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

Day 2

July 29, 2026

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Wednesday, 29 July 2026

(2.00 pm BST)

Housekeeping

THE PRESIDENT: Good morning all and welcome to the second day of the hearing in these remitted proceedings.

Are there any housekeeping issues from either side? On the Claimant's side.

MR PARTASIDES: Good morning, Mr President, members of the Tribunal, there's one issue that we wish to raise.

In addition to the 187 slides that we received yesterday from Respondent we also received, as you have this morning as well, two demonstratives. One of them, demonstrative E is a one-page timeline -- timetable, which is based on the evidence on the record which we don't have an issue with.

The other is demonstrative D, which is a 34-page compilation of extracts of Additional Judgment and Investment Committee member testimony, which seems to us stretches the boundary between demonstrative and further submission. This is an annex that could and should have been presented with the Respondent's Rejoinder just filed two weeks ago and, had it been, we would have had an opportunity to draw your attention during our opening submission to its incomplete and one-sided nature, which we

have been deprived because it has only now been provided.

We don't propose to object, Mr President, members of the Tribunal, to its admission, save to say that it is one-sided and incomplete and, to the extent the Tribunal finds this document to be useful at all, then we would reserve for ourselves the right to complete it at the same time that we file our written rebuttal to be discussed at the end of today.

So no objection to it being raised with that proviso.

THE PRESIDENT: Any comments on the Respondent's side on that?

MR WARE: Given that there's no objection to our use of the demonstrative, I don't have much further to say. We would not object to the Claimant having an opportunity to present any additional summary of the evidence that it may wish to submit in response to this document.

THE PRESIDENT: In connection with the rebuttals?

MR WARE: In connection with the rebuttals.

THE PRESIDENT: Okay. It looks like we have an understanding on how to proceed. Anything else?

(Pause)

The Tribunal's wish on this procedure is that if, you, the Claimant, decide to comment on that exhibit or demonstrative that you do it by way of a mark-up rather than a separate submission to make our life easier, as you did

earlier.

MR PARTASIDES: That makes complete sense. We shall do so, thank you.

There are no other issues on our side, Mr President.

THE PRESIDENT: Very good. So then we proceed, on the Tribunal's side, simply a reminder to the Respondent, Mr Ware, when you proceed that if you plan to address any protected information, please indicate that before you deal with that information so that we can suspend the broadcast and then also indicate when you are done with it. Thank you very much.

Please proceed.

Opening submissions by MR WARE

MR WARE: Thank you very much. And good morning, members of the Tribunal.

It's an honour to have the opportunity to present to you on behalf of Korea in these remitted proceedings. I'll be sharing the opening submissions today with Mr Peter Webster from Essex Court Chambers, to my left, and Mr Kevin Kim from the Peter & Kim firm to my right.

Now, we begin, of course, with the issue that has been remitted by the English court and the court has formulated that issue with crystal clarity. The issue is: did the breaches of the Treaty found to have been

constituted by the measures of the Blue House, the Minister of Health and Welfare and the Ministry of Health and Welfare, cause loss or damage to the Claimant and the relief to be awarded for such loss or damage?

Now, Claimant has devoted much effort in trying to narrow the scope of the remitted issue as formulated by the court, but the terms of the order are clear. The first question is whether the Blue House measures caused any loss or damage to Claimant. The second question is what the remedy should be for any such loss or damage.

Causation and loss. Those are the issues that have been remitted and that will be the focus of our submissions today.

Now, we accept, as a starting point, that the Tribunal has already found that conduct by the Blue House, by Minister Moon and by the Ministry was in breach of the minimum standard of treatment under Article 11.5 of the treaty. That conduct, which the parties for convenience refer to as "the Blue House Measures", consisted of the President and the Blue House instructing Minister Moon and the Ministry to intervene in the merger, and Minister Moon and the Ministry then intervening in the NPS's vote on the merger and instructing the NPS to have the vote be taken by the Investment Committee, and to ensure that the vote be in favour of the merger; that's in award paragraph 602 (a).

