

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

PCA Case No. 2018-55

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In the Matter of Arbitration Between: :

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

Claimants, :

and :

THE REPUBLIC OF KOREA, :

Respondent. :

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HEARING ON THE MERITS, Volume 2

Tuesday, March 22, 2022

New York International Arbitration Center  
620 8th Avenue  
16th Floor Conference Room  
New York, New York

The hearing in the above-entitled matter came on at 8:30 a.m. (EDT) before:

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

ALSO PRESENT:

Registry and Administrative Secretary to the  
Tribunal:

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MS. JINYOUNG SEOK

Assistant to the Tribunal:

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P R O C E E D I N G S

1  
2 PRESIDENT SACHS: Good morning, ladies and  
3 gentlemen. Day 2 of the Hearing.

4 Are there any housekeeping matters that we  
5 should review together?

6 MS. VAZOVA: Good morning, Mr. Chairman.

7 So, on Claimants' side, we're mindful that  
8 we still owe Professor Mayer some responses on his  
9 question yesterday about citations to the evidence.  
10 We have those prepared, if it's okay with the  
11 Tribunal, we would suggest that we have two witnesses  
12 up today, that we go through the witness evidence  
13 first and then address those together with any  
14 questions at the end of the hearing day.

15 PRESIDENT SACHS: That would make sense.

16 Any objection to that?

17 MR. VOLKMER: No, Mr. Chairman.

18 PRESIDENT SACHS: Any housekeeping matters  
19 on your side?

20 MR. VOLKMER: None, Mr. Chairman.

21 PRESIDENT SACHS: Okay. Then we will call  
22 Mr. Garschina to the witness stand.

23 KENNETH GARSCHINA, CLAIMANTS' WITNESS, CALLED

24 PRESIDENT SACHS: Good morning,  
25 Mr. Garschina. In front of you is a Declaration with

1 which I understand you are already familiar. Would  
2 you please read the Declaration for the record.

3 (Inaudible.)

4 PRESIDENT SACHS: And could I ask you to  
5 speak up a little bit and approach the microphone.

6 THE WITNESS: I solemnly declare upon my  
7 honor and conscience that I will speak the truth, the  
8 whole truth, and nothing but the truth.

9 PRESIDENT SACHS: Thank you very much.

10 You are here as a fact witness. We are now  
11 considering your Third and your Fourth Witness  
12 Statement in particular. Is there anything in the  
13 Third or the Fourth Statement that you would like to  
14 correct at this point of time?

15 THE WITNESS: No.

16 PRESIDENT SACHS: Thank you very much.

17 Now, the rules are, as you know, you will be  
18 questioned in direct for some minutes, and then  
19 cross-examined?

20 THE WITNESS: Can you hear me?

21 PRESIDENT SACHS: Yes, I can hear you well.

22 And I hope my two co-Arbitrators--can you  
23 hear the Witness well?

24 ARBITRATOR GLOSTER: Yes, very well, indeed.  
25 Thank you.

1 ARBITRATOR MAYER: Yes.

2 PRESIDENT SACHS: Well, we don't hear you,  
3 Dame Elizabeth, but I understand you.

4 ARBITRATOR GLOSTER: I'm sorry, yes, I can  
5 hear the Witness very well.

6 PRESIDENT SACHS: Liz, can you hear us?

7 ARBITRATOR GLOSTER: Yes, I can hear you.  
8 Can you hear me?

9 PRESIDENT SACHS: Well, we don't hear you.

10 ARBITRATOR GLOSTER: Okay.

11 ARBITRATOR MAYER: I can hear Dame  
12 Elizabeth.

13 PRESIDENT SACHS: And, Pierre, we don't hear  
14 you either.

15 ARBITRATOR MAYER: Ah. We're unmuted.

16 ARBITRATOR GLOSTER: We're unmuted, yeah.

17 (Pause.)

18 PRESIDENT SACHS: So, here we go.

19 Questions in direct.

20 MS. VAZOVA: Good morning.

21 DIRECT EXAMINATION

22 BY MS. VAZOVA:

23 Q. Good morning, Mr. Garschina.

24 A. Good morning.

25 Q. Can you please remind the Tribunal what your

1 role was in connection with Mason's investment in  
2 Samsung?

3 A. Yes, as the co-Chief Investment Officer of  
4 Mason Capital. My responsibilities included  
5 overseeing a Research Team, shepherding the research  
6 process, analyzing the output for the research  
7 process, and ultimately making decisions about, as I  
8 said last time, flipping that switch to own securities  
9 in the Samsung structure.

10 Q. And starting with Samsung Electronics, what  
11 was Mason's investment thesis in relation to Samsung  
12 Electronics?

13 A. The thesis, going back quite a period of  
14 time, is that Korea was going to take affirmative  
15 steps to reform their corporate governance system. I  
16 had been following Korea for--the Korean markets for a  
17 couple of decades, starting with the Asian crisis in  
18 1997, and I noticed that the multiples of earnings  
19 that the market placed on Korean securities in general  
20 was quite low, and the reason for that was easily  
21 identifiable for everyone to observe. It was that  
22 Western investors did not think that they were getting  
23 a fair shake at the table versus management, control  
24 Shareholders, other actors within the orbit of  
25 so-called "'chaebols.'"

1           The thesis was that that was going to change  
2 for a number of reasons. Chief among them was public  
3 pressure against the corruption. That pressure was  
4 putting follow-on pressure to the political  
5 establishment, causing a wealth gap that was  
6 increasingly being recognized by the public as  
7 perverse and unequitable.

8           We think that culminated ultimately around  
9 2010 or so, with a movement politically inside Korea  
10 to make things better, for lack of a better phrase,  
11 more hospitable to outside investors. They realized  
12 that the large amount of capital that was necessary to  
13 develop their economy further would not be possible  
14 when the securities of their high-quality corporations  
15 at which their people worked were trading at really  
16 subsistence valuation levels.

17           Capital was needed for expansion in  
18 increasingly global industries that they played, and  
19 that capital would have to come from either the  
20 issuance of securities or other means, all of which  
21 led to the pressure from the public on the corruption.  
22 Inequality, and the need for access to capital led to,  
23 in my view--and I think it's been borne out by history  
24 since our last hearing--a decision within the country  
25 to reform the chaebols to achieve those ends.

1 Q. And how did all those expectations translate  
2 into Mason's investment in Samsung Electronics in  
3 particular?

4 A. Well, Samsung--we have a thesis around a set  
5 of actions that are going to take place. We looked  
6 for a way to express it, and Samsung was one of the  
7 last chaebols to reform, probably because it was so  
8 politically connected. But there was a roadmap from  
9 others that had begun a process of simplifying their  
10 structures.

11 And Samsung was, you know, in the press a  
12 lot as wanting to move down that path. They were very  
13 communicative with their Shareholders about wanting to  
14 simplify the structure, wanting to have a higher  
15 valuation. They were saying all the things and doing  
16 all the things that indicated to us that they were  
17 going to simplify their structure with the goal of  
18 capital efficiency.

19 And I think, in hindsight, it was an obvious  
20 opportunity that, as I said, even since our last  
21 hearing and since the incident in 2015, has been borne  
22 out by what's happened, and I'm quite pleased by how  
23 South Korea has reformed. The multiples of the  
24 securities have traded at higher prices now, and, you  
25 know, justice has been done in the courts against

1 those that tried to stand in the way.

2 Q. Moving on to Samsung C&T, more specifically,  
3 what was Mason's investment thesis in relation to  
4 Samsung C&T?

5 A. Samsung C&T is a--was a company that--the  
6 Holding Company structure. Its largest asset by far  
7 was the securities in Samsung Electronics. We felt  
8 that it was an even cheaper way to own Samsung  
9 Electronics, given that its largest asset was Samsung  
10 Electronics. The assets inside the structure were  
11 easily identifiable and valuable, given the liquid  
12 nature of most of their securities, and it was trading  
13 at about 50 cents on the dollar, what we considered to  
14 be the Net Asset Value.

15 In addition, the Company--the overall group  
16 decided to use one of their entities, CHALE (phonetic)  
17 or CHILE (phonetic) in order to begin the  
18 restructuring of the organization, that and to the  
19 IPO, I think, the end of 2014, the beginning of 2015,  
20 and they attempted to utilize that entity where the  
21 family had dominant control to merge with C&T in order  
22 to begin the restructuring process.

23 The reason they tried to merge with C&T, in  
24 my view, is because they had such a large--C&T had  
25 such a large cache of SE Shares that were so clearly

1 undervalued, and would have been a very--was--turned  
2 out to be a very advantageous deal for the family at  
3 the terms that an agreement to merge were made and at  
4 the terms that the vote was approved.

5           It was tremendously creative for the family,  
6 and our feeling was they needed to have that C&T box,  
7 as a lawyer would say, because of the value and  
8 because of the strategic nature of its holdings. They  
9 ended up achieving that just by means that I did not  
10 anticipate.

11           Q.    Moving on to that subject, what was your  
12 expectation, Mr. Garschina, about whether the Korean  
13 National Pension Service, in particular, would approve  
14 the Merger between SC&T and Cheil on the terms that  
15 were proposed?

16           A.    Well, I thought they'd be voted down.

17           Q.    Why did you think that?

18           A.    Because of their fiduciary duties. There  
19 was a large spotlight on this, on this transaction.  
20 There was a prominent activist involved, shining an  
21 even brighter light on it.

22                    And I feel like--I believe in the saying  
23 that sunlight is the best disinfectant. I felt that  
24 there was so much attention that even if someone  
25 wanted to abrogate their fiduciary duty, it would be

1 very difficult to do so.

2 In addition, the NPS had voted in a  
3 shareholder-friendly way in the transaction just prior  
4 to that--I forget the name of--SK. And it was so  
5 clearly in their interest, especially given the  
6 trading price of C&T leading into the vote. I didn't  
7 think that they would vote to lose money. And my  
8 presumption that they would vote to lose money was  
9 actually borne out--proven, unfortunately, for Mason  
10 and myself, when it was voted through, and the stock  
11 collapsed. I didn't think--I didn't think that the  
12 NPS would--would vote to lose money, especially in  
13 such a--in such a big forum where there were a lot of  
14 eyes on their behavior.

15 Q. Thank you, Mr. Garschina. I have no further  
16 questions.

17 A. Okay.

18 PRESIDENT SACHS: Thank you.

19 We go to cross-examination.

20 CROSS-EXAMINATION

21 BY MR. VOLKMER:

22 Q. Good morning, Mr. Garschina. My name is  
23 Sven Volkmer, and I have questions for you on behalf  
24 of the Republic of Korea.

25 I would like to start with your First

1 Witness Statement. You have that in front of you. It  
2 should be the first in that little yellow  
3 binder--yeah--and Paragraph 9 of that statement.

4 I'm just waiting for FTI to also put that on  
5 the screen.

6 Thank you.

7 I'll just read this for the record, quickly:  
8 "Mr. Martino and I, working either together or  
9 separately depending on the investment, with certain  
10 employees who one or both of us directly instruct,  
11 make all of Mason's investment decisions."

12 For the investment in Samsung, did you make  
13 the investment decisions alone or together with  
14 Mr. Martino?

15 A. We are each other's surrogate. If we don't  
16 discuss an investment the minute it's made, we will  
17 discuss it shortly thereafter. I don't recall which  
18 of us approved either trade.

19 But more importantly, the investment  
20 process, which is the largest part of our investment,  
21 without which any securities trading would be  
22 possible, is shepherded by both of us. So we are both  
23 knowledgeable. We both follow the research. We both  
24 have both bought into the thesis, and it's a very  
25 collaborative relationship.

1 Q. So, what I understand, then is that you and  
2 Mr. Martino, together worked on the Samsung  
3 investment; is that right?

4 A. Among others at the firm.

5 Q. And did you and Mr. Martino ever disagree  
6 about the Samsung investment, for example, when to  
7 buy, when to sell?

8 A. I mean, we disagree about things every day.  
9 I don't recall specifically. But it would not  
10 surprise me at all. That's how we get to the right  
11 answer.

12 Q. And the core team for Mason for the  
13 investment in Samsung included four employees at the  
14 time; that was Jong Lee, Emilio Gomez-Villalva, Sang  
15 Kim and Ivan Ross. Is that right?

16 A. Yes, Jong and Sang are traders at the firm.  
17 Traders are not typically involved in the investment  
18 process to this level. They were because they're  
19 Korean-American and spoke the language. And the other  
20 two, the way the structure of the firm works was that  
21 we have Mike and myself as the Portfolio Managers.  
22 Two of those individuals that you mentioned, Mr. Gomez  
23 and Mr.--are we allowed to use the names or are we  
24 using letters?

25 Q. I think there is an agreement that we are

1 okay to use the names?

2 A. Okay.

3 Q. It makes it easier for everybody.

4 A. Okay.

5 Mr. Gomez and Mr. Ross were on the analyst  
6 team, which is just under myself and Mr. Martino, and  
7 they are research analysts. They're trained in  
8 corporate finance. Mr. Ross is an expert on tax and  
9 accounting. Their job is to go out and research  
10 companies and situations, distill the information that  
11 they--that they--that they can get their hands on, and  
12 look at what it means, and talk to Mike and myself  
13 about what it means.

14 Mr. Lee and Mr. Kim, as I mentioned, are on  
15 the trading desk. Their function is largely executing  
16 buy and sell orders or other kind of transactions that  
17 are directed by myself and Mr. Martino.

18 As I mentioned, in this particular case,  
19 they were a little bit more involved in the investment  
20 process because of communication issues.

21 Q. So, that team would do most of the  
22 day-to-day work, and then they would report to you and  
23 Mr. Martino; is that right?

24 A. They wouldn't do most of the day-to-day work  
25 versus myself or Mr. Martino. Myself and Mr. Martino

1 were doing our own work. We're analysts, ourselves.  
2 We've never gone into a corner office and become  
3 money-raisers or figureheads. We are analysts. So,  
4 they're doing their work; Mr. Martino and I are doing  
5 our work. In this particular situation, I was doing  
6 more work than Mr. Martino. It's a collaborative  
7 effort. We are members of the analyst team,  
8 ourselves, as well as we're Portfolio Managers, but  
9 the difference being that the analyst team does not  
10 have the ability to actually execute trades.

11 Q. And the analyst team, when they do their  
12 research, they would then report back to you and  
13 Mr. Martino; is that right?

14 A. Sometimes. If they have--if they have  
15 something that is--they think is worthy of  
16 communication, they will, but most of the time they're  
17 working away.

18 Q. If there are important developments to  
19 share, they would share those with you.

20 A. "Important developments"? Most important  
21 developments I would see on my own if they're public,  
22 which most important developments are public, so not  
23 necessarily.

24 Q. The members of your team would, for example,  
25 meet with analysts or legal and financial experts, and

1 then they report--would report back to you about those  
2 meetings; right?

3 A. Sometimes they would. Most often they  
4 wouldn't.

5 Q. Let's briefly look at the timing of Mason's  
6 purchase and sale of shares in Samsung. We'll start  
7 with Samsung C&T. That's under Tab 2 in the bundle,  
8 the white bundle in front of you. This is a chart  
9 that shows Mason's shareholding in SC&T. And just to  
10 remind ourselves, Mason did not own any shares at the  
11 time that the Merger was announced on the 26th of  
12 May 2015; is that right?

13 ARBITRATOR GLOSTER: Could you tell me,  
14 please, what Tab 2 in the bundle is, which bundle?

15 MR. VOLKMER: Dame Elizabeth, this is the  
16 hard copy bundle that we only have in this room  
17 unfortunately, so I can give you the--

18 ARBITRATOR GLOSTER: No, just give me the  
19 reference to the document you're looking at, and I'll  
20 get it from my own documents.

21 MR. VOLKMER: Correct. This is RDE-9. It's  
22 a demonstrative exhibit.

23 ARBITRATOR GLOSTER: Thank you.

24 BY MR. VOLKMER:

25 Q. Okay. So again, just to confirm, the day of

1 the Merger Announcement, 26th of May, Mason did not  
2 yet own shares in SC&T; is that right?

3 A. What was the date of the Merger  
4 announcement?

5 Q. The 26th of May 2015.

6 A. We have European numbers again.

7 Yeah, I don't remember specifically. Our  
8 investment process for this went back at least a  
9 year-and-a-half, and we were in SE Samsung Electronics  
10 most of the time; and around the time of the Merger we  
11 transitioned into SC&T as a better expression, with  
12 more ways to win than our SE holding. So I think it's  
13 quite deceptive to show just the SC&T holdings  
14 because, as I mentioned before, one was a proxy for  
15 the other in our investment framework.

16 Q. I'm a bit mindful of the time,  
17 Mr. Garschina. The question was a fairly simple  
18 factual question: Did Mason own shares in SC&T on the  
19 26th of May 2015? I think the answer is in front of  
20 you. I just want to remind ourselves of the facts at  
21 the time.

22 A. I think the answer is no, but it's a very  
23 misleading question that takes a lot of things out of  
24 context, as I've described.

25 Q. All right. And then again just to remind

1 ourselves, Mason started buying shares in SC&T about a  
2 week after the announcement; is that correct?

3 A. You haven't shown me--according to this  
4 chart, am I supposed to make that assumption?

5 Q. Well, do you remember if Mason bought  
6 shares--

7 (Overlapping speakers.)

8 A. I don't remember.

9 Q. Okay. Then I just represent that to you,  
10 that is not disputed between the Parties, but it is  
11 important to remind ourselves.

12 Let's have a look at the timing of the share  
13 purchases in SEC, and that's under Tab 3,  
14 Demonstrative Exhibit RDE-10.

15 A. Um-hmm. I'm there.

16 Q. So, this chart shows Mason shareholdings in  
17 Samsung Electronics.

18 In October 2014, there is a gap where Mason  
19 first sold all of its shares and then started buying  
20 shares again.

21 Do you see that?

22 A. I do. We discussed this last time.

23 Q. The gap corresponds to approximately two  
24 weeks. That's not indicated in this chart, but we  
25 know that from Mason's trading records.

1           In October 2019--I think you referenced  
2 this--you mentioned that Mason would buy and sell on  
3 an ongoing basis as a way of optimizing its position.

4           A.    Um-hmm.

5           Q.    This two-week gap here, is it your position  
6 that this corresponds to optimization of Mason's  
7 position?

8           A.    I don't remember exactly what this is, other  
9 than to tell you that, during this period of time, the  
10 firm--it was a very ugly time for the P&L of the firm,  
11 and from time to time when we were wrong on  
12 situations, we will decrease our balance sheet in  
13 order to control risk for our investors for whom we're  
14 fiduciaries. So, it could have been that. It could  
15 have been the traders trying to figure out, you know,  
16 maybe there was a big block coming off a seller, and  
17 they wanted to buy it back at a lower price. It could  
18 really be anything.

19           But it's--I know one thing that it's not,  
20 and it's not an indication of our lack of commitment  
21 and time spent and desire to make money from this  
22 investment.

23           Q.    Let's have a look at some of the information  
24 that was available to you before Mason bought its  
25 shares in SC&T. And we'll go to Tab 7. That's

1 Exhibit R-391.

2 A. Yes.

3 Q. And that's an internal Mason e-mail dated  
4 26th of May 2015, the day of the Merger Announcement,  
5 and you were one of the recipients of that e-mail.

6 A. One of many.

7 Q. The e-mail compiles notes of several  
8 analysts on the Merger Announcement. And if we go  
9 down a little bit, we see that there are notes from  
10 JPM--that's JPMorgan; is that right?

11 A. Yes, analysts and traders, yes.

12 Q. And CSFB. That's Credit Suisse?

13 A. Yes, it is.

14 Q. UBS, I think we know what that is. BAML,  
15 that's Bank of America Merrill Lynch?

16 A. I presume so, yes.

17 Q. Okay. Parts of the analysts' notes are  
18 copy/pasted into the body of the e-mail, starting with  
19 JPMorgan at the bottom of Page 1.

20 A. Um-hmm.

21 Q. And the second paragraph, the note considers  
22 ownership structure post-merger.

23 Do you see that?

24 A. Um-hmm.

25 Sorry, yes, I did.

1 Q. And then on the next page, the second  
2 paragraph considers what's the next step, and the  
3 third paragraph considers implications for Samsung  
4 Group companies.

5 Do you see that?

6 A. Yes.

7 Q. So, the note considers next steps after the  
8 Merger between SC&T and Cheil and it considers the  
9 implications of that Merger for other Samsung Group  
10 companies; is that right?

11 A. That's what it says.

12 Q. The note doesn't say that the Merger would  
13 likely fail; correct?

14 A. You know, I don't know. I would have to  
15 take time and read it.

16 Q. Please do.

17 A. Which part of it?

18 Q. Does the note say anywhere that the Merger  
19 was likely going to fail?

20 A. This five-page note, you want me to read it?

21 Q. No, the JPMorgan note.

22 A. The JPMorgan note. The first one?

23 Q. Correct.

24 (Witness reviews documents.)

25 A. Yes, this appears to be a prospective

1 analysis, assuming that the Merger would go through,  
2 which was not my view.

3 Q. Okay. The next note is by Credit Suisse,  
4 and that also doesn't say that the Merger would likely  
5 fail; correct?

6 A. Well, it doesn't say the opposite, either.

7 Q. So, the answer is yes, it does not?

8 A. It doesn't say a lot of things. It doesn't  
9 say what the weather is.

10 Q. And the next note is from UBS, starts at  
11 bottom of the page, continues on the next page, and if  
12 we could look at the next page. So, at the bottom  
13 paragraph of that note, there is a sentence starting  
14 "our review on price."

15 A. Um-hmm.

16 Q. Now, I'll just read this for the record:  
17 "Although SC&T pricing is low versus Cheil, we expect  
18 Merger likely to occur given group holdings, market  
19 expectation of benefits from merging with Cheil and  
20 put strike out of the money."

21 Do you see that?

22 A. I do.

23 Q. And below the UBS note, there is a note from  
24 Bank of America Merrill Lynch. I will not ask you to  
25 read this, I'll just represent to you that that also

1 does not say that the Merger would likely fail.

2 So, in terms of immediate reactions to the  
3 Merger, none of these analysts reported that the  
4 Merger would likely fail, and UBS expected the Merger  
5 likely to occur; correct?

6 A. I mean, they're all entitled to their  
7 opinions. They're not my opinion, and clearly they  
8 weren't the opinion of Mr. [REDACTED], either.

9 Q. Okay. Can we go to the next document,  
10 please. That's Tab 8, Exhibit R-394. This is an  
11 e-mail from Mr. Sull at Korea Investment of Securities  
12 America to Mr. Gomez at Mason. It's dated 27th of  
13 May, one day after the Merger Announcement--

14 A. Yes, I know of Mr. Sull.

15 Q. Okay. In the first paragraph, Mr. Sull  
16 wrote that he checked with our analyst, "Taeho Yoon"  
17 (phonetic), who said, yes, the Cheil Samsung C&T  
18 Merger is a bad deal for Samsung C&T Shareholders,  
19 considering the Company's revenues and grope--sorry,  
20 group investments. Is that consistent with your view?

