



Elliott Associates, L.P. (U.S.A.) v. Republic of Korea

Day 1

July 28, 2026

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(2.00 pm)

Housekeeping

(Proceedings delayed)

THE PRESIDENT: So, we go on the record now.

So, welcome to the main hearing in the remitted proceedings in PCA Case N° 2018–51, Elliott Associates versus Republic of Korea.

The parties have agreed on the hearing schedule for today and tomorrow, so we understand there is nothing to be discussed further on that issue, so we can — before we go to any housekeeping issues that either party may have let's start with the introductions. I don't think the Tribunal needs to be introduced after the meetings we have already had, also with the Respondent's new counsel so what I would suggest is that the parties introduce the individuals representing the party as well as active speakers. If there are any changes to the list of participants, please also indicate those but I don't think there is any need to introduce, in view of the large delegations everybody who is in the room. So, I'll ask the Claimant to start.

MR PARTASIDES: Thank you, Mr President, members of the Tribunal. Good afternoon. Let me begin with those brief introductions. First of all, to confirm, there is

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no one who is attending on behalf of the Claimant who is not on the list of attendees that we have listed for the PCA. There is one person who is not attending, Ms Holly Pelham, who was to be remote from London. She is not attending.

We have two remote attendees. One of them is the party representative — Mr Rich Zabel. He was due to be with us, changed his flight because of the disruption to the hearing. The changed flight, unfortunately, was cancelled last night, so he finds himself in another part of the United States attending remotely, and he has logged in and so he is with us. Other than that, let me simply introduce those on the front row that you see, including those who will present to you over the next two days, starting at the end of the row, Ms Julia Sherman, who is an associate at Three Crowns. Next to me is Ms Nicola Peart, counsel at Three Crowns, and the two speakers on behalf of the Claimant will be my partner, Mr Georgios Petrochilos, and myself, Constantine Partasides.

THE PRESIDENT: Thank you very much, Mr Partasides.

May I ask the Respondent to do the same?

MR WEBSTER: Certainly sir, and good afternoon. May I first introduce Dr Kang who is the Deputy Minister in the International Legal Affairs Department from the Republic

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of Korea; on the front row, apart from myself, it is Jun Hee Kim from Arnold & Porter, Kevin Kim and Saemee Kim from Peter & Kim from Peter & Kim. The plan is that the advocacy will be split between Mr Ware who is attending remotely today, but plans on being present tomorrow, me, and Mr Kevin Kim.

If I may just raise — because it is related to Mr Ware's remote attendance and his health condition — one point about timetabling tomorrow. We're scheduled to have two sessions with 15 minutes break between them. We would very much appreciate if we could have three breaks of ten minutes instead of two breaks of 15 which I hope will be acceptable to the Tribunal. It is for a comfort break.

THE PRESIDENT: Have you raised, Mr Webster, has that been discussed with the opposing counsel?

MR WEBSTER: It has not, I'm afraid.

MR PARTASIDES: There is no objection on this side, of course, members of the Tribunal save to note that there was to be one break of 15 minutes, I believe, and I understand that what is being suggested is that that be replaced by two breaks of ten, which is entirely agreeable.

THE PRESIDENT: Perhaps the only issue with that is that there are some constraints on the part of the Tribunal.

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We have two — at least one or two of us will have to go to the airport right after the hearing. The initial plan was that we would have deliberations on Wednesday morning, and we would be travelling Wednesday afternoon, so we have a bit of a constraint.

May I then suggest that if we have two breaks of ten minutes tomorrow, that we start at 9 o'clock to make sure that we have — we don't have any issues with time, and it will be a bit more relaxed for everybody, at least for those coming from Europe, for those of us it is not a problem to start a bit earlier, so if that is agreeable, I trust it is agreeable for both parties, we start at 9 o'clock tomorrow.

MR PARTASIDES: That is indeed sir, thank you.

MR WEBSTER: Very good sir, thank you.

THE PRESIDENT: Very good. In terms of housekeeping is there anything on the other side?

MR PARTASIDES: Not for us, Mr President, save to note that I have been corrected. We also have three other lawyers — analysts from Kobre & Kim — who are attending remotely and what we will do is provide names to Ms Seok so that she has a complete list.

THE PRESIDENT: Thank you. We will, indeed, need a complete list of all participants to the hearing.

Any housekeeping issues on the Respondent's side?

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1 MR WEBSTER: None, thank you sir.
 2 THE PRESIDENT: From the Tribunal, only one reminder, which
 3 is that as we know this hearing is arranged with
 4 a public viewing, so in case there is any confidential
 5 or protected information that either party would like to
 6 introduce during the opening statements, I would kindly
 7 ask you to remind the PCA before you introduce the
 8 protected information so that we can suspend the
 9 broadcasting, which is delayed, but it would make the
 10 operation of the hearing a bit more smooth, so I'm not
 11 sure whether either party will introduce any protected
 12 information during the opening statements, but if you
 13 do, please indicate before you enter into that
 14 information.
 15 MR PARTASIDES: We shall do so. Thank you.
 16 THE PRESIDENT: That is only by way of reminder, so let's
 17 start, then, with the opening statement and I give the
 18 floor to the Claimant, please.
 19 'Claimants Opening Submissions on the Remitted Issue
 20 MR PARTASIDES: Thank you, Mr President; members of the
 21 Tribunal. It's an honour to appear before you in this
 22 matter once again. We will be circulating some
 23 materials that will facilitate our opening submission —
 24 some slides which we will walk through together, and
 25 also a file of some of the primary evidence that you had

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1 before you before Geneva, and that you still have before
 2 you today, that I will walk through at the appropriate
 3 moment in due course, and we understand that Respondent
 4 will be circulating its slides to Ms Seok now, so that
 5 we are assured that there is no reaction to our slides
 6 in their presentation, and I hope that that will take
 7 place whilst I speak. (Handed)
 8 THE PRESIDENT: Is that agreed?
 9 MR WEBSTER: I confess I hadn't understood that it was to be
 10 sent now, but they will be sent — my understanding —
 11 as soon as possible.
 12 MR PARTASIDES: And that is fine. It need not delay us as
 13 long as we know that it is in the process of being sent.
 14 Members of the Tribunal, as you will remember, this
 15 treaty arbitration arose from circumstances of unusual
 16 gravity, circumstances that led to the prosecution,
 17 conviction and incarceration by the Respondent State
 18 itself of its former President and Head of State, its
 19 former Minister of Health, as well as the former Chief
 20 Investment Officer of its National Pension Service.
 21 Criminal convictions for abuse of authority by public
 22 servants, breach of trust, and, in the case of the
 23 President, for corruption in public office, convictions,
 24 members of the Tribunal, that were confirmed at various
 25 instances of the Korean courts to a criminal standard of

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1 proof, none of which, members of the Tribunal, have been
 2 overturned, despite Korea's latest focus on the outcome
 3 of certain other legal actions, primarily involving
 4 non-governmental actors.

Now, you had those convictions before you during the
 evidential phase of this arbitration prior to your
 award, but you also had before you the underlying
 primary evidence on which those convictions were based,
 an evidential showing that I think I'm entitled to say
 you don't often see in international arbitration, an
 evidential showing, and that had the benefit of a
 multi-year criminal investigation undertaken
 conscientiously by Korea's own Special Prosecutor, a
 criminal investigation that, involved dawn raids,
 document seizures, numerous prosecutor interviews, and
 that featured even transcripts of telephone
 conversations that took place between Korea's Ministry
 of Health and Welfare and its National Pension Service
 and this evidential showing confirmed the existence of a
 direction that came down from the highest governmental
 office in Korea, the Korea Blue House, to the Ministry
 of Health and Welfare, and from the Ministry of Health
 and Welfare to Korea's National Pension Service that was
 expected to, and did, have the casting vote on the
 merger at issue between Samsung C&T and Samsung's Cheil

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1 entities and whether that merger should proceed, and
 2 notwithstanding that the merger price that was widely
 3 believed to be destructive of value for Samsung C&T
 4 shareholders, including the NPS and even though the NPS
 5 had a duty to proceed by way of the principle of
 6 profitability so as to protect the National Pension Fund
 7 of Korea, this was a Government direction that the NPS
 8 should vote in favour of the merger so that it would
 9 occur with the foreseeable consequence that other
 10 shareholders would be damaged, including Elliott — not
 11 only foreseeable, members of the Tribunal, but
 12 foreseen — because, as we shall come to recall, the
 13 name of Elliott was writ large, front and centre, in the
 14 internal governmental communications by which this
 15 instruction was conceived and implemented, and in light
 16 of that weight of primary evidence, members of the
 17 Tribunal, the Republic of Korea itself took the position
 18 repeatedly before you in this arbitration that it wasn't
 19 taking issue with the factual findings in those criminal
 20 convictions. That was a factual stipulation expressed
 21 by Korea's then lead counsel at the very beginning of
 22 our Geneva hearing, and it was repeated — for example,
 23 in Korea's post-hearing brief — after our Geneva
 24 hearing, and, given its significance, members of the
 25 Tribunal, as we see on Slide 2, you recorded Korea's

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1 factual stipulation repeatedly in your award, and on the
2 basis of that factual evidence, that Korea stipulated
3 to, you found that you had jurisdiction, that Korea had
4 violated the treaty, and you found that Korea's
5 violation led to the merger occurring, and that this led
6 to the Claimant's loss, which you awarded to recall in
7 an amount that was only a small part of the amount that
8 the Claimant claimed, but instead of faithfully
9 complying with your award, members of the Tribunal, in
10 the three years since, Korea has sought, one way or the
11 other, to resist it.

12 In fact, Korea sought to challenge almost every
13 aspect of your unanimous decision to reject its same
14 failed jurisdictional challenges in the arbitration,
15 challenges that compelled this still uncompensated
16 Claimant to traverse some of the many snakes and ladders
17 of the English judicial system, and so we find ourselves
18 before you again, and as I introduced during our case
19 management conference in April, despite Korea's efforts,
20 all but one of your jurisdictional determinations
21 survived Korea's challenge. Only one aspect of its
22 challenge was successful. That one aspect pertained to
23 whether the NPS's own acts were attributable to Korea,
24 so Korea failed to set aside your award as it wanted to
25 entirely. It failed to unravel your finding that the

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1 Blue House and the Ministry breached the treaty, and it
2 failed to set aside the entirety of your causation
3 findings as it tried to do before the English courts and
4 we're again before you so that you can simply confirm,
5 following that very limited set aside of your award
6 that, your existing findings, members of the Tribunal
7 that you see on Slide 3 that Korea caused the NPS to
8 vote in favour of the merger, a finding of fact on the
9 merits that you see on this slide that was not set
10 aside, and that remains binding on the parties and on
11 this Tribunal, whether that finding is disturbed by
12 reason of the English court's determination that, as
13 a matter of legal status, the NPS was not a de facto
14 State organ. That is the simple question that has been
15 remitted to you, and the simple answer to that question
16 is: of course not, because those findings of fact,
17 members of the Tribunal, that you have already arrived
18 at, and that remain, did not depend in any way on the
19 legal status of the NPS as a de facto State organ, nor
20 was your finding that those measures were sufficiently
21 proximate to Elliott's loss, because, as a matter of
22 fact, Elliott specifically was at the centre of the
23 crosshairs of the Government's intervention from
24 inception, and so those findings, members of the
25 Tribunal, cannot be disturbed by the court's finding

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1 that as a matter of legal status the NPS was not a de
2 facto organ, which, simple answer, members of the
3 Tribunal, is entirely consistent with a finding in the
4 parallel Mason arbitration in which the Mason Tribunal
5 also found, as you see on Slide 4, that the NPS was not
6 a State organ. You see the top extract on this Slide 4,
7 but still found that the Blue House Ministry measures
8 caused the NPS to vote in favour of the merger and for
9 the merger to be approved with a sufficient degree of
10 certainty. Look at the extract, for example, at
11 paragraph 881 of the Mason award, and in the same way,
12 members of the Tribunal, the findings of fact that you
13 also already arrived at as to cause and effect, did not
14 depend on the legal status of the NPS. That is the
15 simple proposition that decides the one issue that has
16 been remitted to you by the English court.

17 Let's turn, next, to Korea's response to that simple
18 question.

19 For its part, Korea hasn't suggested that your
20 existing factual findings on causation were in any way
21 dependent on the legal status of the NPS, because, of
22 course, it cannot. Korea also has not disputed the
23 facts of the Government intervention, nor the facts of
24 how they were implemented within the NPS, whatever its
25 formal legal status might be — again because, of

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1 course, it cannot.

2 In fact, to recall again, it stipulated to those
3 facts, and, of course, that stipulation cannot now be
4 reversed, and so instead, members of the Tribunal, Korea
5 submits that it is up to Elliott also to prove the
6 negative, to prove not only what did happen and with
7 what effect, but also what didn't happen, but might
8 potentially have happened in a hypothetical world in
9 which the NPS vote was not subverted by the Korean
10 Government.

11 Now, that question of hypothetical causation, we
12 submit, as you know, is the wrong question. Korea, as
13 you will recall, tried that once before. We debated it
14 already before you. You already determined it —
15 determining that it was the wrong question. Causation
16 is about what happened with what effect. That is the
17 entirely conventional way of establishing a causal
18 connection, that the breach which did happen was the
19 adequate cause of the outcome, and while that involves
20 consideration of what else did happen that would, in any
21 event, have led to the same outcome, potential events,
22 what might or might not have happened but didn't, in
23 fact, happen due to the breach, are not part of a but
24 for enquiry.

25 Let me offer an illustration that appears in Hart

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1 and Honoré, the Louisiana barge case that Korea itself
 2 has referred to in its latest brief. Here you see on
 3 the next slide, Slide 5, its reference. The breach in
 4 question was an unlawfully maintained bridge on a river
 5 in Louisiana which obstructed a waterway and therefore
 6 delayed a barge, but it was an existing fact that
 7 a lawfully maintained bridge, further along the same
 8 water way, existed anyway, and would, in any event, have
 9 caused the same delay. That, of course, is obvious and
 10 unsurprising but what that does not invite is an enquiry
 11 into the possibility of a non-existent bridge that
 12 wasn't built that could potentially have been built, and
 13 that could potentially have obstructed the waterway.
 14 That kind of speculation as to potential events does not
 15 form part of the necessary enquiry to demonstrate
 16 adequate causation and applied to our circumstances
 17 here, if Korea could have demonstrated that Samsung, in
 18 any event, had the votes it needed for the merger to
 19 pass, that is 67 percent, the supermajority, without the
 20 NPS supporting the merger, then that would have been the
 21 equivalent of the lawfully maintained bridge that would
 22 have obstructed the barge in any event, but, of course,
 23 Korea couldn't demonstrate that before and it can't
 24 demonstrate that now because that isn't a fact that
 25 existed at the time.

