\}$.

First, you explain how a merger ratio for listed companies is determined under Korean law and you offer your opinion on the limitations that you see in that law; correct?

- 10 A. That's correct
- 12 Claimant's various lawsuits in the Korean courts that 13 came in the wake of the Samsung C&T and Cheil merger 14 could have provided a remedy to the loss that the 15 Claimant alleged it would suffer from the merger ratio

Q. And then you offer your opinion on whether the

- 16 in that merger; correct?
- A. Yes, that's correct.
- 18 Q. And actually the language you used, and I'm reading from
- 19 the English, so you will correct me if the Korean says
- 20 something any different, but it says that you prepared
- 21 your report, and I'm looking at paragraph 10, 22 subparagraph (ii), to address the issue of whether the
- actions pursued by EALP in the Korean courts did or were 23
- 2.4 calculated to provide EALP with a remedy to recover
- 25 damages; is that correct?

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- 1 A. The way I read it in Korean it is correct, but then if
- 2 you're asking me whether the English translation in my
- 3 expert report in English is correct, I'm not in
- a position to say whether it is. But I think it is 5
- roughly correct and if you are asking this question 6 because -- if you're focusing on the part that says
- 7 whether the actions did offer $\,\,--$ did provide EALP the
- 8 remedies, then I would say that the actions $\mbox{\rm did}$ not
- 9 provide remedies to EALP. That is why I feel my response
- 10 is a little vague.

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- 11 Q. Yes. We understand that is your opinion, but you 12 actually skipped the part that I am focusing on, which
- 13 is the -- you say that you were asked to consider
- whether those actions did or were calculated to; is the 14
- 15 phrase "or were calculated to" in the Korean version?
- 16 A. In this Korean version that I am looking at, there is no
- 17 phrase that says "were calculated to".
- 18 Q. Okay, thank you, Professor. Then we will move on to
- 19 maybe a paragraph that gives a clearer statement of this 2.0 first issue, or this issue that you looked at.

21 If we look at paragraph 19 of your report, $\{F2/1/7\}$. 2.2 there you say at the beginning

"None of the actions taken by EALP in the Korean courts did or could have entitled EALP to recover as damages the losses caused by the value transfer

- 1 resulting from an unfair merger ratio."
- Is that a better statement of the issue that you address in your report?
- 4 A. Yes.

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

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

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25 C&T and Cheil merger; correct?

A. Yes, correct.

- 2 Q. And that statutory formula is the same now as it was at
- 3 that time in May 2015?
- $4\,$ $\,$ A. Korean law changes quite frequently. So I will need to
- check to give you the accurate answer. But based on my
 memory, I think that is still the same.
- But I will need to double—check to give you the accurate answer because the detailed regulations are
 - changing quite often.
- 10 Q. Thank you. That's understood. You did testify during 11 your presentation that you have written a great deal
- about the Samsung C&T and Cheil merger; correct?
- 13 A. Yes, that is correct, and I would like to explain to you
- about the background.
- 15 I am focusing on the fact that the fiduciary duty 16 aspect in the Korean law does not work in a way to
- aspect in the Korean law does not work in a way to

 protect the shareholders, and since I was looking at
- protect the snareholders, and since I was looking at
- 18 this as my focus point, I happened to write a lot about
- 19 the Samsung C&T and Cheil merger.
- $2\,0\,$ $\,$ Q. Thank you. So at least as far as you are aware in the
- $21\,$ wake of the Samsung C&T and Cheil merger, there has not
- been any amendment made to the statutory formula, has there?
- 24 A. I believe that there was no amendment to the statutory
- 25 formula right after the -- in the period that is right

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

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- that affects the market price of Chaebol companies in relation to their potential estimated net asset value, are you not?
- A. So as a legal professional, I do understand the term
 "Korea discount" that is used in this profession, but
 then the word "Korea discount" is very widely used in ——
 very widely used in different fields so I cannot tell
 you —— it would be difficult for me to tell you that
 I know the meaning that is used in various different
 fields

But as in the legal background, I would say that

I have good understanding of the context where the word
"Korea discount" is used.

Q. Well, let's look at one of your articles . This is in 14 15 tab 9 in the bundle that you have. It is exhibit R-276. 16 $\{R/276/1\}$. This is an article that you wrote, as 17 I understand it, but please correct me if I am wrong, 18 but you discuss how the conflict of interest between 19 a controlling shareholder and minority shareholders in Chaebols might have an impact on a merger ratio; is that 2.0 2.1 right? $\{R/276/2\}$

22 A. Yes, correct.

Q. And if you turn to page 483, I'm looking at an English
 translation, but I understand it's the same in the
 Korean. On that page you should have a heading

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numbered 2 that talks about same person and self—dealing; do you find that page? {R/276/8}

Just above that heading, I'm reading the last

Just above that heading, I'm reading the last sentence in the paragraph above it, you wrote:

"If the market is efficient, these risks (weakness of the Korean company law that does not legally protect this) will be reflected in stock prices to some extent, and that is what makes up the Korea discount."

You're taking about the facts of the risk of shareholder control will create a discount between what might be considered the net asset value of a company and what it's actually selling for in the Korean market; correct?

A. Well, the net asset value is not exactly the word that I used and this is not exactly the kind of concept that is absolutely necessary to explain my point here.

What I'm trying to explain here is regardless of what the value is, and it is, I would like to tell you that I'm not in a position to make the appraisal or the valuation of the value, but then whatever the value is, if there is a value that is regarded as just in the market, then there is a discount compared to that value in the market.