21 A. Which part?

22 Q. The paragraph I just read.

23 A. Can you read it again, please. Sorry, I'm  
24 confused between the screen. Which one would you like  
25 me to look at?

1 Q. The first paragraph of (overlapping  
2 speakers) the paper.

3 A. Is a bad deal--I see it.

4 Q. Is that consistent with your views at the  
5 time?

6 A. No. I mean, this was all about price.  
7 There was strategic rationale, significant strategic  
8 rationale to putting the two entities together. But  
9 buying something at 50 cents on the dollar when you've  
10 conducted a fraudulent bribery scheme is wrong.

11 And I'm not saying, and I never said, that  
12 it doesn't make sense to simplify the structure. To  
13 the contrary, in my questions from my counsel leading  
14 up, I thought it made sense. And I thought that it  
15 would be good for Korea and good for Samsung and good  
16 for the employees of Samsung and good for me. I'm not  
17 laboring over this investment in order to lose money.  
18 I'm clearly--I'm up front that I wanted to make money  
19 from it. I'm not saying that it's a bad deal  
20 combining the companies. I thought that the price was  
21 demonstrably too low, and you can put a lot of analyst  
22 reports in front of me and people with different  
23 opinions, undoubtedly a lot of those investment banks  
24 are being paid by Samsung. You could even put a  
25 report from Samsung Securities in front of me that

1 said it was a good deal, and I think that would be the  
2 ultimate example of a conflict of interest from  
3 sell-side firms.

4 So, this--this particular line says nothing  
5 about the price of the Merger.

6 So, in general, I'd say putting the entities  
7 together is a good deal. It's a good idea.

8 Q. Okay. The terms of this deal, the price as  
9 you say, was, of course, known at this point in time,  
10 on the 27th of May; right?

11 A. But he's not referring to the price.

12 Q. So, Mr. Sull thought, for the reasons that  
13 he did, that this was a bad deal for Samsung--

14 (Overlapping speakers.)

15 A. We don't know the reasons.

16 Q. Are the reasons that whatever the reasons  
17 may have been--

18 A. So, I can't opine on something, and I don't  
19 know what his thinking is.

20 Q. I understand.

21 Mr. Sull thought it was a bad deal for the  
22 reasons given here, whatever else they may have been.  
23 Can we please have a look at the--

24 A. What are the reasons given here?

25 Q. Mr. Garschina, I think--

1           PRESIDENT SACHS: Mr. Garschina, please wait  
2 for the question first. Thanks.

3           BY MR. VOLKMER:

4           Q. The third paragraph of this e-mail, if we  
5 can have a look at that. So, despite thinking that  
6 this was a bad deal for SC&T, Mr. Sull also thought,  
7 and I'll read this for the record: "'However, the  
8 National Pension Service (NPS), as Shareholders of  
9 Samsung C&T, should go along with the Merger, as the  
10 NPS has been pushing for more group restructuring and  
11 likely Samsung C&T consulted with NPS. In any case,  
12 Shares of Samsung C&T are moving up and should go  
13 through.'"

14           Do you see that?

15           A. I see that.

16           Q. So, KIS America thought that despite this  
17 being a bad deal for SC&T, the NPS should go along  
18 with the Merger; correct?

19           A. That's what they wrote.

20           Q. And according to KIS America, the NPS should  
21 go along since they had been pushing for restructuring  
22 for Samsung for a long time; correct?

23           A. Yes. He--he was--had this opinion, and he  
24 was wrong.

25           Q. Okay. Taking a step back, upon the

1 announcement of the Merger, you received notes from at  
2 least two analysts, KIS America and UBS, saying that  
3 they expected the Merger to go through, and those  
4 Reports were available to Mason before buying Shares  
5 in SC&T; correct?

6 A. A multitude of opinions were proffered on  
7 the outcome of the Merger. You can look where  
8 we--where we put our money as an indication of our  
9 view, and you can also look at the price of SC&T  
10 coming into the Merger was trading above the Merger  
11 price.

12 So, the market, as a whole, all the market  
13 participants all over the world were voting with the  
14 share price trading above the Merger price that they  
15 did not think the Merger was going to go through. But  
16 whether or not these people who have relationships  
17 with Samsung are getting paid by Samsung or other  
18 entities have a view, I'm very skeptical of them. I'm  
19 not--not in an arrogant way, but my job is to identify  
20 conflicts of interest, identify people who are  
21 unbiased, and Mr. Sull in particular, I viewed as a  
22 shill.

23 Q. Okay. So, first of all, I think the answer  
24 to my question was yes; right? These two analyst  
25 notes were available to Mason before it bought shares

1 in SC&T. That's a "yes" or "no" question.

2 A. Were available to Mason? Yes, but I don't  
3 remember reading them.

4 Q. Okay. And then you mentioned Samsung paying  
5 analysts. Do you have any reason to believe that UBS,  
6 a large international investment bank, was paid by  
7 Samsung?

8 A. Do I have any reason to believe that?

9 Q. Yes.

10 A. Yes.

11 Q. Do you have any evidence for that belief?

12 A. Not in front of me.

13 Q. You don't mention any in your Witness  
14 Statement; correct?

15 A. Samsung pays every investment bank. They're  
16 one of the largest companies in the world.

17 Q. Do you have any reason to believe that, for  
18 that reason, UBS would be influenced and would say  
19 whatever Samsung wanted to say?

20 A. Yes. 30 years of investment experience and  
21 seeing it over and over and over again. People went  
22 to jail in this country during the dot-com crisis for  
23 exactly the same thing and I see it every day in my  
24 work. Analysts are influenced by the investment  
25 banking departments. They put out things that the

1 investment banking departments want them to put out.  
2 There is no wall despite the fact that Eliot Spitzer  
3 put a lot of these people in jail, you're probably too  
4 young to remember, but it's--in sell-side reports,  
5 especially when there is a lot of money up in the  
6 corporate finance on the line, are taken by me and  
7 everyone in my business--I'm not special--with a very  
8 skeptical eye.

9 Q. You don't have any evidence that UBS was--I  
10 don't know what you're suggesting--bribed or anything  
11 like that by Samsung?

12 A. No, I didn't say bribes. You did.

13 Q. So, you don't have any evidence--

14 A. I'm saying that if I'm a client, my counsel  
15 is going to--is going to do its best to serve my  
16 interests. UBS is a--potentially, and I'm sure you  
17 can find the information, Samsung represents, if not a  
18 big client at that time, a big potential client.

19 And, you know, investment banks are biased  
20 when there's money from corporations on the line.  
21 It's a fact. Do I have specific evidence that UBS was  
22 being paid on this Transaction? I'd have to do  
23 research. But, in general, large global investment  
24 banks and large global humongous corporations have a  
25 joint interest.

1           So, I don't know who wrote these notes. I  
2 don't really care. I have my own opinions. We had  
3 done years of work, and they culminated in that  
4 process of making these investments. Our money is on  
5 the line. Our view is clear.

6           If I was listening to these--these folks, I  
7 wouldn't even--I wouldn't be employable.

8           Q.    Mason was collecting these analyst notes at  
9 the time and was reviewing them at the time and  
10 looking at what was written by these analysts;  
11 correct?

12          A.    It's the analysts' job to--analysts at my  
13 firm's job--to collect information that's out there.  
14 Whether or not I saw them, I can't tell you, sir.

15          Q.    Right.

16                Analysts at your firm would have seen them.  
17 I mean, clearly, this is an internal e-mail collecting  
18 these notes?

19          A.    Analysts at my firm could have seen them,  
20 yes.

21          Q.    Well, this is an internal e-mail  
22 distributing these notes.

23          A.    Look, I don't what--know who read it. I  
24 have--I--it's immaterial to me.

25          Q.    Does it happen that Mason internally just

1 forwards information that nobody ever looks at?

2 A. It happens quite frequently.

3 Q. And therefore, you miss certain information?

4 A. I seek out the information. I don't miss.

5 I consider certain information and certain opinions to  
6 be valuable. Notes from unnamed sell-side analysts  
7 from large investment banks that are--that are not  
8 well thought out, not well-reasoned, poorly  
9 researched, and potentially biased are not important  
10 to me.

11 So, if I missed them, I don't care.

12 Q. Would you care if your market analyst missed  
13 them?

14 A. If he missed them?

15 Q. If this was never read, was forwarded but,  
16 as you appear to be suggesting, never read?

17 A. Okay. I think if he saw something in one of  
18 these reports that was potentially the opposite of all  
19 the characteristics that I just described, he would  
20 walk into my office and specifically verbally  
21 communicate it to me.

22 Most of our communication is done verbally.  
23 What you're seeing is largely administrative back and  
24 forth e-mail traffic. I grew up in this business  
25 before e-mail, so I prefer verbal communication, and

1 that's why all of our people are in the same place  
2 every day. You know, 95 percent of all of our  
3 communication is verbal.

4 Q. Let's talk about the economic rationale  
5 behind the Merger, in particular from the perspective  
6 of the NPS. These go to your fourth Witness Statement  
7 that's in the yellow bundle, that is CWS-7--the last  
8 tab in the yellow bundle--and Paragraph 14.

9 A. Which statement?

10 Q. Fourth. Paragraph 14.

11 And I'd ask you to read that paragraph to  
12 yourself, not out loud, and let me know once you have  
13 read it, please.

14 (Witness reviews document.)

15 A. Okay.

16 Q. So, the NPS had appraisal rights under  
17 Korean Law and other SC&T Shareholders did as well;  
18 correct?

19 A. I don't know about other SC&T Shareholders,  
20 but NPS.

21 Q. And the appraisal price was a pre-set price  
22 at which shareholders could sell their shares back to  
23 SC&T if they didn't agree with the Merger; right?

24 A. I don't know the specifics of what the  
25 put-back--so called put-back option would be, but

1 there was some sort of ability to sell their shares  
2 back.

3 Q. Well, that's what you're saying in this  
4 paragraph, isn't it? The NPS could sell back its  
5 shares back to the company at a pre-set price. I'm  
6 just calling it an appraisal price. That's another  
7 word for it.

8 A. Okay. Yes.

9 Q. Okay. Now, if, after the Merger  
10 Announcement, SC&T Shares traded below their appraisal  
11 price--

12 A. Um-hmm.

13 Q. --then the NPS would have an incentive to  
14 sell Shares back to SC&T; right?

15 A. No.

16 Q. If the appraisal price is higher than the  
17 actual market price, there would be an incentive to  
18 sell back to the Company? You would make more money  
19 selling back?

20 A. Not necessarily, no.

21 Q. Please--please elaborate.

22 A. Because a fund the size of NPS is invested  
23 not only in SC&T but in all the other Samsung  
24 Securities. And if the Merger was not to go  
25 through--was to go through and they were to sell their

1 securities back, means, in my view, that they would  
2 have lost money in all their other securities because  
3 it would have been a voting through a Merger, that was  
4 clearly wrong on its merits from an economic  
5 perspective, would have driven down the  
6 securities--all their other securities, including all  
7 the securities outside of the Samsung structure that  
8 they owned in Korea. And I think they would have been  
9 well-aware of that. And it's a very shortsighted view  
10 to say, well, I'm going to vote again--even if this  
11 deal goes through, I'm going to be able to put my  
12 shares back. There are plenty of circumstances during  
13 this process where the share price was trading above  
14 the put price.

15           So, if I were NPS, I'd be thinking, if this  
16 Merger doesn't go through and it's renegotiated, and  
17 more importantly, as I mentioned last time, it would  
18 have been a signal that the rule of law was holding in  
19 the country. They could make two, three, four times  
20 their money. So, I think it's a very--I see the  
21 argument that you're making, but it falls on itself  
22 because pension plans are not short-term traders.  
23 They are not interested in making 5 percent. They're  
24 fiduciaries for large amount of public people's  
25 assets. And it could be trading a little bit above

1 the put price, it could be trading a little bit below,  
2 but these are long-term thinking organizations, and  
3 they could double or triple their money in all of the  
4 Samsung securities or Korean securities if the rule of  
5 law was seen as holding here.

6 I think it's bit of a myopic theory.

7 Q. And then taking the opposite approach--I  
8 think you do say that yourself--if the shares traded  
9 above the put-back price, the NPS could have an  
10 incentive, as you say, in theory, to support the  
11 Merger; correct? That is what you say here in your  
12 Witness Statement?

13 A. It could have that in theory, yes, but I  
14 think the larger point out of the myopic is that  
15 there's a much bigger picture, as I discussed in  
16 questions at the beginning. This is not about a  
17 put-back price that you could make a little money on  
18 or lose a little money. This is about wholesale  
19 reform of corporate governance structure in an entire  
20 country, a large country. NPS is at the center of it.  
21 And they're a fiduciary for the assets of the people  
22 that are pushing for this restructuring--putting  
23 political pressure on the politicians about the  
24 corruption and inequality. They're a fiduciary for  
25 those very people.

1           My view was that they would be grasped by  
2 that fiduciary obligation and see the reforms that are  
3 attempting to be taking place, and be a part of it,  
4 following in their own fiduciary duties with the view  
5 that, over time, their assets could be worth five, 10  
6 times where they're trading.

7           And I think, actually, we have the benefit  
8 of a lot of hindsight here because this is almost  
9 eight years ago, and I think that's largely been born  
10 out. So, I think it would have been very shortsighted  
11 and myopic, and Machiavellian to a point of fault, for  
12 their own investors to think about that. And I would  
13 be very surprised if they thought about that.

14           Q.    Okay. Once again, Mr. Garschina, mindful of  
15 the time. That was a fairly long answer to a much  
16 narrower question about what you were saying in your  
17 Witness Statements, so please try to listen to the  
18 questions and--

19                   (overlapping speakers.)

20           A.    I use as many words as I think is--are  
21 required to--to provide context for very narrow  
22 questions.

23           Q.    I would ask you to listen to the question  
24 and answer the question. If there is elaboration,  
25 your counsel will have time to come back to that

1 later. We are limited in our time.

2 So, with the appraisal prices in mind, can  
3 we please go to the next document, which is Tab 11,  
4 R-131. And please keep your Witness Statements next  
5 to you, the paragraph we just looked at.

6 A. R-11?

7 Q. R-131, Tab 11.

8 A. Which Witness Statement before?

9 Q. The fourth, and we just looked at  
10 Paragraph 14 of the Fourth Witness Statement, so you  
11 can just leave that next to you.

12 R-131 is an article published on the 29th of  
13 May 2015 in the Mail Business News, a Korean business  
14 newspaper. I will read the second paragraph of that  
15 article for the record.

16 "On the 29th, a key official of the NPS,  
17 regarding the Cheil Industries-Samsung C&T Merger  
18 said, 'There is no reason for the NPS to oppose the  
19 Merger because the current share prices are higher  
20 than the price of appraisal rights, indicating a  
21 position in favor of the Merger.'"

22 Now, you say in Paragraph 14 of your Witness  
23 Statement that there was market chatter that the NPS  
24 might vote in favor of the Merger based on appraisal  
25 rights but what we see here is not market

1 chatter--right?--this is a statement by the NPS's  
2 about its intention how to vote?

3 A. It's not a statement by the NPS.

4 Q. It's a quote of a statement by the NPS;  
5 correct?

6 A. It's not a statement by the NPS. I can  
7 elaborate, if you would like.

8 Q. The newspaper articles says "a key official  
9 of the NPS said."

10 A. Which official?

11 Q. Not specified in the article.

12 A. So, it's not in a statement. It's an  
13 unnamed source in a newspaper article. A statement  
14 has the NPS's name on it, and it's released.

15 Q. The first paragraph of that article says  
16 that the NPS has announced its position.

17 Do you see that?

18 A. I do.

19 Q. And the NPS can announced its position, and  
20 that would then be reported in the press; correct?

21 A. I don't know what they're referring to when  
22 it says they have announced their position. If you  
23 have an original source document, I'm happy to look at  
24 it.

25 Q. This newspaper article saying that there has

1 been an announcement by the NPS will be relevant  
2 information for an assessment of how the NPS was  
3 likely going to vote?

4 A. Not for me, no.

5 Q. An announcement picked up in a newspaper, in  
6 your mind, is irrelevant?

7 A. It's not irrelevant. It's just not  
8 important.

9 Q. The NPS stating its own intention how to  
10 vote is not important to assess how the NPS would  
11 vote?

12 A. Where is the statement that they said they  
13 were going to oppose it?

14 Q. It is quoted here.

15 A. From who? It's a newspaper article with an  
16 unnamed source. I don't take unnamed sources  
17 seriously.

18 Q. You don't take newspaper articles seriously?

19 A. If they have names on the record sources,  
20 yes. We're in the building of The New York Times,  
21 where things are double sourced. Unnamed accusations,  
22 unnamed sources, especially in a Korean newspaper, I  
23 take with a huge grain of salt.

24 Q. This information would have been available  
25 to Mason before buying its SC&T Shares; right?

1 A. I don't read Korean newspapers, sorry.

2 Q. Not my question.

3 This information was available to Mason  
4 before buying its Shares; correct?

5 A. What does "available" mean?

6 Q. Mason could have seen this information.

7 A. I could have seen anything. It doesn't mean  
8 I did.

9 Q. I'm not asking about you specifically. You  
10 have a team of analysts including Korean-speaking  
11 analysts who read Korean-speaking newspapers. This  
12 information was available to Mason, including your  
13 team?

14 A. I don't know.

15 Q. Well, this was published before you bought  
16 your investment in Mason--sorry, in SC&T; correct?

17 A. I would have to look at the chart with the  
18 purchases again.

19 Q. Okay. We did earlier. It is undisputed  
20 that Mason did not own any shares before this Article  
21 was published.

22 Let's move on. Let's go to Tab 12, Exhibit  
23 R-388. This is an e-mail from an analyst at Macquarie  
24 to Mr. Gomez--this is dated the 26th of May 2015--and  
25 if FTI could perhaps show Pages 1 and 2 side by side.

1           So, this analyst sent an article published  
2 by Macquarie about the Merger Announcement. If you  
3 look at the last bullet point at the bottom of the  
4 page, Macquarie wrote that: "The deal is a win-win  
5 for both Cheil Industries and SC&T, in our view," and  
6 Macquarie then gave reasons why the Merger was a win  
7 for Cheil.

8           Do you see that?

9           A. I don't--as I said before, I agree that  
10 there were many strategic reasons--

11          Q. Sorry, Mr. Garschina, I haven't asked a  
12 question yet to comment on this article. I'm asking  
13 only so far can we agree that we are on the same page?  
14 You see that Macquarie said the deal was a win-win.  
15 You see that Macquarie then gave reasons as to why it  
16 was a win-win.

17          Do you see that?

18          A. I see that's what they wrote, yes.

19          Q. Okay. Let me just read for the record so we  
20 are all on the same page. On the second page, the  
21 sentence starting with "for". "For Samsung C&T  
22 Shareholders the deal removed uncertainties over  
23 Samsung C&T's role in the Group's Shareholding  
24 reshuffling," I will skip the next part, then, "the  
25 Merger will effectively remove competition for

1 construction projects between the two companies, and  
2 the market would likely to allow higher valuation  
3 premiums as the stock becomes a core holding of the  
4 Samsung family.'" "

5 This article doesn't mention appraisal  
6 rights; is that right?

7 A. Doesn't?

8 Q. It does not?

9 A. I will take your word for it.

10 Q. So, according to Macquarie, SC&T  
11 shareholders had reasons other than appraisal rights  
12 to approve the Merger; is that right?

13 A. That appears to be their opinion.

14 Q. And presumably you disagree with that  
15 opinion?

16 A. That people had reasons--I think there are a  
17 lot of considerations, but the chief consideration is  
18 price. It's very easy to value the Company.

19 And no matter what--I think we all agree,  
20 that no matter what the strategic benefits of any  
21 combination, the first thing you're going to look at  
22 is if you're being paid a fair price. Chief in any  
23 negotiation, the first issue in any negotiation  
24 between merging parties is the price. It could be the  
25 best combination since ham and swiss, but if it's a

1 price that is half of what the valuation is of the  
2 swiss, then it's not a good deal.

3 Q. Okay.

4 A. Even though there could be strategic merit.

5 Q. Now, the terms of the deal, the price was  
6 known on this day, so Macquarie thought that this was  
7 a win for Samsung--SC&T, no matter the price; correct?

8 A. I don't know that.

9 Q. Well--

10 A. It doesn't say that.

11 Q. The deal was announced--

12 PRESIDENT SACHS: If I may intervene, it's  
13 the first bullet point, isn't it?

14 MR. VOLKMER: Yes.

15 THE WITNESS: Which bullet point?

16 BY MR. VOLKMER:

17 Q. Samsung--sorry, "Summary of Key Terms" on  
18 the first page. It talks about the Merger Ratio,  
19 that's the price?

20 A. Um-hmm, yeah, but they don't opine on the  
21 price.

22 Q. Well, knowing what the price is, Macquarie  
23 says this is a win-win; correct?

24 A. You know, I think they're referring to  
25 Cheil, that it was a really good deal for Cheil, which

1 I agree.

2 Q. Okay. That's why it's important that we  
3 read this together.

4 So, once again, on the second page, for  
5 Samsung C&T's Shareholders, the deal removed  
6 uncertainties and so on and so forth, what I just  
7 read. These are reasons why the deal is a win for  
8 Samsung C&T; correct?

9 A. We're talking about the accretion, first of  
10 all. We're talking about accretion in the bullet  
11 point you're talking about was 119 percent accretive  
12 to Cheil Shareholders. A very good deal for Cheil  
13 shareholders. The reason it's 119 percent accretive  
14 is because they're stealing it in the parlance of  
15 finance. So, yes, I can understand that it was a very  
16 good deal for Cheil shareholders. They're not saying  
17 what the dilution would have been for C&T  
18 shareholders. C&T was trading at seven times  
19 earnings. Cheil was trading at a jillion times  
20 earnings, and we were taking their currency as  
21 consideration.

22 So, they're pointing out that if they were  
23 being fair, they would have said it's 90 percent  
24 dilutive for the C&T Shareholders.

25 Q. Precisely my point. Knowing what these

1 terms were, knowing what the valuation was of each  
2 company, Macquarie said this is still a win-win for  
3 both companies?

4 A. I mean, that's their opinion. I disagree  
5 with it. Macquarie is an Asian investment bank, and  
6 probably--I don't know who their audience is, but it's  
7 not something that I would give a lot of credence to.

8 Q. Okay. Macquarie is an Australian-based  
9 financial institution; do you know that?

10 A. I do. Their main business is in Asia.

11 Q. Okay. Let's move on to the next document.  
12 This is Tab 13, Exhibit R-423.

13 A. Um-hmm.

14 Q. And this is an e-mail from Mr. Sull at KIS  
15 America to your team, he forwards an article published  
16 by Bloomberg under the heading "'Korea pension has  
17 18 billion at stake in backing Samsung on C&T,'" and  
18 Mr. Sull wrote in his e-mail that he highlighted a  
19 certain paragraph in yellow.