The resulting interference with the NPS's independent decision—making process was wrongful, as the Korean courts and as this Tribunal have held. But in international law, not every wrongful act gives rise to an obligation of the state to make reparation. Sometimes a declaration of breach is the only available remedy. Bosnian Genocide is a case in point. It stands for the proposition that unless the Claimant can show with sufficient certainty that its claimed loss would have been avoided but for the breach, the state cannot be ordered to compensate for such loss.

And sometimes the only form of loss that can be established with sufficient certainty is a loss of opportunity. Bilcon is a case in point. It stands for the proposition that when the state's wrongful conduct has resulted in an unfair decision—making process, the Claimant cannot recover reparation for the outcome of that process unless it can establish, with sufficient certainty, that the decision would have been different absent the wrongful conduct.

We will revisit Bosnian Genocide and Bilcon at multiple points during our presentation today.

Now this slide 4 represents a slide, or reproduces a slide, from Claimant's opening presentation at the Geneva hearing, which illustrated Claimant's asserted causal chain

in three simple links. Link 1, Korea's breaches caused NPS to vote in favour of the merger. Link 2, NPS's vote for merger caused merger to be approved. And link 3, merger caused loss to the Claimant.

But of course the asserted causal chain is far more complex. This slide 5 shows a fuller version of the asserted causal chain. It begins with the Blue House measures and then traverses the misconduct of a non—state actor, CIO Hong, who put pressure on the NPS research team to produce and present to the Investment Committee a reverse—engineered synergy projection, what we call the tainted synergy projection. It then traverses the decision—making of the 12—member Investment Committee which decided on 10 July 2015 that the NPS should vote its shares in favour of the merger, and the NPS's actual vote on the merger seven days later.

It then traverses the SC&T general meeting of shareholders at which thousands of shareholders, comprising a two—thirds supermajority of all shareholders present, voted for the merger.

It then traverses various movements in the SC&T stock price, determined by thousands of buyers and sellers in a public market space, before finally arriving at its destination, Claimant's loss, which the Tribunal determined as the difference between market value of Claimant's SC&T

shares on 16 July 2015 and the value that Claimant received for those shares from subsequent recoveries.

Now this slide 6 illustrates the factual causation enquiry. The question stated simply is whether Claimant has proven that, absent the Blue House measures, the NPS in all probability would have voted differently. In the formulation of that simple question, you have the essence of our answer to certain of the questions that were posed yesterday. It is Claimant that bears the burden of proof on factual causation, just as on any other element of its claim.

What Claimant must prove is that its loss would have been avoided absent the Blue House measures. In the circumstances of this case, that means proving that the NPS would have voted against, rather than in favour of, the merger. The standard of proof is sometimes expressed as "in all probability" and sometimes as "with sufficient certainty". In plain English, it means "highly likely". It's still a probabilistic standard but it is more demanding than a mere balance of probabilities.

In these remitted proceedings, Korea has taken as its task to show that Claimant has not met its burden of proof on factual causation. We have done that by showing that there is a substantial body of evidence in the record, including evidence of the NPS's analysis and decision—making

in the actual world, that points in the other direction. The evidence shows an NPS that had compelling reasons to support the merger and that likely would have done so even without any pushing from the Ministry.

Why then, Claimant asks, did the Ministry feel the need to go to the "criminal lengths" that it went to, if the NPS was headed in the direction of a likely "yes" vote anyway? The answer can be summed up in four words: leave nothing to chance.

This merger was viewed as a matter of national interest. The actors involved were not willing to accept a likely or probable "yes" vote. The record shows they wanted a "100% guaranteed" "yes" vote. And so they intervened. But that does not mean that their intervention changed the direction of travel. What it means is that the decision—making process was changed. It is for Claimant to prove, based on evidence, that the intervention changed the outcome of the NPS's decision—making process. As I will show later this morning, Claimant has not done so and cannot do so on this record.