24 Q. Thank you for that, Professor.

Let's look briefly at another one of your articles . $114 \label{eq:114}$

This is in tab 10. It is exhibit R-303. It's an article that you wrote about the NPS ruling in the wake of the merger. $\{R/303/1\}$

I would like to turn to page 61 in this article $\{R/303/10\}$. You're writing about the issue of companies holding stock in other affiliated companies in the Chaebol system as I understand it, and I'm going to read a passage from —— about the middle of this block of text $\{R/303/10\}$.

And reading

"In other words, if an entity is not affiliated with the group, it can sell Samsung Electronics' stocks or use its value in many other ways. However, since C&T must retain them for the controlling shareholder, it is only a 'warehouse keeper without pay' ..."

16 THE INTERPRETER: I'm very sorry, but I was not able to find 17 the passage you were referring to and it seems

18 Professor Lee is also struggling.

19 MR TERCEÑO: Is it not the page that is up on screen? It be
20 right in the middle essentially of that block, and it
21 should be page 61. It begins the fourth line from the
22 top in the Korean, as I understand it. "In other words,
23 if an entity is not affiliated", do you see where I'm

24 reading?

25 THE INTERPRETER: Please proceed, thank you.

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1 MR TERCEÑO: "In other words, in an entity is not affiliated 2 with the group, it can sell Samsung Electronics' stocks 3 or use its value in many other ways. However, since C&T must retain them for the controlling shareholder, it is 5 only a 'warehouse housekeeper without pay' that does not 6 have much benefit even if the stock price rises and the 7 undervaluation of C&T can be said to be a 'penalty' of 8 the market or a 'cold evaluation' of the market 9 concerning such a point.

So what you're describing here is that in the
market's cold evaluation, a company in a Chaebol that is
holding shares from which it cannot benefit, is ascribed
a lower market value because of that; correct?

A. That's correct, but if you are not a corporate law
 expert, it may be misleading. So let me explain a bit
 more.

 $17\,$ $\,$ Q. Please do. I'm a litigator .

18 A. So the point here is that in the stock market, there is
19 a stock exchange that is where the shares of the
20 non-controlling shareholders are being traded and then
21 there is an M&A market where the shares of the

22 controlling shareholders in the companies are being

23 traded. And here the term "Korea discount" means that

since there is an additional premium to the shares of

25 the controlling shareholders, the shares of the

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1 non-controlling shareholders are being traded at 2 discount

> So broadly, there is the Korea Stock Exchange, where the trading is happening between general, non-controlling shareholders and there is the M&A market, where the controlling shareholders' shares or the whole company are traded.

> So when you are in the trading market, you are selling and buying at discount. And in the case of the Samsung C&T and Cheil merger, it is an M&A case. So in the M&A market, the trading has to happen based on the entire value of the company.

So according to the corporate law perspective, you cannot see that the M&A trading should be happening at

Would you mind opening for me slide 13 of my presentation?

18 Q. Professor. I think you've given enough of an answer now. 19 The other side can bring you to that if they wish to, 20 but I would like to move on.

> But I just want to clarify one thing. From what you said in the case of this merger, it's an M&A case, and it should be trading based on the entire value of the company. But it actually, as you said, trades on a mandatory statutory formula that sets the merger

1 ratio; correct? That determines how the merger goes 2

- A. Yes, that is true. That is why a statutory formula is often thought to be a means that would be quite difficult to become an accurate remedy among the people who are studying corporate law. And, for example, in the case of the Samsung C&T and Cheil merger, prior to the merger, the owner family had the share of 1.4%, but it jumped to 30% after the merger. And they actually benefited a lot from a legal perspective because the trading happened at a discounted market price, and they didn't have to pay for the premium.
- Q. Professor, that actually brings us to the second limitation that you find in the statutory formula. So let's look at that. It's again paragraph 18 of your expert report, this time (ii), where you write that the controlling shareholder can deliberately create circumstances that give rise to the calculation of a merger ratio that if approved is unfair to non-controlling shareholders. Do you see where I am? {F2/1/6}

You say here, Professor, that -- you may want to look at the hard copy, Professor, because on the screen it only seems to have the end part of that paragraph.

A. Yes, I have found it.

1 Q. You also say here, and I believe it's what you also just 2

testified, that the reason it could be unfair is that

3 the result would be to give the controlling shareholder

4 more shares in the merged entity than it might otherwise

5 get if the merger ratio were more fair in your view it 6 wouldn't — that wouldn't happen; correct?

7 A. Yes. correct.

Q. Then you say that the controlling shareholder might 8 9 achieve this by influencing the share price of the two 10 companies for the month before the merger announcement;

11 correct?

12 A. Could you please point me to the exact phrase that we 13

14 The phrase was my own. I was just summarising the point 15

16 A Yes

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17 Q. And just so I understand it, your concern here is that

18 the statutory formula therefore is potentially subject

19 to share price manipulation when there's -- the companies being merged are affiliates with a single 2.0

2.1 controlling shareholder; do I have that right?

22 A. So I do not think that that is an accurate explanation

2.3 of my opinion or my concern. In fact, the market share 2.4 price manipulation is a criminal act and since this is

25 a criminal act, this is not something that would happen

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1 normally when you're pursuing a merger and it would be 2 quite difficult to identify too, unless you are a police 3 investigative agency, it would be difficult for you to identify such criminal act.