20 Do you see that? It's the first line of  
21 that e-mail.

22 A. "'I highlighted it in yellow.'" Yes, I see  
23 that.

24 Q. Okay. Then I will read the third paragraph  
25 of the Bloomberg article for the record: "'The NPS is

1 used to being caught between the competing interests  
2 of business stalwarts and minority shareholders. Its  
3 stakes in at least 12 listed Samsung affiliates, worth  
4 \$17.8 billion, may force its hand on C&T because with  
5 the take-over so integral to Samsung's  
6 once-in-a-generation leadership transition, the Fund  
7 can't evaluate the deal in isolation.'" "

8           So, according to this Bloomberg article, the  
9 NPS couldn't evaluate the Merger only from the  
10 perspective of an SC&T Shareholder; correct?

11           A.    So, they seem to be saying that it was  
12 uncertain how they were going to vote.

13           Q.    Not quite my question.

14           According to this Bloomberg article, the NPS  
15 couldn't evaluate the Merger only from the perspective  
16 of an SC&T Shareholder; correct?

17           A.    That's what it says in the article. It's  
18 the opinion of the article.

19           Q.    Okay. And according to this article, given  
20 that the NPS owned shares in at least 12 Samsung  
21 companies worth almost \$18 billion, the NPS would have  
22 to consider the impact of the Merger on all of the  
23 Samsung investments?

24           A.    I considered that very fact. I could  
25 elaborate, if you want.

1 Q. Let's move on. We can still talk about this  
2 document a little more. Now, this document is in  
3 black and white, but then you can see that the next  
4 paragraph is the one that was highlighted by Mr. Sull,  
5 still on the same page, on the first page. It's a  
6 little shaded.

7 A. Um-hmm.

8 Q. I will just read that again for the record:  
9 "For investors who only have C&T Shares, the decision  
10 may be easy, 'as they can oppose the deal if they  
11 agree with Elliott,' Albert Jong, Chief Executive  
12 Officer of Petro Capital Management, 'which I received  
13 about KRW 450 billion, USD 409 million, including C&T  
14 Shares, said by phone in Seoul on Monday. But for  
15 investors like the NPS who have stakes in other  
16 Samsung affiliates, it's more complicated. The  
17 collapse of this deal could bring losses to its other  
18 shareholdings.'"

19 So, this fund manager made a similar point  
20 to that in a previous paragraph in this article,  
21 namely that the NPS's perspective of the merger was  
22 more complicated than that of a shareholder only in  
23 SC&T; right?

24 A. That's what his opinion is.

25 Q. And, according to this fund manager, the NPS

1 would have to consider the collapse of the Merger that  
2 that might bring losses to other holdings than SC&T;  
3 right?

4 A. Or gains.

5 Q. Well, the fund manager says the collapse of  
6 this deal could bring losses to its other holdings,  
7 right?--that is what he is pointing out.

8 A. I disagree with that a hundred percent, and  
9 I think history is on my side given that the opposite  
10 happened when the deal was approved, so he was wrong.

11 Q. In your opinion, he was wrong, but you  
12 knew--

13 A. Not my opinion. The opinion of the market  
14 when the deal--when the deal was approved, all of the  
15 securities in the Samsung structure went down.

16 Q. And you knew--

17 A. I can elaborate, if you would like.

18 Q. No need. Thank you.

19 You knew that at the time placing yourself  
20 in May or this is now June 2015--this is before the  
21 Merger was approved, that some market participants  
22 thought the NPS, knowing what the Merger Ratio was,  
23 had an incentive to support the Merger; right?

24 A. I mean, market participants are entitled to  
25 their opinions. My opinion, as expressed in the

1 amount of money that I had invested here, was that the  
2 NPS would follow their fiduciary duty.

3 And indeed the Market Prices of C&T trading  
4 above the price of the Merger, indicate that the  
5 market agreed with me, and the Market Prices of C&T  
6 declining precipitously when it was approved, indicate  
7 the market agreed with me.

8 So, the market represents the aggregation of  
9 all, if you believe in the "efficient market"  
10 hypothesis, which I don't, we can discuss, but it is  
11 more of an indication, much more of an indication of  
12 the aggregate opinion of all market participants than  
13 the opinion of one who you're citing here.

14 Q. Right.

15 You're referring to what happened after the  
16 Merger was approved. This is before the Merger was  
17 approved, and I'm trying to situate us at that point  
18 in time.

19 A. He's hypothesizing about what could happen  
20 after the Merger is approved.

21 Q. Right.

22 Nobody knew at this point in time what would  
23 happen after, right? This is before.

24 A. No, but he's saying that they would have to  
25 consider what happened after.

1 Q. And what I'm saying is let's place ourselves  
2 at that point in time with the knowledge the people  
3 had at that point in time.

4 A. But I'm saying he was wrong.

5 Q. I understand that. Let's move on--

6 A. So, my instinct that I shouldn't listen to  
7 him was right.

8 Q. With the benefit of hindsight, you're  
9 offering your opinion now, understood.

10 Let's move on to Mason's expectations of how  
11 the NPS would vote on the Merger. And if we can go to  
12 your third Witness Statement, CWS-5, at Paragraph 22.  
13 And you say here you were horrified and shocked when  
14 you learned that the NPS had decided to vote in favor  
15 of the Merger, and that the Merger would proceed as a  
16 result.

17 Do you remember how you learned that the NPS  
18 had decided to vote in favor?

19 A. No.

20 Q. Do you remember when you learned it?

21 A. No.

22 Q. So, you just remember--you don't remember  
23 how, you don't when, you just remember being shocked  
24 at some point in time?

25 A. I remember when I got this cut on my head,

1 but I don't remember the date. It was a jarring  
2 moment, and I think humans are prone to remember their  
3 emotions, not the date on the calendar.

4 Q. Okay. It could have been before, after the  
5 SC&T Shareholder Vote? You don't remember?

6 A. How would I know that they were going to  
7 vote until after the vote?

8 Q. Okay. So, you think it must have been after  
9 the Shareholder Vote?

10 A. Well, I'm not a--I had no material nonpublic  
11 information, if that's what you're implying.

12 Q. Okay. Let's have a look at the information  
13 available to Mason at the time.

14 Perhaps--sorry, before we do that--yeah, no,  
15 that's right.

16 Your Fourth--sorry--your Fourth Witness  
17 Statement at Paragraph 15. Your Fourth Witness  
18 Statement, Mr. Garschina. And I will read the second  
19 sentence for the record: "'Our view, which solidified  
20 as the Merger Vote approached, was that if the NPS was  
21 rational and acted in good faith, and thought of its  
22 own pocket and its fiduciaries (the Korean  
23 pension-holders)--as it should have--it would vote  
24 against the Merger.'"

25 And you refer to a Footnote 7; and in that

1 footnote, you cite Exhibit C-125. And I would like to  
2 have a look at that Exhibit C-125, which is in your  
3 binder under Tab 15.

4 And that's an e-mail from Mr. Gomez to you,  
5 dated 8th of June 2015.

6 A. Um-hmm.

7 Q. That chain starts with a question from you  
8 to Mr. Gomez: "How you feel about the ability to  
9 block a deal if 60 percent show up, do Treasury Shares  
10 count?"

11 The "deal" refers to the Merger; is that  
12 right?

13 MR. VOLKMER: And FTI, that's on the second  
14 page.

15 THE WITNESS: Oh, yes, sorry.

16 BY MR. VOLKMER:

17 Q. And the "deal" refers to the Merger?

18 A. I don't know. It could refer to a deal in  
19 Korea in general. I'm asking about mechanics--general  
20 questions about the mechanics of both deals.

21 Q. Okay. Because this is an e-mail cited in  
22 your Witness Statement. Do you remember if this is  
23 referring to the Merger between SC&T and Cheil?

24 A. Can you show me where I cite it in my  
25 Witness Statement?

1 Q. Footnote 4 of the paragraph we just looked  
2 at. Paragraph 15 in your Fourth Witness Statement.

3 A. Well, my question is not in the Witness  
4 Statement, is it? You're asking me about my question?

5 Q. I'm asking whether you're familiar with this  
6 document. You cite it in your Witness Statement.

7 A. You asked me if I'm referring to the deal,  
8 as this version, I'm saying I don't know. That is not  
9 cited in my Witness Statement.

10 Q. Okay.

11 A. The lines you're asking me are not cited in  
12 my Witness Statement.

13 Q. All right. Let's look at the rest of this  
14 document. I think it becomes clear from context that  
15 this is the Merger.

16 A. Okay.

17 Q. So, on the first--sorry, in response to your  
18 question, Mr. Gomez gives you answers about Treasury  
19 Shares and about the 60 percent--

20 A. Um-hmm.

21 Q. --showing up.

22 Then on the next page, Page 1, there is an  
23 e-mail where you asked: "Try to get the gist of  
24 Elliott letter to NPS."

25 Do you remember what that was about, what

1 this letter was about?

2 A. I mean, not specifically. I remember  
3 Elliott being public in opposition to the Merger.

4 Q. And you remember that Elliott wrote a letter  
5 to the NPS to influence how it might vote?

6 A. Elliott not only wrote a letter, they put  
7 out large public presentations lobbying investors to  
8 mind their fiduciary duties when they voted, and I  
9 thought it was a--one of the reasons that I was  
10 very--first of all, I was very happy they were there,  
11 and I thought that them, as I said, shining a light on  
12 the situation would make it even more likely that NPS  
13 would come up with their fiduciary duty.

14 Q. Okay. Then the next paragraph, that's the  
15 middle of the page, it's again an e-mail from  
16 Mr. Gomez to you, and in the middle of that paragraph,  
17 that e-mail, I will read that for the record: "NPS  
18 is the wild card. I agree with you that it doesn't  
19 make sense to buy stock to side with Cheil and lose  
20 money but we don't know what else could be driving  
21 NPS. Bankers told me NPS has been more pro  
22 shareholders lately. Also I sensed the Samsung  
23 Securities Bank was concerned with this. Before  
24 Elliott, it looked like NPS was going to approve the  
25 Merger solely based--solely because stock traded above

1 put-back, i.e., a short-sighted economic decision. If  
2 they now also think about their pocket, they should  
3 approve. Jong was trying to reach out to them.'"

4 The NPS being the wild card meant that it  
5 was unclear how the NPS would vote?

6 A. I think he's saying that they're the swing  
7 vote.

8 Q. A wild card is something unpredictable and  
9 uncertain; correct?

10 A. I thought that it wasn't uncertain. To me,  
11 it was--I was willing to place a lot of money relying  
12 on them following their fiduciary duties. But I can  
13 tell you who also thought it was uncertain was  
14 Mr. [REDACTED].

15 Q. Okay. Not the question at all.

16 NPS is the wild card means NPS, the vote was  
17 uncertain; right? Mr. Gomez says we don't know what  
18 else could be driving NPS. At this point in time, we  
19 don't know what the NPS is going to do? You may have  
20 an opinion but you don't know?

21 A. That could be what he's saying. I don't  
22 know.

23 Q. You don't understand the phrase "'NPS is the  
24 wild card'"?

25 A. No, I don't. It's telling me that he either

1 hasn't made up his mind or doesn't have a firm  
2 opinion. Again, Mr. Gomez is an analyst. He has no  
3 investment authority. We placed a lot of money  
4 disagreeing with Mr. Gomez.

5 And again, everybody had an opinion here,  
6 but my opinion is--I repeat it over and over--no  
7 voluminous amount of other people's opinions cannot  
8 get us away from the fact that I had a strong opinion  
9 as illustrated by my putting my own fiduciary duty on  
10 the line for my investors.

11 Q. Okay. Let's move on to the next document.  
12 This is Exhibit C-128. It's under Tab 16 in your  
13 bundle. This is an e-mail two days after the e-mail  
14 we just looked at. This is the 10th of June 2015.  
15 Again, an e-mail to you.

16 There is a PDF of this e-mail.

17 MR. VOLKMER: Yeah, that's right, FTI, but  
18 there's also an Excel file. Could we pull up the  
19 Excel file next to the PDF, please.

20 FTI TECHNICIAN: I'm sorry, the Excel file  
21 is C-128 as well?

22 MR. VOLKMER: It should also be named C-128,  
23 yeah.

24 If it isn't there, we'll just move on.

25 BY MR. VOLKMER:

1 Q. In your bundle, that file is the next page,  
2 and you can see from the attachments that that was  
3 attached to the e-mail. It's called "'C&T Voting  
4 Sheet.'"

5 A. Um-hmm.

6 Q. There we go. Thank you.

7 So, middle of the first page, that e-mail  
8 exchange, it says: "'Below is our estimate in  
9 percentage on how votes may shake out. If our  
10 estimate is correct, we need 10 to 11 percent  
11 additional no vote to block the deal.'"

12 And then when you look at that Excel file,  
13 the table--exactly--in your bundle, it shows that this  
14 estimate on how votes may shake out counts the NPS as  
15 a Yes vote; correct?

16 A. I don't know whose estimate it is, but  
17 that's what it says, yes.

18 Q. That is an internal Mason estimate, isn't  
19 it?

20 A. I don't know. It could be cut and pasted  
21 from an Analyst's Report somewhere.

22 Q. Okay.

23 A. It comes from the trading desk, so it's  
24 not--

25 Q. So, the e-mail--

1           A.    As I mentioned before, it's not a product of  
2 our research department.

3           Q.    Okay.  So, the e-mail that we just looked at  
4 is from Mr. Jong Lee at Mason Capital?

5           A.    Yes.

6           Q.    And he writes "'this is our estimate';  
7 correct?

8           A.    He writes "'our estimate,'" yes, or someone  
9 did, and he's forwarding it.

10          Q.    You're saying that this is not his estimate  
11 when he says "'our,'" he doesn't mean--

12          A.    I don't know what his estimate is.  I don't  
13 know who "'our'" refers to.  The e-mail comes from our  
14 trading desk, which has no decision-making authority,  
15 and everyone was entitled to their view.

16                I don't remember seeing this.  It was not my  
17 view.

18          Q.    This was forwarded--sorry to interrupt.  Go  
19 ahead.

20          A.    I don't remember seeing it.  It was not my  
21 view.  And if it was my view, I wouldn't have owned  
22 the securities that I owned.

23          Q.    Okay.  Just for the record, this e-mail was  
24 sent to you; correct?  You may not have read it, but  
25 it was sent to you?

1           A.     Yes.

2           PRESIDENT SACHS:   May I intervene, I'm a bit  
3 confused.  I see in the middle of the page in a  
4 different kind of printing what appears to be your  
5 e-mail, Mr. Garschina, to Mr. Jong Lee, and it states  
6 what percent do you have voting in this analysis?

7           So, in reading this, it seems to me that  
8 this is your e-mail, isn't it?

9           THE WITNESS:   Yes.  I wrote that.  I'm  
10 asking--I'm asking a question on quorum, which is--

11          PRESIDENT SACHS:   Yes.  And isn't what  
12 follows the answer to your question?

13          THE WITNESS:   This analysis only counts for  
14 45 percent--sorry, 57 percent of the votes.

15          PRESIDENT SACHS:   But it's an answer, isn't  
16 it?

17          THE WITNESS:   The reason I asked the  
18 question is because they're only counting 57 percent  
19 of their votes in their analysis.  See the 45 yeses  
20 and the 12 nos, adds up to 57, so I'm effectively  
21 saying where is the other 43 percent?

22          PRESIDENT SACHS:   Okay.  So, you're reacting  
23 to that e-mail.  It's not an answer to the e-mail.  
24 You're reacting--

25          THE WITNESS:   Yes.

1           It appears to be. Sorry, I didn't see--I  
2 didn't see my participation actively in it.

3           PRESIDENT SACHS: Okay.

4           THE WITNESS: But my question is on, okay,  
5 where's the other 43 percent?

6           BY MR. VOLKMER:

7           Q. Right.

8           So, I think we established you did look at  
9 this e-mail at the time. You also asked what percent  
10 do you have voting in this analysis, which appears to  
11 be referring to an analysis by Mr. Lee--right?--it's  
12 not some external analysis.

13          A. It could be. I don't know. I don't know  
14 where he got that from.

15          ARBITRATOR GLOSTER: Mr. Garschina, I'm  
16 confused now. The e-mail we're looking at is 10th of  
17 June at 9:13.

18          THE WITNESS: Um-hmm.

19          ARBITRATOR GLOSTER: And your e-mail, which  
20 we see in the middle of the page is responding to an  
21 earlier e-mail from Mr. Lee, as I understand it,  
22 of--is this right? The previous day, or--which way  
23 does it go? All the times are different. I'm just  
24 trying to understand. Which e-mail are you responding  
25 to? Are you responding to the one at the bottom of

1 the page?

2 THE WITNESS: I think that's the sequence,  
3 as I understand it.

4 ARBITRATOR GLOSTER: Right. So, you then  
5 respond to Mr. Lee.

6 And then at the top of the page, Mr. Lee  
7 sends his e-mail to Bloomberg's and Emilio at Mason.

8 So, what I'm trying to understand is, I can  
9 see you were responding to the earlier e-mail, but you  
10 don't seem to be a recipient--or were you?--of the  
11 later e-mail.

12 THE WITNESS: I don't know.

13 MR. VOLKMER: Dame Elizabeth, maybe just to  
14 try to clear this up.

15 BY MR. VOLKMER:

16 Q. The Bloomberg address, Amagansett--I'm not  
17 sure I pronounced it right, but--

18 ARBITRATOR GLOSTER: Yes.

19 MR. VOLKMER: --that's Mr. Garschina's  
20 e-mail address.

21 ARBITRATOR GLOSTER: Right. I'm so sorry,  
22 then that explains it, yeah.

23 MR. VOLKMER: Yeah, and for the time stamps,  
24 we can't, of course, speak for what this document  
25 originally shows, but where we see this in practice is

1 often where the times don't match up is under  
2 different time zones.

3 ARBITRATOR GLOSTER: Yes, absolutely.  
4 Absolutely. Thank you.

5 BY MR. VOLKMER:

6 Q. Okay. So, last question on this document.  
7 In Mr. Lee's e-mail at the very top responding to your  
8 question, we see in what we might call the second  
9 paragraph, "'the wild card will be foreign  
10 shareholders,'" so there is an expression by Mr. Lee  
11 of uncertainty of about how foreign shareholders might  
12 vote at the SC&T shareholding meeting; correct?

13 A. That's Mr. Lee's view.

14 Q. Okay.

15 MR. VOLKMER: I see that we're at 10:00,  
16 Mr. Chairman. We would be happy to stop here for a  
17 break.

18 PRESIDENT SACHS: Yes. Agreed.

19 We meet again at 10:15, please.

20 (Brief recess.)

21 PRESIDENT SACHS: We can resume.

22 MR. VOLKMER: Mr. Chairman, we don't see the  
23 co-Arbitrators yet.

24 (Pause.)

25 PRESIDENT SACHS: Please proceed.

1 MR. VOLKMER: Okay.

2 BY MR. VOLKMER:

3 Q. Mr. Garschina, we will stay on the topic of  
4 Mason's knowledge of the NPS's vote before the  
5 Shareholder Meeting. Can we please go to Exhibit  
6 R-541. That's under Tab No. 20. That's a Mason  
7 internal e-mail exchange from the 10th of July 2015.  
8 Several of your colleagues were part of that exchange,  
9 including Mr. Martino. You aren't.

10 And on the day of this exchange, the NPS's  
11 Investment Committee approved the Merger.

12 Let's start on the second page, and towards  
13 the top of the page you see an e-mail from Mr. Jong  
14 Lee to Mr. Martino and others, and Mr. Lee forwarded  
15 an article published by Bloomberg. That article is in  
16 the bottom half of the page under the second dashed  
17 line, and I'll read that article for the record. It  
18 says: "National Pension Fund to vote for Samsung C&T  
19 Merger Economic Daily," and then it says: "South  
20 Korea's National Pension Service will support the  
21 merger between Cheil Industries and Samsung C&T, Korea  
22 Economic Daily Reports without citing anybody. NPS's  
23 decision comes amid criticism and speculative overseas  
24 hedge funds and concerns about the negative impact to  
25 NPS which holds more than KRW 20 trillion in Shares of

1 Samsung affiliates.'" "

2 Do you see that?

3 A. Yes.

4 Q. And then towards the top of the page, we  
5 have Mr. Lee's e-mail, and he writes: "'I'm looking  
6 into the credibility of this paper and if it has  
7 Samsung ties.'" "

8 So, as far as you understand, this document,  
9 this paper is referring to the Korea Economic Daily?

10 A. That's the link in the Bloomberg article is  
11 the Korean Economic Daily, yes.

12 Q. Okay. And are you aware that Korea Economic  
13 Daily is a large business newspaper in Korea?

14 A. I'm not.

15 Q. Let's go to Page 1, middle of the Page, and  
16 we see an e-mail from Mr. Ivan Ross to his colleagues  
17 at Mason. And I'll just read this for the record:  
18 "'I just spoke with James Smith at Elliott. He thinks  
19 story is true but his view is that NPS, by not making  
20 any formal announcement, is still leaving itself some  
21 wriggle room to vote no if circumstances on the ground  
22 change, for example Korean Shareholders protest  
23 increase. James's base case, however, has said that  
24 NPS will be a yes. In which case, he thinks the key  
25 factor for approval or disapproval will be overall

1 turnout. His view is if closer to 70 percent Merger  
2 fails, closer to 80 percent Merger probably  
3 succeeds.'" "

4 So, on the 10th of July 2015, the Korea  
5 Economic Daily reported that the NPS would approve the  
6 Merger, Elliott thought that the story was true, and  
7 Elliott's base case was that the NPS would approve the  
8 Merger. That's what this e-mail says; correct?

9 A. It says--it says base case, I assume based  
10 on the newspaper article you cited, he's not  
11 disagreeing with the newspaper article. I don't know  
12 if it was just base case. I would doubt it was his  
13 base case coming into the vote, but I think he's  
14 taking the article at face value.

15 Q. And, of course, Mason was informed about all  
16 of this because one of Mason's employees spoke with an  
17 employee at Elliott; right?

18 A. Informed about?

19 Q. About the newspaper article, about Elliott's  
20 position of the newspaper article, and Elliott's base  
21 case going forward.

22 A. Yes. Mr. Lee was, and probably a lot of  
23 other people at Mason, saw this e-mail.

24 Q. And spoke with Elliott?

25 A. That's what he says, yes.

1 Q. Okay. So, as of the 10th of July, Mason  
2 knew that it was highly likely that the NPS would  
3 approve the Merger; correct?

4 A. What's the date of the--date of the vote?

5 Q. The date of the e-mail is 10th of July, the  
6 date of the Shareholder Vote is 17th of July, one week  
7 later.

8 A. Can you repeat the question, please?

9 Q. As of the date of this e-mail, based on all  
10 the information we just reviewed, Mason knew that it  
11 was highly likely that the NPS would approve the  
12 verger--Merger?