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1 The most, members of the Tribunal, that Korea could
 2 now say is that the outcome of a deliberative process
 3 within the NPS would, in any event, have been inherently
 4 uncertain — perhaps a bridge would have been built
 5 anyway — but, of course, that kind of speculation about
 6 a deliberative process was already true, members of the
 7 Tribunal, before your award, and Korea already said that
 8 before your award, and you already decided that that was
 9 not enough to resist a showing of adequate causation,
 10 and again, that decision was not dependent in any way on
 11 your decision as to the legal status of the NPS.

12 Let me pause briefly on that last point, because to
 13 recall when you found that the NPS was a de facto State
 14 organ, you did so while recognising that it had
 15 a statutory duty of independence in the exercise of that
 16 function, and so your decision already factored in that
 17 its unfettered deliberative process would lead to an
 18 independent outcome, but that didn't stop you already
 19 reaching the findings of fact that you see again on
 20 Slide 6, findings that remain in your award and must
 21 continue to remain in your award; findings, members of
 22 the Tribunal, that, with respect, would look
 23 schizophrenic if they sat side-by-side in a supplemental
 24 award that also now held that those directions and
 25 instructions didn't have the effect you already held, as

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1 your supplemental award would also have to include if
 2 you accede to Korea's position.

3 The factual narrative that the Republic offers to
 4 invite you to engage in that schizophrenia is, in any
 5 event, an artifice, and an old one at that, that you
 6 already considered and rejected, and so Korea, once
 7 again, points to the fact that other shareholders of
 8 Samsung C&T voted in favour of the merger, and Korea
 9 also argues, once again, as it did before, that it isn't
 10 clear that the NPS merger necessarily would have gone to
 11 the Experts Voting Committee — you will remember that
 12 debate and Korea also once again argues that it isn't
 13 clear how the members of the NPS Investment Committee,
 14 to whom this was sent instead, would have voted but for
 15 the illegal Government intervention.

16 The next slide, members of the Tribunal, will
 17 include some protected information. I'll pause and
 18 invite you to tell me when I can proceed.

19 So let's turn now to Slide 7. You may recall this
 20 slide, members of the Tribunal, from our oral closing in
 21 Geneva. You may recall that this collated the
 22 statements of many of the individual members of the
 23 Investment Committee who gave statements in writing,
 24 that were and are on the record of the arbitration —
 25 you see the references in the final column on the

15

1 right — who confirmed that but for the fictitious
 2 synergy effect calculation that was presented as
 3 bridging the loss in value that the NPS would suffer as
 4 a result of the merger. Even on the basis of doctored
 5 valuations that we will come to recall in due course,
 6 they would not have voted in favour of the merger.

7 Statements from members of the Investment Committee
 8 on the record in this arbitration that actually do
 9 confirm the negative, members of the Tribunal, that they
 10 would not have voted in support of this merger but for
 11 the cooked books that were placed before them at the
 12 direction of the Ministry; statements that Korea, again,
 13 seeks now to sow doubt on, in precisely the same way as
 14 it did once before in Geneva, we remember, but which, of
 15 course, has never involved actually presenting those
 16 Investment Committee members as witnesses in this
 17 arbitration at any stage, and so Korea's factual
 18 arguments, members of the Tribunal, are not so much old
 19 wine in new bottles, as the French would say, but old
 20 wine in old bottles that you have already declined to
 21 drink from, and so when Korea submits to you that you
 22 must look at the evidence afresh, members of the
 23 Tribunal — we're no longer in protected information
 24 territory — not only is that wrong as a matter of law,
 25 you have already evaluated that evidence. You are not

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1 entitled to re--open your factual determinations that
 2 have already been made, that have not been set aside,
 3 but we say when you look at that evidence again, as we
 4 shall do so, it is futile, given the weight of factual
 5 evidence that remains on the record of this arbitration
 6 which I will walk you through in due course.
 7 Primary evidence that is not altered one bit,
 8 members of the Tribunal, by the handful of new decisions
 9 by the Korean courts that Korea has now introduced into
 10 the record of this arbitration, and that followed your
 11 award, because those new decisions largely pertain to
 12 civil actions with different causes of action applying
 13 different law to different evidential showings, because
 14 those new decisions that are not focused on Government
 15 misconduct, have not led to the reversal of the
 16 convictions that were before you earlier in this
 17 arbitration, and because in any event they do not change
 18 the primary evidence that is before you, much of which
 19 those later civil actions have simply not addressed, and
 20 as Korea itself has observed and as you see on Slide 9,
 21 albeit in another context, the context they are seeking
 22 to distinguish as the Mason award, you must reach your
 23 decisions on the evidence before you, not on the
 24 evidence of some other Tribunal or court, and that
 25 applies in exactly the same way to the new decisions

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1 that they call evidence that they seek now to rely on.
 2 Now, on the matter of legal causation, you've
 3 already decided the legal standard for demonstrating
 4 legal causation. You've already held, as you see on
 5 Slide 10, that legal causation concerns claimed loss
 6 that is directly or proximately caused by the alleged
 7 breach, and you've already decided that that standard
 8 was fulfilled on the basis that there was sufficient
 9 proximity and again, the only question that arises is
 10 whether that existing finding is disturbed by the
 11 court's different decision on the legal status of the
 12 NPS, and again, the simple answer to that proposition is
 13 no, because your finding on proximity was in no way
 14 dependent on the legal status of the NPS. It was rather
 15 dependent on the factual evidence that Elliott, in
 16 particular, was in the Government's crosshairs when
 17 those Government directions were conceived and executed,
 18 and so Korea utterly ignores, even in its latest
 19 Rejoinder submission filed just a couple of weeks ago,
 20 the evidence that, as you see on the next slide, Slide
 21 11, the Government had Elliott specifically in its
 22 sights as it conceived the intervention that caused the
 23 NPS to vote in the way that it did, and that not only
 24 was the effect of its intervention on Elliott
 25 specifically foreseeable, but it was foreseen as was the

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1 likely investment treaty claim against Korea that would
 2 result, and those facts, members of the Tribunal, are
 3 not disturbed by a different decision as to the legal
 4 status of the NPS.

5 Members of the Tribunal, with those words of
 6 introduction let me set out for you a roadmap of our
 7 submissions here today. You see it on the next slide.
 8 I will address you on the English court's partial
 9 set--aside, and also I will remind you of some of the
 10 primary factual evidence that you considered already in
 11 this arbitration. Mr Petrochilos will address you on
 12 applicable legal standards, and I will then bring fact
 13 and law together, both in relation to factual causation
 14 and legal causation before concluding with some final
 15 remarks.

16 Let me begin with the English court, because it is
 17 important, members of the Tribunal, that there is no
 18 confusion as to what the English court did, what it did
 19 not, and what it could not find. As you will remember
 20 me submitting during our CMC, in a jurisdictional
 21 set--aside, which arises under section 67 of the English
 22 Arbitration Act, the court is required to determine
 23 jurisdictional issues de novo. The nature of its
 24 inquiry is not simply a review, it is a rehearing of the
 25 same issues, and so the court was taken through the

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1 evidence of the Government measures in question here. I
 2 did that myself, and arrived at its own de novo
 3 determination that the conduct at issue here amounted to
 4 measures adopted or maintained, as did you, and that
 5 this conduct related to Elliott and its investment, and
 6 so it was only one jurisdictional objection that the
 7 court decided differently from you on the issue of NPS
 8 attribution. You see on the next slide it did so whilst
 9 recognising that this was, indeed, a difficult question,
 10 that it was not surprised to see that all of the six
 11 arbitrators who had considered this question in this
 12 case and in Mason, the split was four to two in favour
 13 of the NPS being a de facto organ, and it added, as you
 14 can see, that had the question for the court been simply
 15 reviewing whether your decision was a reasonable one, it
 16 would have confirmed that it was, but the court was
 17 conducting again a de novo review, reached its own
 18 decision that the NPS was not a de facto organ in the
 19 same way that the majority did in the Mason case, and
 20 that led, then, to the one issue that is now remitted to
 21 you as a result of the court's decision on attribution,
 22 so let's remind ourselves of it.

23 We see it on Slide 14. The issue is whether the
 24 separate breach of the treaty by the Blue House and the
 25 Ministry caused the NPS to vote in favour of the merger,

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1 now in light of the fact that the NPS has been held not
2 to be a de facto State organ.

3 Now, during the arbitration you already heard
4 significant evidence and argument on that very question.
5 You heard it because both parties argued causation
6 without knowing the outcome of your determination on the
7 question of attribution, and so both parties had to
8 address you on that question, and so they did, and so
9 did you, and so you rendered the findings we see again
10 on the next slide, and yet notwithstanding those
11 findings, members of the Tribunal, that survive, and
12 therefore continue to bind and therefore will need to
13 appear in your supplemental award, Korea places much
14 emphasis on paragraph 265 of the court's set-aside
15 judgment.

16 You see it on Slide 16 in which the court indicated
17 that it was not persuaded that it was open to it to
18 conclude that the Tribunal had found causation to be
19 established, even if the acts of the NPS were not
20 attributable to Korea, i.e. in respect of the breaches
21 further up the Government chain alone, but the context
22 of paragraph 265 is important in understanding what the
23 court was and was not saying here, and the context was,
24 under section 67 of the English Arbitration Act, even if
25 the court decides a jurisdictional issue differently

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1 from the Tribunal, it can still decide not to set aside
2 the award if it reaches the conclusion that its
3 different decision would have made no difference.

4 On the next slide, 17, you see how that option is
5 open to the court in the language of Foxton, LJ in this
6 case, but to make use of that option, members of the
7 Tribunal, it has to be clear that the different decision
8 on a jurisdictional issue would not have made any
9 difference, and it has to be clear from the Tribunal.
10 That's not something that the court can infer, and
11 exactly how clear it has to be was a matter of debate
12 before the English court, and it was Korea's submission
13 that you see on the next slide that it had to be
14 completely clear. That was Mr Webster's submission to
15 the court, effectively that there had to be an explicit
16 statement in the award that it would not have made any
17 difference. As an example of just how clear that it had
18 to be, Korea relied in particular on a judgment in
19 relation to an award rendered by a sole arbitrator, the
20 late Laurie Craig, in which he had stated explicitly in
21 his award that even though he found that he did not have
22 jurisdiction, the Claimant in that case would not have
23 been successful anyway.

24 Now, the court found that he was wrong to find that
25 he didn't have jurisdiction, that in fact he did have

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1 jurisdiction, but it recognised that in light of the
2 explicit statement made by the sole arbitrator that he
3 would have found against the Claimant anyway, it was
4 completely clear that that error in jurisdiction made no
5 difference.

6 So, taking that guidance into account, in our case
7 the judge recognised that although there were a number
8 of indications in your award that a different decision
9 on the NPS's legal status would have made no difference,
10 it wasn't sufficiently clear that that was the case, in
11 particular in the light of the explicit statement that
12 you made at paragraph 814 of your award which you see on
13 Slide 20 in which you said that you didn't need to
14 decide that issue, given your finding on NPS
15 attribution, and so the court's view was that it could
16 not infer itself that your decision would not change.
17 The court's view was that that was a decision for you,
18 and that is all that the court was saying in paragraph
19 265, and so here we are, and paragraph 265 certainly
20 doesn't stop you from reaching the conclusion that the
21 different outcome on attribution makes no difference on
22 causation, just as it made no difference in the Mason
23 case, and to do so, members of the Tribunal, we maintain
24 that the question before you remains a narrow one — you
25 see it on Slide 21: does the determination of the

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1 English court that the NPS, as a matter of legal status,
2 may not be regarded as a State organ, disturb the
3 findings that you have already reached on cause, on
4 effect, and on proximity in parts of your award that
5 survive.

6 Members of the Tribunal, with that framework of what
7 the English court did, didn't, and couldn't find, let's
8 turn, next, to the facts.

9 We're going to walk through some of the primary
10 evidence of the Government's wrongful intervention, and
11 let me note that in its Rejoinder, members of the
12 Tribunal, the Republic suggested that we had somehow
13 kept our powder dry on this factual narrative until our
14 reply submission. That was paragraph 7 of its
15 Rejoinder.

16 I have to say we found that to be a surprising
17 submission, given that the facts that we rely on were
18 precisely the same facts that we presented in our
19 Statement of Claim back in April 2019, all the way
20 through to our reply post—hearing brief in May 2022, and
21 presented again to the English court in December of last
22 year, so not so much keeping our powder dry as firing
23 that powder repeatedly, and if I may say so, having
24 found the target on at least one occasion.

25 Let me first, before we turn to that primary

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1 evidence, remind us of the context.

2 The backdrop was the failing health in 2014 of the
3 chairman of Samsung, GH Lee, the patriarch of the Lee
4 family. This led his son and heir apparent, JY Lee, to
5 focus on succession issues — how to maintain Lee family
6 control of the Samsung group following the passing of
7 his father, and how to deal with the multibillion dollar
8 inheritance tax bill that would arise when GH Lee's
9 holdings passed to his family, and the answer to this
10 succession, as you will remember, was a merger between
11 Samsung C&T, which held a large stake in the crown jewel
12 of the Samsung empire, Samsung Electronics, with Cheil,
13 another Samsung entity which held disparate interests —
14 leisure, fashion, those kinds of things — in which GH
15 Lee did not have the same size of holding, but JY Lee
16 did.