This slide 7 illustrates the legal causation enquiry. The question, stated simply, is whether Claimant has shown that the Blue House measures were a direct and proximate cause of Claimant's loss. If the chain is too attenuated, too aleatory, legal causation is not satisfied.

Notice the three links in the chain highlighted in orange on this slide. Each of those links involves an event of considerable complexity. First, the decision of a 12—member deliberative body, then the vote of thousands of shareholders, each with their own set of interests, and finally the stock transactions of thousands of buyers and sellers of SC&T stock, which together produced a decline in the SC&T share price following the merger vote.

Legal causation asks the question: is it right that, because it engaged in the Blue House measures, Korea should bear full legal responsibility for the adverse economic consequences to Claimant from the combination of all of those events? We say that it is a bridge too far. Mr Webster will address you on legal causation.

This slide 8 illustrates the loss of chance framework. Here the third link is not "merger caused loss to Claimant", as in Claimant's graphic. Instead, the third link, the relevant loss, is Claimant's loss of opportunity to have its anti—merger campaign decided in the absence of government interference with the NPS's decision—making process. You can see straightaway the elegance and simplicity of this framework. It fits the circumstances of this case, but Claimant has not invoked it, instead opting for an all—or—nothing strategy. In a moment, Mr Webster will also be addressing loss of chance.

Now, members of the Tribunal, Korea commends to you the Additional Judgments, which contain a wealth of important factual findings that go directly to the questions posed by the remitted issue. The Korean courts have taken tremendous care in their handling of these complex criminal and civil cases and we trust that you will find them very useful. We also appreciate that certain of the judgments are very long and so we have prepared the Additional Judgments Annex to help guide your review. Mr Kevin Kim is going to introduce these new judgments in greater detail shortly.

These three slides, slides 9 through 11, help situate the new judgments among the full suite of merger—related judgments you have before you. For reference they are the Moon/Hong judgments, which are criminal proceedings regarding the exercise of the NPS's voting rights on the merger. Then we have the first set of Additional Judgments, what we call the JY Lee Unlawful Merger Judgments, which are criminal proceedings concerning alleged illegality in the merger transaction itself. Then you have three sets of civil proceedings concerning the merger, the two Merger Injunction decisions, the Merger Annulment judgment, and the second of the two sets of Additional Judgments, the Shareholder Claims judgments, which arise out of claims by SC&T shareholders against the

Republic of Korea seeking economic damages for alleged losses in share value as a result of the same wrongful conduct comprising the Blue House measures here. For completeness on civil proceedings, the Tribunal will recall there are also a set of decisions arising out of Appraisal Price Determination proceedings.

Now, the Tribunal will, of course, also recall three additional sets of judgments arising from criminal proceedings regarding allegations of bribery and corruption as listed on this slide 11. The most salient point, in Korea's submission, is that in the President Park case, the court considered and rejected the prosecution's claim that there had been an unlawful solicitation of President Park by JY Lee for assistance in relation to the NPS's exercise of voting rights on the merger. The Korean courts confirmed this point again in the JY Lee Unlawful Merger case as Mr Kim will explain.

So, members of the Tribunal, let me close this introduction with a few points about the merger transaction that is the subject of this arbitration and with which you are already so familiar. After the transaction was announced, and following Elliott's decision to wage a campaign of shareholder activism against the merger, a fierce battle for shareholder opinion ensued between Elliott and Samsung with each side pressing its own

narrative about the merger.

Elliott, for its part, described the merger as:

"So breathtakingly bad and designed to favour the Lee family over the legitimate rights of the investing public."

Samsung, for its part, described the merger as a new growth engine for the Samsung Group and touted the benefits of the merger for the merging companies. The NPS listened carefully to both of these narratives and reviewed carefully the information and data that was provided in support of each narrative.