> My concern is more around something that is not amounting to the criminal act, but then more subtle and more difficult to identify. More subtle and some activities that would be more difficult to identify, and the controlling shareholders are in complete control of -- it wasn't the complete control, let me rephrase

> The controlling shareholder has control over the management rights. So they have a lot of ways, and various ways and power to influence the share price, and that is happening quite easily in reality.

16 Q. Thank you, Professor. Just so we're clear, any merger 17 between public listed $\,\,--\,\,$ publicly listed $\,$ affiliates $\,$ in 18 Chaebols in Korea is governed by the statutory formula 19 and thus subject to these opportunistic actions by

2.0 controlling shareholders; correct?

21 A. I would say it is easy for -- easy to have such 2.2 incentive in this situation. I cannot say that all 23 companies would be following that path, but structurally 2.4 there is strong incentive to pursue that path, and also

25 they have strong power to push that through.

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MR TERCEÑO: Thank you. Mr President, I'm in your hands, 1 2 but this might be a good time for a short break since 3 we've been going for about an hour and a half. 4 THE PRESIDENT: Yes, it would be. Let's break for a coffee or tea until 3.15. And Professor Lee, I should remind 5 you that you cannot speak with anybody about your 6 7 testimony during the break. 8 Please feel free to have a coffee or tea or go to 9 the restroom. You can move around. 10 THE WITNESS: Understood, thank you. 11 (3.03 pm)12 (A short break) 13 (3.15 pm) THE WITNESS: Sorry for being late. 14 15 THE PRESIDENT: Mr Terceño. MR TERCEÑO: Thank you, Mr President. 16 17 Professor Lee, I just have a few more questions 18 before we can wrap up for the day. I want to talk to you about one of the lawsuits that 19 2.0 you discuss in your expert report. You discuss this 21 initially in paragraph 19 of your expert report. You

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point to what I'll call the appraisal rights lawsuit

that could not provide a remedy for the purportedly

unfair merger ratio; is that correct? $\{F2/1/7\}$.

that the Claimant brought which you say was a lawsuit

1 A. Yes. correct.

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Q. And I don't think you will need to read them, but you discuss this in paragraph 67 to 70 of your expert report where you say that a shareholder who dissents from a merger has a right to request that the company buy back its shares at a particular appraisal price.

{F2/1/27}.

So one way to compensate for a purported value transfer from an unfair merger ratio would be to set an appraisal price for the Claimant's shares that reflected the purported full value of those shares; correct?

- 12 A. I couldn't quite understand the part about the shares 13 reflecting the purported full value of those shares.
- 14 Q. My guestion was that one way to compensate for what you 15 say is a value transfer from one group of shareholders 16 to another if a merger ratio is unfair would be to set 17 an appraisal price for the Claimant's shares that 18 reflect that purported full value of those shares so it 19 can recover
- 2.0 A. Yes, that is my opinion that was presented in the slide 21 earlier
- 2.2 Q. And if we look at --
- 23 A. So my intent is that the accurate compensation would be 2.4 the compensation made in proportion to the value of the 25 company as a whole.

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- 1 Q. And as you testified earlier, you do not know what the 2 value of the company of Samsung C&T was, do you?
- 3 A. Yes, because I'm not a valuation expert or a financial expert, I didn't really give my thought into that. 4
- 5 Q. So let's look at the appraisal price litigation which you did give some thought into in your expert report. 6

This is tab 2 in the bundle in front of you. It's exhibit C-53. {C/53/1}

9 You list this in Appendix 3 of your report. So this 10 is a decision that you read in preparing your expert 11 report; correct?

12 A. Yes. correct.

- 13 Q. Now, if you take a look at the first page, you will 14 see -- which I think the Korean pdf might be labelled as
- 15 page 43. It should be the first page of the decision. 16 It lists the appellants who are multiple Korean
- 17 companies and individuals, but you do not see the
- 18 Claimant EALP listed there; correct?
- 19 A. Yes. correct.
- 20 Q. And you understand, don't you, that the Claimant was 21 originally an appellant in this case before it reached
- 22 this court? In fact if we see on page 2 it states under
- "Purpose of the Application and Purpose of the Appeal" 23
- 2.4 there's a parenthetical that says:
- 25 "(Elliott Associates LP withdrew its application on

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March 23, 2016)." 1

2. $\{C/53/2\}$

3 A. Yes.

- 4 Q. So when you talk about in your report at paragraph 38
- 5 certain actions taken by the Claimant in the Korean
- 6 courts that you say could not have offered them full
- 7 compensation and you say these include the exercise of
- 8 appraisal rights, you're talking about this action;
- 9 correct? {F2/1/15}
- 10 A. Yes. correct.
- 11 Q. And as we also see on page 2 of the decision, again 12 under the "Purpose of the Application" heading, it 13 reads:

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"[The] applicants seek a determination of the 15 purchase price of each common shares issued by Samsung 16 C&T Corporation."