17 Now, the trick here, therefore, was that if those
18 two entities could be merged at a ratio of shares in the
19 old entities that under-valued SC&T and over-valued
20 Cheil, then SC&T value could pass to the Cheil
21 shareholders, including JY Lee, at a significant
22 discount, so depressing the value of SC&T, inflating the
23 value of Cheil, and timing the merger to coincide with
24 that could achieve the transfer of value without
25 inheritance tax, but the merger required a super

25

1 majority from other shareholders — over 66.66 percent
2 of the vote — and so we come to the market reaction to
3 Samsung's announcement of the merger when it was made in
4 May 2015, a reaction that was strongly negative, you
5 will recall, a negative reaction that was extensively
6 evidenced in the arbitration. We gathered some of that
7 evidence on one slide that we presented to you during
8 our opening submission in Geneva, you see it again on
9 the screen at Slide 23.

10 Now, Korea's National Pension Service was the
11 largest of the shareholders in SC&T, with a statutory
12 duty to invest in a manner that was consistent with the
13 principle of profitability so as to maximise Korea's
14 National Pension Fund, and so in exercise of that duty,
15 the NPS asked for advice from its proxy adviser, the
16 [Korea] Corporate Governance Service on how it should
17 vote in the merger, and the KCGS advised it to vote
18 against the merger in the clearest possible terms on the
19 next slide, Slide 24. You see those terms, and we can
20 see again the clear and unambiguous advice coming from
21 the KCGS as to the motive for the merger at that time,
22 how unfavourable it would be to SC&T shareholders, and
23 therefore a recommendation to disapprove, and that
24 appeared to be the NPS's own initial reaction as well,
25 because as Mr James Smith, who was the Claimant's Head

26

1 of Asian Investments at the time describes in his
2 witness statement to you in these proceedings, he had
3 a meeting with the NPS on 18 March 2015 during which the
4 NPS confirmed to him that it was not supportive of a
5 merger at that time, given where the share prices were.
6 You see an extract of his witness statement on Slide 25
7 again. That witness evidence, you may recall, was not
8 contradicted in the arbitration by any witness evidence
9 from any officers of the NPS and nor was Mr Smith
10 challenged at all by the Republic on his description of
11 the meeting during his cross-examination before you in
12 our Geneva hearing and that failure to rebut was notable
13 as Mr Thomas drew attention to in his separate opinion
14 that you see an extract of on Slide 26.

15 So, members of the Tribunal, it is a little late now
16 for the Republic to attempt to challenge that evidence
17 now and to do so not through any new evidence from the
18 NPS, but rather by pointing to the date of the March
19 meeting — March 2015 — a date, by the way, that hasn't
20 changed, as being before the merger was announced and
21 before, therefore, the merger ratio was set, but the
22 problem with that old fact, members of the Tribunal, it
23 certainly isn't a new fact, is that it was already clear
24 in March 2015 that any attempt, as the market rumoured
25 there would be, to proceed with a merger between those

27

1 two entities at this time, at a merger ratio that would
2 automatically apply by means of the Capital Markets Act,
3 would be enormously disruptive and destructive to the
4 value of the minority shareholders of SC&T, could only
5 serve the succession interests of the Lee family, and so
6 it was hardly surprising that the NPS itself felt able
7 to express a view in March as the uncontested evidence
8 before you is that it did, and so we come to Samsung's
9 announcement of the merger nevertheless and Elliott's
10 public announcement of opposition which fired the
11 starting gun on the Government's intervention that took
12 place between late June and mid-July 2015.

13 Now, to evidence that intervention, of course you
14 did have the benefit of the convictions of Minister Moon
15 and Chief Investment Officer Hong of the NPS, at both
16 the Seoul District Court and High Court level, and on
17 the next slide, Slide 27, you see some of those findings
18 again — defendant A, I should say, is Minister Moon, is
19 ordered to perform acts contrary to official duties and
20 then defendant A and B, defendant B being Chief
21 Investment Officer Hong's inducement of votes — again,
22 convictions that have not been overturned.

23 You also had the benefit of the conviction of former
24 President Park at every level of the Korean judiciary,
25 including the Supreme Court, with a Seoul High Court

28

1 finding, as you see on Slide 28, that there was decisive
2 assistance from the President's administration for the
3 merger.

4 But again, members of the Tribunal, you had much
5 more than the convictions themselves, you also had the
6 benefit of the underlying primary evidence, and to
7 recall how that evidence also became a part of our
8 record in this arbitration, I remind you that that
9 evidence was presented in open court in Korea, that
10 presentation in open court formed the basis of the
11 document production request we made to you, and the
12 basis of your document production orders that led to
13 their disclosure by Korea, and introduction on to the
14 record by the Claimant.

15 Now, I don't have time to go through all of that
16 primary evidence again, members of the Tribunal, but
17 because of the present attempt to rewrite history,
18 perhaps in the hope of taking the benefit of the effect
19 of time on all of our memories, we think it is important
20 to look at some of that primary evidence again, because
21 when one does, one quickly sees, as you did before, the
22 utter artifice in Korea's position, and to walk through
23 it we have a binder of that primary evidence. Much of
24 this contains protected information so I will give you
25 references to the record as I speak, but I suggest that

29

1 if the operator puts those extracts up on the screen,
2 those who should not have access to protected
3 information be excluded. I will work through the file
4 with you, and I will begin at tab 1.

5 Members of the Tribunal, this is an internal Blue
6 House memo. It is undated, but believed to have been
7 prepared in the wake of Samsung's announcement of the
8 merger on 26 May 2015, and in the wake of Elliott's
9 public announcement of its opposition to the merger on 4
10 June 2015, and the Blue House memo [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 THE PRESIDENT: What is the date of this document?

24 MR PARTASIDES: This document, sir, is undated but it is
25 understood to have post-dated the announcement of the

30

1 Merger by Samsung and post-dated Elliott's announcement
2 of its opposition to the merger, and so we believe that
3 it took place some time in the second half of June 2015,
4 and that's how we presented it to you in Geneva as well.

5 THE PRESIDENT: Thank you.

6 MR PARTASIDES: If we look further up the page, members of
7 the Tribunal, we see that the only hedge fund mentioned
8 in the memorandum, and it is mentioned explicitly, is
9 Elliott. You see the reference in the first bullet
10 point under the subheading "Related Developments".

11 THE PRESIDENT: If I may come back to this, I think the
12 parties' case — or at least the Claimant's case in the
13 arbitration was that the intervention started on or
14 about 29 June. Is that still the Claimant's case on
15 this evidence?

16 MR PARTASIDES: I think, sir, it may be from 24 June to the
17 intervention began, and the reason why there is some
18 doubt is we don't know whether this memo was the 29th or
19 the 24th, but we do know, given what it says, that it
20 post-dated Elliott's announcement of its opposition.

21 ARBITRATOR GARIBALDI: The point for consideration section,
22 does it suggest that the Government had not yet taken
23 a decision about what to do?

24 MR PARTASIDES: It does suggest that, sir, and the next tab
25 in the bundle will help explain how it went from

31

1 considering the options to deciding which of the options
2 to take.

3 ARBITRATOR GARIBALDI: The next tab is what date?

4 MR PARTASIDES: The next tab, if you want me to turn to it
5 now is — just to identify it — this is C/488, it is
6 the second suspect examination report by one of the
7 Presidential Secretaries who was in these meetings at
8 the time — Mr Jin—Su Kim — and it records his
9 description of what happened at around about the time
10 that this memo was circulated.

11 ARBITRATOR GARIBALDI: Can you — by reference to other
12 documents, can we come to a more precise judgment about
13 the date of the document number 1?

14 MR PARTASIDES: It may be difficult to do so more than
15 within the range of a few days. I'm not sure it is
16 significant, though, Mr Garibaldi, in the sense that we
17 know what happened after it was sent, and we know that
18 it post-dated Elliott's announcement of opposition, and
19 that seems to be the important temporal location that is
20 relevant, rather than whether it was the 24th or the
21 25th or the 26th of June.

22 ARBITRATOR GARIBALDI: Thank you.

23 THE PRESIDENT: Can you again remind us of the date of the
24 announcement by Elliott?

25 MR PARTASIDES: The announcement — I'll find that for you,

32

1 the exact date. I think it was some time in the middle
2 of June, sir, but I'll have the exact date so that you
3 have it to hand.

4 So I have introduced this second document and I'm
5 going to ask you to turn to page 3 in the Opus
6 reference, it's page 6 of the internal pagination —
7 488/3, page 6 you will see in the bottom right-hand
8 corner — and you will see highlighted an answer near
9 the top of the page in which {C/488/3} Mr Kim, the
10 Presidential Secretary, is telling the Special
11 Prosecutor's office that on or around 29 June, so here
12 we have greater clarity — he doesn't have the precise
13 date but he does say it is towards the end of June of
14 2015 — then President Park directed her senior
15 Presidential Secretaries [REDACTED]

16 [REDACTED]
17 You see the reference to [REDACTED]
18 [REDACTED], and we also see at the end of
19 that first highlighted paragraph, that this was
20 understood by her subordinates as meaning:

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 That's Presidential Secretary Kim on or around June
25 29.

33

1 Now, if we move forward, members of the Tribunal, in
2 that prosecutorial interview to page 7, so this is Opus
3 reference {C/488/4}, you will see that Senior
4 Presidential Secretary Choe instructed Mr Kim and Mr Noh
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Elliott's press release,
8 Mr President, in answer to your question announcing its
9 opposition was 4 June 2015, so I correct what I said to
10 you earlier.

11 You see the reference to Elliott specifically again,
12 members of the Tribunal, and with that in mind let's
13 move forward a little bit further to the end of the
14 report, page 24 of the internal pagination {C/488/17} of
15 the Opus reference, [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED].

24 Now, there were lots of communications between the
25 Blue House and the Ministry at this time. I'm not going

34

1 to take you through tabs 3 and 4, [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]. I'm going to ask
5 you to turn to tab 5. This is Exhibit C/497, for the
6 record. [REDACTED]
7 [REDACTED], and I'm going to invite you to
8 turn to page 12 of the internal pagination and I'm going
9 to read some of the court testimony of Ministerial
10 Director General Jo. If you have that page we've
11 highlighted the exchange. It is page {C/497/12}. Let
12 me read a couple of the exchanges for you:

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED] Chief Investment Officer Hong.

35

1 Let me read for you the last two Q&As on that page:

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 Answer:

14 [REDACTED]

15 Question:

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 Answer:

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

36

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 I want to turn forward in this exchange to the top
6 of the next page:
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 Answer:
12 [REDACTED]
13 Question:
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 Let's move forward to the bottom of page 14 so just
20 over the page. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

37

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 Mr Jo confirms that that is, indeed, what he said to
9 Chief Investment Officer Hong.
10 So here we [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED], so this is a ministerial
14 intervention that was not only concealed [REDACTED]
15 [REDACTED].
16 [REDACTED]
17 [REDACTED]
18 [REDACTED], so let's turn to tab 6, exhibit {C/333/1}
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] and the Ministry's Deputy
22 Director of Pension Policy, so Mr Jo's deputy, Deputy
23 Director Baek, and if we turn together to page
24 {C/333/6}, [REDACTED]
25 [REDACTED]

38

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 Deputy Minister of Health and Welfare at the time,
11 Deputy Minister Lee. You will find his testimony
12 transcribed at tab 9. This is exhibit {C/496/1} for the
13 record, and I'm going to ask you to turn with me to page
14 {C/496/14} which is the internal pagination, so that's
15 {C/496/2} of the Opus reference, and I'll ask you to
16 focus on the first highlighted Q&A:
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

39

1 [REDACTED]
2 [REDACTED]
3 Answer:
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 There was a second meeting with the Minister,
11 members of the Tribunal. You'll see this — the subject
12 of the Q&A on the next page, bottom of the page
13 {C/496/3}, page 15, Minister Moon, Defendant Moon:
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 Answer:
19 [REDACTED]
20 This is testimony in a Korean court from a Korean
21 Deputy Minister. Of course, I went through this with
22 you in Geneva.
23 Let's turn next to the communication of this
24 direction that clearly came from the Minister within the
25 NPS. We're going to go back to tab 5 which is the court

40

1 testimony of the Ministry's Director General Jo. This
2 is in the Moon/Hong District Court hearing and I'm going
3 to invite you now to turn to pages 32 and 33 of that
4 testimony, Opus reference {C/497/28}. Let me read for
5 you the final Q&As at the bottom of page 32 and the top
6 of 33:

12 That was the question. Answer:

14 Question:

18 Answer:

20 Question:

25 That's the question. Answer:

41

2 Question:

7 Answer:

9 So the NPS has its marching order, regardless of its
10 status as a State organ or not. Let's see how it
11 complied with that ministerial order, and to do so let's
12 look at tab 10. This is, members of the Tribunal,

18 You will recall, I hope, that
19 the ratio is intended to reflect the relative value of
20 shares in the two entities to be merged, and it reflects
21 what proportion of the shares in the new merged entity
22 the shareholders of the two companies would receive.

23 Now, that merger ratio that the NPS valued as being
24 appropriate, compared to the Samsung proposed merger
25 ratio of 1:0.35, one Cheil share for 0.35 SC&T shares,

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1 which meant that the merger ratio of 1:0.35 was
2 enormously destructive of value for the SC&T
3 shareholders, so that's what the NPS came up with all by
4 itself.

5 What happened next? Well, let's look at tab 11.

7 at
8 C/487 for the transcript, and I'm going to invite you to
9 turn to page {C/487/2}, Opus reference, C/7279 of the
10 internal pagination.