13 A. These people on this e-mail chain thought  
14 that James Smith at Elliott thought that it was  
15 likely.

16 Q. And that includes Mr. Michael Martino?

17 A. He's one of the recipients.

18 Q. So, did Mr. Martino inform you about this  
19 e-mail?

20 A. I don't recall.

21 Q. You don't recall hearing from anybody from  
22 your team that there was an article that the NPS would  
23 approve and that Elliott thought that this was  
24 correct? Yes, the NPS would approve?

25 A. I don't recall that, no.

1 Q. You don't recall that.

2 You don't recall whether, at this point in  
3 time, you were shocked and horrified to find out the  
4 NPS voted yes? It might have been this time, it might  
5 have been later?

6 A. I believe it was after the Merger Vote was  
7 announced.

8 Q. But you don't remember?

9 A. It would not have been on this. I--I--this  
10 is not an announcement of the Merger terms. This is a  
11 rumor from a newspaper.

12 Q. Which Elliott believed to be true.

13 On this--the date of this e-mail, after this  
14 e-mail, before the Shareholder Vote, Mason could have  
15 sold shares in SC&T; right? That would have been an  
16 option for Mason to do?

17 A. If I had believed this e-mail, that would  
18 have been one of my natural courses of action, but I  
19 didn't.

20 Q. Well, I think you just said you don't know  
21 if anybody brought this to your attention.

22 A. I can't remember specifically if someone  
23 brought it to my attention. This was a long time ago.

24 Q. Now, according to this e-mail, Elliott  
25 expected that the key factor for approval or

1 disapproval would be turnout at the SC&T Shareholders'  
2 Meeting; right? That's what Elliott told Mason at the  
3 time?

4 A. That's what it says here, yes.

5 Q. Yeah.

6 Was it also your expectation that turnout  
7 would be a key factor?

8 A. You know, there--there were a lot of  
9 factors, but the predominant factor to me was NPS, and  
10 that, I think--if you look at the record of the votes  
11 that happened, that was what it turned on.

12 Q. Okay. Was turnout one of the key factors  
13 that you considered at the time?

14 A. Yeah. In any vote, the amount of people  
15 that show up is important.

16 Q. And, according to this e-mail, Elliott  
17 thought turnout, if it was closer to 70 percent, the  
18 Merger would fail; and, if it were closer to  
19 80 percent, the Merger would probably succeed? That  
20 was Elliott's view at the time, as communicated to  
21 Mason?

22 A. I think what he's saying is that, even if  
23 NPS votes yes, you can still--can still be voted down  
24 if there's a certain amount of turnout.

25 Q. And do you remember you agreed with those

1 numbers? Do they reflect your view at the time?

2 A. I don't. I don't remember, but my view at  
3 the time was that it did not turn on--on the turnout.

4 Q. Okay. Let's move on to Mason's rationale or  
5 thesis for investing in Samsung, and we can have look  
6 at your Second Witness Statement for that, CWS-3, at  
7 Paragraph 8.

8 I'll read this for the record: "What  
9 prompted to us invest at the time was the prospect  
10 that the transition to the next generation of  
11 leadership would require a significant restructuring  
12 of the Samsung Group. The restructuring would be a  
13 catalyst to unlock value in the business for  
14 Shareholders. The Samsung heir apparent was under a  
15 lot of pressure from Shareholders, particularly  
16 foreign Shareholders, to improve governance and  
17 increase the returns."

18 Do you see that?

19 A. Yes.

20 Q. And it's your position that, when the Merger  
21 between SC&T and Cheil was announced, that invalidated  
22 Mason's investment thesis, and Mason therefore sold  
23 its shares in SC&T and Samsung Electronics; right?

24 A. When it was approved, not announced.

25 Q. If I said announced, then I misspoke. When

1 it was approved.

2 Now, let's look at how this is reflected in  
3 Mason's memos from 2015, and we can first go to  
4 Exhibit C-51 under Tab No. 5.

5 This is an internal e-mail dated 4th of  
6 March 2015, and attached to it is a memo prepared by  
7 Mr. Gomez and Mr. Lee.

8 A. 51?

9 Q. It's Tab 5.

10 A. Tab 5.

11 Q. Exhibit C-51.

12 An internal e-mail from Mr. Gomez and  
13 Mr. Lee--sorry, a memo prepared by Mr. Gomez and  
14 Mr. Lee is attached to this e-mail.

15 And to just remind ourselves, Mr. Lee was  
16 the primary analyst responsible for analyzing the  
17 investment; correct?

18 A. No, he wasn't. It was Mr. Gomez.

19 Q. Sorry, that's what I meant. Mr. Gomez was  
20 the primary analyst, okay.

21 A. Yes.

22 Q. And he is one of the authors of this memo?

23 A. Yes--

24 Q. Can you see that--

25 A. I.

1 (Overlapping speakers.)

2 A. --this memo is partly cut and paste pasted  
3 from sell side analyst reports, but I believe he has  
4 put together all the facts.

5 Q. Okay. And just to be clear, you can see  
6 that he was one of the authors. If you look at first  
7 page, the e-mail is coming from him, and the subject  
8 line says "writeup by Jong and me."

9 A. Yes.

10 Q. Okay. So, let's have a look at the memo, so  
11 that's the second page of the PDF.

12 The memo sets out Mason's analysis of the  
13 anticipated restructuring of the Samsung Group,  
14 including why and when Samsung would restructure;  
15 right?

16 A. He seems to be saying why, but when, he says  
17 that no one knows.

18 Q. Right.

19 But those questions are considered--I mean,  
20 the title is "Samsung Restructuring," and two points  
21 considered are why restructure and when will they do  
22 it; right?

23 A. Yeah. He's weighing out different scenarios  
24 that could take place in the restructuring.

25 Q. Right.

1           And then if we could go to PDF Page 7,  
2 that's the second-to-last page of the memo. And in  
3 the bottom half, the page considers possible  
4 restructuring scenarios, and I'll read that paragraph  
5 under that heading for the record: "The goal is  
6 break up circularities and increase control of the  
7 family. For that, it seems reasonable to think that  
8 Cheil will be the holding company of the group, given  
9 that the family has a large ownership."

10           So, according to this memo, Mason  
11 anticipated Cheil would become a holding company after  
12 the restructured Samsung Group; right?

13           A. I agreed with that.

14           Q. And then Point No. 2 sets out a possible  
15 restructuring scenario, namely a merger between Cheil  
16 and SC&T, and it says: "C&T trades pretty much at  
17 the value of its stake in SEC, given the perceived  
18 risk of the Merger. Given Cheil high valuation and  
19 C&T low valuation, this Merger makes sense for Cheil  
20 as it would gain control of 4 percent of SEC."

21           Do you see that?

22           A. I do.

23           Q. So, in March 2015, Mason believed that  
24 Cheil's valuation was high, and SC&T's valuation was  
25 low?

1 A. Yes.

2 Q. And if Cheil and SC&T merged, these  
3 valuations would favor Cheil?

4 A. No.

5 Q. The Merger Ratio had higher valuation for  
6 Cheil, it would be favorable to Cheil?

7 A. He's not discussing the Merger Ratio.

8 Q. The Merger Ratio is determined by the  
9 valuation of the companies?

10 A. It's determined by a negotiation.

11 Q. Are you familiar with how Merger Ratios are  
12 set in Korea?

13 A. I think so. You know, where the securities  
14 are trading has a factor but, you know, you need to  
15 get a vote. You can set the ratio wherever you want,  
16 you need to have a vote to approve it.

17 Q. Are you aware that a Merger Ratio in Korea  
18 is set based on the average trading price of the  
19 companies of the month, week, and day before the  
20 Announcement?

21 A. I don't recall.

22 Q. Okay. It is not disputed. I'll just  
23 represent that to you.

24 So, on that basis, if the valuation of a  
25 company was high, that would favor that company in a

1 Merger?

2 A. In a proposed Merger it could.

3 Q. And the memo doesn't say that such a Merger  
4 that would favor Cheil would invalidate Mason's  
5 investment thesis, does it?

6 A. You know, I--I--again, I--I think they were  
7 very relevant and fine corporate reasons for the  
8 entities to go together. So, the fact they're merging  
9 is not an invalidation of our thesis. In fact, it's a  
10 validation of our thesis that they're taking a step to  
11 simplify the structure, but that's not what's  
12 important here. What's important is the price that  
13 was offered and the manner in which the votes were  
14 gathered.

15 Q. Right.

16 The memo considers not just a Merger in the  
17 abstract. It considers a Merger at the high valuation  
18 for Cheil and a low valuation for SC&T.

19 A. Where--can you point me to that?

20 Q. PDH--sorry, PDF Page 7, the second point  
21 that we just looked at, giving Cheil high valuation  
22 and C&T low valuation, this Merger makes sense for  
23 Cheil.

24 A. Okay.

25 Q. So, that is what this memo considers; right?

1 A Merger with a high valuation of Cheil and a low  
2 valuation of C&T?

3 A. I mean, they can try to do a Merger at a  
4 price that's not fair for Shareholders but the  
5 Shareholders have to vote on it.

6 Q. Right.

7 A. That was not--my conclusion from this was  
8 not that C&T is going to get a bad deal.

9 Q. Right. This memo does not say that this  
10 kind of Merger with a high valuation for Cheil would  
11 invalidate Mason's investment thesis, does it?

12 A. Doesn't say that--it doesn't say that it  
13 would invalidate or validate.

14 Q. Right.

15 There is no concern expressed over such a  
16 Merger, is there?

17 A. You know, our--we've looked at a lot of  
18 documents, and I want to circle back to one thing I  
19 should have mentioned. Most of all our research take  
20 place--deliberations takes places--takes place  
21 verbally. You know, people write reports, people who  
22 work for me write reports. They put a lot of effort  
23 into it. They're designed to put a lot of facts  
24 together for me to consider.

25 But whether we're really deliberating about

1 investments, it's in person, and we consider as many  
2 factors as we think are relevant.

3 Q. And then, sometimes that is written up and  
4 put in a memo such as this one?

5 A. These memos are--most of the time, they're  
6 starting points for analysts to do research. The  
7 decisions are made by discussing the likelihood of  
8 events happening or not happening. These are--he's  
9 putting out a lot of bullet points, some of which are  
10 relevant, some of which aren't. It's the job as an  
11 analyst, I'm not faulting him for it.

12 Q. Right.

13 And Mr. Gomez, just to remind ourselves, was  
14 your lead analyst on this investment; correct?

15 A. He was in charge of the modeling, I was the  
16 lead analyst on the decision-making.

17 Q. Let's have a look at another Mason memo,  
18 that's Exhibit R-397, and that's under Tab No. 24 in  
19 your bundle.

20 This is another e-mail from Mr. Gomez to  
21 Mr. Lee, dated 1st of June 2015. This was about a  
22 week after the proposed Merger between SC and Cheil  
23 were announced, so at this point in time Mason would  
24 have known the Merger Ratio; correct?

25 A. I presume so, yes.

1 Q. And Mason did not yet own its shares in  
2 SC&T?

3 A. I believe at this period of time, we were  
4 deliberating whether to switch from SEC into SC&T.

5 Q. The subject line is FYI I'm going--I'm  
6 giving this SEC summary to the big guys. The "'big  
7 guys'" refers to you and Mr. Martino?

8 A. It does. It's not Joe Biden in this  
9 circumstance.

10 Q. And the e-mail attaches a three-page memo.  
11 You can go to the second page of that, the first page  
12 of the memo. And that's--the title is, "'Samsung  
13 restructuring June 2015.'" So this memo considers  
14 potential next steps in Samsung's restructuring  
15 process; right?

16 A. Yes.

17 Q. And the memo considers, among other things,  
18 if those next steps would be good for Masons  
19 investment in Samsung, I think you can see that under  
20 the heading, "'Why is this good for SEC?'"

21 A. Yes.

22 Q. Okay. Let's have a look at those potential  
23 next steps under the heading "'SEC.'"

24 The memo says that the base case is that  
25 Samsung Electronics was split into a holding company

1 and an operating company and the holding company was  
2 then merged with C&T/Cheil.

3 Do you see that? It's the first line under  
4 the heading '"SEC.'"'

5 A. Yes, I do.

6 Q. Okay. C&T/Cheil, that refers to the merged  
7 company that would come out of the Merger between SC&T  
8 and Cheil?

9 A. Yeah--that's his hypothesis, yes.

10 Q. All right. And the memo also refers to that  
11 as New SC&T; right? I think you can see that in the  
12 fourth bullet under the base case, New SC&T (Cheil)  
13 and C&T?

14 A. Yes.

15 Q. Okay. So, the memo anticipated a potential  
16 Merger between Samsung Electronics Holding and New  
17 C&T; right?

18 A. He's--he's hypothesizing, I think.

19 Q. Right.

20 A. I don't know if he's anticipating, but he's  
21 laying out scenarios.

22 Q. Right.

23 And he's describing it as the base case, so  
24 it's not just some fanciful hypothesis. That's the  
25 base case?

1 A. For him.

2 Q. Right. Your lead analyst--sorry, the--

3 A. I'm the lead analyst, but it appears to be  
4 his base case, yes.

5 Q. Okay. And the memo announced why is this  
6 good for SEC, and it lists two bullet points, and the  
7 first one is "'solve the corporate governance because  
8 interest of SEC and the family aligned.'" The  
9 "'family'" here refers to the [REDACTED] Family; right?

10 A. Yes.

11 Q. So, according to this memo, a Merger between  
12 Samsung Electronics Holdings and the New SC&T would be  
13 good for corporate governance because the interest of  
14 Samsung Electronics and the [REDACTED] Family would be  
15 aligned?

16 A. Yes.

17 As I said before, a successful restructuring  
18 of the group benefits would have inured to all the  
19 parties, in my view. It was a win-win.

20 Q. And let's go to the last page of the memo,  
21 that's PDF Page 4. Under the heading "'New C&T, C&T  
22 plus Cheil.'" The memo lists two positives and two  
23 negatives. And the positives are, first positive is  
24 align with the family, so that again refers to the  
25 alignment of interests that we just looked at.

1           The second positive is can increase value  
2 and it then lists four ways in which value can be  
3 increased.

4           Do you see that?

5           A.    I do.

6           Q.    Okay.  And one way to increase value would  
7 be for New C&T to merge with Samsung Electronics  
8 Holdings; right?

9           A.    Which bullet was that?

10          Q.    First bullet point under "can increase  
11 value."  It says "emerging with SEC Holds Co. in the  
12 future."

13          A.    Yes.

14          Q.    That refers to a merger between SEC  
15 Holdings--

16          A.    He's hypothesizing about there is a myriad  
17 of different ways that the restructuring could have  
18 happened, and he's hypothesizing as to what some of  
19 those are.

20          Q.    Right.

21                And he's saying a Merger between the new  
22 entity that would come out of the Merger between SC&T  
23 and Cheil, so this New C&T, a merger of that entity  
24 and SEC Holdings that would be a way to increase  
25 value; right?

1           A.    I don't know about increase--yes, increase  
2 value as a next step after--I think his view was that  
3 they would try to do Cheil-SC&T, and if that was  
4 successful they would proceed to merge more entities  
5 and continue to simplify the structure.

6           Q.    Right, exactly. So, they would first do the  
7 Merger that we have been talking about so much,  
8 Cheil-SC&T, then the hypothesis is they will go on to  
9 merge the New SC&T with Samsung Holdings. In your  
10 analysts' view, that would be a way to increase value?

11          A.    Well, I think it's important to note that,  
12 as I said before, the main asset of C&T was Samsung  
13 Electronics Shares. So, if Cheil could buy--by buying  
14 C&T, a lot of Samsung Electronics Shares at 50 cents  
15 on the dollar, that's a good deal for them. I  
16 thought--I thought that wouldn't happen inside the  
17 bounds of the law. But it's reasonable to assume if  
18 they had paid a good price and that had entity--the  
19 resulting entity of that Cheil-SC&T Merger had a lot  
20 of Samsung Electronics shares in it, that in order to  
21 further simplify the structure, merging that entity  
22 with Samsung Electronics itself would be a way to  
23 really simplify and organize the structure.

24          Q.    Right. You refer to the price. The price  
25 was known at this point. This was the 1st of June,

1 almost a week after the Merger Announcement. This  
2 wasn't just some hypothetical price. They knew the  
3 terms of the Merger, and were saying this is the way  
4 to increase value based on the terms of the Merger as  
5 it is known.

6 A. It's not saying that the deal is going to go  
7 through at this price.

8 Q. There was only one deal on the table?

9 A. Yeah, and I thought it would be voted down,  
10 and that there would be--as I said in my last  
11 testimony two-and-a-half years ago, that one of the  
12 results of voting the Merger down was that it would be  
13 renegotiated at a fair price. He's not assuming that  
14 it goes through at a bad price. My view was that it  
15 would be voted down. He's hypothesizing about if it  
16 does go through at a price, he doesn't know what price  
17 during next steps, and that's totally reasonable.

18 Q. Right.

19 The memo doesn't say any of this, does it?  
20 It doesn't say we expect the deal as we know it right  
21 now, as it was just announced, to fail, then there's  
22 going to be another deal, that deal is going to have a  
23 different price, and then we look what happens?

24 A. That was my view.

25 Q. Right.

1 A. It doesn't say it in here.

2 Q. Right. Okay. And then going on down the  
3 list--

4 A. Importantly, if I--I had to consider all  
5 those issues. I can't just consider what is or isn't  
6 a note from one of my analysts.

7 Q. Right.

8 And then we consider, if you go further down  
9 the memo, there are two negatives of risks. The first  
10 one is a potential incentive to keep New C&T stock low  
11 temporarily. And the second one is that core business  
12 of both Cheil and SC&T have not been performing well,  
13 in the absence of restructuring, news stock could  
14 trade down.

15 A. I see that.

16 Q. Okay. So, the memo doesn't say that, based  
17 on the terms of the Merger, as they were known then,  
18 the approval of the Merger would be a negative or a  
19 risk for Mason's investment; correct?

20 A. It doesn't say in either direction.

21 Q. And the memo doesn't say that, if the Merger  
22 goes through and the New C&T is created on based on  
23 the terms of the deal as it was known then, Mason  
24 should sell all of its shares in Samsung Electronics?

25 A. It doesn't say that, but I--look at what I

1 did. I didn't do anything that was really out of  
2 consensus here. We were owning securities above a  
3 deal price, and the market agreed with me that it  
4 would be voted down. And when the market was  
5 surprised as I was, the price went down.

6 Q. This memo, in fact, assumes that Mason would  
7 keep its shares; right? That is why this memo  
8 considers next step in the restructuring. The plan  
9 had been to sell the shares immediately after the  
10 Merger, based on the terms of that Merger, there  
11 wouldn't be any need to consider next steps?

12 A. That's wrong.

13 Q. You wouldn't need to consider next steps in  
14 the Samsung restructuring if your plan was to sell  
15 after the Merger; correct?

16 A. Our plan is based on what happened. You  
17 know, we don't have a pre-determined plan. You know,  
18 we had a strong view that the Merger would be turned  
19 down. When it wasn't turned down, I didn't know what  
20 had happened.

21 I'm happy to be wrong on a commercial basis.

22 Q. If we can just go back to the Transcript to  
23 something you said before the break, and if FTI could  
24 pull that up, perhaps, it's at 947, I think it's  
25 Lines 4619, maybe that's Page 46.19. Yeah, that's

1 right.

2 And your answer was: "Elliott not only  
3 wrote a letter, they put out large public  
4 presentations lobbying investors to mind their  
5 fiduciary duties when they voted, and I thought it was  
6 one of the reasons that, first of all, I was very  
7 happy that they were there," and so on and so forth.

8 Now, you weren't just very happy that  
9 Elliott was there. You invested on the day that  
10 Elliott made its announcement; correct?

11 A. When our investment process began well  
12 before that, but we were investing around the time  
13 that Elliott--are you talking about SEC or SC&T?

14 Q. SC&T.

15 A. Yes, our investment in Samsung Group happens  
16 well before that. We were still investing and  
17 investing during that period of time, yes.

18 Q. Right.

19 And is it mere coincidence that Mason bought  
20 shares in SC&T the very day that Elliott announced  
21 that it would oppose the Merger and buy SC&T Shares?

22 A. I don't know if it was a coincidence or not.

23 Q. Do you--

24 A. I can tell you that, having a large investor  
25 coming out and shining a light on a situation is a

1 positive thing, from my view, that it would be turned  
2 down.

3 Q. Right.

4 You say that you don't know whether it was a  
5 coincidence. Does that mean it is possible that you  
6 invested because you saw that Elliott made the  
7 announcement that day?

8 A. I mean, anything is possible. Our record on  
9 investing in the Samsung structure is long, and the  
10 fact that they would oppose the Merger agreed with  
11 my--cemented my--not "cemented," but made me feel  
12 stronger about my thesis.

13 Q. You mentioned earlier that the ultimate  
14 investment decision is with you or Mr. Martino. When  
15 you or Mr. Martino gave the order to buy that day, did  
16 you do that after having heard from Elliott?

17 A. I don't know.

18 Q. All right. Given that there is so much  
19 uncertainty about this timing, I put it to you,  
20 Mr. Martino--Mr. Garschina, excuse me--that on the day  
21 you invested, because Elliott was entering the scene,  
22 not because of any expectation with NPS?

23 A. That's your view?

24 Q. I put that to you, yes.

25 A. That it's your view?

1 Q. I put that to you that that is what  
2 happened.

3 A. Okay.

4 Q. And what is your position on that?

5 A. Well, the two--the two issues are  
6 intertwined; are not distinct. My view was that if  
7 the fiduciary duties were followed, the vote would be  
8 turned down, and that turned out to be the case.

9 Having a large shareholder who was able to  
10 vote their shares and is also lobbying to vote in the  
11 direction I thought was possible, likely, is a good  
12 thing for our investment, so they're intertwined.

13 Q. Right. So, you took a chance, you made a  
14 bet that Elliott would be successful in the campaign?

15 A. I wouldn't characterize it as making a bet.  
16 I'd say that we had an informed view that was crafted  
17 over a long period of time.

18 Q. We don't have any further questions.

19 PRESIDENT SACHS: Thank you.

20 Will there be redirect?

21 REDIRECT EXAMINATION

22 BY MS. VAZOVA:

23 Q. Mr. Garschina, you were asked a number of  
24 questions about what counsel characterized as  
25 "'memos.'" Can you please elaborate on the role of

1 these documents in Mason's investment process.

2 A. Yes. Analysts produced a lot of documents  
3 with their thoughts and aggregating information. It's  
4 like a research project. I think last time I was here  
5 we were joking about whether I'm a management  
6 consultancy firm or not, but our research process is  
7 thorough and covers everything that's out there.

8 And, you know, it's advisory to myself and  
9 Mr. Martino. Sometimes I look at them, sometimes I  
10 don't, but our primary source of interaction and  
11 deliberation and coming to an investment conclusion is  
12 verbal.