17 And you understand that to mean Samsung C&T prior to 18 the merger; correct? $\{C/53/2\}$.

- 19 A. If you look at the upper part of that, it seems that the 2.0 new Samsung C&T has become the successor of the case and 21 is in fact identified as the party, a merged entity 2.2 after the Merger.
- 23 Professor, this is the appraisal rights litigation which 2.4 was meant for the buy back of the Claimant's shares in
- 25 Samsung C&T; correct? I'm simply clarifying that that's

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- 1 the Samsung C&T shares they're talking about. 2 A. Yes, that's correct. 3 Q. And you also understand that until it withdrew its 4 claim, those common shares would have included about 5 7.7 million of the shares that the Claimant held in the original Samsung C&T; correct? These were the shares it 6 7 was trying to sell back. 8 A. I am not familiar with the exact number, but I have 9 heard about the event. 10 Q. Okay. Well, as this decision says it's reversing the 11 first instance decision. So before we go further, let's 12 take a look at that first instance decision. It's tab 8 13 in your binder. It's exhibit C-259. $\{C/259/1\}$. Now, this decision is not listed in your Appendix 3. 14 15 So have you read this decision before, Professor? A I do not have a clear recollection, because it's a while 16 17 back. I remember that I focused more on the second 18 instance decision because I was aware that the first

1 course if you need to look at the decision in detail, 2 you're welcome to. 3

instance decision didn't have anything new because it

was made based on the general statutory formula based

this, so hopefully they will be simple enough. But of

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decisions. So I didn't pay much attention to it

and I focused my attention to the second instance

Q. Understood. I just had a couple of questions about

We see on page 1 -- sorry, go ahead.

We see on page 1 that here the Claimant, Elliott Associates LP is listed . So it was one of the appellants at this stage; do you see that? $\{C/259/1\}$

7 A. Yes, I see that.

decision.

 $\ensuremath{\mathsf{Q}}.$ And if you turn to the bottom of page 3 under grounds for the application $\{C/259/2\}$, at the end it states:

> "Applicant Elliott Associates LP requests for the court to determine the fair purchase price of the common shares issued by Samsung C&T corporation."

And then you see it listing the number of shares I just mentioned previously. It's 7,732,779 common shares. {C/259/2}

16 A. Yes, I can see that.

 $\ensuremath{\mathsf{Q}}.$ Now, on the next page there's a heading number 1, called 17 18 basic facts, and I'm going to direct your attention to 19 subparagraph F {C/259/3}.

> There you will see that it lists as one of the facts that the calculation of the appraisal price under the Capital Markets Act had come out to Korean Won 57,234, and you understand that to be the calculation done under the formula that you've described for appraisal rights;

> > 126

correct?

A. I think so.

Q. If we turn back to the previous page under the heading 3 that says "Order" $\{C/259/2\}$, we see that the court has

4 ordered that the purchase price for these common stocks

shall be Korean Won 57,234 per share, so you understand 5 that what the court did here was accept the calculation 6

7 under the Capital Markets Act and make no adjustment;

8 correct?

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A. Yes, correct.

10 Q. Now, if we look at page 8, this is under a heading 11 numbered 3, "Arguments by Applicant Elliott Associates

12 LP" {C/259/6}. You will see there's a ... (Pause) 13 THE INTERPRETER: Counsel, would you mind ...

MR TERCEÑO: Apologies for that. Page 6 in the Korean 14 15 translation -- Korean original. {C/259K/6}

16 A. Yes. I found page 6.

17 Q. So I'm looking again under the heading number 3.

18 "Arguments by applicant Elliott Associates LP", and 19 you will see a couple of sentences in there's a heading 2.0 number 12 and it says:

"Despite the fact that the former SC&T obtained a construction project for a combined fossil fuel power plant in Qatar, it made a late disclosure of such fact after the merger with the former Cheil was complete."

25 Are you aware that the Claimant was arguing that

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1 that late disclosure was used to manipulate the share 2. price?

3 A. Yes, I am aware.

Q. And so if we turn to page 10, which I believe is page 9 in the Korean original $\{C/259/9\},$ this is the findings 5 6 of the court and two paragraphs above a heading 7 numbered 3, we see a paragraph that reads:

> "With respect to the construction project for the combined fossil fuel power plant in Qatar, the disclosure cannot be considered to be in violation of applicable disclosure rules so as to constitute an adoption of unlawful means based on the materials on record '

So do you understand this to mean that the court 14 15 found that there was no issue with the Qatar contract 16 disclosure with respect to manipulating share price?

A. Yes, it reads so according to the decision. 17

18 Q. So let's go back to the appellate decision on this.

19 This is again tab 2 in exhibit C-53. As I have 2.0 mentioned, this reversed the lower court decision that 21 we were just looking at $\{C/53/1\}$.

2.2 On page 31, which in Korean should be before --23 there's a list of charts that begin —— it's the one that 2.4 has the conclusion. $\{C/53/31\}$. Are you there, Professor?

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- 1 A. (In English) Yes.
- Q. So it says here that the appellate court has found that
- 3 the price derived through the Capital Markets Act
- 4 calculation of Korean Won 57.234 per share is unjust.
- and this court finds the applicants' appeal to have 5 justifiable grounds: 6
- 7
 - "Therefore, the first instance decision is reversed and the fair purchase price shall be Korean Won 66,602 per share.
- 10 I believe you had this on one of your slides, but 11 you understand that what this court did was increase the 12 purchase price for the Claimant's shares: correct?
- 13 A. Yes. I understand so.
- 14 Q. And if I can just for the sake of accuracy, the Claimant 15 was not an appellant at this point. So it may not be
- 16 perfectly accurate to say that the court increased the
- 17 purchase price for their shares, but as we know and the
- 18 tribunal knows through a Settlement Agreement, the
- 19 Claimant has, it will receive any increase in the
- 2.0 purchase price that is paid out as a result of this
- court case. 21
- 22 You understand, Professor, and explained that the
- 2.3 way the court arrived at this higher price was to change
- 2.4 the date from which it applied the capital markets
- calculation; correct?