11 ARBITRATOR GARIBALDI: What was the tab again?

12 MR PARTASIDES: I'm sorry sir? So this is tab 11.

43

6 Over the page:

13 So what's happened next?

14 Well, ,
15 the NPS research team produced two revised valuations
16 within a space of just a handful of days, members of the
17 Tribunal, and they were both very different from the
18 first valuation. For present purposes let's just look
19 at one of those two revised valuations. You see it at
20 tab 12. This is C/426 for the record. I'm going to
21 invite us to turn to {C/426/4}, Opus reference, page 2
22 of the valuation,

44

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 Let's turn to tab 13. [REDACTED]
5 [REDACTED]
6 It is another statement that he gave, and it is Exhibit
7 C/466, and I'm going to invite us to focus on Opus
8 reference {C/466/3} [REDACTED]
9 [REDACTED] — this is near the top of the page,
10 I have highlighted it for you — [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 Answer:
19 [REDACTED]
20 Question:
21 [REDACTED]
22 A member of his team:
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

45

1 [REDACTED]
2 [REDACTED]
3 Well, you will see his answer, just over 2 trillion
4 won for the value of SC&T as a whole, 6.7 percent of
5 which would be the Experts share of 138.8 billion:
6 [REDACTED]
7 Final Q&A:
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Answer:
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 Let's turn the page:
18 [REDACTED]
19 [REDACTED]
20 Indeed. Let's, members of the Tribunal, turn to the
21 next document, tab 14. This is C/477, because now we
22 come to the [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

46

1 [REDACTED] Let's focus — we're
2 going to go through this document in a bit more detail.
3 I suspect he may remember it. I certainly will never
4 forget it.
5 We begin on page {C/477/3}:
6 [REDACTED]
7 Answer:
8 [REDACTED]
9 Further down that page:
10 [REDACTED]
11 [REDACTED]
12 And you see the answer:
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 So in the words of [REDACTED]:
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 This was a synergy effect calculation that was to be
21 reverse-engineered. Let's move forward to page
22 {C/477/5}, the Opus reference, page 11 of the internal
23 reference. If we look at the question that is asked
24 there, and if I can paraphrase: [REDACTED]
25 [REDACTED]

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1 [REDACTED]
2 [REDACTED] is the answer.
3 How did the witness feel after receiving this
4 instruction?
5 Well, let's look at his answer to that question and
6 let's focus on the last three lines:
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 If we turn the page:
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 Let's look at how he went about calculating the
17 merger synergy. [REDACTED]
18 [REDACTED]
19 [REDACTED] Let me just highlight two extracts. Let's
20 begin on {C/477/8} of the Opus reference, internal
21 pagination 14, look at his answer at the bottom of that
22 page, members of the Tribunal:
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1 Go over the page {C/477/9}:

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 This is the man producing the calculation, his
6 answer:

7 [REDACTED]
8 [REDACTED] y
9 [REDACTED], from the

10 man who calculated it.

11 Page {C/477/10}, top of the page, you see the
12 answer:

13 [REDACTED]
14 [REDACTED]

15 Answer:

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 You will see on the next page, members of the
21 Tribunal, the final Q&As:

22 [REDACTED]
23 [REDACTED]

24 Question:

25

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1 [REDACTED]
2 [REDACTED]

3 Answer:

4 [REDACTED]

5 Now, members of the Tribunal, this steered valuation
6 and this arbitrary synergy effect that made no sense to
7 anyone in the words of the man that was asked to come up
8 with it in a couple of hours was then recorded in the
9 NPS research team's report and presented to the
10 Investment Committee of the NPS that met on 10 July 2015
11 when it decided on how to vote, and that Investment
12 Committee relied on the research team's manipulated
13 valuation and fabricated synergy effect and let's look
14 at tab 15 [REDACTED]
15 [REDACTED], and I'm just going to
16 refer you to a couple of extracts of it for present
17 purposes.

18 We've highlighted them for ease of reference, so
19 this is R/128, the Opus reference, and I'll ask our
20 operator to take us to page {R/128/11} where you see

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

50

1 You see that repeated throughout these minutes. If
2 we turn the page to page 12, {R/128/12}:

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 So this is repeated — you will see various
7 references to it — [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 Of course, valuation and synergy was important
14 because the Experts had a statutory duty to invest by
15 reference to the principle of profitability, and a gap
16 in value would have been inconsistent with that. They
17 could not have voted in favour but for that doctored
18 valuation and that synergy effect.

19 I should say by the way that those opposite hang
20 their hats on the three letters, etc., at the end of the
21 words, [REDACTED]

22 [REDACTED]. We, members of the Tribunal, refer you to
23 everything that I have just walked through in response.

24 Now, what is more, members of the Tribunal, there is
25 evidence from a number of the members of that Investment

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1 Committee — some of whom had been hand-picked as we
2 shall come to see by CIO Hong — that but for the
3 synergy effect calculation they would have opposed the
4 merger.

5 At tabs 16 and 17 — I don't propose to take you to
6 them now — but you will see two of the individuals of
7 the Investment Committee that voted in favour that have
8 said in terms that they would not have done so but for
9 the synergy effect calculation. In the interests of
10 time, if I may, I'll leave those two documents with you.

11 Now, the final step in the chain of this
12 Governmental direction from on high is that the NPS
13 approval caused the merger to be approved when it voted
14 in favour at the Samsung vote on 17 July, seven days
15 after that Investment Committee meeting, and it is an
16 arithmetic fact, members of the Tribunal, that the
17 merger would not have passed without the NPS. Let me
18 give you the numbers. The threshold for approval was
19 66.67 percent of the voting shareholders. On the day of
20 the merger vote the NPS held 11.2 percent of the shares
21 in SC&T. With NPS support, 69.53 percent voted in
22 favour of the merger. If the NPS had voted against,
23 this would have fallen to 56.3 percent — indeed, even
24 if the NPS had abstained, the vote would not have
25 passed.

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1 So, taken together, members of the Tribunal, the
 2 evidence — the primary evidence, putting judgments of
 3 the Korean courts to one side — that you have before
 4 you is, as I told you in Geneva, not so much a smoking
 5 gun, but a Technicolour video of the gun being fired and
 6 the bullet reaching its target.
 7 Now, with those words, members of the Tribunal, on
 8 the relevant facts, I should say that we've come to the
 9 end of the protected information. We're going to turn
 10 now to causation and the legal principles applicable,
 11 and for that I turn to my partner, Mr Petrochilos.
 12 MR PETROCHILLOS: Mr President, I'm conscious that the
 13 Tribunal has been sitting for more than an
 14 hour—and—a-half — not actively listening but sitting,
 15 nevertheless. I'm in your hands. I have a natural
 16 break in ten minutes but I'm very happy to defer my
 17 starting —
 18 THE PRESIDENT: We started a bit late, actually, 22 minutes
 19 late, I think, so we could go on for another ten minutes
 20 and then we could have exactly one hour 30 minutes —
 21 MR PARTASIDES: Just so that we don't deprive ourselves of
 22 any time, on my clock — by the way that clock is not
 23 correct — we've had one hour 20.
 24 MR PETROCHILLOS: I'm entirely in your hands, Mr President.
 25 THE PRESIDENT: If you have a natural break after ten

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1 minutes, let's go for ten minutes and then we have
 2 a break.
 3 MR PETROCHILLOS: I do have that. I do have that. So you
 4 know my direction of travel in the next 30 minutes or
 5 so, I'll be addressing you on the legal principles
 6 governing causation in law, in causation in fact first
 7 and then causation in law.
 8 What I will have to say will sound terribly
 9 familiar. You were addressed by the parties on these
 10 exact same issues, making the exact same arguments and
 11 you made determinations in the award accordingly. It is
 12 all *deja vu* all over again as the well worn malapropism
 13 goes. Korea's main arguments are, again, three in
 14 number: 1) the counterfactual scenarios, what would have
 15 happened absent the breach, must be established to
 16 a level of certainty while the actual facts of the
 17 breach must be established on a balance of
 18 probabilities; 2) that the Tribunal must satisfy itself
 19 not only that the NPS in fact approved the merger
 20 because the Blue House and the Ministry of Health
 21 directed it to do so, as the Tribunal, in fact, did
 22 satisfy itself, but also that the NPS could not, in
 23 theory, have approved the merger through a proper
 24 process, and based on real data and honest analysis, and
 25 3), to make it more athletic, that the burden of proof

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1 for this hypothetical negative, to prove a hypothetical
 2 negative, rests with the Claimant and not with Korea.
 3 So, you know Elliott's answers to these fanciful
 4 arguments — indeed you know the answers *de coeur* —
 5 because these are arguments you considered. These are
 6 arguments you had to consider in making your award, so
 7 when our new friends opposite invite you, as they do in
 8 their Rejoinder, to consider matters afresh, a fairer
 9 term would have been to say to consider matters
 10 recycled. There is very little on the menu today that
 11 is fresh.
 12 So, this brings me to make three framing points
 13 which we regard as important before I go to causation
 14 proper. They are outlined on this slide, 30.
 15 The first point concerns the parameters of the
 16 English court's remission. You've already been
 17 addressed on this. I'll go into some detail.
 18 Foxton, LJ remitted to the Tribunal four paragraphs
 19 of the award which relate to causation. He did so
 20 recognising that while multiple passages in the award
 21 suggest that your finding that Korea caused Elliott's
 22 loss did not necessarily rest on a characterisation of
 23 the NPS as an organ of Korea, while the court did
 24 recognise that this was not necessary for the causation
 25 analysis, two paragraphs of the award, namely 814 and

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1 821 are couched in terms that the NPS was an organ of
 2 Korea and these are part of the causation analysis of
 3 the Tribunal, and you will find that at paragraph 265 of
 4 the High Court judgment which I'll leave now for your
 5 notes.
 6 I'll turn to two further paragraphs if I may, so on
 7 this slide, 31, the judge was quite candid that once the
 8 Tribunal clarifies this point about the relevance or
 9 irrelevance of the status of the NPS under international
 10 law in the causative analysis, once you, the Tribunal,
 11 clarified this point, which the judge, of course, could
 12 not do himself, the conclusion may well be — may well
 13 be, he says, in terms — that Elliott is entitled to the
 14 same relief as that which was granted in the award just
 15 as the Mason Claimants were, and you find this at
 16 paragraphs 268, as I say, and 269 which you have on
 17 Slide 31.
 18 For your notes I have also placed on Slide 32 the
 19 relevant holding of the Mason Tribunal, as well as
 20 a schematic from our Geneva closing argument which
 21 illustrated a decision pathway which did not require the
 22 NPS to be characterised as an organ, but simply as part
 23 of the consequences of the breach, and this theme was
 24 then developed at paragraphs 50 to 60 of Elliott's
 25 post-hearing brief after the hearing.

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1 Now, consistent with paragraphs 268 and 269 of his
 2 judgment, Foxton, LJ was quite plain in his granular
 3 directions ruling which followed after considerable
 4 debate between the parties, and I'm now quoting
 5 paragraph 7 which you have on your screen on Slide 33.
 6 He says:
 7 "The scope of the remission will not affect or allow
 8 Korea to revisit findings which have not been set
 9 aside".
 10 Now, this specific ruling was in recognition of the
 11 fact that the award — you saw that already on Slide
 12 3 — so the award, paragraphs 602, 603 and 623 in
 13 particular — contains final and binding holdings,
 14 non-reviewable holdings — but the NPS voted in favour
 15 of the merger on the direction and on the instructions
 16 of the Blue House and the Ministry of Health.
 17 That was my first framing point. I'm coming to the
 18 second, which is in the same vein but separate.
 19 While Korea now professes to accept, because it
 20 must, that the award which will ensue from this
 21 resubmission process, the supplemental award, cannot
 22 override or undo in any way, whether expressly or by
 23 implication, the 982 paragraphs of the award out of a
 24 total of 995 which remain entirely unaffected by the
 25 court's decision, Korea has resolved to pay this duty on

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1 the lip—service, and it has now contrived that since the
 2 NPS cannot be regarded as an organ, the whole causative
 3 pathway from the Blue House and the Ministry's breach of
 4 the treaty down to Elliott's damages is up for grabs,
 5 including the legal principles that determine that
 6 pathway, and one sees that at paragraphs 21 and 121 of
 7 Korea's Rejoinder where it is said that the NPS is
 8 now — now — an exogenous factor outside the State
 9 apparatus, which was to take investment decisions
 10 independently of the politicians, and that factor, so
 11 our friends say, requires the Tribunal to adopt a new
 12 paradigm for its causation analysis.
 13 Now, a number of strong words spring to mind when
 14 one reads this who has participated in this case, but
 15 "mischievous" will do, because, in truth, the cause of
 16 action involved in this case always has been that the
 17 Blue House and the Ministry subverted a decision-making
 18 process which, by law, was guaranteed to be independent
 19 of outside interference. The Tribunal has pronounced on
 20 this cause of action, holding that the State failed in
 21 its legal duty not to interfere in the NPS's
 22 decision-making process which was supposed to be
 23 independent.
 24 So, what our friends now call an exogenous factor
 25 was, in truth, the very DNA of this case, and the basis

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1 upon which the Tribunal has made factual and legal
 2 holdings of treaty breach, and the causation enquiry as
 3 debated before the Tribunal and reflected in the award
 4 were crafted on that basis, of course.

5 Let me put it in this way: if you had a case before
 6 you about governmental interference in a final
 7 adjudication, then the causation analysis would take you
 8 through the same paths and the same interrogations,
 9 whether the decision was issued by a court, which is
 10 a State organ, or rather an arbitral Tribunal which, of
 11 course, is not a State organ. Organ or not, the
 12 question will be what outcome flowed from the
 13 Government's interference in a process guaranteed by law
 14 to be independent.

15 My third framing point, members of the Tribunal, is
 16 legally important, and so it is good to have it clear,
 17 but it is uncontroversial. It is common ground, indeed
 18 it is well settled law, that the State's duty to make
 19 reparation may include injury caused by non-State actors
 20 who are part of the causal chain, even if, and I stress
 21 that, even if these non-State actors are acting
 22 independently rather than under the State's direction or
 23 control, and to illustrate that, which is, as I say,
 24 uncontroversial, expressly conceded by our friends
 25 opposite, we have selected just two examples from cases

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1 in the record. Let me show you these two cases. This
 2 is Slide 34 and it contains extracts from Saluka v The
 3 Czech Republic. The State there had leaked to the media
 4 that a bank called IPB could come under forced
 5 administration, and this then led to a bank run by the
 6 depositors, obviously, and finally to the bank's
 7 collapse. The collapse was the loss for which the
 8 investor, who was a shareholder in the bank, IPB, was
 9 entitled to compensation.