13 Q. Would you typically create documents  
14 memorializing the specific investment thesis?

15 A. No. No. These documents are--I'm from the  
16 old school before e-mail, and the internet. The  
17 younger guys and gals use these to communicate  
18 and--you know, it's the job of any analyst to point  
19 out to me--to have had pointed out to me all the  
20 different views in the market because it's their job  
21 to aggregate information.

22 Q. You were shown some charts reflecting  
23 Mason's purchases of SEC and SC&T before the Merger  
24 Vote. Did those purchases reflect Mason's investment  
25 thesis about those two companies?

1           A.    Can you repeat the question?

2           Q.    Sure.

3                    You were shown charts reflecting Mason's  
4 purchases of Samsung Electronics and Samsung C&T  
5 before the SC&T-Cheil Merger was voted on July 17,  
6 2015. My question to you is: How, if at all, did  
7 Mason's actual trading in SC&T and SEC reflect its  
8 investment thesis?

9           A.    Well, I was confident that--my thesis was I  
10 was confident that the vote would be turned down, if  
11 it was done inside the bounds of the law. And the  
12 reason to buy SC&T, as I mentioned last time, is that,  
13 that if it were turned down, which was my thesis, we  
14 would make money in many different directions, the  
15 whole value of the structure would lift, SC&T would  
16 trade at a smaller discount to its NAV, and it was  
17 possible--in fact, I foresaw that it was so important  
18 to do this transaction for the reasons your counsel  
19 has discussed, but they would have to raise the price,  
20 and we would get paid that way; right? I thought  
21 there were a number of ways to win but the central  
22 thesis was that the Merger would be voted down.

23           Q.    If you believed the Merger was likely to be  
24 approved, would you have directed your team to make  
25 those purchases in SEC and SC&T?

1           A.    Absolutely not.

2           Q.    You were asked a number of questions about  
3 the Exhibit C-125.  Could we please have that on the  
4 screen?  That's Tab 15 in the binder.

5                    So, I want to direct you to the second  
6 e-mail in the chain.  That's from Emilio on 6/8/15 at  
7 4:47.

8           A.    Um-hmm.

9           Q.    About halfway down in the middle of the  
10 paragraph after the language that counsel asked you  
11 about, "NPS is the wild card;" I want to focus on  
12 the sentence after that:  "I agree with you that it  
13 doesn't make sense to buy stock to side with Cheil and  
14 lose money."

15                   Do you see that?

16           A.    Yes, he's speaking to my view.

17           Q.    What is your recollection about what NPS's  
18 trading in SC&T looked like after the Merger was  
19 announced?

20           A.    Well, they were buying more shares, and I  
21 thought it would be--I couldn't fathom why you would  
22 buy shares in order to vote those shares in a  
23 transaction to lose money for yourself.

24           Q.    So, what did the fact that NPS was buying  
25 shares in SC&T tell you, if anything, about the

1 likelihood that whether they would approve the Merger?

2 A. It was a sign to me that they would vote it  
3 down. It was a clear sign to me because--who would be  
4 so bold to buy shares and vote them down as a  
5 fiduciary for pension assets in order to lose money  
6 for your--for your, I guess, clients or people that  
7 you have fiduciary responsibility to. I thought--

8 And, in fact, I think the record is borne  
9 out that, until there was an intervention by Mr. [REDACTED]  
10 [REDACTED], they would have voted for it, in my view--voted  
11 against it, in my view.

12 Q. So, staying with that subject, you said at  
13 the beginning of your testimony that you had been  
14 following the Korean market for some 20 years.

15 Did you ever expect fraud and corruption of  
16 the type and scale that was exposed in relation to the  
17 Samsung Merger?

18 A. No.

19 And I think it's fair to say that when--when  
20 I got the news that it was voted through, I didn't  
21 know what had happened. You mentioned before--Korea's  
22 counsel mentioned before, I don't remember the date,  
23 but I do remember the emotions and they were--I didn't  
24 understand what had happened because I--I'm not always  
25 right in my investment career, but this one was not a

1 close call to me, relying on the pension scheme to  
2 vote in their clear economic interest was--it wasn't a  
3 hard decision for me to make.

4 And when--only when the subsequent events  
5 came to light did I know--that I knew what had  
6 happened.

7 Q. Thank you, Mr. Garschina. I have no further  
8 questions.

9 PRESIDENT SACHS: Thank you.

10 I turn to my two colleagues. Dame  
11 Elizabeth?

12 ARBITRATOR GLOSTER: I have no questions.  
13 Thank you.

14 PRESIDENT SACHS: Professor Mayer?

15 ARBITRATOR MAYER: No questions, thank you.

16 PRESIDENT SACHS: I don't have questions  
17 either.

18 We thank you, Mr. Garschina, for your second  
19 performance before us. You're now released as a  
20 witness.

21 THE WITNESS: Thank you. Thank you.

22 PRESIDENT SACHS: And you may leave the  
23 room.

24 THE WITNESS: Thank you.

25 (Witness steps down.)

1                   PRESIDENT SACHS: We will now have our lunch  
2 break. We are very punctual. We are even ahead of  
3 schedule.

4                   45 minutes, meaning that we will resume at  
5 11:45.

6                   (Whereupon, at 11:00 a.m. (EDT), the Hearing  
7 was adjourned until 11:45 p.m. (EDT) the same day.)

8

AFTERNOON SESSION

1  
2 PROFESSOR SUNG-SOO KIM, RESPONDENT'S WITNESS, CALLED  
3 PRESIDENT SACHS: So, good afternoon,  
4 Professor Kim. You may take off your mask.

5 Good afternoon, Ms. Ran Ha. You have to  
6 speak loud so that also my colleagues who are  
7 connected online understand you.

8 THE INTERPRETER: I will, thank you.

9 PRESIDENT SACHS: Okay. So, in front of  
10 you, Professor Kim, you will find the Declaration for  
11 expert witness. You are an expert witness, so we  
12 would ask you to read this Declaration for the record.  
13 Read it loud.

14 THE WITNESS: Can I do it in Korean?

15 PRESIDENT SACHS: Yes, of course.

16 THE WITNESS: Expert Declaration for Expert  
17 Witness.

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

21 PRESIDENT SACHS: Could you come closer to  
22 the microphone, please.

23 Professor Kim, you submitted two Expert  
24 Reports in these proceedings. Is there anything in  
25 these reports that you would like to amend at this

1 point of time?

2 THE WITNESS: None.

3 PRESIDENT SACHS: Thank you very much.

4 I have a doubt whether we will have a  
5 presentation or whether we go to direct and  
6 cross-examination. What was the agreement?

7 MR. HAN: Thank you, Mr. President.

8 The Parties have agreed that there is no  
9 expert presentation for our legal expert.

10 PRESIDENT SACHS: Okay. But there will be  
11 some direct?

12 MR. HAN: No, there is no actual direct.

13 PRESIDENT SACHS: So immediate  
14 cross-examination?

15 MR. HAN: Yes, we're happy to hand over to  
16 the Claimant.

17 PRESIDENT SACHS: So, the floor is yours.

18 Ms. Lamb? Okay. Thank you very much.

19 MS. LAMB: Thank you so much.

20 CROSS-EXAMINATION

21 BY MS. LAMB:

22 Q. Good afternoon, Professor Kim.

23 A. Good afternoon.

24 Q. In my questions today, I may make use of a  
25 visual aid, and this is Exhibit CDE-1. For Members of

1 the virtual Tribunal, this is the equivalent to  
2 Slide 128 in our Opening Submissions from yesterday.  
3 This is intended just as a visual aid, to depict the  
4 structure that we are going to talk about. If there  
5 is anything in it with which you disagree, you can  
6 tell me.

7 So, if we just start at the top, the Korean  
8 Constitution, of course, sets out the highest level of  
9 each of the branches of government, including the  
10 presidency; correct?

11 A. Yes, that is correct.

12 Q. And the Ministry of Health and Welfare is a  
13 ministry established under the control of the  
14 President; that's right, isn't it?

15 A. That is right.

16 Q. The Korean Constitution provides that it's a  
17 duty of the State to protect citizens who are  
18 incapable of earning a livelihood, including as a  
19 result of old age or disability; that's right, isn't  
20 it?

21 A. Yes, I am aware of that, but, if you don't  
22 mind, I would appreciate it if you could point me to  
23 the exact provision.

24 Q. Of course.

25 Let's look at Article 34, subsection 5 of

1 the Korean Constitution at CLA-149.

2 A. Could we have that up on the screen, please?

3 VOICE: We created a hard copy.

4 BY MS. LAMB:

5 Q. So, Article 34(5), an extract from the  
6 Constitution: "'Citizens who are incapable of earning  
7 a livelihood due to a physical disability, disease,  
8 old age or other reasons shall be protected by the  
9 State under the conditions as prescribed by Act.'"

10 A. Yes, I see it.

11 Q. The Act that implements that constitutional  
12 responsibility is the National Pension Act, isn't it?

13 A. That is not correct.

14 So, let me, if I may, explain to you the  
15 Article 34(5) of the Constitution is about the  
16 citizens who are difficult to make a living because of  
17 their physical disabilities or disease or the old age,  
18 and this is, in fact, covered by the Elderly Welfare  
19 Act or the Child Welfare Act. And, in fact, the  
20 National Pension Act is about the pensioners who are  
21 paying the monthly contribution to the National  
22 Pension Service, and they still maintain their  
23 property of right to the contributions that they make,  
24 and the State is managing the Fund for a certain  
25 amount of time, and then, when the pensioners retire,

1 they receive the money back.

2 So, I can see what is prescribed in the  
3 Article 34(5) of the Constitution, but I cannot agree  
4 that the statute that is based on the Article 34(5) of  
5 the Constitution is the National Pension Act.

6 And let me add one more thing.

7 The National Pension Act is to ensure the  
8 rights of the citizens to be guaranteed about the  
9 contributions that they make to the Fund. So it is,  
10 in fact, a slightly different structure<sup>1</sup> from  
11 the--what is prescribed in Article 34(5), which is  
12 unilateral welfare services from the State to the  
13 citizens.

14 Q. Let's have a look at CLA-157, which is,  
15 indeed, the National Pension Act. We look first at  
16 Article 1, which is its purpose.

17 A. Yes, I'm looking for it.

18 Now I have it.

19 Q. So, the purpose of the Pension Act is to  
20 contribute to the promotion of the stable livelihood  
21 and welfare by providing pension benefits for old age,  
22 disability, or death.

23 A. Yes, but, in fact, in the purpose of this

---

<sup>1</sup> The English interpretation at the hearing was inaccurate. Instead of "slightly different structure," an accurate translation of the Korean testimony is "completely different structure."

1 Article is that the--it stipulates the reasons for the  
2 welfare to be given to the citizens, which are old  
3 age, disability, or death. But in the Article 34(5)  
4 of the Constitution, it is not prescribing the legal  
5 reasons for the citizens to be receiving the welfare  
6 benefits. It is, in fact, a national law that is  
7 giving help to them through the Constitution so that  
8 there is a slight difference between the two.

9 Q. Under Article 2 of the National Pension Act,  
10 it's the Minister of Health and Welfare, isn't it, who  
11 is in charge of the National Pension Services?

12 A. Yes. This says that the National Pension  
13 Service business would be in--sorry. It says that the  
14 Minister of Health and Welfare would be in charge of  
15 the National Pension Service business.

16 Q. Provided under this Act?

17 A. Yes.

18 Q. And if we go back to our visual aid, we see  
19 here the links between the Ministry of Health and  
20 Welfare and the National Pension Service.

21 A. Yes.

22 Q. You can see on the Act--sorry, on the visual  
23 aid at the bottom the National Pension Fund. Under  
24 the--do you see it on the diagram?

25 A. So, in the English version, it says

1 "National Pension Fund," but in the Korean version  
2 it only says "national pension" without the word  
3 "Fund," and I think there should be one.

4 Q. Yes. The last entity, if you will, at the  
5 bottom of the diagram is intended to be the National  
6 Pension Fund.

7 Under the Pension Act, it's the Minister who  
8 establishes the National Pension Fund, isn't it?

9 A. Yes.

10 Q. And it is the Minister that has the power to  
11 manage and operate the National Pension Fund, isn't  
12 it?

13 A. Yes.

14 Q. The National Pension Act provides for the  
15 methods by which the Minister of Health and Welfare is  
16 to manage and operate the Fund; that's right, isn't  
17 it?

18 A. That is correct, but I would be--really  
19 appreciate it if you could point me to the exact  
20 provision.

21 Q. Of course.

22 Article 102(2) of the National Pension Act,  
23 which is your CLA-157.

24 Article 102, subsection 2 (reading): "The  
25 Minister of Health and Welfare shall manage and

1 operate the Fund by use of the following methods,'" and these include, at Item 3, purchase, sale and  
2 lending of securities under Article 4 of the Financial  
3 Investment Services and Capital Markets Act.  
4

5 A. Yes.

6 Q. And the National Pension Act also  
7 establishes the National Pension Service; correct?

8 A. Yes.

9 Q. And the sole purpose, the sole function of  
10 the NPS is to carry out services commissioned by the  
11 Minister of Health and Welfare; correct?

12 A. It is not the sole purpose. There are a lot  
13 of services that are commissioned by the Minister of  
14 Health and Welfare that is carried out by the NPS, but  
15 there are other numerous activities that are conducted  
16 by the NPS that are not part of that.

17 Q. Let's just look at CLA-157 again, Article 24  
18 (reading): "'The National Pension Service shall be  
19 established to effectively carry out services  
20 commissioned by the Minister of Health and Welfare to  
21 attain the purposes set forth in Article 1.'"

22 A. Yes.

23 Q. And we looked at Article 1, didn't we? The  
24 purpose of the Act is to contribute to the promotion  
25 of the stable livelihood and welfare of citizens by

1 providing pension benefits, et cetera.

2 A. Yes, I see the purpose; but, as I explained  
3 earlier, the pensions--the pension benefits are not  
4 given out to the people who are in need as a mere  
5 benefit. But then the pension benefits are the  
6 benefits that the pension-holders receive in exchange  
7 for their monthly contributions which is, in fact,  
8 found by the Korean Constitutional Court as their  
9 right to property, and that money is in fact paid to  
10 them when the certain conditions are met.

11 Q. The Minister's power to manage and operate  
12 the Fund is then delegated to the NPS, isn't it?

13 A. Are we referring to the Article 102(5)?

14 Q. Shall we look at CLA-150. This is the  
15 Presidential Decree of the National Pension Act.  
16 CLA-150. And you may recall Article 76: Entrustment  
17 of affairs concerning Management and Operating of  
18 Fund.

19 A. Yes, I found it.

20 Q. So, Article 76(1) (reading): "The Minister  
21 of Health and Welfare shall entrust the affairs in the  
22 following subparagraphs to the service"--that's the  
23 National Pension Service"--under Article 102(5) of  
24 the Act, the National Pension Act."

25 A. Yes.

1 Q. Turning back to CLA-157, let's look at  
2 Article 41 of the National Pension Act. The Service  
3 must acquire and obtain the approval of the Minister  
4 on its Plan of Operations and its budget every year,  
5 mustn't it?

6 A. Yes.

7 Q. And it must also report to the Minister on  
8 its performance after the end of the financial year;  
9 that's right, isn't it?

10 A. Yes.

11 Q. And the Minister may order it to take any  
12 necessary measures regarding supervision; that's also  
13 right, isn't it?

14 A. That is not correct. In this provision, it  
15 is not clearly mentioned what kind of necessary  
16 measures pertaining to the supervision would be.

17 And in Korea, there--indeed, there are  
18 multiple public institutions that would be under the  
19 supervision of the competent ministerial authority.  
20 But if you looked at this Article 41 that is  
21 applicable to the National Pension Service, if you  
22 compare it to the other regulatory provisions that are  
23 applicable to other public institutions, it is very  
24 clear that the--that this provision is considering a  
25 significant amount of independence and autonomy of the

1 Service, and it is also highlighting--it is also  
2 highlighting that the supervision is only indirect and  
3 done in a macro level.

4 Q. Can we just look again at Article 41(3).  
5 This says very clearly that the Minister of Health and  
6 Welfare may order the Service to report on its  
7 services, inspect the status of its services or  
8 property; and, if deemed necessary, take necessary  
9 measures regarding supervision. Are you disagreeing  
10 with those powers of the Minister of Health and  
11 Welfare?

12 A. I am not disagreeing with what the provision  
13 said, but I would like to, if I may, offer you some  
14 interpretation of what this provision means.

15 So, let me first direct your attention to  
16 what it means to order the service to report on its  
17 services. It is not only applicable to a public  
18 institution like the National Pension Service, but it  
19 is also something that can be requested to the  
20 non-profit corporations that are established under the  
21 civil law such as the orphanage or a nursery. There  
22 can be an occasion where they are ordered to provide a  
23 report on their financial status or the accounting  
24 status after a year's business.

25 And as for the second part, inspect the

1 status of a services or property. In fact, in Korea  
2 about two years ago, there was an occasion where a  
3 kindergarten that is receiving national funding  
4 was--had become an issue; and, in that case, that  
5 kindergarten in question was requested to provide a  
6 report on their status of the property and their  
7 operation to the competent ministerial authority or  
8 the regional head.

9           And let me finally turn to your attention to  
10 the last part, which is related to the necessary  
11 measures regarding supervision. As I said earlier,  
12 this doesn't provide any specific examples of what  
13 such measures would be, but in the case of other  
14 public institutions, there is a more strict rules  
15 applied to them; for example, the Authorities can, in  
16 fact, make a cancellation or a suspension of the  
17 actions or the dispositions made by the public  
18 institutions directly.

19           But in the case of the National Pension  
20 Service, it is set out rather loosely. It is only  
21 mentioning that the necessary measures could be taken.  
22 It doesn't extend to the extent where it--the  
23 authority can cancel or suspend the actions taken by  
24 the National Pension Service.

25           Q.     Otherwise, it can take the measures that are

1 necessary to perform its supervisory functions?

2 A. So, not all the necessary measures for  
3 supervision are allowed. If you looked at the court  
4 decisions and rulings in Korea, there are certain  
5 conditions and restraints that are set forth clearly.  
6 For example, there is a rule of proportionality and  
7 the necessary measures are not all accepted.

8 So, it is not only considering the necessity  
9 of the measures, but then it is also considering how  
10 much of the violation of rights could happen as a  
11 result of the measures. And it is also looking at the  
12 amount of punishment that would be applicable to the  
13 target when it is applied, et cetera.

14 Q. And, subject to those, if you will,  
15 administrative-law constraints, the Minister of Health  
16 and Welfare, indeed, can take necessary measures  
17 regarding supervision?

18 A. Yes, indeed this provision is giving a  
19 discretion that the Minister may take necessary  
20 Measures, but then in the case of the exercise of such  
21 discretion, what is, in fact, in practice is very  
22 limited under Korean case law. For example, you will  
23 need to consider many different factors, such as the  
24 principle of proportionality and the principle of the  
25 protection of trust and the principle of impartiality

1 and so forth.

2           So, in the case of the National Pension  
3 Service, which is a self-controlling entity with a  
4 Board of Directors, the discretion would only apply in  
5 a very limited sense, according to the court decisions  
6 made in Korea.

7           Q.    You don't dispute the existence of the  
8 Minister's power as it is stated here in Article 41 of  
9 the Act?

10          A.    Yes.   The Minister has the power.

11          Q.    Thank you.

12                Let's look again at the visual aid.  We can  
13 see that the NPS has a number of connections with  
14 other State institutions.  Let's look at the National  
15 Assembly.

16                Do you see that on the top left-hand side of  
17 the visual aid?

18          A.    Yes.

19          Q.    The National Assembly has certain audit  
20 rights, doesn't it, over the National Pension Service?

21          A.    Yes.

22          Q.    And that's because the National Assembly may  
23 inspect affairs of State or investigate specific  
24 matters of State affairs; that's right, isn't it?

25          A.    Yes.  You can say that the National Assembly

1 has the power to inspect, but it cannot be done any  
2 time. It is only done when the conditions are met,  
3 according to the National Inspection and Audit Act.

4 Q. Let's just remind ourselves of Article 61 of  
5 the Constitution, CLA-149.

6 A. Yes. I've found it.

7 Q. And just focusing on the power and the  
8 source of the power, you agree that this is that the  
9 National Assembly may inspect affairs of State or  
10 investigate specific matters of State affairs?

11 A. May I direct your attention to the  
12 Article 61(2)?

13 Q. Please, perhaps you can first answer my  
14 question, which is to confirm that the National  
15 Assembly has, indeed, a power to inspect affairs of  
16 State or investigate specific matters of State, and  
17 that is why it has a power to investigate the National  
18 Pension Service.

19 A. Yes, that is what is written in the Article  
20 61(1) of the Constitution, but only with this Article  
21 61(1) of the Constitution we cannot say whether this  
22 would allow the Ministry<sup>2</sup> to have the right to have an  
23 inspection or the Audit over the NPS.

---

<sup>2</sup> The English interpretation at the hearing was inaccurate. Instead of  
'"Ministry,'" an accurate translation of the Korean testimony is '"National  
Assembly.'"

1           For us to be able to discuss that, we will  
2 need to look at Article 61(2) and see whether the  
3 statutes that are written in the Article 61(2) would  
4 be providing the conditions necessary for the NPS to  
5 be subjected to a certain audit or the inspection and  
6 whether these conditions are met

7           So, I mean, Korea is regulated by law. It's  
8 a country that is regulated by law, so we cannot  
9 simply say, looking at one provision in the  
10 Constitution, to say whether a certain--a Ministry<sup>3</sup>  
11 has a certain right over a certain public institution.  
12 We will need to look at a cert--we will need to look  
13 into the intent of the legislators and look into the  
14 conditions that are required by the law to decide  
15 whether it is possible to do so when the conditions  
16 exist.

17           Q.     Professor Kim, I did not ask about the  
18 Ministry's own rights to conduct an audit. I'm simply  
19 asking the question whether the National Assembly  
20 itself has audit and inspection rights in matters of  
21 affairs of State or that concern specific matters of  
22 State affairs. That's what the Constitution appears  
23 to say; do you agree with that?

---

<sup>3</sup> The English interpretation at the hearing was inaccurate. Instead of  
'"Ministry,'" an accurate translation of the Korean testimony is '"National  
Assembly.'"

1           A.    Yes, I completely agree with what you say,  
2 but what I wanted to say was: What was implied in  
3 your question earlier was that--was that--based on  
4 Article 61(1), the National Assembly has a right to  
5 inspect or audit the NPS, and that would be wrong.

6           Q.    There are a number of other audit routes, of  
7 course, over the activities of the National Pension  
8 Service. If we look again at our visual aid, we see  
9 on the right-hand side the Board of Audit and  
10 Inspection. Do you agree that that Board has a  
11 periodic audit and inspection right over the National  
12 Pension Service?