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

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- 23 iust trust me on it. either wav.
- 2.4 A. I can trust you on that.
- 2.5 Q. Thank you. I appreciate that.

- So this slight increase in the price of
- 2 Korean Won 9,368 per share would mean, if this is
- 3 upheld, that the Claimant for its 7.7 million shares
- 4 would be receiving an additional Korean Won
- 72,440,673,672 for its alleged loss; does that sound 5
- right to you? 6
- 7 A. I think so.

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- MR TERCEÑO: And I do apologise for making you struggle over 8
 - the numbers, having seen that earlier in the hearing,
- 10 I wrote mine out so that I could get it right.
 - Thank you very much, Professor.
- 12 Mr President, we have no further questions.
- 13
- 14 THE PRESIDENT: Thank you, Mr Terceño. Any questions in
- 15 redirect? Re-examination by MR CONSEDINE 16
- 17 MR CONSEDINE: Very briefly, sir, with your indulgence.
- 18 It may be the tab you have open, Professor Lee,
 - tab 2, the High Court's decision in the appraisal price
- 20 proceedings. Do you have that open?
- 2.1 A. Yes
- 2.2 Q. You won't need a long memory to recall you were asked
- some questions about this by Mr Terceño; yes? Do you 2.3
- 2.4 remember that?
- 25 A. Yes. I remember that.

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

1	merger ratio was significantly unfair".	1	that is pursued by the company in terms of the M&A.
2	And I'm asking you what you meant in your	2	When the company is pushing forward with a merger or
3	presentation by "incomplete remedy" by reference to that	3	acquisition, irrespective of their intention or their
4	part of the court's judgment.	4	will, and makes the impact of that acquisition or the
5	A. I will do so. I would like to ask to have my screen on.	5	merger attributable to all the shareholders, then when
6	I would like to have the presentation slide page 13 for	6	the shareholder is dissenting from that opinion, then
7	everyone to have a look at. $\{J/18/14\}$ Basically, as	7	they would be exercising the appraisal right.
8	I mentioned earlier, the appraisal price $$ statutory	8	Therefore, according to the principles of $M&A$, the
9	appraisal price formula is basically the same as the	9	payment has to be made in accordance with the value of
10	statutory formula.	10	the entire company, and I have in fact mentioned this in
11	Therefore, the fundamental limitations of not being	11	my slide as well, and this is well established by the
12	able to remove the conflict of interest of the	12	Delaware Supreme Court.
13	controlling shareholders still remains. For example,	13	I'm not an expert in the US law, but then since the
14	may I direct your attention to slide 15. $\{J/18/16\}$	14	system was originated from the US, and if you are
15	As you can see here, the share price of SC&T started	15	a Korean academic who is working in this field, then you
16	off with 70,129 Won in the two—month observation period	16	must be aware $$ you must be familiar with this
17	and it went down to 62,156 Won up to the point that is	17	precedent. That is why I am using this as evidence.
18	closer to the reference date, and it is a decrease of	18	There is one last point that I would like to make,
19	10%.	19	and this is in fact regarding something that would $$
20	So the Seoul High Court seems to think that the mere	20	that is quite problematic and I can —— so problematic
21	act of putting the reference date forward would be able	21	that I can write a paper out of it.
22	to remove the conflict of interest, but as you can see,	22	So as you could see in the example of the statutory
23	it is not the case.	23	formula, the Korean courts, if it is not the
24	The High Court held that the reference date should	24	manipulation of the market price or the criminal
25	be brought forward to remove the impact from the listing	25	conduct, the implicit influence by the controlling
	be brought forward to remove the impact from the fisting	23	conduct, the implicit influence by the controlling
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1	of the Cheil Industries, but then the news of the	1	shareholder is considered part of the market price and
2	potential listing of the Cheil has been going around in	2	then that is why the Korean court did not accept any
3	the market since end of 2013 and all throughout 2014.	3	merger nullification proceedings or the injunctions with
4	And anyone who is $$ who has practical experience in	4	regards to it.
5	the securities law would understand that the listing	5	And in the appraisal litigation, even though there
6	doesn't happen overnight. I mean, since many months	6	was no evidence of any criminality, the court decided
7	before the actual listing, the company has to make an	7	arbitrarily to bring the date forward by five months,
8	application to the exchange and also there are certain	8	saying that this $$ there was influence in the market
9	objective and open requirements to be met.	9	price.
10	So the activities are going on many months prior to	10	So one might think that this is a good $$ this was
11	the actual listing .	11	a good thing because in the end you got a higher price
12	So my point is not to bring the date forward a lot	12	out of it, and then you were paid off based on a higher
13	further. My point is that the decision to bring the	13	price. But if you are allowing for such arbitrary
14	date forward in and of itself is arbitrary and	14	decision and something that is not based on the
15	illogical, especially the statutory formula is using the	15	principles, then there can be a lot of other cases where
16	one—month or two—month observation period before the	16	you would not be compensated for the due amount.
17	merger, and that is being criticised a lot, but then the	17	And one more thing. And one more thing is that the

exercise of appraisal right is in fact exercised when 24 estate appraiser, and it is only a technical approach, the shareholder has a complaint about the activities 25 and it is also only applied to a single company.

merger ratio.