10 So that's one illustration of how third parties
 11 could be at the end of a causal chain.

12 The second example in this further Slide 35 contains
 13 extracts from Vivendi II. There, an Argentine regulator
 14 had encouraged customers not to pay invoices that had
 15 been issued by a utility, ultimately as a result the
 16 utility collapsed, and as you see highlighted, the
 17 Tribunal found that the State's conduct destroyed the
 18 utility's base of paying customers and therefore the
 19 destruction, as the Tribunal says, of the Claimant's
 20 investment in the utility was proximately caused by the
 21 State, and that was the compensable loss, the
 22 destruction of the business.

23 Now, I say for completeness that we accept entirely,
 24 of course, that what exactly third actors may have done
 25 down the line, if the State had not committed a delict

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1 may, on the facts, be inherently uncertain, and that is
 2 precisely, I'll recall the enquiry that your Tribunal
 3 had to conduct and conducted, in quantifying Elliott's
 4 loss by reference to a but—for universe where the NPS
 5 would not have approved the proposed merger. I would
 6 return to that point but you were positing what the
 7 stock market price would be, and whether the inherent
 8 value would be entirely liberated and so on and so
 9 forth. It was that inherent uncertainty down the line
 10 that you were quantifying, and for your notes, this is
 11 at paragraphs 916 and following of the award, but that
 12 analysis, I'm telegraphing this for now, was downstream
 13 of the binary yes or no vote by the NPS as to which
 14 there was no uncertainty at the end of your but for
 15 enquiry, so members of the Tribunal, I am about, now, to
 16 move to causation proper. If this is a convenient time,
 17 I am very happy to pause here.

18 ARBITRATOR GARIBALDI: Mr Petrochilos, let's talk
 19 conceptually for a moment. At Geneva I understood the
 20 case of the Republic of Korea to be that there was no
 21 causation — let's stick to causation, in fact, to
 22 simplify — there stick to causation in fact, because
 23 the NPS could have voted in favour of the merger. In
 24 this proceeding, as I read the submissions, and I may be
 25 wrong and you will correct me if I'm wrong, I see the

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1 argument of the Republic of Korea as being somewhat
 2 different, not that there is no causation because the
 3 NPS could have voted in favour of the merger, but the
 4 NPS would have voted in favour of the merger, which is
 5 a very different proposition.
 6 At the same time, there is an argument that the NPS
 7 was an independent deliberative body, and that the
 8 voting of that independent deliberative body could have
 9 been different, so what kind of case is the Claimant
 10 responding to? What is the case that is being presented
 11 here — not in Geneva, here — and what is your answer?
 12 MR PETROCHILOS: Let me telegraph you the answers because I
 13 do want to go into both of these in somewhat greater
 14 detail, so I'll telegraph the answer to these two points
 15 right now and if that is not satisfactory you can please
 16 press me further.

17 First question: has Korea's case changed? No, it
 18 has not. It maintains that it is for Elliott to
 19 disprove a negative possibility, namely that the NPS
 20 could not have voted in favour of the merger through
 21 proper process and on honest data and analysis, so it
 22 remains a "could" rather than "certainly would". It
 23 remains that case, and it is also said further, as I
 24 mentioned earlier to make it more athletic, that it is
 25 for Elliott to disprove that hypothetical negative.

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1 So Korea's case is not the actual drawbridge down
 2 the river in the Hart and Honoré example, it is there is
 3 an imaginary bridge one could have been put in place.
 4 That remains the case.

5 As to your second point, it was always the case that
 6 the NPS had to decide independently. It was always the
 7 case on the facts that the NPS did not decide
 8 independently. It was always the case that the NPS had
 9 to decide one thing and one thing only. It had to
 10 decide yes to the merger as proposed or no to the merger
 11 as proposed, so the counterfactual enquires about a yes
 12 or no binary choice. The counterfactual doesn't posit,
 13 unlike, for example, in the Bilcon case, what would have
 14 happened had the process been entirely fair and not
 15 tainted by procedural irregularities, one where you have
 16 a yes or no kind of binary outcome, then you can posit
 17 what the but for hypothesis would be, and you can do the
 18 causative analysis in a straightforward way.

19 That is the second answer. On the facts you don't
 20 need to posit — in fact you cannot posit, and you
 21 should not posit — what might be the process of an
 22 independent and honest, not interfered with NPS, and
 23 I'll have more to say on these points after the break.

24 ARBITRATOR GARIBALDI: Thank you very much.

25 THE PRESIDENT: On this subject, may I just flag for both

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1 parties that the Tribunal would be interested in hearing
 2 the parties' position on two issues: first, in what
 3 circumstances, if any, does the but for scenario become
 4 relevant in terms of causation in fact; and, second, who
 5 bears — which party bears the burden of proof if and
 6 when it becomes relevant. Let's leave it at that. You
 7 may want to address it now or you may want to address it
 8 on closing, but it is an issue that we are interested
 9 in.

10 MR PETROCHILOS: These questions will naturally arise in the
 11 course of the remarks that I have for the Tribunal in
 12 opening argument. In fact, I was intending to address
 13 them. If you see that I have failed to address them
 14 when I move from one point to the other, all you need to
 15 do is to say "you haven't properly addressed it" and I
 16 will do so properly.

17 THE PRESIDENT: Thank you very much. Thank you.
 18 (4.00 pm)

(A break was taken)

20 (4.15 pm)

21 THE PRESIDENT: Okay. Let's resume, Mr Petrochilos.

22 MR PETROCHILOS: Thank you, Mr President.

23 Now, before the break I had traversed my three
 24 framing points, and I was about to embark on discussing
 25 the legal standards of first in fact and then causation

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1 in law, and before I do so, may I recall, and this is
 2 now on Slide 36, that what each of these legal tests —
 3 and I would stress legal tests rather than purely
 4 logical constructs — means is defined in the award. I
 5 have extracted the relevant paragraph on this slide, 36,
 6 for ease of reference as an aide-memoire.

7 Now, an equivalent but arguably less elegant way of
 8 putting the two legal standards would be to say
 9 causation, in fact, is answered by asking all other
 10 things being equal, would outcome Y have occurred but
 11 for breach X. While causation in law is answered by
 12 asking is there any legal principle which precludes,
 13 which stands in the way of treating outcome Y as the
 14 consequence of X, which is the breach.

15 Let's, therefore, turn to causation in fact first.
 16 There are four matters to address here outlined on this
 17 slide, 37.

18 The first matter speaks directly to the Tribunal's
 19 first question, it is purely for clarity, members of the
 20 Tribunal, because in the end it's a non-issue. Between
 21 pages 19 and 30 of the Rejoinder, our friends counter an
 22 argument that Elliott has not made, and consistent with
 23 its own position throughout this arbitration, Elliott
 24 could not have made.

25 The imaginary argument is that in this case, factual

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1 causation does not require, or even allow,
 2 a counterfactual enquiry as to what would have occurred
 3 absent Korea's breach of the treaty. Three ICJ
 4 decisions are marshalled to counter this imaginary
 5 argument, starting from Bosnian Genocide to suggest that
 6 the imaginary argument is wrong.

7 Now, in reality, Elliott has always accepted that in
 8 the factual matrix of this case, being quite specific,
 9 where there is no over-determination of the cause as to
 10 the vote of the NPS, so in the factual matrix of this
 11 case, a but—for enquiry à la Bosnian genocide is the
 12 appropriate enquiry, and all you need to do is to pick
 13 up Elliott's Reply in the original arbitration at
 14 paragraph 1 where we state so much.

15 To make this explicit, the but—for enquiry here
 16 involves two questions, or, if you will, two sequential
 17 causal switches. At the threshold, the question is
 18 whether a yes vote by the NPS meant that the merger
 19 would carry the day. This has to do with the necessary
 20 majorities, as Mr Partasides has explained. You answer
 21 that enquiry at paragraphs 817 to 820 of the award on
 22 the evidence the NPS de facto held the casting vote.

23 The subsequent but—for enquiry is as to the vote in
 24 itself, and there the but—for enquiry asks one to remove
 25 the unlawful conduct, the direction and the instructions

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1 by the Blue House and the Ministry, that are being
 2 identified at paragraphs 602, 603 and 623 of the award,
 3 so one asks: absent the direction and instructions of
 4 the politicians "to ensure" that the vote would be in
 5 favour of the merger as the award says in those
 6 paragraphs, would the NPS have voted yes or would it
 7 have voted no.

8 Now, we know the answer to that question as the
 9 evidence which Mr Partasides has already traversed makes
 10 plain. The short point is that if the NPS were minded
 11 to vote yes to the merger on independent grounds, then
 12 the NPS Chief Investment Officer, Mr Hong, would have
 13 told as much to the Director General of the Ministry of
 14 Health, Mr Jo, when he was instructed, when he, the CIO,
 15 the Chief Investment Officer, was instructed to
 16 intervene in NPS's decision-making process.

17 Now, not only did Mr Hong not say so, did not say
 18 "merger seems likely to be approved so don't worry about
 19 this", but he put in place a mechanism to get the yes
 20 result that he was directed to get, namely by keeping
 21 the Experts Voting Committee, the external
 22 decision-makers out of the decision-making process and
 23 by doctoring an arbitrary synergy effect.

24 So in, perhaps, a legal analogy way, the Ministry
 25 gave Mr Hong an obligation de résultat: get me a yes

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1 vote, for Mr Hong to achieve by means of his choosing,
 2 and these means amounted to criminally unlawful
 3 interference, as you heard earlier, in NPS's
 4 decision-making process.

5 Now, none of these unlawful means would have been
 6 resorted to if the NPS would get to a yes decision on
 7 some independent merits of the proposed merger. That's
 8 the answer to the second counterfactual enquiry, and it
 9 is already in your award read as a whole.

10 Now, this brings me to my second matter which is
 11 Korea's position on the standard of proof for causation.
 12 Mr President, the burden of proof I will deal with
 13 a little separately. So now this is about the standard
 14 of proof.

15 Let me recall what the award has to say on the
 16 topic. In short, the award adopts an "in all
 17 probability" or "balance of probability" standard of
 18 proof across all matters that are susceptible to proof.
 19 Let me recall the relevant passages, if I may. You
 20 addressed the standard of proof at paragraph 581 of the
 21 award which is extracted on this slide 38. You say that
 22 the applicable standard was, by agreement of the
 23 parties, the balance of probabilities rather than proof
 24 beyond a reasonable doubt, as in criminal proceedings.

25 Let me add that in your footnote 880 you referred to

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1 authorities which were cited to in Elliott 's Reply
2 pleading at the time, and these authorities , as you can
3 see in the portion highlighted on your screen, included
4 holdings not only on the standard of proof applicable to
5 breach, but also to causation of harm, namely Gold
6 Reserve and Kardassopoulos.

7 So you have the complete picture handy on this Slide
8 39, I have extracted the relevant portion of Elliott 's
9 Reply, including the footnote, and there, in the main
10 text, the related point was also made that Korea's
11 authority then, as now, on standard of proof, Bilcon v
12 Canada, referred to an "in all probability" test as
13 equivalent to forming a sufficient degree of certainty ,
14 which, in itself , is a 1920s formulation of the PCIJ,
15 and as is also there explained what either of these
16 formulations means is a balance of probability test .

17 Further, on this slide , 40, I have extracted
18 paragraphs 719 and 756 of the award where the Tribunal
19 recounts Korea's argument relying on Bilcon that the
20 applicable standard is a sufficient degree of certainty
21 which Korea said is not equivalent to, but a higher
22 standard than in all probability . You did not accept
23 that argument. Instead, you explicitly applied the
24 normal probability standard, both in respect of
25 Elliott 's claims for breach, and you also did that in

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1 quantifying Elliott 's loss — if I may recall paragraphs
2 931 and 932 of the award. I'm happy to leave that
3 reference for your note — there you consider the value
4 that the SC&T shares would have attained in the but—for
5 world where the merger was not approved and as I say I'm
6 happy to leave that reference for your notes. That is
7 the evidential standard that the Tribunal applies across
8 the board.

9 So, against this decision background, which is final
10 and binding and not open to be revisited, what does
11 Korea say now? It says two things. First , it says that
12 at paragraph 581 of the award the Tribunal did not
13 determine, and now I quote, "still less resolve" the
14 standard of proof applicable to factual causation.

15 As I have just recalled , including by reference to
16 your counterfactual valuation analysis in paragraphs 931
17 to 932, this is just wrong.

18 Can I respectfully suggest all one needs to do is
19 read the award with an intention properly to understand
20 it , rather than to contrive gaps in the award, and
21 secondly, as you can see on this slide 41, our friends
22 say that while the standard of proof for historical
23 facts is the balance of probabilities , per paragraph 581
24 of the award, the standard of proof for a counterfactual
25 scenario is higher. This counterfactual analysis

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1 requires, they say, and I quote, a, " sufficient degree
2 of certainty", and I will point out in fairness that
3 Korea is quite unembarrassed by stating that it is
4 rehashing an argument that it concedes it has already
5 made without success.

6 Korea's lone authority for this suggestion about
7 a higher supposed standard is, again, Bilcon, and I have
8 already addressed the proper import of Bilcon, recalling
9 what the Tribunal has held having considered Bilcon,
10 which was Korea's case in the arbitration , but let me
11 just say one thing in substance about this suggestion
12 about a higher standard of proof for a counterfactual.

13 It is , with respect, quite insidious . It is
14 insidious to suggest that evidential conclusions about
15 a counterfactual scenario require a greater degree of
16 confidence than conclusions about actual facts, because
17 that would mean that the question whether something
18 actually occurred can be determined on a balance of
19 probabilities , but the question whether that same thing
20 might not have occurred in a counterfactual world has to
21 be determined as a certainty. That cannot be right,
22 members of the Tribunal. A finding of liability for
23 breach is no different in quality than a finding in
24 respect of liability to compensate for the breach —
25 same evidential rules and standards apply.

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1 If a higher standard of proof were to apply to the
2 latter , then establishing to a certainty
3 a counterfactual event, so let 's ponder this, an event
4 which the breach itself prevented from occurring in the
5 first place, establishing that to a level of certainty
6 would be a boost to the breaching party, and an
7 obstacle, possibly an insurmountable obstacle, to the
8 innocent party who has suffered the breach, and that
9 cannot be right either .

10 So, Korea's suggestion in our respectful submission
11 is both unprincipled and self-serving, which is why, of
12 course, you do not accept it in the award.