In the original proceedings in this arbitration, Claimant sought to tarnish and discredit all aspects of the pro—merger narrative as part of a corrupt and fraudulent scheme by Samsung. These were said to be known and established facts. The stock prices of the merging companies, the viewpoints of security analysts, the valuation report of Big Four accounting firm Deloitte, even the very act of other non—aligned shareholders voting in favour of the merger, all of this must be viewed with profound scepticism, you were told, because Samsung had manipulated and corrupted it all.

Well, every one of the prosecutor's allegations upon which Claimant relied to argue that Samsung had engaged in corruption, manipulation and deception in relation to the merger, every one of those allegations was rejected by the Korean courts in the JY Lee Unlawful Merger case. Mr Kim is going to address these points so, in the interests of time, I will not read these lists of rejected criminal allegations on slides 14 to 15, but I commend it to you.

Another benefit of reading the JY Lee unlawful merger judgment is you get to find out how the story ended. It turns out the merger delivered on, and in some respects even exceeded, expected benefits that Samsung and various analysts had touted at the time of the events in question. Most strikingly, because of its financial strength following the merger, new SC&T was able to absorb KRW2.6 trillion in dormant SC&T losses not long after the merger was consummated. I'll come back to the significance of that fact later.

We are, of course, not suggesting that the Tribunal should judge this transaction from the perspective of hindsight, but we do say that many of Claimant's categorical assertions throughout this arbitration to the effect, for example, that the NPS could not rationally have voted in favour of this transaction are difficult to square with the finding of the Korean courts in relation to the benefits actually realised by the merger.

Members of the Tribunal, the remainder of our submission will proceed in six parts. Mr Webster will

13

address you on the scope of the remitted issue and then Mr Kim will address you on the Additional Judgments. On factual causation, which will be the longest portion of our submissions today, Mr Webster will address you on the legal issues and I will address you on factual evidence.

Mr Webster will then come back on legal causation, loss of chance and costs and interest and, if there is time, I will finish with a few brief concluding remarks. Thank you very much.

Opening submissions by MR WEBSTER

MR WEBSTER: Good morning.

Scope. So the Claimant is trying to portray this as far more complicated than it is and, importantly, trying to portray the matters before this Tribunal as far narrower than they actually are.

The starting point, as Mr Ware says, when working out what is before you, is to look at the court order, which is on this slide [slide 19] and one can compare that against the Claimant's position as set out in writing, which is at the bottom of this slide. And it would be surprising, in my submission, putting it mildly, for the order to have been made in those terms if the scope of the issues arising on remission is actually as the Claimant contends, ie limited only to the questions of whether legal causation has been satisfied.

14

Now, just before turning to the detail, I do flag at the outset, and also I want to emphasise that I'm not making this submission in terrorem, I am just making an obvious point that it is incumbent on the Tribunal to decide the issues that are before it and, from the English court's perspective, were that not to happen, that would be a failure of arbitral process. And so it is very important to identify what the issues are. I'll take you to the court's judgment shortly, because that, in my submission, is (a) short, in relevant parts, and (b) it's obviously the point of reference and (c) it supports Korea.

But just before doing that, it's useful, I think, to take a step back. In summary, what has happened is as follows: the court has upheld Korea's challenge to the Tribunal's finding that the NPS was part of the state. The consequence of that is that acts of the NPS are not measures and so any finding that an act of the NPS was a treaty breach is outside jurisdiction and has to be removed from the award, which the court has done.

But, as we know, there were also findings that there were breaches at the level of the Blue House and such findings survived the court challenge and so the question then arises: well, what about causation? And the court -- I'll take you to the judgment in a moment -- proceeds in this way: first, it identifies the arguments that the

15

parties had made in the arbitration about causation.

Second, it then asks itself -- and this is paragraph 265:

"Whether, on a fair reading of the award..."