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appraisal proceedings, as it was stated by the court is

not a process to examine the unjust and unfair merger $% \left(1\right) =\left(1\right) \left(1\right)$

 ${\sf ratio}\,.$ It is not looking into any wrongdoing. It is

not designed to rectify the wrongdoing or the unfair

The court in this case is only acting like a real

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system is maintained because based on the grounds that

If the court -- when the court brings the date

forward by five months, then it is in fact undermining

the meaning of the existence of the statutory formula.

Most importantly, as I mentioned earlier, the

this is the information that is the latest.

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1	So, as I said earlier, this is not a process to	1	not as a matter of an exercise in valuation, how do you
2	examine whether something is done well or something is	2	handle those blocks of controlling shares in determining
3	wrong or right, and just because the controlling	3	the standalone value of the entities to be merged?
4	shareholder had an influence on the prices the court	4	A. In terms of the theory, I mean, the financial $$ there
5	decided that the reference date should be brought	5	is room for financial theory. So it would be difficult
6	forward by five months, and the fact that this sort of	6	for me to give all the details specifically in a legal
7	decision was given is showing that the system is used in	7	perspective.
8	an illogical, irrational way.	8	But in general, if, because of the conflict of
9	And it is only looking at the two-month window, so	9	interest of the controlling shareholders, the share
10	that is why if the suppression on the share price by,	10	price of the minority shareholders is at a discount,
11	for example, not paying out the dividends and so forth	11	legally speaking, that would be in fact reflected to
12	has been going on for a long term, for example, one or	12	the $$ as a premium to the controlling shareholder.
13	two years, then the damages will not be repaired with	13	So in my opinion if you add the values of the
14	the two-month period only.	14	controlling shareholders and the value of the
15	That's all I have to say.	15	non-controlling minority shareholders, then it will
16	MR CONSEDINE: Thank you very much, Professor. Nothing	16	result in the value of the entire company and, as far as
17	further from us, sir.	17	I understand, the legal grounds of the Delaware courts
18	THE PRESIDENT: Thank you. There will be questions from the	18	and such are in the same line.
19	tribunal, Professor.	19	MR GARIBALDI: All right. More concretely, in an M&A ma
20	Questions from THE TRIBUNAL	20	valuation, when you are determining the standalone value
21	MR GARIBALDI: Professor Lee, you made a distinction $$ I'm	21	of each one of the companies, do you discount the value
22	sorry .	22	of the controlling blocks of shares?
23	THE INTERPRETER: Good afternoon, Mr Garibaldi, is what he	23	A. It was the specific question of how the valuation is
24	said.	24	done and how the discount works in the specific
25	MR GARIBALDI: Thank you so much.	25	valuation scenario is not something that I am an expert

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You made a distinction between the market for shares

2 and the M&A market. As I understood it, in the market 3 of shares a person buys shares from an existing shareholder or sells to another person, a shareholder 5 sells to another person, and in that case the fair value 6 of the shares can be established by the market. Did 7 I understand that part correctly? 8 A. That's correct. 9 MR GARIBALDI: In the M&A market, by contrast, you need to 10 determine the value of the companies being merged. 11 I have done it myself in early -- at a very early stage 12 of my career. I used to be an M&A lawyer. 13 Now, in that case you say the values determined 14 by -- just determining the value of the two merging 15 entities: is that right? 16 A. Yes -- are you referring to the standalone value? 17 I believe that what is right is to estimate -- evaluate 18 the value of each merging entities. 19 MR GARIBALDI: That's the way I understood it. You value 2.0 each individual entity and then you determine the right 21 ratio for purposes of the merger. Now, my question is this: suppose that the merging 2.3 entities, or at least one of them, owns shares in other 2.4 companies, and some of those shares reflect the 25 controlling interest. Now, as a theoretical matter, and

All right. More concretely, in an M&A market en you are determining the standalone value of the companies, do you discount the value olling blocks of shares?

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

8 MR GARIBALDI: Briefly, thank you.

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

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

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

17 More in the context of Chaebol specifically, 18 I understand your testimony to be that in case of 19 a Chaebol, the minority shares are being traded in the 2.0 stock market at a discount.

21 A. Yes, generally so.

2.2 THE PRESIDENT: And in fact the controlling shares are not 23 traded because they are used for controlling purposes? 2.4 Yes, that's correct, and in the stock exchange market,

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the shares are like the small sands that are lying