13 I come now to the third matter to address here,
14 which is Korea's submission that Elliott must not only
15 establish the positive, the affirmative, that the
16 political direction and instructions caused the NPS's
17 yes vote, but it must also establish a potential
18 negative, or exclude a potential negative, namely that
19 a yes vote could not have ensued from independent
20 grounds.

21 Can I be clear on that? Because the Tribunal is
22 interested as to exactly what Korea's case is. Not
23 grounds that were decisive in NPS's decision—making as
24 it occurred, but hypothetical grounds, so 'could'
25 grounds, about which Korea now uses at some length in

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1 its Rejoinder, and this is notably at paragraphs 49 and
2 80, so in response to the Tribunal's question Korea's
3 case is about a could, not about a would.

4 Now, you will recall, members of the Tribunal, this
5 matter was extensively debated in Geneva. You will
6 recall the Tribunal pressed our colleagues opposite, our
7 then colleagues opposite, with analogies — the armourer
8 analogy was one analogy — to which they declined to
9 answer because they could not give a respectable answer.
10 Korea's argument then was identical to Korea's argument
11 today — exactly identical — and you will be able to
12 see this by comparing paragraphs 42 and 43 of Korea's
13 present Rejoinder which you have on Slide 41 with
14 paragraph 719 of your award which recounts Korea's then
15 argument which you also have on Slide 40.

16 In your award, as I will come to show you, you dealt
17 with Korea's defence as to the hypothetical "would", as
18 an issue of causation in law as opposed to causation in
19 fact. You rejected it. This is at paragraph 822 which
20 I have extracted on Slide 52 to which I'll return in
21 a few minutes.

22 So, Korea's argument on factual causation is wrong.
23 I dare say it is also offensive as a matter of policy,
24 and it gets only worse by dint of repetition. Let me
25 say first why it is wrong, which was part of my third

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1 point, and then I will come to why it is offensive from
2 a legal policy perspective.

3 So, it is wrong because a but—for enquiry seeks to
4 identify whether, on the facts, outcome Y was caused by
5 breach X. It does not ask whether outcome Y could
6 alternatively have been caused by some hypothetical
7 factor. Why? Because in a but—for enquiry you cannot
8 add to the facts by injecting speculation. An example
9 of this fundamental point is in the most recent Partial
10 Award in Chevron v Ecuador. This, you may recall, is
11 the case concerning the corrupt Ecuadorian court
12 judgment for a fabricated environmental liability of
13 US\$10 billion. You have the relevant extract of the
14 relevant award on Slide 42. Let me recall the context.

15 The context was that Ecuador, similarly to Korea
16 here, argued that an adverse court decision against
17 Chevron could also have resulted, hypothetically, from
18 certain so-called individual claims that you see
19 mentioned in the award which claims had been made but
20 then they had been abandoned, and so they were never
21 adjudicated upon.

22 So, Ecuador's argument was if Chevron had not lost
23 through a corrupt decision vindicating fabricated
24 claims, as, in fact, Chevron did, then Chevron could
25 have lost through an honest decision based on cogent,

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1 albeit entirely hypothetical claims.

2 Now, the Tribunal held that the but—for enquiry
3 could not include hypothetical claims, and confidently
4 rejected Ecuador's defence.

5 Now, I come to my fourth point, which is Korea's
6 argument is also offensive from a legal policy
7 perspective, and the decision under the presidency of
8 Professor and later ICJ judge and President Higgins in
9 Amco II shows why. We have the relevant extract or
10 extracts on this slide 43.

11 The Tribunal there was seeking to determine the harm
12 that had flowed from a procedurally tainted decision by
13 an Indonesian regulatory body called BKPM. This body,
14 through that tainted decision, had revoked Amco's
15 investment license, and Indonesia was arguing that no
16 harm had flowed because even a "fair BKPM", within
17 quotation marks, would have revoked Amco's license.

18 The point was pleaded under international law — I
19 underline that because our friends seem not to have it
20 in mind — and decisions of International Courts and
21 Tribunals were brought to bear on the issue.

22 Now, the Tribunal had no time for Indonesia's
23 argument. It said in paragraph 174 — you have it on
24 the right-hand side of the slide: Such an argument about
25 a hypothetical negative decision, honest grounds through

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1 an honest process, misaddressed causality by injecting
2 speculation.

3 So in essence, Indonesia, just as Korea here, argued
4 that when the State has tipped the balance, tipped the
5 scale to make sure that an independent decision-maker
6 reaches one decision rather than the other, so this is
7 about a binary, will your license be maintained or will
8 it be revoked, and then the State is caught having
9 tipped the scales, it can then somehow wash its hands of
10 the consequences because it can say, well look, the
11 victim of the rigged decision must also prove that
12 a fair process, which, by the way, either State made
13 sure would not happen in the first place, would not have
14 reached the same outcome on an honest basis, so if you
15 like football, the analogy is team A bribes the referee
16 to make sure that it will win a match which hangs in the
17 balance. Team A is then caught, and then it says: look,
18 team B also has to prove that team A couldn't have won
19 without the bribe.

20 You have to exclude a hypothetical negative.

21 Now, members of the Tribunal, this is to seek to
22 draw advantage from one's own wrongdoing, and the Amco
23 II Tribunal would have none of that, so we respectfully
24 commend, once again, the same approach to you, and as to
25 that I'm conscious that our friends say that Amco II was

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1 insufficiently reasoned, relying on writings by
 2 Professors Paulssen and Douglas. The reality is that
 3 neither of these distinguished commentators, or anyone
 4 else, for that matter, has criticised the substantive
 5 holding, for indeed the logic is compelling, the logic
 6 is that states cannot escape liability by positing that
 7 what they have, in fact, done unlawfully, what they have
 8 chosen to do unlawfully, they might conceivably also
 9 have done in the alternative lawfully.

10 Well, the State has chosen to proceed unlawfully,
 11 thereby excluding the possibility of acting lawfully, so
 12 the but for analysis has to factor that in. It has to
 13 be faithful to that fact pattern, and before I leave
 14 this, just so the record before you is complete, we have
 15 included in the record the part of Professor Paulssen's
 16 2020 Hague Academy lectures where he revisits Amco II
 17 together with some analogous cases and he expressly
 18 endorses it. You can see that on Slide 44 which I'll
 19 leave for your notes.

20 Members of the Tribunal, these are the four matters
 21 I intended to address in respect of causation in fact.
 22 I now turn to causation in law.

23 Two matters to be addressed here in short order.
 24 Again, they are telegraphed on this Slide 45.

25 The first matter is Korea's contention that the

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1 Tribunal failed to address a requirement of
 2 foreseeability of harm. You have Korea's position on
 3 this Slide 46. Korea says that the Tribunal, and I
 4 quote:

5 " ... did not apply a foreseeability test", and
 6 Korea also says that the fact that an impact upon
 7 Elliott was foreseen by Korea does not mean that the
 8 requirement of legal causation is satisfied.

9 With respect, Korea's argument is wrong in law and
 10 it is incoherent on its own terms.

11 Let me start with why it is wrong in law.

12 The first thing to do is to recall paragraph 815 of
 13 the award — now, again, I think for the third time in
 14 this slide deck, members of the Tribunal, on Slide 47.

15 THE PRESIDENT: Apologies, Mr Petrochilos, I'm a bit slow.
 16 Can we go back to the entity in Amco, and just a quick
 17 question there. The entity, BKPM, was it a State organ
 18 or not?

19 MR PETROCHILOS: It was, indeed, a state entity,
 20 a regulator.

21 THE PRESIDENT: Okay. Thank you.

22 MR PETROCHILOS: The issue, however, was exactly the same.

23 The issue was Indonesia was saying: look, you really
 24 have suffered no harm because you, Amco, had failed to
 25 comply with necessary requirements of Indonesian law,

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1 and even if this process conducted by BKPM were not as
 2 it was, which was tainted and so on, it was a denial of
 3 justice, held the Tribunal, even if this had been done
 4 fairly, so a fair BKPM, would have revoked your license.
 5 That was a binary. Maintain the licence or revoke the
 6 license. The Tribunal said: you cannot rerun the
 7 process that you have rigged in the first place. You
 8 are injecting speculation. That is not how but—for
 9 causation works.

10 Inherent in all of this is that that organ, BKPM,
 11 was required to apply due process, and that is why the
 12 case is on all fours with ours in respect of the issue
 13 that we're considering, namely the hypothetical
 14 negative.

15 Mr President, if that answers your question —

16 THE PRESIDENT: Please go on.

17 MR PETROCHILOS: I was on Korea's argument in respect of
 18 what the Tribunal did and what the Tribunal did not on
 19 the test of foreseeability, and I was recalling
 20 paragraph 815 of the award for the third time in our
 21 slide deck on this Slide 47, just to recall it. The
 22 Tribunal there sets out the requirement of directness or
 23 proximity between the breach and the harm. It describes
 24 what each of these notions means. It says they are
 25 technically different but in substance they seek to

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1 capture the same requirement of a sufficiently close
 2 link unbroken between the breach and the ensuing loss or
 3 damage.

4 Now, that paragraph is not remitted. Korea accepts,
 5 as it must, that it cannot revisit it and yet Korea does
 6 seek to revisit it by suggesting that the Tribunal ought
 7 to have set out a test of foreseeability and then
 8 applied that test, so paragraph 815, Korea says, to be
 9 blunt about it, is not good enough.

10 That suggestion, members of the Tribunal, is wrong
 11 all the way, not only because paragraph 815 stands
 12 complete and cannot be re—opened, but also because
 13 foreseeability is a possible but not necessary test
 14 under international law. On this slide 48, I have set
 15 out the extract from the ILC's official commentary which
 16 records why the commission decided not to include in ILC
 17 Article 31 a requirement of foreseeability or
 18 a requirement of directness or proximity, for that
 19 matter, in the causative analysis. The commission
 20 explains that the specific test or tests for legal
 21 causation will depend on the facts of the case, and on
 22 the substance of the obligation breached, and for this
 23 reason it was not wise to set out rigid rules in the ILC
 24 Articles, and so the commission notes that in some cases
 25 foreseeability was treated as dispositive, and 1930s

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1 Naulilaa case is cited as an example, this is a case
 2 about counter measures and reprisals, in fact, while in
 3 others it is not.
 4 So on the same slide, much respected authority —
 5 Lemire. The analysis of the Lemire Tribunal is set out.
 6 This explains that foreseeability is a methodological
 7 tool to establish proximity or directness of cause, and
 8 the Tribunal says, and I quote:
 9 "A chain of causality must be deemed proximate, if
 10 the wrongdoer could have foreseen that through
 11 successive links the irregular acts finally would lead
 12 to the damage".
 13 So it is a methodological tool, or a short—cut, if
 14 you will. It is not a necessary part of the legal
 15 causation analysis, so Korea's argument to the contrary
 16 is wrong in law, but it is also nonsensical argument,
 17 perhaps more to the point, and I say this with respect:
 18 in view of what the award holds as to Korea's own actual
 19 foresight in real time about the impact on Elliott of a
 20 yes vote by the NPS, the relevant extracts are now on
 21 your screen, Slide 49. You established on the evidence,
 22 albeit in the context of another legal requirement where
 23 you applied a foreseeability test that, the Blue House
 24 and the Ministry plainly foresaw that a yes vote by the
 25 NPS would harm Elliott's position, and indeed the Blue

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1 House and the Ministry directed and instructed a yes
 2 vote by the NPS precisely to negate Elliott's opposition
 3 to the merger.
 4 So, how our friends can now say that this holding
 5 which applies a foreseeability test for another legal
 6 standard, would not apply across and satisfy a causation
 7 test of foreseeability if you wanted to adopt one, which
 8 you didn't have to, beggars belief and I'm understating
 9 this. It must apply across, lest the award be a
 10 schizophrenic text pulling in two opposite directions.
 11 What would you say, that the impact on Elliott was
 12 foreseeable for purposes of the related to
 13 jurisdictional test, but it was not foreseeable based on
 14 a requirement of legal causation? How could anyone
 15 write that?
 16 We proceed on the approach that the award must be
 17 read in good faith with a view to preserving its spirit,
 18 and the 885 paragraphs which have not been affected by
 19 the court's decision.
 20 Now, as I am about to leave this point, I'm coming
 21 to my second matter on causation in law. This is about
 22 intervening causes that can sever the chain of
 23 causation. As part of that, Mr President, I'll address
 24 the second question of the Tribunal, which is about the
 25 burden of proof.