13          A.    I agree with the statement, but the audit  
14 that is conducted by the Board of Audit and Inspection  
15 would be subject to the Article, either 100 or  
16 Article 99 of the Constitution. But the audits that  
17 are conducted by the Board of Audit and Inspection is  
18 conducted--pursuant to the Act on the Board of Audit  
19 and Inspection instead of the Constitution.

20          Q.    So, I think you're agreeing with me, then  
21 that, indeed, the Board of Audit and Inspection has  
22 the right to conduct periodic audits of the National  
23 Pension Service?

24          A.    Yes, I agree with the statement, but if you  
25 would like to have a more in-depth knowledge or

1 understanding, it would be really appreciated if you  
2 could point me to a certain article or provision  
3 within the Act on the Board of Audit and Inspection to  
4 look into when, which--sorry, which conditions could  
5 be met for the Audit to happen.

6 Q. I'm only concerned with the existence of the  
7 power, so there's really no need for us to go into  
8 that detail, but thank you for the offer. I would  
9 like to turn to your First Report, if I may.

10 Would you be kind enough to go to  
11 Paragraph 48. So, in Paragraph 48, you say that--and  
12 you were talking here about the NPS's purposes--  
13 purpose, functions and powers, and you say: "Save  
14 for a few that are functionally administrative, the  
15 powers entrusted to the NPS are commercial and private  
16 in nature."

17 A. Yes.

18 Q. Let's have a look at some of those powers,  
19 if we may. They're in Article 25 of the Pension Act  
20 that conveniently you summarize some of them in  
21 Paragraph 29 of your own Statement, and I'm happy to  
22 use that.

23 So, here, you're summarizing some of the  
24 powers of the NPS: Number 1, management and  
25 maintenance of records on insured persons.

1 A. Yes.

2 Q. And that that's an administrative power in  
3 nature, isn't it?

4 A. Yes.

5 Q. And the Number 2, the imposition of pension  
6 contributions, and here we mean the mandatory  
7 contributions to be made by Korean citizens; that's  
8 right, isn't it?

9 A. Yes.

10 Q. And, of course, a commercial pension fund  
11 would not have the right to compel contributions from  
12 its pension-holders, would it?

13 A. Yes. The National Pension Fund is focusing  
14 on the management of the Fund, and what is prescribed  
15 in the Number 2 of my Statements,  
16 Article--Paragraph 29, is the role that is played by  
17 the National Pension Service.

18 Q. Correct.

19 And my question was to ask you to confirm,  
20 if you will, that that is not a power that enjoyed by  
21 a private pension provider?

22 A. Are we talking about the right to impose the  
23 premiums?

24 Q. The compulsory contributions to the National  
25 Pension Fund, that's not a right that a commercial

1 pension fund enjoys, is it?

2 A. The private companies would not have the  
3 public power. They are operating based on the  
4 contractual terms with the pension-holders.

5 Q. Quite.

6 And they operate under a very different  
7 regulatory regime to the National Pension Service,  
8 don't they?

9 A. In a way, yes; and in a way, no. Even if  
10 we're talking about a private pension fund, there  
11 would be certain principles that such private pension  
12 funds would be operated. And if the pension--private  
13 pension fund is a big one in terms of the size, it  
14 would be big enough to have a significant influence in  
15 the market. Then, the operation would need to  
16 consider its implications in the market.

17 Q. My question to you is whether they operate  
18 under a different regulatory regime to the National  
19 Pension Service. Can you answer "yes" or "no" to  
20 that question?

21 A. I would say is a correct statement.

22 Q. Thank you.

23 Item 4 on your list, Paragraph 29, "welfare  
24 promotion services," and these include the operation  
25 of welfare facilities for the current and former

1 insured beneficiaries.

2 Now, again, that's not a power or duty that  
3 a private pension fund would have, is it?

4 A. I would also say, in a way, yes; and in a  
5 way, no, to that question. I work at Yonsei  
6 University, and Yonsei University is a private  
7 university, and a private university like Yonsei  
8 University is, in fact, offering loans to its former  
9 employees or former professors at a lower interest  
10 rate than the market.

11 Q. So, my question was whether a private  
12 pension fund has an obligation to engage in welfare  
13 promotion services, to the best of your knowledge?  
14 "Yes" or "no".

15 A. Even if we are talking about a private  
16 pension fund, they would be offering such welfare  
17 services to their own employees.

18 Q. That wasn't my question, and I think you  
19 know that.

20 Is it obliged to provide those services to  
21 its pension fund holders?

22 A. So I--it is hard for me to grasp why the  
23 private fund or the private pension fund is at the  
24 center of the discussion right now. But, for example,  
25 there is a group called a "Mutual Cooperation Group"

1 within many of the Korean entities, and this is--in  
2 fact, this kind of a welfare service is, in fact,  
3 something that is frequently offered by this Mutual  
4 Cooperation Group.

5 Q. I'm asking the question because your opinion  
6 is that many of the powers entrusted to the NPS are  
7 commercial and private in nature, and so I'm asking  
8 you whether, to the best of your knowledge, a private  
9 pension fund is obliged to provide old-age planning  
10 services and the establishment and operation of  
11 welfare facilities as part of its mandate, to the best  
12 of your knowledge.

13 A. I am retiring next year, and I have high  
14 hopes of receiving a significant amount of salary from  
15 the Mutual Cooperation Group that I mentioned earlier.

16 Q. I'm not really sure that's an answer to my  
17 question but I wish you all the very best of luck with  
18 your retirement.

19 Perhaps we can look at my visual aid again.  
20 Thank you. So, I would like to start by looking at  
21 the National Pension Fund Operation Committee. That's  
22 right in the middle of our visual aid.

23 A. Yes.

24 Q. Under the National Pension Act, this  
25 Committee, the Operation Committee, is established

1 under the Ministry of Health and Welfare; that's  
2 right, isn't it?

3 A. Yes.

4 Q. And the Operation Committee shall deliberate  
5 and decide on matters concerning the Operation of the  
6 Fund; that's right, isn't it?

7 A. Yes.

8 Q. And that includes matters relating to  
9 guidelines for Operation of the Fund; that's right,  
10 isn't it?

11 A. Yes.

12 Q. And the National Pension Service is obliged  
13 to comply with the matters specified in those  
14 guidelines?

15 A. Yes. The Guidelines are a Administrative--

16 THE INTERPRETER: Sorry, give me a second.

17 (Pause.)

18 THE WITNESS: The Guidelines are an  
19 Administrative Rules, so it should be--it should be  
20 complied with. But what is important is not only the  
21 Guidelines, and the National Pension Act and  
22 Presidential Decree on the same come above and will  
23 first need to be complied with.

24 BY MS. LAMB:

25 Q. Indeed, there are, but the Guidelines

1 themselves, they must be complied with; that's right,  
2 isn't it?

3 A. Yes, correct.

4 Q. And, in fact, a number of organizations and  
5 their members are also required to comply with the  
6 Guidelines, aren't they?

7 A. Yes, correct. They are obliged to comply,  
8 but that is only regarding the Guidelines for  
9 operation of the Fund. Not everything but limited to  
10 the Guidelines regarding the operation of the Fund.

11 Q. Let's just look at Article 1, briefly, of  
12 the Guidelines; that's your C-6. So, I'm looking at  
13 subsection 3 of Article 1.

14 A. So, we're looking at the Guidelines on the  
15 exercise of Voting Rights? We're looking at the Fund  
16 Operation Guidelines?

17 Q. We're at C-6, Guidelines for Management of  
18 the National Pension Service Fund.

19 A. I don't have it here.

20 Q. Apologies, it seems that the translation in  
21 the Cross-Examination Bundle is of the wrong document,  
22 so we just rectified that now. Can we use the  
23 electronic version from the main case record? In  
24 Korean.

25 A. I would, in fact, really appreciate it, if I

1 could look at the Korean document on the screen.

2 Q. Perhaps FTI can help us with a side by side.  
3 Article 1, subsection 3. I will have to trust you  
4 about this, that this is the right translation.

5 A. Yes, I am looking at it.

6 Q. Thank you.

7 So, we're just looking to clarify those  
8 others who are required to comply with the matters  
9 specified in the Guidelines, and those entities are  
10 listed in Paragraph 3, aren't they?

11 A. Yes.

12 Q. So, those include the Ministry of Health,  
13 the Experts Voting Committee, the Service itself.

14 A. Yes.

15 Q. And we find more of the Fund operational  
16 principles in Article 4.

17 And you will agree with me that Article 4  
18 sets out, if you will, the guiding principles on which  
19 the Minister shall operate the Fund.

20 A. Yes.

21 Q. So, just looking at Principle 1, the  
22 Principle of Profitability--

23 A. Yes.

24 Q. --and what we see there is that the Fund, in  
25 its operation, must consider the burden on future

1 generations.

2 Do you see that?

3 A. Yes, I see it.

4 Q. So, if we were to compare the way in which  
5 the National Pension Fund is operated versus a private  
6 pension fund, we can immediately see a difference  
7 because a private pension fund is not obliged to  
8 consider the burden on the future generation, is it?  
9 It's only concerned with its own pension-holders?

10 A. Yes, in principle.

11 Q. Thank you.

12 When it comes to the exercise of Voting  
13 Rights, difficult decisions are to be referred to the  
14 Experts Voting Committee; that's right, isn't it?

15 A. Yes, but when the difficult--when a decision  
16 is referred to the Special Committee, the principle is  
17 that the NPSIM would make a decision first. And when  
18 it is deemed difficult to make a decision, then it may  
19 request the Special Committee to vote.

20 Q. And so, for a difficult decision, the  
21 decision is taken away from the National Pension  
22 Service, and it's passed externally to the Experts  
23 Voting Committee?

24 A. Well, but if you only say that it is about  
25 the difficult decision, I think it could be a bit

1 misleading. I think it will need to be more specific.  
2 When it is difficult for the NPSIM to decide whether  
3 to cast an affirmative vote or the negative vote, the  
4 Decision may be referred to the Special Committee.  
5 That is how I would put it.

6 The exercise of Voting Rights would be  
7 primarily done by the NPSIM. But when it is difficult  
8 for it to decide whether to cast an affirmative vote  
9 or the negative vote, it will refer the matter to the  
10 Special Committee which is under the Fund Operation  
11 Committee under the Ministry of Health and Welfare.

12 And one thing I would like to note here is  
13 that it may refer it to the Special Committee, not  
14 that it is required to refer it to the Special  
15 Committee.

16 Q. Indeed, thank you for that.

17 So, to summarize, when a decision is  
18 difficult, it is taken out of the hands of the NPS and  
19 referred to a Committee established under the Ministry  
20 of Health and Welfare?

21 A. Yes, but I would like to once again  
22 highlight that the matter that is difficult is related  
23 to deciding the exercise of voting rights of whether  
24 it should be in the affirmative or negative. It is  
25 not about all the difficult decisions that the NPSIM

1 should make.

2           So, I'm not quite sure whether you're  
3 intending to omit some of the parts that I highlighted  
4 or you're just trying to maybe make it more broad in  
5 terms, but I have, in fact, made this point a number  
6 of times.

7           Q. I think my point is very simple, and I think  
8 you've agreed with it, and it's simply that when a  
9 decision is deemed difficult and sent to the Experts  
10 Voting Committee, it is taken out of the hands of the  
11 NPS and placed into the hands of a Committee which  
12 operates under the authority of the Minister of Health  
13 and Welfare?

14           A. Well, if you simply put it, I would agree,  
15 but all of the matters that happened in this world are  
16 complex and difficult matters. So, if you only say  
17 that the matter being difficult is the only condition  
18 for it to be referred to the Committee, then it will  
19 render the activities done by the Investment Committee  
20 of the NPS or the NPSIM meaningless.

21                   And to that point I disagree.

22           Q. Let's be very specific then. C-6, back to  
23 the Guidelines, Article 17, subsection 5.

24                   So there is no confusion between us as to  
25 what difficult decision I'm referring to. So, while

1 Voting Rights shall, in principle, be exercised by the  
2 NPS, proposals for which it is difficult for the NPS  
3 to determine, whether to support or oppose shall be  
4 decided on by the Experts Voting Committee, so that is  
5 the difficult decision I'm referring to.

6 A. Yes, I fully understand your point, and once  
7 again, I would like to highlight very clearly that the  
8 NPS, in principle, has a right to exercise its Voting  
9 Rights, and only when it is difficult to make a  
10 decision on whether to cast an affirmative vote or the  
11 negative vote, it would refer to the Committee.

12 And these two conditions are significantly  
13 important. And if these two conditions do not stand  
14 or met, then the actions by the Investment Committee  
15 or the NPSIM would be rendered meaningless.

16 So, I would like to, once again, make it  
17 clear that these two conditions are important.

18 Q. And if the conditions are met, the decision  
19 is taken out of the hands of the NPS and placed with  
20 the Experts Voting Committee outside the NPS.

21 A. Yes.

22 Q. And to the best of your knowledge, that's  
23 not a feature, is it, of a private pension fund. They  
24 do not refer difficult decisions to those outside of  
25 fund management?

1           A.     Well, I am not an expert in the private  
2 pension funds, I do have a certain amount of knowledge  
3 in it, but you are constantly asking me questions  
4 about the operation of the private pension fund, and I  
5 would like to say that I can only provide you with a  
6 very general answer to the questions with respect to  
7 the private pension funds, I'm afraid.

8           Q.     That's understood, and that's all we can  
9 ask. I simply make the comparison because, in your  
10 opinion, many of the powers carried out by the NPS are  
11 equivalent to those carried out by commercial/private  
12 organizations, and I'm making the most immediate  
13 comparison I can think of.

14          A.     That is not so much about the exercise of  
15 Voting Rights, I'm afraid. The commercial function of  
16 the Fund that I want to highlight here is with  
17 relation to the maximization of the profitability, and  
18 this is to ensure that the Fund is providing the  
19 welfare to the beneficiaries in Korea that is  
20 facing--heading into an aging society at a fast pace.

21                 When the Fund is operating, it should follow  
22 the principle of profitability and if you look at the  
23 National Pension Act Article 102 and Article 103, it  
24 says that when the Fund is making an equity  
25 transaction or a derivative product transaction, that

1 it should do so in a direction that exceeds market  
2 returns, so that is something that I am highlighting  
3 as commercial aspect of the Fund.

4 Q. Let's turn our attention to the Executive  
5 Officers of the NPS. Perhaps we could look at  
6 CLA-157, so we're back in the National Pension Act,  
7 Article 30.

8 A. Yes.

9 Q. And under Article 30, the Minister of Health  
10 has the power to appoint and dismiss the standing  
11 Directors and other Directors and the Auditor?

12 A. Yes.

13 Q. And as to who those Directors are, one of  
14 them shall be, indeed, a national public official of  
15 the Ministry of Health or a public official in general  
16 service belonging to the senior Civil Service; is that  
17 right?

18 Perhaps if you could look at subsection 1 of  
19 Article 30.

20 A. Yes. Yes, that is correct, but if you look  
21 at the whole composition of the Board that is coming  
22 right before what you have highlighted, among the  
23 Directors, there are the representatives of the  
24 employers, and the representatives of the employees,  
25 and the individually insured persons in the regional

1 community as well, so I would say that the Directors  
2 include people from all walks of life.

3 Q. They do, indeed, but the Government itself  
4 has a seat at the Board table, doesn't it?

5 A. Yes.

6 MS. LAMB: Mr. Chairman, that might be a  
7 convenient moment take our break before I move on to  
8 something very different.

9 PRESIDENT SACHS: Very good. We will resume  
10 at 1:30.

11 Professor Kim, you are still under expert  
12 testimony, so please do not talk to anybody about the  
13 case during the break.

14 (Brief recess.)

15 PRESIDENT SACHS: Okay, Mrs. Lamb. Are you  
16 ready to proceed?

17 MS. LAMB: Thank you.

18 BY MS. LAMB:

19 Q. I'd like to ask you a couple of questions  
20 about the Financial Supervisory Service, if I may. If  
21 I call it the FSS, you'll know what I mean?

22 A. Yes.

23 Q. So, the FSS performs essential prudential  
24 supervisory functions over banks, capital markets,  
25 supervision, consumer protection and so on; do you

1 agree?

2 A. Yes.

3 Q. So, it performs, if you will, classic market  
4 regulatory, supervisory functions?

5 A. Yes.

6 Q. And it has investigatory powers of its own  
7 as well?

8 A. Yes.

9 Q. The FSS has a separate legal personality,  
10 doesn't it?

11 A. Yes, it has.

12 Q. Like the NPS, which also has separate legal  
13 personality?

14 A. Yes, both entities have separate legal  
15 personalities. That would be the common  
16 characteristics that they share, but the NPS is a  
17 public institution that is under the Act on the  
18 Operation of the Public Institutions, and FSS is not.

19 Q. Let's have a look at CLA-230.

20 So, this is a writing from Professor Kang,  
21 and he is describing the legal characteristics of the  
22 Financial Supervisory Service. Professor Kang  
23 is--himself, has a regulatory advisory position with  
24 the FSS? Do you know?

25 A. I am not familiar with that.

1 Q. Let's have a look at his description of the  
2 relevance of separate legal personality for the FSS,  
3 and for that we will need to go to Page 24, Section 6,  
4 subsection 1, which on the PDF for those following is  
5 Page 24; I think Page 137 of the Korean text. It's  
6 Section 6, subsection 1. I'm sorry, Page 3 of the PDF  
7 in the English.

8 So, according to Professor Kang, the fact  
9 that the FSS has separate legal personality in no way  
10 detracts from its public functions and public purpose;  
11 do you agree with that?

12 A. Yes.

13 Q. So, FSS performs public law functions; it  
14 performs the State affairs of financial supervision;  
15 it has separate legal personality, and, in his view,  
16 to conceptualize it as a private organization would be  
17 a patent error that should be abandoned.

18 Do you see that?

19 A. Yes, that is correct.

20 And the FSS is not a private organization.

21 Q. And it seems that Professor Kang is rather  
22 focusing on the nature of its acts and its duties,  
23 what it does for the State, within the State, and not  
24 the form that it takes.

25 A. I can partially agree with that, but we will

1 need to be cautious. I am not quite sure when this  
2 article was published. I think it was around 20-plus  
3 years ago. And ever since this paper was published,  
4 there have been many amendments to the Act on the  
5 establishment of the Financial Services Commission.  
6 And just referring to this document as a fact can be  
7 an erroneous one.

8 Q. I was simply asking the question whether it  
9 seemed to you, as it seems to me, that Professor Kang  
10 is rather focused on the nature of the acts and the  
11 nature of the duties that the FSS undertakes, and not  
12 the legal form that it takes.

13 A. It may seem that way and it may not at the  
14 same time.

15 Q. Now, in your statement, you advocate a  
16 three-category classification for State organs.  
17 Perhaps for the convenience of the Tribunal, we just  
18 look at Paragraph 11 of your First Report. And, in  
19 your view, if an entity does not fall within one of  
20 these three categories, it cannot be a State organ  
21 under Korean Law; is that your opinion?

22 A. Yes.

23 Q. So, under your classification, the FSS,  
24 which performs these important governmental regulatory  
25 functions, is not an organ of the State.

1           A.    It is not a State organ, according to the  
2 classification. It doesn't fall into either three of  
3 the categories that I set forth. It is not a  
4 constitutional institution like, for example, the  
5 National Assembly or the President. It is not an  
6 entity that is established under the Acts pursuant to  
7 the Constitution, and it is not a central  
8 administrative agency that is set up based on the  
9 separate Acts to set up such agency, so it is not a  
10 State organ.

11                    But something that we will need to keep in  
12 mind here is that if you ask me whether this is an  
13 administrative agency, even though it is not a State  
14 organ, then the FSS is an administrative agency, and  
15 that will be agreed upon by many of the academics in  
16 Korea.

17           Q.    And the NPS is also an administrative  
18 agency, isn't it?

19           A.    NPS is an administrative agency. It is  
20 performing the functions of an administrative agency.  
21 If you look at the Article 25 of the National Pension  
22 Act, the National Pension Service is capable of  
23 carrying out some administrative dispositions such as  
24 the imposition of the contributions and the  
25 disbursement and determination of the contributions.

1 So, it is an administrative agency.

2 But, if you look at the Korean  
3 Administrative Appeals Act and the Korean  
4 Administrative Procedure Act, then the administrative  
5 agency is not related at all to its status of a State  
6 organ. So the administrative agency is an entity that  
7 is making an administrative decision-making, and it is  
8 also making such administrative decision-making  
9 public, and that would include the State or a local  
10 government and public organizations, their agencies  
11 and individuals, which are delegated with the power  
12 from the State or local governments.

13 And so, if you say that, since the FSS is an  
14 administrative agency, it will also constitute a State  
15 organ or since the NPS is an administrative agency so  
16 it would constitute a State organ, then that would not  
17 stand logically.

18 Q. The Central Bank of Korea performs more than  
19 administrative functions, doesn't it? It formulates  
20 monetary policy for the Government; do you agree with  
21 that?

22 A. Yes.

23 Q. The Central Bank of Korea doesn't seem to  
24 fall within any of your three categorizations either,  
25 does it?

1           A.    It does not fall into any of those  
2 categories.  It is not a constitutional institution,  
3 and it is not an organ that is established under a  
4 certain act under the--pursuant to the Articles 96 of  
5 the Constitution.  According to the administrative  
6 organization legalism, it is not a State organ, and it  
7 is not a central administrative agency, either.

8                    The fact that the reason why the Korean  
9 lawmakers didn't make such organization a State organ  
10 is because the Central Bank of Korea does perform some  
11 governmental functions, but it should be ensured a  
12 very important principle of independence and  
13 neutrality when it is formulating the monetary and  
14 credit-related policies.

15                   And the fact that the Central Bank should  
16 have the independence and neutrality from politics is  
17 not only applicable to Korea but would be applicable  
18 to any country around the world.

19           Q.    So, does that mean, then, that the Central  
20 Bank of Korea does not enjoy sovereign immunity in  
21 other countries, in other courts?  Do you know?

22           A.    I do not know about that in detail, but if  
23 the Central Bank of Korea argues in such a manner,  
24 then I would say, in my view, it is an erroneous  
25 judgment.  If the Central Bank of Korea says that it

1 is a State organ, that it means that it will be under  
2 a direct supervision and oversight by the Ministry of  
3 Economy and Finance, and that would be wrong.

4 Q. There may be those within your client who  
5 are surprised to hear that, but that's your opinion,  
6 and you're entitled to it.

7 Perhaps we could look at CLA-126. And this  
8 is a Court Decision from the Korean courts, the  
9 Administrative Courts, I believe.

10 A. Euijeongboo District Court.

11 Q. That's right.

12 And this is a Decision that you covered in  
13 your Report, so you're familiar with it; yes?

14 A. Yes.

15 Q. So, just looking at who the plaintiff is,  
16 then, from the cover page, it's the National Pension  
17 Service who is appearing as plaintiff, apparently not  
18 represented by any counsel, just appearing as the  
19 National Pension Service. And I think the respondents  
20 are the mayors of certain cities in Korea.