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1	around. So these are the shares that are priced at	1	to have up to 40% of the control.
2	a discount and there is no premium of the controlling	2	So when they have the 30% stake, the value of the
3	shareholders that are reflected to this price. So no	3	way that they would feel about the —— when.
4	controlling shareholder would want to sell their shares	4	THE INTERPRETER: Sorry.
5	at that price.	5	A. — when they had the 13% stake, the value of the 7%
6	THE PRESIDENT: Okay. So then I'm trying to understand your	6	stake of Elliott would be completely different from the
7	evidence, to make sure I understood it.	7	value of the 7% stake of Elliott when they have 40%
8	If then the value of the controlling shares is not	8	stake.
9	reflected in the share price, it's reflected in the	9	This is exactly what the Delaware court says. The
10	value of the company in the M&A market?	10	controlling premium has been permanently lost, and here
11	A. That's correct, and I also —— I explained to you earlier	11	I'm referring to the Elliott's value.
12	that the Korea discount is quite severe, and according	12	THE PRESIDENT: Okay, yes. I understand. I'm just trying
13	to some of the literature that I read in my studies, the	13	to understand your evidence.
14	M&A market's controlling shareholders' premium in Korea	14	So what you're basically saying is that if the
15	is very high, and it goes up to 50%.	15	minority shares are being traded at a discount, the
16	THE PRESIDENT: Now, in case of a merger between two Chaebol	16	premium would be in the value of the controlling shares,
17	companies which are controlled by the same owners, in	17	but because the controlling shares are not traded, and
18	case of a merger, the value of the two companies cannot	18	they are self—dealing, there's no market price for the
19	actually be determined because the owner is the same.	19	controlling shares. Is that what you're saying? Please
20	So there is no market value.	20	correct if I'm wrong.
21	This is what you mean by self—dealing because the	21	A. So the — if you're saying that there is no market price
22	merger is between companies that are owned by the same	22	because that is not traded at the market, then I think
23	or controlled by the same party. So that's	23	you have the right point. But then when one is asked
24	self—dealing? That's what you mean by self—dealing?	24	the question what is the fair value, those in finance
25	A. Yes, in Korea the affiliate, the term "affiliates" is	25	would be able to calculate something that would —— that
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1	defined according to the Fair Trade Act, and it is	1	is believed to be the fair value.
2	defined as the entity that is controlled by the single	2	Also, in reality, in the M&A market, the shares of
3	person or the single business group. But even if the	3	the controlling shareholder do get traded. So it is not
4	transaction is about the two affiliates , it doesn't mean	4	that the shares of the control shareholders are not
5	that there will be no premium at all. For example, in	5	traded at all.
6	the case of the SC $\&$ T merger, the stake of the owner	6	THE PRESIDENT: Yes, understood. I understand you are also
7	family was only 13%.	7	saying you are not a valuation expert. We will hear the
8	On the other hand, NPS held 11% stake and Elliott	8	valuation experts a bit later this week.
9	held around 7% stake. So this was in fact higher than	9	So I have taken enough of your time. Thank you for
10	what was owned by the Samsung Group.	10	your patience, Professor Lee.
11	In such case, control is not clearly established.	11	THE WITNESS: Thank you.
12	So, for example, there could be a case where other	12	THE PRESIDENT: That concludes your examination, so you are
13	shareholders hold hands to request for an improvement in	13	free to go. And there will be a further discussion
14	governance or initiate a control dispute, in which case	14	between the parties. So you don't need to stay, at
15	there remains the possibility for the share price to	15	least on the hot seat. Thank you.
16	increase or for enterprise value to improve.	16	(The witness withdrew)
17	And the owner of the Samsung Group didn't like the	17	Certainly stay in the room, but you don't need to
18	idea. That is probably why the owner of the Samsung	18	sit there.
19	Group pushed for this kind of merger.	19	Housekeeping
20	11 years ago, back in 2004, the British hedge fund	20	THE PRESIDENT: We have on the schedule a final discussion

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before we finish today, a discussion or a -- on the

outstanding matters and schedule for next week. We

understand that there is an agreement now how to deal

started that discussion already yesterday and we

with Mr Smith's testimony.

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Hermes actually started buying SC&T which came off as

that became a big issue in Korea.

threatening to the management of the Samsung Group and

And by pursuing this merger, they were able to get

away from such trauma because this merger ensured them

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1 We didn't want to open that unless either party 2 wants to clarify anything, but what we wanted to discuss 3 with the parties is the schedule for the next week, 4 including possible closing or post-hearing submissions. MR TURNER: Sir, if I may, before we talk about that, 5 6 there's just an update on our examination of my learned 7 friend's documents. 8 We have been looking at them. As I said yesterday,

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

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

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

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just to keep the tribunal updated.

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

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

9 THE PRESIDENT: Claimant?

10 MR PARTASIDES: Thank you, Mr President.

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

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

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

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be easier, as long as they are paginated, if they were eight new exhibits. But if there is a preference that they be individually exhibited, then of course that is another way of doing it. I'm not quite sure I see the point of that as long as they are paginated, but that is a practical question that I express no further view on.

THE PRESIDENT: Okay. So that was by way of an update. No need for a tribunal intervention at this stage. So that is noted.

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

MR PARTASIDES: I'm able to say that the parties have

liaised on the question of closing submissions which will have an impact on how we spend our weekends, of course.

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

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

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

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

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

I'll let my learned friend speak for the Respondent.
On our side it seems to us that oral closings up to
but no more than two hours, given the subject matter,
seems appropriate. That is up to but no more than two
hours each. But of course we're in your hands as to
whether that accords with your preferences as well.

THE PRESIDENT: Mr Turner?

19 MR TURNER: Thank you, sir.

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

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

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

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

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

Nor do we want there to be unnecessary duplication where we say the same thing orally and then in writing. So that was our thinking, but we are in the

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

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

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

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

I think we ended up in something like $100\ pages\ to$

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

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

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

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

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

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

I have already spoken too much. Any further comments?