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1 Now, as I said earlier in your award at paragraph
 2 822, you deal with Korea's argument about a
 3 hypothetical, untainted, independent, yes, decision by
 4 the NPS. On this slide, 50, I simply recall that you
 5 treated that argument as a *causa interveniens* defence,
 6 and you rejected it on that basis — rightly, if I may
 7 say so — on grounds that an intervening cause must be
 8 an actual event, not a hypothetical supposition.
 9 So, the Chevron Tribunal said exactly the same thing
 10 but as part of the but—for factual causation analysis,
 11 you say this as part of the legal causation analysis.
 12 So this is, again, about the drawbridge down the river.
 13 The Hart and Honoré example — it must be an actual
 14 bridge, not an imaginary bridge.
 15 Now, the English court as you can see on the lower
 16 part of this slide, has not ruled that your holding in
 17 this paragraph 822 was made without jurisdiction, rather
 18 the court asks the Tribunal to revisit this paragraph on
 19 the basis that as it was drafted and in its immediate
 20 context, it appeared to the court to be inextricably
 21 linked as a matter of formulation to the Tribunal's
 22 approach that the NPS was part of the Korean State. It
 23 is therefore entirely appropriate, we respectfully
 24 submit, for the Tribunal to explain in its supplemental
 25 award that paragraph 822 stands on its own, and is

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1 independent of the status of the NPS under international
 2 law, and that will be the end of that story. That is,
 3 indeed, the approach we respectfully commend to the
 4 Tribunal for two reasons.
 5 The first reason is one I explained at the outset
 6 and this is a fundamental reason. It makes no
 7 difference to the causative pathway whether
 8 a decision—maker that is required by law to decide
 9 independently yes or no, right, independently, without
 10 interference from the Government, is independent within
 11 the State, like a court, or independent outside the
 12 State like an arbitral Tribunal.
 13 The NPS was required to reach its decisions without
 14 outside interference, and that obligation was breached
 15 by Korea. It was breached by the Blue House and the
 16 Ministry of Health, and that, members of the Tribunal,
 17 is why the Mason Tribunal, who held by majority that the
 18 NPS was not an organ, and it also rejected Korea's
 19 hypothetical *causa interveniens* defence — same defence
 20 was made there. The relevant paragraph on that award is
 21 816, and as you can see, it speaks of a superseding
 22 event, not a hypothetical, that becomes the main cause
 23 of the loss, and this is now on Slide 51.
 24 The second reason is that if a *causa interveniens*
 25 could be hypothetical, as Korea now says, then it would

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1 be for Korea, not for Elliott to establish it, and I
 2 will recall that on Korea's own case the standard of
 3 proof would be a standard of certainty.
 4 Both the Lemire and the Mason Tribunals have
 5 pronounced on this burden of proof of an intervening
 6 cause, as you can see in this slide, 52. It is not for
 7 the Claimant to establish the absence of an intervening
 8 cause, but it is for the Respondent affirmatively to
 9 establish, as a defence that (a) there was an
 10 intervening event, and (b), that event operated as
 11 a cause that breaks the chain of causation, so the
 12 burden of proof is squarely on the Respondent to
 13 establish this as a defence and Korea which says the
 14 opposite has these two backwards.
 15 ARBITRATOR GARIBALDI: May I ask a quick question? You are
 16 addressing the question of *causa interveniens* finally.
 17 Do you understand the — first, you understand the
 18 Respondent to be making an argument of *causa*
 19 *interveniens* at this point? 2) if the Respondent is
 20 making an argument of *causa interveniens*, is it making
 21 an argument as a matter of factual causation or as
 22 a matter of legal causation? What is your
 23 understanding?
 24 MR PETROCHILLOS: My understanding is that an argument about
 25 a *causa interveniens* is made, although not in these

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1 exact terms. It is made both as a matter — as I
 2 understand it — both as a matter of causation in fact,
 3 so what do we do in the but—for analysis, as I mentioned
 4 earlier, but I was addressing this point as well on the
 5 basis that it is part of legal causation, causation in
 6 law, because that is, indeed, how the Tribunal resolved
 7 the argument when it was put to it in exactly the same
 8 terms in the arbitration in Geneva.
 9 ARBITRATOR GARIBALDI: How do you understand the Respondent
 10 is arguing the point?
 11 MR PETROCHILLOS: I was addressing — I understand that they
 12 are putting their case on both causation in fact,
 13 causation in law, and I was more concerned that the
 14 Tribunal be clear as to what the English court has asked
 15 it to do. I care more about the English court than I do
 16 about my friends opposite, with respect. The English
 17 court has said: please revisit paragraph 822. It may be
 18 that you come to the same conclusion but you need to
 19 explain how you do it, because as I read 822 it refers
 20 to the NPS being an organ, so over to you, members of
 21 the Tribunal. The court says to clarify this.
 22 ARBITRATOR GARIBALDI: Thank you.
 23 MR PETROCHILLOS: Thank you.
 24 Members of the Tribunal, unless I can assist
 25 further, it will be now for Mr Partasides to take over

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1 again and tie the bow and conclude the Claimant's
 2 opening argument. Thank you.
 3 MR PARTASIDES: Thank you, members of the Tribunal. Having
 4 recalled the evidence of fact, having recalled the
 5 relevant legal test, it's now time to try and bring
 6 those two together, and that first involves recalling
 7 your existing findings of fact which, having seen the
 8 primary evidence, we would suggest that the opposite of
 9 surprising, and having seen that evidence we've seen
 10 that they are findings that are not, in any way,
 11 dependent on your determination of the separate legal
 12 question as to the legal status of the NPS.
 13 A legal conclusion as to status one way or the other
 14 does not change the facts that you have before you that
 15 are contained in this single file.
 16 Before we turn to tying this altogether, let's focus
 17 on the Republic's suggestion to you, members of the
 18 Tribunal, in its latest brief that you see extracted on
 19 the next slide, Slide 54, that up until this juncture
 20 you have not had occasion to assess the length and the
 21 complexity of the causal chain.
 22 Now, with respect, that is an astonishing suggestion
 23 which might even be greeted with a certain amount of
 24 indignation, and not only by those on this side of the
 25 room, because, of course, that's exactly what this

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1 Tribunal had occasion to do during the multi-year
 2 proceeding that preceded your award, and of course you
 3 did it because you had to do it. The suggestion that
 4 this is the first time you are looking at the length,
 5 complexity, alleged uncertainty of a causal chain is,
 6 with respect, something that we feel indignant about.
 7 On the next slide, you see a diagram of the links in
 8 the chain of causation that your existing findings
 9 relate to. I'm going to lead you through those existing
 10 findings step-by-step. Let's start with the first link
 11 in the chain. Your first finding recorded — and you
 12 see it again, amongst other places, in your award at
 13 paragraph 602 — and you see that you found there that
 14 the Respondent, through the Ministry intervened in the
 15 NPS's vote on the merger and instructed the NPS to
 16 ensure that the vote would be in favour of the merger.
 17 That was not a finding that depended in any way on your
 18 legal analysis under Article 4 of the ILC, and you found
 19 in terms that the intervention was to the effect that
 20 the Investment Committee voted in favour of the
 21 merger — again, in no way dependent on your separate
 22 finding as to legal status of the NPS. These were
 23 findings of fact, and you repeated the finding as you
 24 see at the bottom of this slide in paragraph 623, and I
 25 draw your attention, in particular, to the highlighted

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1 sentence which begins with the words:
 2 "As established above ..."
 3 Which had, indeed, been established above. 623 is
 4 the end of that section of the award in which you note
 5 that causal chain, in fact.
 6 So how does Korea seek to brush this aside? Well,
 7 on the next slide, Slide 57, you see that attempt from
 8 its recent Rejoinder, and we submit that the inadequacy
 9 of that attempt is patent. How can you read paragraph
 10 623 or 602 that precedes it, or the many paragraphs that
 11 precede 602, and seriously suggest that it doesn't
 12 contain a finding of fact as to cause and effect? And
 13 how can you have in mind the primary evidence that we've
 14 walked through again together and seriously suggest that
 15 the finding was merely derivative of the Moon/Hong
 16 conviction judgments? You referred extensively to the
 17 Moon/Hong conviction judgments, members of the Tribunal
 18 in your award because Korea stipulated to the facts in
 19 them, and so you were entitled to do so.
 20 To suggest that this is merely derivative of a
 21 judgment that they stipulated to, with respect, is not
 22 serious, and so we move to the second link in the chain
 23 and your existing findings in that respect where you
 24 found that the NPS vote caused the merger to be
 25 approved, and this was because it was clear that the NPS

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1 had the casting vote. Indeed, that is precisely why the
 2 NPS was targeted for intervention by Korea in the way
 3 that it was, and when I say it was clear, members of the
 4 Tribunal, that the NPS had the casting vote, it was
 5 clear to all, as you see, again, on Slide 59 which is
 6 a duplicate of one of our Geneva slides, and which shows
 7 everyone believing from the Blue House down that the
 8 casting vote would be the NPS, including the NPS itself,
 9 and you accepted that, members of the Tribunal, recorded
 10 in the Moon/Hong convictions which you were entitled to
 11 rely on again because they stipulated to the facts in
 12 those convictions, and it wasn't contested at the time
 13 by Korea that we were dealing here with a de facto
 14 casting vote.
 15 So we turn to the final simple link in the chain,
 16 and it's not an unusually long chain — certainly not in
 17 comparison to some cases we've all done — and that is
 18 that the merger caused the loss to the Claimant, and
 19 your existing findings on that final link in the chain,
 20 which we see on the next slide, followed considerable
 21 evidence you may remember, evidence of fact and expert
 22 evidence, as to the loss that resulted from the merger.
 23 You found in terms that the merger did cause a loss to
 24 Elliott which you quantified, you will recall, at
 25 a fraction of the amount that Elliott claimed.

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1 Now, members of the Tribunal, those existing
 2 findings were not surprising findings of fact — I hope
 3 you will forgive us for taking exception only with the
 4 quantification finding of fact that led to the amount of
 5 your award, a fraction of what was claimed. They
 6 weren't surprising findings because of the weight of
 7 primary evidence before you which is why the Republic
 8 stipulated to those facts, and of course Korea can't now
 9 recant that earlier stipulation. Of course, it is
 10 estopped from blowing hot and cold in relation to that
 11 earlier stipulation, and so instead it engages in an
 12 exercise of what might have been — not what happened
 13 and with what effect — but rather what didn't happen,
 14 but hypothetically could have happened in a world in
 15 which its breaches didn't exist.
 16 Now, as you've heard from Mr Petrochilos, that isn't
 17 the right exercise as a matter of law, but it is also
 18 futile as a matter of fact, members of the Tribunal,
 19 because it involves doing no more than recycling some of
 20 its failed factual theories of the past which I
 21 mentioned in my introduction and that I now return to.
 22 Now, we showed you in the Annex to our Reply how
 23 each and every one of the new what if arguments of fact
 24 that are presented by Korea are arguments that they
 25 presented to you before Geneva and in Geneva. We showed

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1 you the references to all those pre-award submissions
 2 making exactly the same arguments to you before.
 3 On the next slide, Slide 63, you see a summary of
 4 what I suspect will be familiar propositions, and I'll
 5 address each of them now in turn, and so Korea argues,
 6 first, once again, that the NPS might, in any event,
 7 have viewed the merger favourably, because other
 8 shareholders voted in favour, because some proxy
 9 advisers were more favourable, and because the NPS had
 10 a holding in Cheil, and so it stood to benefit from the
 11 merger at least to some degree, if you looked at its
 12 interests a little more broadly.
 13 Now, I have to say that for anyone who has lived
 14 this arbitration since the beginning, that is an
 15 astonishing argument to read once again. Why did the
 16 Government go to the criminal effort it went to unless
 17 it reached the view that that criminal intervention was
 18 necessary?
 19 It is also astonishing in the light of the record
 20 that has already demonstrated that Samsung influenced
 21 and even suborned Korean analysts to support the merger,
 22 and so the former CEO of Hanwha Investments and
 23 Securities confirmed to a Korean congressional hearing
 24 in December 2016, as you see on Slide 64, that Samsung
 25 had applied significant pressure on Korean securities

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analysts and brokerage firms to issue favourable comments about the merger.

Again, all that evidence was before you in Geneva, but members of the Tribunal, in any event, the relevant question is not how other shareholders voted, but how the NPS, with its casting vote, voted to bring the merger about, and in relation to the NPS, Korea is also now arguing, again, that the failed portfolio argument of the past that NPS had broader interests and would evaluate this decision on a broader basis is being recycled once more.

Now, I say that that is a surprising submission to hear again because the evidence shows that the NPS valuation team that we looked at a little earlier considered that the only way this merger could be presented as anything other than enormously damaging was by doctoring a valuation and forging a synergy effect calculation, as we've just seen together.

If there were broader benefits, members of the Tribunal, to be taken into account, if there were longer term benefits to be taken into account, then why didn't the NPS's valuation team refer to them at the time rather than cooking the books?

So when Korea now says, as you see on Slide 65 which is an extract from their Rejoinder, that it is not

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relying on the NPS team's estimate, it is Korea that misses the point. It is not what Korea prefers to rely on now that is relevant to causation, but what the NPS did at the time that is relevant to the exercise before you, and there's also no point, by the way, you see underlined in 70(b) on the slide, relying on a report by one of the proxy advisers, Deloitte Anjin.

If the NPS Investment Committee did not rely at the time on Deloitte Anjin, then there is no point offering it now, and the NPS didn't rely on it at the time. There is no record of the Deloitte Anjin report being discussed in the Investment Committee minutes that we looked at earlier, even though the Deloitte Anjin report was amongst the Investment Committee's supporting materials, and what is more, members of the Tribunal, as we see on the next slide, there is, in any event, primary evidence of Deloitte Anjin, like so many others, having been interfered with by Samsung to produce a valuation that was favourable to the merger.

On this slide you see extracts of the statement report of the Deloitte Anjin partner who was leaned on by Samsung at the time, who kept putting pressure on Deloitte Anjin to revise its calculations from what they had been to be supportive of the merger. What's described as a whopping 17 times in the space of just

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a few weeks. Just read, if you will, the second and the third extracts that speak for themselves.

Now, again, members of the Tribunal, this is nothing new. We referred to this evidence in our post—hearing briefs before your award, and yet we face, again, the argument that Deloitte Anjin is an example of an objective, rational, independent valuation in support of the merger that the NPS might have listened to—all the things that Deloitte Anjin itself has confirmed could not be said about its valuation. Korea relies on the fact that in one of the subsequent Korean judgments the Korean court said that there is no basis to impugn the Deloitte Anjin valuation.

Now, in the face of a conflict between that rather surprising conclusion by a Korean court and the primary evidence coming from Deloitte Anjin itself, we invite you to prefer the primary evidence.

So let's turn to Korea's second proposition which you see on the next slide, because it is also now arguing, once again, that the NPS might have circumvented the Experts Voting Committee anyway, even without the Government pressure to do so.

Once again, surprising to say the least, members of the Tribunal, to see this attempt at resuscitation, because the record leaves no doubt that the NPS itself

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believed at the time that the decision should be taken by the EVC. As we saw in the file in early July 2015, following the Ministry's instruction, "have the Investment Committee make this decision", not the Expert Voting Committee, the NPS officials pushed back. On the next slide you see the transcript that we looked at earlier of a telephone call that took place at the beginning of July 2015, so this is after the Ministry had directed the NPS to avoid the Expert Voting Committee, between [REDACTED] from the NPS and the Ministry's Deputy Director Baek, and it speaks for itself. We don't need to wonder about whether the NPS would have sent this to the Experts Voting Committee if it hadn't been leaned on by the Government because it stated at the time itself that it would have done so.