21 What I'd like to look at is the positions  
22 that were taken by the NPS itself, so we'll need to go  
23 into the Decision; and, in this case, the NPS, itself,  
24 argued that the National Pension Fund is vested in the  
25 State and the NPS only conducts management and

1 operation of the Fund commissioned by the Minister of  
2 Health and Welfare.

3 But the point is the NPS argues that the  
4 Fund, itself, is vested in the State.

5 A. Yes.

6 Q. That was the Claim made, the position  
7 asserted by the NPS.

8 And looking at the Court's Decision, among  
9 other things, the Court decided that it was  
10 appropriate to regard the NPS's acquisition of shares  
11 through the Fund as an acquisition by the State. That  
12 was the Court's Decision, wasn't it?

13 A. So, yes, but we will need to be very  
14 cautious in looking into this case. As you would  
15 know, the National Pension Service has a separate  
16 legal personality. So, when it is acquiring shares,  
17 the legal effect of acquiring shares would be  
18 attributable to the National Pension Service. And the  
19 Fund that--the share that it acquires would fall into  
20 the Fund of--the Fund that it operates, and then it  
21 will form a general property.

22 So, it could be summarized this way: The  
23 act of purchasing a share would be done by the  
24 National Pension Service, but the negligence<sup>4</sup> with

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<sup>4</sup> The English interpretation was corrected from "negligence" to "profits"

1 regard to such shares and the legal impact of such  
2 acquisition would be falling into the State general  
3 property.

4           There is a very well-known doctrine in the  
5 Tax Act which is the substance over form, so the  
6 action is taken by the National Pension Service, but  
7 the negligence<sup>5</sup> would be attributable to the Fund, and  
8 that is according to the Tax Act.

9           So, I actually have a question to you,  
10 counsel: In any part of this ruling, does the Court  
11 say that the NPS is a State organ? I mean, you're  
12 asking me whether the Fund is part of the national  
13 property, then yes, but is it saying that the NPS is a  
14 State organ?

15           MR. HAN: Mr. President, there is a  
16 translation issue here, and I would like to comment.

17           So Professor Kim said "'gwashil,'" and here  
18 "'gwashil'" does not mean "'negligence,'" as you can  
19 see in the Transcript; it should be "'profits.'"

20           BY MS. LAMB:

21           Q. The Court's rationale for finding that the  
22 Fund is vested, indeed, in the State even though NPS  
23 has separate legal personality, is explained in the

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during the hearing. See page 397 below.

<sup>5</sup> The English interpretation was corrected from "'negligence'" to "'profits'" during the hearing. See lines 11-15 below.

1 Judgment as follows (reading): As in the case of the  
2 Government budget, the Fund's operation plans are  
3 subject to the Government and the National Assembly's  
4 administration and control, including the President's  
5 approval, report to the National Assembly, submission  
6 of report on final accounts to the Minister of  
7 Strategy and Finance, et cetera. It is therefore  
8 appropriate to deem that the Fund is vested in the  
9 State. That was the Court's reasoning.

10 A. Yes. And as you said multiple times, in  
11 this ruling, it says, even though the NPS has a  
12 separate--I mean, sorry, it says since the NPS has a  
13 separate legal personality, the legal act that is  
14 conducted by the NPS such as the acquisition of shares  
15 would be an act that is conducted by NPS, but the  
16 result of such act, such as the profit made, would be  
17 attributable to the Fund.

18 And the--there are certain governmental  
19 interventions or supervision by the Ministry of Health  
20 and Welfare in relation to the various managements of  
21 the NPS, but this ruling doesn't say anywhere that the  
22 NPS is a State organ.

23 Q. What the Court does say in Paragraph 3 is  
24 that, "in light of the Fund's legal nature and  
25 circumstances of management and operation as described

1 above'"--we just read that--'"it is appropriate to  
2 deem that the shares acquired by the Fund is vested in  
3 the State.'" That was the Court's Decision.

4 Do you agree with that?

5 A. Yes. This is a reference to the principle  
6 of the Tax Act, as I mentioned earlier, the substance  
7 over form. The form is that the National Pension  
8 Service acquired shares, and the profits or the  
9 results of such acquisition of shares would be vested  
10 in the Fund, and that Fund is part of the national--

11 THE WITNESS: (In English) General property.  
12

13 A. So--but this is not related at all to saying  
14 that the National Pension Fund or the National Pension  
15 Service is a State organ. The acts conducted by the  
16 NPS is a form, and the result of such act is vested  
17 into the Fund, and that is all it says.

18 And I am not understanding why this ruling  
19 is used as an evidence to say that the NPS is a State  
20 organ.

21 Q. The Court's Decision was confirmed on  
22 appeal, wasn't it? We know that from CLA-127.

23 A. Yes.

24 Q. And, among other things, the Appeal Court  
25 found that the NPS's duties to manage and operate the

1 Fund are delegated from the Minister and that,  
2 therefore, the legal effect of its duties were to be  
3 attributed to the State. That's what the Court found,  
4 wasn't it?

5 A. Yes. And, in fact, this is almost the same  
6 ruling as what was said in the lower-court decision.

7 Q. Moving on now to an entity that you refer to  
8 in your Report. We called it "KAMCO." It's the  
9 Korean Asset Management Corporation. So, perhaps we  
10 could look at your Second Report, Paragraph 44.

11 So, as to KAMCO, now, this is an entity  
12 which takes on, if you will, the bad debts of a  
13 failing bank; simplistic description. Do you agree  
14 with that?

15 A. Yes, I do.

16 Q. And what we know is that KAMCO, itself,  
17 asserted sovereign immunity in litigation overseas,  
18 and it asked the courts of the United States to  
19 recognize it as a State organ under Korean Law.  
20 That's what KAMCO said to the U.S. Courts; and you're  
21 aware of that, aren't you?

22 A. Yes.

23 I read that from what you have provided, and  
24 based on my judgment, I am, in fact, not familiar in  
25 detail with what they have argued at the courts and

1 what kind of legal disputes were at issue at such  
2 case. But if--but the fact they made such statements  
3 at the litigation with regard to the State--sorry,  
4 sovereign immunity and them saying that they're a  
5 State organ is for them to defend themselves in such  
6 legal proceedings.

7 And my personal view is that such argument  
8 is not--not reasonable in light of the Korean  
9 administrative law.

10 Q. Well, let's just look at how KAMCO put its  
11 case under Korean Law. If we go to CLA-121. This is  
12 KAMCO's brief. And the relevant section is Section F.  
13 Printed page 41, if that helps.

14 So, this is the part of the brief where  
15 KAMCO is setting out the reasons why it considers that  
16 it is treated as a government organ under Korean Law.

17 A. Is this the brief that is submitted by  
18 KAMCO?

19 Q. Yes, it is.

20 A. This is the first time that I read this.

21 PRESIDENT SACHS: Mrs. Lamb, perhaps you  
22 could put this brief in context so that the Expert  
23 Witness can understand the context.

24 MS. LAMB: Certainly.

25 BY MS. LAMB:

1 Q. So, simply put, this is the document in  
2 which KAMCO gave its reasons to the Court why, under  
3 Korean Law, it should be considered a State organ.

4 And what KAMCO said to the Court was that,  
5 in fact, there were myriad ways in which KAMCO is  
6 treated as a government agency under Korean Law and  
7 is, therefore, an organ of the State.

8 A. I think it's a wrong assertion made by  
9 KAMCO.

10 Q. The-- we won't go through all of the many  
11 reasons it says it's a government organ under Korean  
12 Law, but among other things, it points to its founding  
13 statute. So it says KAMCO is a creature of statute,  
14 was created by an Act. It's the Act that determines  
15 its mission, its functions and so on, and for that  
16 reason it should be treated and is treated as a  
17 government organ under Korean Law.

18 A. So I do not know about this case in detail,  
19 but it doesn't seem that KAMCO had submitted specific  
20 documents or statutes to prove its status as a State  
21 organ in this case.

22 And, as you know, KAMCO is an entity that is  
23 managing the underperforming assets, so in a simple  
24 way to put it, it is in effect cleaning up the mess of  
25 an underperforming company, so it is not performing

1 the commercial functions so much.

2 But, for example, for the NPS is a different  
3 story because it is pursuing profitability to ensure  
4 the livelihood of the citizens after retirement. It  
5 engages in financial activities in a very aggressive  
6 and active way to increase the Fund, so that is a  
7 difference between the KAMCO and the NPS.

8 And "'either'" (corrected to "'neither'"  
9 below) of the entities can be considered State organ,  
10 in my view, and why KAMCO is making such a statement  
11 in this brief is beyond my understanding at this  
12 point, sitting here, because this is the first time  
13 that I'm seeing this brief in detail.

14 Q. I won't ask you any more about it, perhaps  
15 other than to ask if you know that the U.S. Courts, in  
16 fact, accepted the position of KAMCO that, indeed, it  
17 was an organ of the State under Korean Law?

18 A. I didn't know it was accepted. I mean I  
19 only heard that KAMCO made such assertion.

20 PRESIDENT SACHS: May I just interject a  
21 question maybe an issue of translation. The  
22 translation of the statement of the Expert Witness  
23 some moments ago was, "'and either of the entities can  
24 be considered a State organ.'"

25 THE INTERPRETER: Cannot be.

1 PRESIDENT SACHS: Okay.

2 THE INTERPRETER: Sorry.

3 PRESIDENT SACHS: Thank you.

4 BY MS. LAMB:

5 Q. Could we have a look at CLA-229. This is  
6 one of your writings.

7 A. Yes, I have it.

8 Q. So, this is the 9th edition of a book on  
9 "General Administrative Law" authored by yourself?

10 A. Yes.

11 Q. And, among other things in your writing, you  
12 say that it is difficult to define what executive  
13 administration precisely means. We find that on  
14 Page 2 of the PDF or Pages 8 to 9 of the Korean.

15 A. Yes.

16 Q. And you endorse another academic statement,  
17 if we look at Footnote 1 on Page 2. You endorse that  
18 statement, that administration cannot be defined but  
19 only described.

20 A. Yes.

21 Q. And so, ultimately, you say that, despite  
22 attempts to define "administration" under  
23 administrative law, it ends up being defined by way of  
24 unique characteristics or features, such as serving  
25 the public interest. That was your opinion then?

1           A.    Yes.  And indeed, it is a personal honor to  
2 have my rather humble textbook shown on the screen in  
3 front of the Tribunal, but the reason why I put this  
4 in here--put this statement in here is because, if you  
5 look at the three branches of the Government;  
6 Executive Government--sorry, Administrative and  
7 Judicial Branch and the Legislative Branch.  If you  
8 compare it to--if you compare the Executive Branch to  
9 the Legislative or Judicial Branch, the roles that are  
10 performed by the Executive or the Administration is  
11 way more diverse and complex, and it is more related  
12 to a lot of different policies.  So, it is very  
13 difficult to define clearly what the concept is.  That  
14 is what I wanted to say through what I wrote here.

15                 So, this is a view of an academic in the  
16 Administrative Law, and this is not related to how the  
17 State organ should be defined under Korean Law.

18           Q.    You give us an example of a definition of  
19 administration that is "taking on unique initiatives  
20 to execute national tasks in terms of future-oriented  
21 social formation."  What do you mean by that?

22                 "Unique initiatives to execute national tasks in  
23 terms of future-oriented social formation."

24           A.    Well, the initiatives that I wanted to  
25 highlight here is, in comparison to the activities

1 taken by the courts, such as the trials or the  
2 activities taken by the Legislative Branch, the  
3 administration could engage in, for example,  
4 large-scale projects; for example, building  
5 large-scale airports or pushing for a pension reform.  
6 Such activities would be examples of the  
7 future-oriented social confirmation.

8 Q. Or tasks which involve safeguarding the  
9 National Pension Fund for future generations, the  
10 Principle of Profitability that we looked at earlier?

11 A. So, of course, that will fall into the  
12 category of the governmental tasks or the  
13 administrative task, but here I would like to  
14 highlight something. This is a government task and a  
15 State activity, but how, in what form should it be  
16 conducted is remaining as a question.

17 So, would the State directly do the job.  
18 For example, let's take an example of a pension  
19 reform. If I am a law-maker, I would establish a  
20 Pension Reform Agency under the Ministry of Health and  
21 Welfare, but in this actual case, the Korean  
22 Government decided to create the separate legal entity  
23 with the separate legal personality, the National  
24 Pension Service, to manage and operate such  
25 activities.

1           So, I am not disagreeing with the fact that  
2 this is a national initiative or the national task,  
3 but then how it should be conducted can be decided by  
4 the legislation through the statutes, whether the  
5 Government would do it directly, whether it will  
6 delegate its authority to the NPS to conduct the  
7 activities. I mean, that is up to the Legislative  
8 Branch to decide.

9           Q. Thank you, Professor Kim. A couple of final  
10 questions.

11           You've been good enough to tell us in your  
12 First Report right at the beginning that you have,  
13 indeed, held many Government positions over the past  
14 three decades. I just wanted to bring up Paragraph 1.

15           A. Yes.

16           Q. And in addition to this case, you're also  
17 retained to give an opinion on another case that we've  
18 heard about this week, the Elliott case; is that  
19 right?

20           A. Yes, that is correct.

21           And I had an opportunity to look into this  
22 particular case, the Mason case, and I was able to  
23 find a lot of differences, even though there were many  
24 similarities as well, so I studied a lot for this case  
25 specifically.

1           So, the fact that I was retained in another  
2 case would not undermine my independence or neutrality  
3 as an expert witness in this case.

4           Q.    You've already testified in the other case?

5           A.    Yes.

6           Q.    And finally, Mr.--Professor Kim, are you  
7 aware of another investment tribunal case, Dayyani,  
8 which is also a case against Korea?

9           A.    Yes, I read it from the Mason's Report, and  
10 I understood the content from it.

11          Q.    The outcome of this Decision was--was  
12 reported in the press, wasn't it, even in the Korean  
13 press?

14          A.    Yes, that is what I am aware of.

15          Q.    So, you will know, at least from that, not  
16 just from what I say, that KAMCO was considered to be  
17 an organ of the State by a Tribunal in that case?

18          A.    Yes, but as I explained earlier, I heard  
19 about that Report but I do not know about the specific  
20 reasons why KAMCO argued that it is a State organ and  
21 what was a dispute at issue at that case. I am only  
22 aware of that case at a level that would be reported  
23 by the media outlets.

24          Q.    Okay, understood. No further questions.  
25 Thank you so much for your time, Professor Kim.

1           PRESIDENT SACHS: Is this case on the  
2 record?

3           MS. LAMB: We discussed it in opening. So,  
4 if you recall--

5           PRESIDENT SACHS: Yes.

6           (overlapping speakers.)

7           MS. LAMB: --the press reports are on  
8 record. We asked if we could see a copy, and it has  
9 not been shared with us. That is, indeed, the case.

10          PRESIDENT SACHS: Okay. Thank you.

11          Redirect.

12          MR. HAN: Thank you, Mr. President.

13                           REDIRECT EXAMINATION

14          BY MR. HAN:

15           Q. Professor Kim, the counsel for the Claimant  
16 spent time with you about document (unclear) CLA-157.  
17 Let's take a look at that document.

18          MR. HAN: Operator, can you put up 157 on  
19 the screen?

20          FTI TECHNICIAN: I'm sorry? CWS-157?

21          MR. HAN: CLA-157, please.

22          FTI TECHNICIAN: One moment, please.

23          MR. HAN: This is not CLA-157.

24          FTI TECHNICIAN: I'm sorry, could you direct  
25 me to the folder of the bundle?

1 MR. HAN: There is no separate bundle for  
2 CLA--

3 MR. VOLKMER: Sorry, I'll try to help.

4 This is a Claimant's Legal Authority.

5 FTI TECHNICIAN: I see it. My apologies.

6 MR. HAN: Thank you.

7 BY MR. HAN:

8 Q. Can you show us Article 24 and 25.

9 So, Professor Kim, the counsel for the  
10 Claimant asked you some questions about NPS powers,  
11 abilities or affairs that NPS can conduct. Can you  
12 remember that?

13 A. Yes.

14 Q. Other than the authority or power that NPS  
15 can exercise in Article 24 and 25, can you explain  
16 whether NPS can exercise other business or activities  
17 under the Act?

18 A. There would be several activities that the  
19 NPS performs, for example, lending out the money or  
20 leasing out a certain property as part of its  
21 business, but I am looking to find the right provision  
22 for that.

23 But let me just explain verbally. The NPS  
24 could be leasing some part of its office to the  
25 private entity to generate income from that, or it

1 could engage in a profit-generating business to  
2 increase profits in its pocket.

3 So, those would be the examples of other  
4 Commercial functions that the NPS can engage in.

5 And that is under Article 46 of the National  
6 Pension Act with regard to the welfare businesses and  
7 the lending business, et cetera.

8 Q. Professor Kim, can you take us to the  
9 Article and further elaborate? Article 46, please.

10 A. So, the NPS can perform many different  
11 welfare and loan services according to Article 46 of  
12 the National Pension Act. It says that this service  
13 may conduct the following welfare services to promote  
14 the welfare of currently and formerly insured persons  
15 and beneficiaries as prescribed by Presidential  
16 Decree. For example, the services would include loan  
17 services and establishment, supply, lease and  
18 operation of welfare facilities for the aged under the  
19 Welfare of the Aged Act, and the establishment and  
20 operation of sports facilities under the Installation  
21 and Utilization of Sports Facilities Act, and other  
22 welfare services as prescribed by Presidential Decree.

23 And if I may, I would like to direct your attention to  
24 Article 74 of the  
25 Presidential Decree of the National Pension Act.

1 There, you'll be able to see myriads of other  
2 profit-generating businesses that the NPS conducts.

3 Q. Professor Kim was referring to not CLA-157  
4 but to the Enforcement Decree of the National Pension  
5 Act, which is CLA-150.

6 A. And Article 74.

7 May I have the interpreter to read the  
8 Article 74(2) for the record?

9 Q. Yes, please.

10 A. Under Article 74(2), it says--it sets out  
11 the businesses that the NPS can conduct, for example,  
12 Number 1, banks under the Banking Act, the Korea  
13 Development Bank under the Korea Development Bank Act,  
14 and the Industrial Bank of Korea under the Industrial  
15 Bank of Korea Act.

16 And Number 2, investment traders, investment  
17 brokers, trust business entities, collective  
18 investment business entities, investment consultants,  
19 and securities finance companies under the Financial  
20 Investment Services and Capital Markets Act.

21 And Number 6, insurance companies under the  
22 Insurance Business Act.

23 And Number 7, is Postal Service offices.

24 So, these diverse activities are crucial  
25 activities conducted by the NPS. These commercial

1 activities are crucial to the NPS for the purpose of  
2 maximizing the profits and increasing its fund.

3 Q. And then, Professor Kim, the last question  
4 on this document, so, those activities you just  
5 explained are activities that commissioned by the  
6 Ministry of Health and Welfare or just those  
7 activities that are conducted or done without that  
8 commission by the Minister?

9 A. So, in principle, the operation of the Fund  
10 is commissioned by the Minister of Health and Welfare  
11 under Article 102(5) of the National Pension Act, but  
12 the loan services or the welfare services that was  
13 mentioned before were under Article 46 and these  
14 activities that are set forth under Article 74 of the  
15 Presidential Decree, these are the activities that are  
16 conducted autonomously by the NPS.

17 And the acquisition of shares and investment  
18 activities are the activities that are conducted by  
19 the Investment Committee and the NPSIM of the NPS in a  
20 self-controlling way, and this is, in fact, a very  
21 difference between the NPS and the other entities such  
22 as KAMCO that was mentioned earlier.

23 Q. Thank you, Professor Kim.

24 MR. HAN: Now, Operator, can you take us to  
25 Document C-6. C-6.

1 Article 17-5 please.

2 Just keep this document on the left-hand  
3 side, and can you pull up Transcript Page 24, Row 8.

4 BY MR. HAN

5 Q. So, Professor Kim, while operator is pulling  
6 up the Transcript, can you take a look at Article 17,  
7 Page 5 of this document because the counsel for the  
8 Claimant asked some questions about this document, and  
9 I will explain. I take to that question and answer  
10 shortly.

11 FTI TECHNICIAN: Do you have the time stamp  
12 for the Transcript?

13 MR. HAN: It's 12:58:16.

14 Yeah, there. Thank you.

15 BY MR. HAN:

16 Q. So, Professor Kim, Claimants' counsel asked  
17 a question about the 17-5 of this document, and she  
18 asked, I read: "So, the difficult question, that  
19 decision is taken away from the National Pension  
20 Service, and it's passed externally to the Experts  
21 Voting Committee."

22 Can you carefully take a look at this  
23 question and your answer, and give your comment on  
24 this question and answer.

25 MS. LAMB: Mr. Chairman, I'm very loath to

1 interrupt, but respectfully, it's not a re-examination  
2 to say to the Witness, look at what you were asked and  
3 look at what you said, comment on it. If he has a  
4 question, then please put it. He's been invited to  
5 look at the Transcript and comment on it.

6 PRESIDENT SACHS: I presume you will have a  
7 question in relation to that, or--

8 MR. HAN: Sir, I was trying to ask the  
9 Professor Kim's explanation on what perspective--what  
10 context he gave this answer to the question.

11 ARBITRATOR GLOSTER: Can you not articulate  
12 a question for the Witness, Mr. Han?

13 MR. HAN: Okay. Will do so.

14 BY MR. HAN:

15 Q. Professor Kim, do you have the Korean  
16 version of this document and with Article 17-5 with  
17 you right now?

18 A. Yes, I do have it.

19 Q. Okay. Regarding this Article, Article 17-5,  
20 the Claimants' counsel asked this question and it  
21 goes, so the difficult question, the decision is taken  
22 away from the National Pension Service.

23 So, Professor Kim, can you explain whether  
24 the agenda, which as you can see on the screen,  
25 difficult question, it is taken away from the National

1 Pension Service?

2 (No interpretation.)

3 Q. Yes, thank you.

4 A. Well, the phrase "'taken away'" is something  
5 I want to explain a little more on. It is not  
6 entirely taken away to a completely external party.  
7 It is not staying inside the NPS, but it is given--it  
8 is referred to the Special Committee that is under the  
9 Fund Operation Committee of the Ministry of Health and  
10 Welfare.

11 And while the Claimants' counsel have  
12 highlighted multiple times on the difference between  
13 the NPS and private pension funds --and I would say  
14 that the Decision is not entirely taken away to a  
15 complete external party--I would not 100 percent say  
16 that it is taken away from the National  
17 Financial--sorry, National Pension Service.

18 Q. Thank you, Professor Kim.

19 MR. HAN: Operator, can you pull up CLA-126,  
20 please. You can pull down the document on the screen.

21 ARBITRATOR MAYER: Sorry, maybe I should ask  
22 the question now.

23 Professor Kim, you have been asked a  
24 question about this expression "'taken away.'" But my  
25 question would be, in connection with that, who

1 decides that it's going to go to the Special Committee  
2 and not stay with the NS--NPSIM?