And you'll understand why I am emphasising those words:

"Whether on a fair reading of the award the Tribunal had made findings of both factual and legal causation [that's the court's words in 265] by reference to the Blue House measures alone."

And the court concluded that the Tribunal had not done so.

In consequence, the award of damages which was made cannot stand because there are no causation findings supporting it, certain parts of the Award are specifically set aside, and the causation issues now arise before you to be determined.

Now, they're not back before you to be sort of revisited or, as the Claimant submits, to be confirmed. You could only be confirming a finding if you had already made one and the whole point of the court's judgment is that it held, on a fair reading of the award, there had not been such a finding. And that is obviously a critical point and it's also a point which deals with so many of the Claimant's criticisms about Korea advancing the same arguments as

16

before. It is, because the logic of the English court's analysis is that those issues had not been determined, but now arise for determination.

So that's the overview.

I'd now like, with your permission, just to walk through the judgment. You may be very familiar with it. I've given you hard copies this morning just to make that easier. It's {H/222}, CLA-222. And one paragraph which hasn't got a lot of attention so far is on page {H/222/8} and this is in the section of the judgment where the court is summarising the -- what the award did and here at page 20, top of page 8 the court says:

"There is an issue as to whether the Tribunal made a finding as to how the NPS would have voted but for the treaty breaches at the level of the Blue House."

Then moving on to page {H/222/65}, which is paragraph 242, this is after the judge has set out basically the outcome of his jurisdictional analysis. At 242, he identifies the obvious point that there were two types of claim by reference to the Blue House measures and the NPS measures.

At 243, the effect of his findings about the NPS is that the Tribunal had jurisdiction to make the Blue House breach findings, but not findings about the NPS.

At 244, he sets out his findings about the

Blue House measures.

At 245, he notes that the Tribunal had also made findings of breach by reference to the NPS measures. And then, 247, he said that:

"[F]indings, to the extent that they are dependent on the NPS being a de facto organ are made without jurisdiction."

And then at 248 you see the court identifying the question which then arises, namely whether the Tribunal's findings about the Blue House measures provide a sufficient jurisdictional basis for the relief which has been awarded.

Now, then in the following paragraphs, one sees him setting out some English authorities about the circumstances in which, having set aside part of an award, another part of the award can be preserved or severed. I'm going to this because it's relevant to respond to one of my learned friend's arguments about the test that the English court was applying.

So between 250 and 253, {H/222/67}, you see reference to previous authorities and then at 254, {H/222/69}, Lord Justice Foxton sets down his formulation of what the legal test is for working out whether one can sever other parts of an award where parts of the award have been made without jurisdiction. I'll just let you read that to yourself. The point I'd highlight is he is saying when it

is apparent from -- so the other parts of the award are not affected:

"[If] it is apparent from the face of the award that that part of the award which is to remain capable of enforcement does not depend on those parts being set aside ..."

That's the first element of the test and then the second element of the test is:

"There a realistic possibility that there would have been a different outcome."

So in 254 he's setting out the severance test and you see him referring to it later by reference to tainting other parts of the award.

And then in 255 he refers to the Integral Petroleum case on which the Claimant places a lot of reliance.

Now, as the Claimant says, it is a principle of English law under section 67 of the Arbitration Act that the court may refuse to grant relief if it is satisfied that the excess of jurisdiction had no effect on the relief granted by the Tribunal. And Claimant's submission is that that was the principle in play later in the judgment. I just invite you to note here that one doesn't get the impression from reading this paragraph that Lord Justice Foxton thinks this is the decisive point.

"Finally I should record that it was common ground..."

Then he moves on after the outline of principles, to his decisions. First, he looks at the findings of breach and he concludes that those are not separable -- I beg your pardon, they are separable and therefore they survive.

But then he looks at causation. And you see from the heading above 261, {H/222/70}, when he's talking about are the findings on causation and loss tainted, "tainted", that's a reference back to the severance test in 254. He says that.