You may also remember, members of the Tribunal, that Korea presented as a witness of fact in Geneva one of the members of the Experts Voting Committee, a Mr Cho. I cross-examined him. On the slide, Slide 69, you see an extract of his testimony under cross-examination before you, during which this witness presented by Korea admitted in terms, that it was not only surprising that the Expert Voting Committee had been by-passed but that it was outrageous. His testimony on behalf of Korea before you.

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1 This admittedly outrageous conduct served a purpose.
 2 It was no accident. As you see from Slide 70,
 3 a Presidential Secretary at the time confirmed that the
 4 Government resolved to by-pass the Expert Voting
 5 Committee precisely because of the outcome they thought
 6 would otherwise occur.
 7 So we come, members of the Tribunal, to the
 8 Investment Committee to which this decision was funneled
 9 by the Ministry which you see is the third of the three
 10 propositions, and which is where the Republic's
 11 hypothetical world of what might have been breaks down
 12 entirely, because the evidence is more than adequate to
 13 establish that the Investment Committee members voted in
 14 favour of the merger because of the fabricated merger
 15 synergy effect calculation, not because of any of the
 16 other factors that Korea now claims might have weighed
 17 in favour of the merger, and we say that with confidence
 18 because we have the Investment Committee meeting minutes
 19 that record the Committee deciding to support the merger
 20 in view of its synergy effect. You've seen this already
 21 before in the file and let me say, members of the
 22 Tribunal, that my next slide which we've seen before is
 23 one that again contains protected information, so before
 24 we show it I just make that note, and with that note
 25 let's turn to Slide 73 where we see a determinative

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1 number of NPS Investment Committee members who have
 2 confirmed that they would not have supported the merger
 3 but for the forged synergy effect calculation with which
 4 they were presented.
 5 So let me pause now a little more on this document
 6 and explore a little bit Korea's response which isn't at
 7 any point in this arbitration ever to have presented any
 8 witness evidence from a member of the Investment
 9 Committee to offer some confirmation of the speculation
 10 they invite you to engage in.
 11 Instead, they recycle isolated statements by some of
 12 the Investment Committee members that they use again to
 13 suggest that — who knows, they might have voted in
 14 favour of the merger anyway.
 15 I say again, members of the Tribunal, because Korea
 16 tried this once before in Geneva, and so it draws
 17 attention, once again, to isolated statements made by
 18 two of the Investment Committee members — Mr [REDACTED] and
 19 Mr [REDACTED], although it ignores the statements made by some
 20 of the other Committee members who have also confirmed
 21 that they voted yes but would have voted no.
 22 So let's focus on Mr [REDACTED] and Mr [REDACTED] and first of all,
 23 so far as Mr [REDACTED] is concerned, this cherry-picking of
 24 some things that he said still ignores the following
 25 statements he made that you see on the slide in court

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1 testimony in the Moon/Hong Central District court case.
 2 They speak for themselves.

3 Let's turn to Mr [REDACTED]. Again, Korea cherry-picked
 4 some of his statements, but they ignore the following
 5 statements that you see on the slide. This is
 6 a statement report given to the Special Prosecutor in
 7 December 2016, that again speak for themselves.

8 Korea also ignores the evidence of other Investment
 9 Committee members who have confirmed the same, Messrs
 10 [REDACTED], [REDACTED] and [REDACTED]. In the interests of time let me just
 11 give you references to where their evidence on what they
 12 would have done can be found — C/472/10; C/468/17 and
 13 18; C/473/21 and 22 — Committee members that have been
 14 willing to say on the record, [REDACTED]
 15 [REDACTED].

16 Korea also ignores the evidence that you see on
 17 Slide 76, [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED], and Korea also ignores,
 24 members of the Tribunal, the evidence you see on Slide
 25 77 [REDACTED]

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1 [REDACTED].
 2 The pension will be framed as a Wan-Yong Lee, known
 3 in Korea as a traitor, so he probably took it as
 4 a request to consider voting in favour of the merger in
 5 a positive light.

6 Members of the Tribunal I apologise for some
 7 indignation but none of this is revelation. All of this
 8 was on the record before you in Geneva. None of it was
 9 dependent on the legal status of the NPS, and yet it
 10 seems to come as a surprise to those presenting Korea's
 11 case today.

12 That is the end of the protected information,
 13 members of the Tribunal, and so I turn now to the
 14 additional judgments that Korea now seeks to rely on
 15 purportedly as additional evidence as a counterweight to
 16 the primary evidence that you have before you, as
 17 a basis to re-open the factual findings you've already
 18 made, and that remain in your award, and these include
 19 judgments from the criminal proceedings brought against
 20 JY Lee for market manipulation, and civil proceedings
 21 brought by Samsung C&T shareholders against the NPS and
 22 against the Republic of Korea.

23 The first point to make about these additional
 24 judgments, members of the Tribunal, is that they are not
 25 new primary evidence at all, they are decisions by other

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1 decision—makers applying different legal standards to
2 different causes of action on the basis of different
3 evidential showings before those courts.

4 As Korea has itself declared in another context, and
5 I referred you to this in my introductory remarks, to
6 state the obvious, the fact that one decision—making
7 Tribunal has decided to take a particular approach does
8 not mean that its decision was correct".

9 Obvious indeed, members of the Tribunal. That's my
10 first point. This isn't primary evidence. It is the
11 opinion of other decision—makers.

12 The second point is that a couple of those
13 additional judgments were already before you before you
14 rendered your award — the merger injunction decision
15 which pre—dated the merger, obviously, it was an attempt
16 to stop the merger in early July 2015 was, of course,
17 already before you before you rendered your award, so
18 you already took that into account in rendering your
19 award, and there are two points to make about that
20 decision. The first is that, as you see from the
21 extract of expert SH Lee's opinion before you,
22 injuncting a merger would have been unprecedented or
23 almost unprecedented in Korea. That shouldn't come as
24 a surprise. Look at the first paragraph extracted from
25 his expert report.

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1 Secondly, and perhaps more importantly as you see in
2 the bottom extract, of course the injunction was
3 rejected long before evidence of illegality emerged in
4 late 2016, 2017, that you had the benefit of before you.
5 Again, you already had this decision before you before
6 you rendered your award, as you did, members of the
7 Tribunal, the merger nullification decision which Korea
8 seeks to make much of now, which also made findings that
9 were favourable to Samsung and to the merger, and again
10 that you had in hand before you rendered your award, and
11 at paragraph 614 of your award, as you see on Slide 80,
12 you explained why the different conclusions in those
13 Korean court decisions changed nothing in your decision.

14 What you write in this paragraph, 614, members of
15 the Tribunal, could be said about the other decisions
16 that Korea now puts before you. That's my second point
17 in relation to the additional judgments.

18 The third is that the subsequent decisions have
19 resulted in none of the criminal convictions against
20 Minister Moon, Chief Investment Officer Hong ever being
21 overturned. The extensive findings in those decisions
22 that those opposite stipulated to, and that you see
23 summarised on Slide 81 remain, nor indeed, by the way,
24 has the separate conviction of President Park for
25 corruption in public office, nor the separate conviction

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1 of JY Lee himself for corrupting a public official, all
2 of which still stand. That's the third point.

3 The fourth point on those additional judgments
4 pertains to the very different causes of action that
5 they relate to in comparison to the claim before you —
6 applying a different law to a different evidential
7 showing, not focused on governmental misconduct in the
8 same way as the proceedings before you are focused.

9 By way of example, the shareholder claims raise the
10 narrow question of whether, under Korean law, one
11 shareholder owes duties actionable in tort law to
12 another shareholder. That was what the shareholder
13 claims pertained to. In fact, in deciding that
14 a shareholder didn't owe duties to another shareholder,
15 a finding that Korea seizes hold of here, the Seoul High
16 Court as you see summarised in Slide 82, recognised the
17 clear distinction between the legal test that you are
18 applying and Korean law as you see on the slide.

19 That was the fourth of my points in relation to the
20 additional judgments, members of the Tribunal.

21 My fifth point about those additional judgments is
22 that it is far from clear that they are based on the
23 same evidential showing that you have the benefit of,
24 and Korea does not confirm otherwise.

25 On the next slide, Slide 83, you see Korea's most

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1 recent submission in that regard which simply says that
2 the JY Lee Unlawful Merger case duly considered prior
3 criminal proceedings, notably falling short of
4 confirming that the primary evidence you have before you
5 was before the court and examined, and in truth it is
6 difficult, members of the Tribunal, to reconcile some of
7 the findings in those additional judgments with the
8 evidence that you have before you.

9 If you look at the next slide, Slide 84, which is an
10 extract from the shareholder claims judgment which Korea
11 is happy to embolden and italicise in its recent
12 Rejoinder, we invite you just to read the highlighted
13 language and ask yourselves how it can be reconciled
14 with the evidence before you that we've just walked
15 through together.

16 We say it can't be, and that brings me to the sixth
17 and final point on these new judgments which is that
18 your decision, members of the Tribunal, was based not on
19 the Moon/Hong convictions alone to which Korea
20 stipulated, but on the primary evidential record. That
21 primary evidential record has not changed, and so I turn
22 to our showing of legal causation, members of the
23 Tribunal, which again you have already accepted, again
24 applying the standard Mr Petrochilos has reminded us of.
25 There is no reason to conclude that your existing

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1 findings are disturbed by the English court's different
 2 decision as to the legal status of the NPS.
 3 THE PRESIDENT: Mr Partasides, if I go back to the factual
 4 causation and the additional judgments, what is your
 5 understanding of the standard of causation that was
 6 applied by the courts in those decisions? Was it
 7 but—for or something else?
 8 MR PARTASIDES: The causation test, I believe, was but—for,
 9 but I can confirm that.
 10 THE PRESIDENT: Thank you.
 11 MR PARTASIDES: Let's just go back to the prior slide.
 12 Sorry, the one before. The one before that.
 13 This passage, Mr President, is an interesting one,
 14 and if you read the paragraphs around the extract that
 15 we have on this slide, it will develop the differences
 16 that the Korean court considered existing between the
 17 test it was applying and the one before you.
 18 So, let's turn to legal causation, and your existing
 19 finding of sufficient proximity, findings that, again,
 20 were unsurprising on the basis of the evidence before
 21 you, and so just to recap, as you see on the next slide,
 22 you saw and had before you a Blue House memorandum at
 23 the genesis of this intervention considering the
 24 advantages and disadvantages of Blue House intervening
 25 in the NPS's exercise of its voting rights, specifically

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1 noting Elliott's opposition to the merger at the
 2 starting point.
 3 You have before you, as you see on the next slide,
 4 87, the suspect statement report of one of the
 5 Presidential Secretaries confirming that President Park
 6 specifically identified Elliott at the meeting as a key
 7 obstacle to Korea's efforts to ensure that the merger
 8 was accomplished, and you have before you, as you see on
 9 the next slide, Slide 88, evidence of Blue House
 10 officials specifically noting that implementing
 11 President Park's orders risked an ISDS claim from
 12 Elliott in particular. None of this, to state the
 13 obvious, members of the Tribunal, this evidence of
 14 Elliott in particular being in the Government's sights was
 15 in any way dependent upon your separate finding as to
 16 the legal status of the NPS, and so again, it cannot be
 17 disturbed by the English court finding differently as to
 18 the NPS's legal status.
 19 Members of the Tribunal, we're coming to the end of
 20 our opening submission, and so let me end with just
 21 a few words on loss of a chance, and it really will be
 22 just a few words, because as we've noted in our
 23 writings, Korea already argued for the application of
 24 loss of a chance as a damages framework before your
 25 award. We give you the references in our writings. You

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1 didn't accept that framework. You found other ways in
 2 which significantly to reduce Elliott's claim amount.
 3 We drew attention to this undeniable fact of prior
 4 consideration in our submissions, and you see on the
 5 next slide, Slide 90, Korea's response suggesting that
 6 this was plainly incorrect, though note, members of the
 7 Tribunal, the contradictory invitation for you to
 8 revisit this issue in the very final word of that
 9 paragraph. How can you revisit something that hasn't
 10 been visited before?

11 Of course it was visited before, and yet Korea makes
 12 the submission that you did not need to decide this
 13 issue before, and that's why you didn't embrace it as
 14 a framework. Of course, you made no such statement in
 15 your award, members of the Tribunal, because that would
 16 be a non sequitur, because in finding that the NPS was
 17 a de facto State organ, you found that its function
 18 required its decision—making to be independent of
 19 Government, and so your prior finding proceeded on the
 20 basis that Elliott's entitlement was not to a particular
 21 outcome, but to a fair opportunity to achieve that
 22 outcome. That was the prior framework, and so the
 23 Bilcon framework that Korea now invites you, again, to
 24 adopt, which you see summarised in an extract of its
 25 Rejoinder on Slide 91, to the extent that it is relevant

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1 at all would have been relevant even in the world in
 2 which the NPS was a de facto State organ, but you
 3 decided, nevertheless, not to apply it, and there is no
 4 basis nor reason to revisit that prior decision again,
 5 to use the word that Korea attaches to its invitation,
 6 and that is because, members of the Tribunal, the facts
 7 of this case speak for themselves. The Government
 8 intervention at issue here was clearly more than
 9 adequate to have caused the outcome that Elliott
 10 suffered — the yes vote to the merger.

11 Let me end by saying, members of the Tribunal, that
 12 when parties find themselves repeating what they have
 13 said before over and over again as Korea is doing, and
 14 as we are compelled to do in response, it really is time
 15 to bring this saga to an end. We invite you now to do
 16 so by confirming your prior findings and the outcome
 17 that they have led to as set out in your existing award
 18 which we commend to you.

19 Members of the Tribunal, that concludes Elliott's
 20 submission today.

21 THE PRESIDENT: Thank you very much.

22 Any further questions from my colleagues? I think
 23 we raised the questions that we had. As we said
 24 yesterday, there will be a few questions — not many —
 25 depending on what happens tomorrow, that we will give to

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1 the Parties to be addressed in the second round of
2 closing submissions.
3 So, if there is anything else from either side,
4 let 's close it for today and we will resume tomorrow
5 morning at 9 o'clock. Thank you.
6 (5.32 pm)
7 (The hearing adjourned to 9 am on Wednesday, 29 July 2026)

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I N D E X

1
2
3 Housekeeping1
4 'Claimants Opening Submissions on the Remitted Issue

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