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

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

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

possible, but given the subject matter here, it seemed	1	THE PRESIDENT: Absolutely. So let's meet 9 o'clock Monday
to us up to two hours was a safer estimate. Of course,	2	morning and if we need to extend the day, we have a bit
there's no obligation on either side to use all of the	3	more leeway.
two hours, and if someone on either side can do this	4	MR PARTASIDES: That suits us.
more briefly, then more power to them.	5	THE PRESIDENT: Thank you.
But it seemed to us, given the different categories	6	(4.38 pm)
of issue here, and we haven't turned our minds yet to	7	(The hearing adjourned until Monday, 22 November 2021 at
the significant subject of quantum, which will dominate	8	9.00 am)
much of next week, it seemed to us that a two hour	9	
estimate was both safer and also not one that would be	10	
unreasonable, given the time we have available to us.	11	
So that is the reason for our estimate, but you	12	
have, I think, heard from both sides on that now. If	13	
you didn't have a preference, it might be that you would	14	
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· · · · · · · · · · · · · · · · · · ·	16	
	17	
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thought, was exactly right, and 30 pages for the	23	
153		155
simultaneous Reply if the tribunal wanted two rounds.	1	INDEX
Just to give you a flavour where we were thinking,	2	PAGE
but all of that we are happy to discuss at the end of	3	PROFESSOR SUNG-SOO KIM (continued)1
next week.	4	
THE PRESIDENT: So why don't we come back to the length of	5	Cross-examination by MR PETROCHILOS1
the closing statements on Monday morning. We'll have	6	(continued)
the tribunal's preference by then if there's no	7	
agreement.	8	Re-examination by MR BHAT55
Thank you.	9	
Enjoy the weekend to the extent you can.	10	Further cross—examination by MR61
Thank you very much. See you Monday morning, and it	11	PETROCHILOS
will be $$ let me see $$ it's 9 o'clock $$ it's 9.30.	12	
We'll have Mr Milhaupt and Professor Bae or	13	Questions from THE TRIBUNAL62
Professor Milhaupt and Professor Bae. So we keep 9.30	14	
for Monday morning.	15	PROFESSOR SANG—HOON LEE (called)76
MR TURNER: Perhaps $$ we will have told you on Sunday	16	
evening time to be defined whether we want to talk to	17	Presentation by PROFESSOR SANG-HOON LEE77
Mr Smith. We are happy to meet at 9 o'clock on Monday	18	
morning if that is helpful to the tribunal to discuss	19	Cross—examination by MR TERCEÑO102
any practical questions that arise out of what we say to	20	
you on Sunday evening.	21	Re-examination by MR CONSEDINE131
I haven't discussed this with my learned friend, but	22	
it just seems sensible to have a buffer if there's	23	Questions from THE TRIBUNAL137
anything to $$ we can always not use the buffer and have	24	
an extra cup of coffee if we don't need to.	25	Housekeeping144
154		156
	to us up to two hours was a safer estimate. Of course, there's no obligation on either side to use all of the two hours, and if someone on either side can do this more briefly, then more power to them. But it seemed to us, given the different categories of issue here, and we haven't turned our minds yet to the significant subject of quantum, which will dominate much of next week, it seemed to us that a two hour estimate was both safer and also not one that would be unreasonable, given the time we have available to us. So that is the reason for our estimate, but you have, I think, heard from both sides on that now. If you didn't have a preference, it might be that you would leave it to the parties to choose how they wish to make their closing, spending no more than two hours. THE PRESIDENT: So then we will end up with two hours. But that will be fine. MR TURNER: That is of course the risk, sir, and we are in your hands. Let's see if we can reach any further agreement between us. Otherwise I would prefer the tribunal to tell the parties what it would prefer that pix as a further and probably last point from me, 100 pages, we thought, was exactly right, and 50 pages for the 153 simultaneous Reply if the tribunal wanted two rounds. Just to give you a flavour where we were thinking, but all of that we are happy to discuss at the end of next week. THE PRESIDENT: So why don't we come back to the length of the closing statements on Monday morning. We'll have the tribunal's preference by then if there's no agreement. Thank you. Enjoy the weekend to the extent you can. Thank you very much. See you Monday morning, and it will be —— let me see —— it's 9 o'clock —— it's 9.30. We'll have Mr Milhaupt and Professor Bae or Professor Milhaupt and Professor Bae. So we keep 9.30 for Monday morning. MR TURNER: Perhaps —— we will have told you on Sunday evening time to be defined whether we want to talk to Mr Smith. We are happy to meet at 9 o'clock on Monday morning if that is helpful to the tribunal to discuss any pr	to us up to two hours was a safer estimate. Of course, there's no obligation on either side to use all of the 3 two hours, and if someone on either side can do this 4 more briefly, then more power to them. 5 But it seemed to us, given the different categories of issue here, and we haven't turned our minds yet to 7 the significant subject of quantum, which will dominate 8 much of next week, it seemed to us that a two hour 9 estimate was both safer and also not one that would be 10 unreasonable, given the time we have available to us. 11 So that is the reason for our estimate, but you 12 have, I think, heard from both sides on that now. If 13 you didn't have a preference, it might be that you would leave it to the parties to choose how they wish to make 15 their closing, spending no more than two hours. 16 THE PRESIDENT: So then we will end up with two hours. But 17 that will be fine. 18 MR TURNER: That is of course the risk, sir, and we are in 19 your hands. 20 Let's see if we can reach any further agreement 21 between us. Otherwise I would prefer the tribunal to 22 tell the parties what it would prefer and just as 23 a further and probably last point from me, 100 pages, we thought, was exactly right, and 50 pages for the 153 simultaneous Reply if the tribunal wanted two rounds. 1 Just to give you a flavour where we were thinking, 2 but all of that we are happy to discuss at the end of 3 next week. 4 THE PRESIDENT: So why don't we come back to the length of the closing statements on Monday morning. We'll have the tribunal's preference by then if there's no agreement. 10 Thank you. 10 pages of the 10 pages of 10 pag

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