He then conducts a review of the parties' submissions in the arbitration to work out what the arguments on causation by reference to the Blue House measures were. He puts his conclusions at 263, {H/222/71}, and the point I ask you to note here is 263(v), {H/222/72}, because he identifies that one of the issues that would arise in that situation is a loss of a chance analysis and I'm highlighting that obviously because the Claimant's submission is that that point does not now arise on remission. That's inconsistent with what Lord Justice Foxton is saying there.

At 264, the judge then turns to look at the Claimant's arguments. So the Claimant was relying on various paragraphs before him as allegedly showing that the

Tribunal had made a finding of causation by reference to the Blue House measures alone and the judge rejects that in 264 and 265. I'd like to highlight, first, the points on which Korea relies in these paragraphs and then deal with some points made by the Claimant.

First, if we could look just at 265, over the page, {H/222/73}, you see here the court expressly rejecting the Claimant's case that there were existing findings of factual and legal causation in the award connecting the Blue House measures to the loss. I've already highlighted the wording to you a moment ago:

"I am not persuaded that it's open to me to conclude on a fair reading of the award..."

Not some elevated "does it need to be completely clear standard, just a fair reading of the award, and he says:

There are no findings of legal and factual causation connecting the Blue House measures to the loss.

The second point to highlight is that the judge places considerable weight here, and you see it in 265, with this reference to paragraphs 814 and 821 of the award. He places considerable weight on the structure of your causation section. I'd ask you to note that when one looks at the causation section of the award, the point the judge is making is that the causation in fact analysis in 815 to

821 of the award is about whether the NPS had the casting vote in the shareholders' meeting. It's downstream from the NPS. It's not the upstream connection between Blue House measures and NPS decision. And that's also true if one looks at the legal causation section.

And then the third point to stress about these two paragraphs is if one looks back over the page at 264(i), {H/222/72}, Lord Justice Foxton specifically makes a finding about paragraphs 602 and 603. This is critically important because the Claimant places an incredible amount of weight on 602 in its presentation and in its submissions to you, basically saying: those are existing findings of causation. And Lord Justice Foxton specifically holds that 602 does not address the question whether there was a requirement, and if so for whom, to show what would have happened if there had been no breach at the level of the Blue House and whether that burden had been discharged. Then he makes the same finding in respect of 623 in the same following subparagraph.

Now these are binding findings of the English court. They're binding between the parties and, I would also respectfully say, on the Tribunal. It's not open, in my submission, to the Claimants now in this proceeding to say to you that 602 is a finding of causation, if a but—for test needs to be applied; the English court has said that

it's not.

It was also put to you yesterday that it would be schizophrenic, I think was the word used, to have this finding, 602, in your award and then in your remittal award to say that there is no causation. But this paragraph gives the answer to that, because Lord Justice Foxton is saying that 602 was not addressing the but—for causation question, so there would be no difficulty in your remittal award saying "There needs to be a but—for causation analysis and I conclude that it is not met".

So those are the points that the Republic of Korea emphasises about those paragraphs. Just turning to deal responsively with Claimant's point. It says that paragraph 265 is a decision by court applying this very exceptional Integral Petroleum discretion, so the discretion not to set aside an award because it would make no difference. And the logic behind Claimant's argument seems to be to suggest that there's a very high threshold test if the court were applying Integral Petroleum and so that provides some room for the Claimant to say: well, actually, if you look at the award, there are findings of causation there, it's just that it wasn't clear enough for the court.

But that's just completely inconsistent, in my submission, with what 265 actually says. It's not applying an "Is it completely clear" standard; it's saying "This is

my view on the fair reading of the award". It's very flattering of the Claimants to note that I had submitted to the Tribunal —— to the court, I beg your pardon, that the court needed to be completely satisfied but, with respect, that's not the point. The point is: what has the court found? And it's very clear in 265, in my submission, what threshold it was applying.