3 THE WITNESS: That would be decided by the  
4 Investment Committee under the NPSIM in accordance  
5 with the Guidelines on the Exercise of Voting Rights.  
6 So, let me elaborate a little further on that.

7 I am aware that there is some confusion  
8 around the interpretation of this particular provision  
9 because there is a provision that is related to this  
10 matter in the Operational Guidelines as well. It is  
11 within the authority--so, because of that, some  
12 interpret it as the Special Committee having the right  
13 to refer the matter to the Special Committee itself,  
14 and this would be an erroneous interpretation.

15 Simply put, let me explain to you about the  
16 procedure of how it works.

17 So, when there is a matter that the  
18 Investment Committee finds difficult to decide whether  
19 to cast the affirmative vote or negative vote, that  
20 difficult decision would be referred to the Special  
21 Committee under the Fund Operation Committee under the  
22 Ministry of Health and Welfare that is outside of the  
23 National Pension Service and this is about procedure  
24 and method in a way.

25 And, according to the procedure and method,

1 the jurisdiction, I would say, is established for the  
2 Special Committee under the Fund Operation Committee.

3 And we have to be careful here. So, who is  
4 making a decision of referring this certain matter to  
5 the Special Committee? That is, of course, done by  
6 the Investment Committee under the NPS, and by doing  
7 so, jurisdiction is created for the Special Committee  
8 for it to decide on the matter afterwards. So, this  
9 is the overall flow, and we shouldn't be making a  
10 mistake of confusing between the two.

11 ARBITRATOR MAYER: Sorry, I have a short  
12 question, and maybe there will be a short answer: Who  
13 decides whether the question is difficult or not?

14 THE WITNESS: That is decided by the  
15 Investment Committee of the NPSIM.

16 ARBITRATOR MAYER: Thank you, Professor Kim.

17 PRESIDENT SACHS: And a follow-up question  
18 from my side, forgive me.

19 Decided by the members of the Investment  
20 Committee? Without taking a decision on the issue or  
21 prior to taking a decision on the issue, is it, so to  
22 say, tentative? You're discussing an issue and you  
23 find it difficult to decide and then it is decided to  
24 pass it on to the Special Committee, or how does it  
25 work in practice? Do you have an idea?

1 THE WITNESS: I am not an expert in the  
2 practice of the NPS, but as far as I am aware, when  
3 the Investment Committee under the NPSIM decides  
4 entirely itself that the decision is difficult to  
5 decide between an affirmative vote or a negative vote  
6 when it is exercising the Voting Right, then it will  
7 refer to the Special Committee. And when the Special  
8 Committee is referred to, then it will make a final  
9 decision on whether--how to exercise the Voting Right.

10 So, based on my judgment, the final  
11 decision-making would be done by the Special  
12 Committee.

13 PRESIDENT SACHS: Thank you.

14 MR. HAN: Operator, can you go back to  
15 CLA-126, please, internal Page 3. Yes. Can you  
16 scroll all the way down to the bottom and stop at 3.  
17 Yes. And can you show the next page, sir. Thank you.

18 BY MR. HAN:

19 Q. So, Professor Kim, can you take a look at  
20 this paragraph and comment on whether the Court found  
21 that NPS is a State organ or the shares acquired by  
22 National Pension Fund should be attributable to the  
23 State from the tax perspective?

24 (No interpretation.)

25 MR. HAN: Mr. President, I only have one

1 min--go on. Sorry.

2 THE WITNESS: As I explained earlier, this  
3 particular principle under the Tax Act would apply  
4 here, and what is written by the Court here is--in--it  
5 says, in light of the legal characteristics and the  
6 Operation of the National Pension Fund.

7 And here, based on my judgment, the Court  
8 has found since the Fund does not have a separate  
9 legal personality, it cannot engage in a legal act by  
10 itself, such as acquiring the shares.

11 So, when the shares are acquired, then the  
12 right of that--right to the property would be  
13 attributable to the Fund, which is a State property.  
14 That is what is written--that is what is found by the  
15 Court here, and it is not about asserting that the NPS  
16 is a State organ.

17 MR. HAN: Mr. President, I only have one  
18 very short question and I finish.

19 BY MR. HAN:

20 Q. So, Professor Kim, you recall that counsel  
21 for Claimants take you to the issue whether NPS is  
22 subject to the Audit by the Board of Audit and  
23 Inspection under Korean Law. Do you recall?

24 A. Yes.

25 Q. Could you explain what else entities are

1 also subject to the Audit by the Board of Audit and  
2 Inspection under Korean Law?

3 A. There are many entities that are supervised,  
4 that are audited under the Act on the Audit and  
5 Inspection under Korean Law. It is very broad. The  
6 scope is very broad. For example, the Yonsei  
7 University, a private university that I work for, is  
8 receiving a certain amount of funding from the  
9 national fund and the state and local government, so  
10 it is audited under the Act and the entities that are  
11 under the Act would include the private universities,  
12 kindergartens and the nurseries and the orphanages as  
13 well.

14 And these entities are under the Act and  
15 they are subject to audit under the Act because  
16 taxpayer's money is paid in those entities.

17 MR. HAN: No further question,  
18 Mr. President. Thank you.

19 MS. LAMB: Very briefly?

20 PRESIDENT SACHS: I think that is justified  
21 in the context of what you raised earlier.

22 MS. LAMB: Thank you.

23 PRESIDENT SACHS: But please, as a rebuttal.

24 RECROSS-EXAMINATION

25 BY MS. LAMB:

1 Q. Could we just go back to the Transcript then  
2 because I just want to check that we have properly  
3 understood your evidence. So, at 14:39. Perhaps we  
4 could just pin that. 14:39:24, 24 seconds.

5 Perhaps I can paraphrase. If we need to we  
6 can look at the Transcript.

7 Professor Kim, I understood you to have said  
8 that the NPS can engage in myriad profit-generating  
9 businesses, and that these include, among others, a  
10 banking business, investment banking business,  
11 insurance business, and other items listed under  
12 Article 74 of the National Pension Fund. Was that,  
13 indeed, your expert opinion?

14 A. Yes, so that is under Article 74 of the  
15 Presidential Decree of the National Pension Act.

16 Q. Could we just have a look, then, please, at  
17 Article 102 of CLA-157.

18 A. That is not specifically my expert opinion,  
19 but that is what is stipulated in the law.

20 Q. Let's just examine that.

21 Article 102 of the National Pension Act--we  
22 have it in front of us now--so, this is dealing with  
23 management and operation of the Fund, a reminder the  
24 Fund should be managed and operated by the Minister.

25 And then in subsection 2, we are told the

1 methods that the Minister of Health and Welfare may  
2 use to manage and operate the Fund.

3 Do you see that? The first line,  
4 subparagraph (2), "the Minister of Health and Welfare  
5 shall manage and operate the Fund by use of any of the  
6 following methods," and they are then listed 1  
7 through 7.

8 A. Yes.

9 Q. And one of the methods, number one, is  
10 "deposits or trusts in financial institutions  
11 prescribed by Presidential Decree."

12 Do you see that?

13 A. Yes, that is exactly what I meant by what is  
14 prescribed in Article 74 of the Presidential Decree.

15 Q. It can make a deposit or trust in one of the  
16 financial institutions listed in the Decree. They  
17 can't, themselves, carry out the business of banking,  
18 investment banking, insurance business, and so on;  
19 that's right, isn't it?

20 A. In fact, the Article 74 that we looked at  
21 was mistranslated, so it doesn't say that the Fund can  
22 make a deposit or engage in such actions on its own.  
23 It was mistranslated in that document.

24 Q. Let's have a look--let's have a look at the  
25 Presidential Decree, which is CLA-150, Article 74.

1           So, Fund Operation Business, subsection 1,  
2 and then it says: "Financial institutions under  
3 Article 102, subsection 2, Number 1 of the Act."

4           So, we have to sort of go back to  
5 Article 102. But Article 102 is simply the provision  
6 which empowers the Minister to place deposits or  
7 trusts in financial institutions prescribed by Decree,  
8 and the Decree is then listing the institutions in  
9 which the Fund may place a deposit or trust; correct?

10          A. Yes, but I would like to direct your  
11 attention to the Paragraph 3 of Article 74 of the  
12 Presidential Decree. You can see a lot of  
13 profit-generating businesses and activities that is  
14 written here. This is the core of what I wanted to say  
15 earlier.

16          Q. Professor Kim, with the greatest of respect,  
17 you sought to say in your evidence to the Tribunal  
18 that the National Pension Fund could itself conduct  
19 myriad profit-generating businesses which you said  
20 were listed in Article 74 and, indeed, all Article  
21 74(1) is telling us is what financial institutions the  
22 Minister is entitled to place a deposit in; that's  
23 right, isn't it?

24          A. Um-hmm.

25          Q. Thank you.

1           A.     Well, of course, what you're saying is  
2 right. The subparagraphs to the Article 74(1) are  
3 stipulating the financial institutions that the Fund  
4 can make a deposit to.

5                     But what I want to highlight here is that,  
6 according to Article 74(3), you can see a lot of  
7 myriads of areas where the Fund can make an investment  
8 in, and this is what is important. I am not  
9 disagreeing with your point, though.

10           Q.     And would the NPS be paying corporation tax  
11 on these profit-generating activities, to your  
12 knowledge?

13           A.     Yes, of course. These profit-generating  
14 business are subject to Corporate Tax, but the  
15 Operation of the Fund and the profits that are  
16 generated from the Operation of Fund is not subject to  
17 Corporate Tax. Only the profit-generating activities  
18 and businesses are subject to Corporate Tax.

19           Q.     Shall we just take a quick look at the  
20 corporation tax paid on these myriad profit-making  
21 activities. R-338.

22                     So, R-338 is a 2020 Q1 statement, tax  
23 statement, but it's telling us a little bit about some  
24 of the years prior to that, you can see in the middle  
25 of the document, starts in 2015, and you've got the

1 tax, the relevant tax base, and the amount of  
2 Corporate Tax paid on these profit-generating  
3 activities, so nothing at all 2015; '16; '17; KRW  
4 63,000 2018; KRW 152,000 in 2019.

5 And apologies, I was approximating to U.S.  
6 dollars, of course, in won the number would be in the  
7 millions, not hundred thousand.

8 So, rather small, if I may say so, amounts,  
9 in the context of the enormous size of the Funds  
10 which, in fact, form the primary and significant part  
11 of the NPS's activities. You would agree with me on  
12 that, wouldn't you?

13 A. Yes, I agree.

14 And, in fact, this is what is quite sharply  
15 criticized when they're making an evaluation of the  
16 public institutions.

17 Q. Just a final question, and on these  
18 so-called "'difficult decisions'" for the Voting  
19 Committee, the Experts Voting Committee.

20 You were asked in your knowledge the  
21 practice of referring a difficult decision and who can  
22 refer a difficult decision. Are you aware that the  
23 Chairman of the Expert Voting Committee can him or  
24 herself deem a decision necessary for consideration by  
25 the Expert Voting Committee?

1           A.     Well, once again, I'm not an expert in that  
2 regard, but if you looked at the Voting Guidelines and  
3 the Fund Operation Guidelines, it is entirely up to  
4 the Investment Committee of the NPSIM to decide  
5 whether to refer a matter to the Special Committee or  
6 not. And once a matter is referred to the Special  
7 Committee, then the decision-making--the right to make  
8 a decision on that matter would be within the scope of  
9 right of the Special Committee. That is how I would  
10 view it legally.

11           Q.     Shall we just take a look at Article 5,  
12 then, of the Guidelines. This is C-6.

13                     So, within Article 5, we have a  
14 subsection 5, and this is where we see the roles and  
15 responsibilities of the NPS's Expert Voting Committee.

16           A.     We don't have the Korean version in the  
17 bundle. It's the document that we had a problem with  
18 earlier.

19                     MS. LAMB: We will make them side by side.  
20 This happened before, if you recall.

21                     BY MS. LAMB:

22           Q.     So, we are on Article 5, subsection 5, the  
23 National Pension Fund's Experts Voting Committee for  
24 the exercise of Voting Rights, and what we see--I'm  
25 sure you will agree with me--is a list of six

1 circumstances in which, indeed the Voting Committee  
2 shall involve itself. And if we see Item 6, "other  
3 matters which the Chairman of the Expert Voting  
4 Committee deems necessary."

5 Were you familiar with that?

6 A. Well, I am not fully familiar with this, but  
7 as a legal expert, let me make an interpretation of  
8 what I see here.

9 This Number 6 is saying that outside of what  
10 is stipulated in Number 1 through 5, if there are any  
11 other matters that the Chairman of the Special  
12 Committee deems necessary, then it could create a  
13 jurisdiction within the Special Committee to make a  
14 decision.

15 Q. Indeed, the Chairman himself has the power  
16 and a discretion to put matters to the Expert Voting  
17 Committee?

18 A. Yes, but even though it is written in such a  
19 manner this way, there could be a power and discretion  
20 under the Chairman, but if there is a procedure that  
21 is set forth separately on how such power and  
22 discretion is to be exercised, then the procedure will  
23 need to be followed for such power and discretion to  
24 take effect.

25 MS. LAMB: Nothing further for Professor

1 Kim. Thank you so much. This time was the last time.

2 PRESIDENT SACHS: Also we have questions.  
3 Do you have questions that have now been triggered by  
4 Ms. Lamb's questions?

5 MR. HAN: Only very short two questions,  
6 Mr. President.

7 PRESIDENT SACHS: Very short.

8 MR. HAN: I promise.

9 FURTHER REDIRECT EXAMINATION

10 BY MR. HAN:

11 Q. I'm sorry, but the operator, can you put the  
12 C-6 again, which we do not have the Korean version  
13 hard copies, so we need to put up the other bundle  
14 side by side.

15 Thank you.

16 BY MR. HAN:

17 Q. So, Professor Kim, regarding this  
18 subparagraph six which provides other matters which  
19 the Chairman of the Expert Voting Committee deems  
20 necessary, so I'm wondering whether the Expert Voting  
21 Committee can decide any matters that the Chair deems  
22 necessary, is there any kind of limitation in terms of  
23 scope of that authority that Expert Voting Committee  
24 can decide? For example, then Chair can deliberate  
25 and resolve an agenda on whether they can impeach the

1 Minister of Health and Welfare?

2 A. Well, that would be not possible sensically,  
3 and as explained earlier, this is a guideline, and  
4 guidelines are the Administrative Rules. And in terms  
5 of the hierarchy, the Administrative Rules falls under  
6 the Act.

7 So, even if the Chairman deems necessary to  
8 conduct such an act, the higher laws and statutes  
9 would prevent him from exercising such a right. For  
10 example, the impeachment of a Minister would need to  
11 be regulated by the Constitution or other Acts that  
12 are related to the impeachment.

13 So, if we are to say that the Chairman of  
14 the Special Committee would have a right to make an  
15 impeachment, according to what is written here, then  
16 it will be a disagreement to the hierarchical system  
17 of the law up front.

18 Q. Thank you.

19 MR. HAN: Operator, can you pull up R-338,  
20 please.

21 BY MR. HAN:

22 Q. Professor Kim, this is a document that  
23 counsel for Claimant took you to about the Corporate  
24 Tax amounts that NPS paid from 2015 to 2019. Can you  
25 see that?

1           A.    Yes, I see it.

2           Q.    So, as far as see it, so tax amount that NPS  
3 paid in 2019 is not KRW 152,000 but actually the unit  
4 is KRW 1,000 that they should be way bigger than that;  
5 is that correct?

6           A.    Yes, correct.

7                    And another thing I want to say here is that  
8 the Corporate Tax or any other tax would be levied on  
9 the net income basis. It is the same for the personal  
10 Income Tax and for the Corporate Tax alike. And from  
11 what I see here, the Fund has an enormous size, but  
12 the Corporate Tax amount seems to be small. That is  
13 probably because, even though there was a huge amount  
14 of revenue, there was a huge amount of expenditures as  
15 well.

16                    So, since the Corporate Tax is levied on a  
17 net basis, that this is probably why we see a  
18 smaller-than-expected number here.

19           Q.    Just one last follow-up question. In 2015,  
20 if you look at tax base column, there is like a more  
21 than KRW 1 million loss.

22                    So, can you explain that tax base and how  
23 come that loss came up in that year?

24           A.    Well, I do not have any information about  
25 the revenues that the NPS made in the Year 2015, but

1 just saying from a common sense probably in this year  
2 they had more expenditures than the revenue, and that  
3 is why we see a minus here, and maybe that would be a  
4 year when the NPS was paid back the taxes.

5 Q. Thank you.

6 MR. HAN: No further question,  
7 Mr. President.

8 THE WITNESS: And one last thing to add, I  
9 mean, I do have similar experiences personally, and  
10 that feels good to have the taxes back.

11 PRESIDENT SACHS: I still have a question,  
12 Professor Kim, regarding Article 74 of the  
13 Presidential Decree, and I would ask the operator to  
14 put Article 74(2) and also Paragraph 3, if there's a  
15 Paragraph 3, because we only saw 74(2) on the screen,  
16 please.

17 This is not so good.

18 (Pause.)

19 PRESIDENT SACHS: 74(2). Right.

20 Now, we've somehow, in my understanding,  
21 clarified the purpose and the meaning of this Article,  
22 at least as far as Paragraph 1 and 2 are concerned,  
23 and I wondered whether you would still maintain what  
24 you said at 14:44 where you said "and the acquisition  
25 of shares, and investment activities are the

1 activities that are conducted by the Investment  
2 Committee of the NPS in a self-controlling way, and  
3 this is, in fact, the very difference between the NPS  
4 and the other entities such as KAMCO that was  
5 mentioned earlier.'" "

6           So, my question is: I understand now  
7 Article 74 to set out the banks and other players that  
8 were mentioned in the law--which law was that? Yes,  
9 in the Pension Act. But when we discussed that very  
10 Article earlier, you seemed to say it shows that the  
11 NPS does all this business in a self-controlling way.

12           Could you elaborate on this, whether this is  
13 the case?

14           THE WITNESS: So, that was, indeed, pointed  
15 out to me by the counsel and by Mr. President, and the  
16 Article, Article 74(1) of the Presidential Decree is  
17 about the institutions and players where the money can  
18 be deposited.

19           And it is now clear that the NPS is not  
20 doing these businesses on its own, but when the NPS is  
21 making a decision on which institution, which player  
22 that it wants to put in its money in, for example, it  
23 would choose to go to a player that is offering a  
24 higher Interest Rate, and that Decision would be made  
25 solely by the Investment Committee and the NPSIM.

1           So, the Judgment of how to increase the  
2 profit is upon the NPS and NPSIM to decide. And if  
3 you look at the many profit-generating business that  
4 are set out in the Paragraph 3, there are multiple  
5 areas where the NPS can make an investment in. For  
6 example, real estate can be one of it, and the energy  
7 business is something that the NPS can make an  
8 investment into.

9           And given the Korean context, for example,  
10 if the real-estate investment is a risky business for  
11 now, then if I am an operator of the Fund, then I  
12 would choose to invest my money in the renewable  
13 energies since we are living in an energy-transition  
14 era, with the aim of increasing the Fund, so that is  
15 what I would like to say.

16           PRESIDENT SACHS: Could the operator show us  
17 Paragraph 3 of Article 74. Yes, that's the article  
18 that you mentioned in the later discussion but not at  
19 14:42.

20           My question is: Is there something similar  
21 as regards KAMCO? Because when you compared KAMCO to  
22 NPS, you said this is the difference, but my question  
23 would be: Is there such Ministerial Decree also in  
24 place regarding KAMCO with respect to KAMCO's  
25 activities where they are given a certain liberty to

1 select among funds or placements?

2 THE WITNESS: Thank you so much for the  
3 question, Mr. President. That I believe is a very  
4 important one. If you look at the two acts that are  
5 applicable to the KAMCO, I would say they are the  
6 Underperforming Debt Resolution Act and the  
7 Restructuring Act. And I looked into those two Acts,  
8 and if you look at the--sorry, the second Act is the  
9 Restructuring Fund Act, and I looked into those two  
10 Acts, and I was able to understand that there was no  
11 provisions that is allowing the KAMCO to make any  
12 aggressive investment or engage in any aggressive  
13 profit-generating activities, and that is because it  
14 is a public institution that is not serving  
15 specifically commercial functions.

16 But on the contrary, NPS is allowed quite a  
17 lot of liberty compared to the KAMCO, and if you look  
18 at the businesses that it can invest in, it is  
19 including some businesses that is on a riskier end  
20 such as the venture business or investment in a  
21 private equity, and for those people who are concerned  
22 about the profitability and the maintenance of the  
23 Fund, there are some people who are feeling a bit  
24 negative about such a wide range of liberty that the  
25 NPS is given, so I would say that is showing the

1 difference between the KAMCO and the NPS.

2 PRESIDENT SACHS: But nevertheless, you  
3 maintain that also KAMCO is not a state agency?

4 THE WITNESS: Yes. That is because the  
5 KAMCO is given a separate legal personality because it  
6 should operate with the professionalism in the area of  
7 underperforming debts and restructuring, and that is  
8 the intent of the KAMCO Act that establishes the  
9 KAMCO. But it is not a State organ under the  
10 Constitution or the Government Organization Act.

11 PRESIDENT SACHS: Thank you. I have no  
12 further questions.

13 I turn to my two co-Arbitrators.

14 ARBITRATOR MAYER: No questions from me.

15 ARBITRATOR GLOSTER: No questions from me.  
16 Thank you.

17 PRESIDENT SACHS: So, this means that we  
18 have come to the end of your expert testimony. We  
19 thank you, Professor Kim, for your Expert Opinion. I  
20 was glad to hear that Mr. Forsthoff, a German  
21 administrative lawyer, was referred to in your book,  
22 but you're now released as a Witness, and it's the end  
23 of our day in terms of taking up evidence.

24 We will still have to deal with the answers  
25 to the questions put by Professor Mayer, but

1 considering the late hour in Paris in particular, I  
2 think we should move that to tomorrow. Would that be  
3 agreeable?

4 MS. LAMB: We are entirely in your hands,  
5 sir. Of course, we have a rather lighter day  
6 tomorrow.

7 PRESIDENT SACHS: Yeah. Would that be  
8 agreeable?

9 MR. HAN: Yes, Mr. President.

10 PRESIDENT SACHS: I see no objections from  
11 Paris?

12 ARBITRATOR MAYER: No objection at all.

13 ARBITRATOR GLOSTER: No objection from  
14 London, either.

15 PRESIDENT SACHS: Okay. Thank you very  
16 much.

17 (Witness steps down.)

18 (Whereupon, at 3:50 p.m. (EDT), the Hearing  
19 was adjourned until 8:30 a.m. (EDT) the following  
20 day.)

## CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



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DAVID A. KASDAN