Now, to the extent it matters, and in my submission it doesn't, but just for the record, the Republic of Korea was not relying on Integral Petroleum. Integral Petroleum was the Claimant's case that it was relying on. My submissions were about the severance test not about Integral Petroleum. But in my submission one doesn't need to get into all of that, because it's clear in 265 what the court has done.

In any event, even if, even if the court were in 265 applying some Integral Petroleum test, with respect, it wouldn't help the Claimant, because we're still here. We'd still be here with the remitted issue, with various paragraphs of the award set aside, and with the court having said that, in its view, on a fair reading of the award, there are no existing findings of factual and legal causation between the Blue House measures and loss.

So the Integral Petroleum point is, in my submission, a red herring.

Two quick final points on this, just by reference to the ruling that the court hands down alongside its order. And just to explain, perhaps the Tribunal's familiar with the English process, but just in case not, when a judgment is given it's up to the parties to try to agree an order. If they can't agree it, they submit a dispute about the formulation of the order to the court. This is the ruling in respect of those issues.

Two points to flag. Paragraph 5(c) again, a specific finding in respect of paragraph 602, the paragraph on which the Claimant is repeatedly placing reliance. The judge says in terms:

"Once those provisions of the award which find that the conduct of the NPS constituted a measure adopted or maintained by Korea are set aside, this paragraph simply involves a factual finding as to what the NPS did and under whose direction it acted."

And so that's confirming the point which I've already shown you in 264, that the judge is saying these -- that paragraph does not contain findings on a counterfactual causation question.

The next point to show you here is over the page in subparagraph (l)(i). There was a dispute between parties about whether the entirety of the causation section had to be set aside or only parts of it. The judge only sets aside

parts of it. It's very important to see what he says. He's not setting aside 815. That's where you set out your factual causation test and he says:

"The Tribunal's findings as to the test remain relevant to the issues which are remitted."

He wouldn't be saying that if there was no factual causation issue back before you.

Then 816 to 821, those are all findings about whether the NPS had a casting vote in the shareholders' meeting. And what he says is that those are relevant on a potential causal pathway. Again, he wouldn't be saying that if there was already a binding finding, as the Claimant would have it, that there is causation between Blue House, NPS and outcome. He's describing that as a potential causal pathway.

So, members of the Tribunal, unless I can help further, that concludes my review of the judgment and the ruling. In my submission, it is crystal clear that both issues of fact -- factual causation and legal causation are back before you and 602 does not have the status for which the Claimant contends.

MR WARE: With the Tribunal's indulgence now, perhaps would be a good opportunity for the first of our comfort breaks this morning.

THE PRESIDENT: Let's do that.

Shall we resume at 10 o'clock.

Thank you.

(2.48 pm BST)

(A short break)

(3.04 pm BST)

THE PRESIDENT: Okay, let's proceed. Mr Ware or your colleague.

Opening submissions by MR KIM

MR KIM: Good morning, Mr President, members of the Tribunal. For the record I'm Kap-You Kim representing the Republic of Korea.

My task this morning is to guide you through the two sets of Additional Judgments. In doing so I briefly revisit another two sets of the Korean court judgments that the Tribunal has previously reviewed, the Moon/Hong judgment and the Merger Annulment judgment. While I appreciate that the Tribunal has already reviewed each judgment, I ask for the Tribunal's indulgence in briefly revisiting them as doing so will help place the new judgment in proper context.

Slide 25. Moving into the shareholder claim judgment, one thing I want to note here is that the shareholder claim court heard on this case for more than five years, two years in the first instance and three years in the second instance, and in doing so fully considered the Moon/Hong judgments in addition to other evidence. Yet, the

court determined that there was no proximate causal relationship between Minister Moon and CIO Hong's action and damages to Samsung C&T shareholders.

In this case, the plaintiffs were former Samsung C&T minority shareholders and the defendants were ROK. The plaintiff claimed damages for losses from the reduced value of Samsung C&T shares under the merger ratio. The court dismissed the plaintiffs' claims for damages.

As you can see on slide 27, the factual matrix of the shareholders' claim case is comparable to this arbitration: the same type of parties, the same type of losses.

Under Korean law, for a tort claim to be established a causal relationship between unlawful act and the damages is required. To answer that question the court employed the established jurisprudence that damages can be found if:

"A proximate causal relationship between the public official's breach of duty and the plaintiff's damages exist, which shall be assessed based upon probability of a typical outcome."

In deciding whether a proximate causal relationship exists, the court acknowledged that NPS's vote stood between Minister Moon's acts and approval of the merger. As the NPS exercised its shareholder rights existing between the act of abuse of authority and approval of the merger agreement, the court found that Korea could be held liable for compensation on only two possible grounds.

The first route was to find that the public official 's acts and NPS's act constitute a joint tort or, alternatively , the second route was to find public official 's acts have deprived the NPS of freedom to make decisions.

The court elaborates further that:

"If the NPS's exercise of a shareholder right was based upon its free will , the causal relationship between the public official 's unlawful acts and the alleged damages is severed."

On this standard, the first ground was not found. The court found that shareholders' exercise of voting rights is shareholders' own right and cannot be regarded as joint tort.

The second ground was also not found. The court concluded that the acts of Minister Moon and CIO Hong did not actually affect the exercise of voting rights by the Investment Committee, based upon three specific reasons which I will examine in slide 31.

The first reason was that the voting method adopted by the Investment Committee cannot be regarded as necessarily favourable to securing a vote in favour.

Second, the court found that, as to synergy materials, the Investment Committee members, being experts, were all aware that synergy effects could not be accurately quantified and certain members in fact raised the issue leading to discussion within the Investment Committee, such that it cannot be said that members believed the losses that were caused as a result of the merger could be recovered on the basis of the synergy analysis alone.

Third, the court stated that the synergy effects were merely one of several criteria for assessing the effect of the merger, with overall consideration given to changes in governance structure, the impacts on the share price of relevant securities and Samsung Group affiliates, the stock market, the economy, and impacts on the fund management in the event the merger fell through.

On that basis, the court concluded that:

"It is difficult to find the acts of Minister Moon and CIO Hong actually affected the exercise of voting rights by Investment Committee."

MR GARIBALDI: On what standard of proof were these findings made and can you point to the particular passage in the judgment where the standard of proof is mentioned?

MR KIM: Maybe I can find the relevant portion during the break. I can't find it immediately, but the

burden of proof is based upon the normal standard of Korean courts and as I just mentioned that is probability .

MR GARIBALDI: I'm sorry, repeat that: the burden of proof is based on?

MR KIM: Level of probability.

MR GARIBALDI: Level of probability. Okay. Could you come back to us and give us the citation of the passage?

MR KIM: Yes.

MR GARIBALDI: Thank you very much.

MR KIM: Let me pause here, Mr President, and members of the Tribunal. You may be wondering how the shareholders' claim judgment fits together with previous judgments concerning the merger. So to assist your understanding I briefly revisit the Moon/Hong judgment and the Merger Annulment judgment here.

In the Moon/Hong judgment, Minister Moon was charged with abuse of authority and obstruction of exercise of rights. You can see that there is no element of loss in the crime. So naturally the court found none in relation to Minister Moon.

For CIO Hong, the criminal charges in question were breach of occupational trust. The offence is established if a person who manages another's affairs in the course of business breaches such duty and thereby acquires benefit or causes a third party to acquire such a benefit to

the loss to the principal.

As to elements on loss to the principal, it is important to understand that the loss does not need to be an actual loss. Instead, a risk of loss is enough as the Supreme Court has held the risk of loss is sufficient .

The Moon/Hong first instance court specifically stated the same legal principle:

"In crimes of breach of duty, the moment where financial damage was caused includes not only instances where practical damage has been caused, but also instances where a danger of actual financial harm was brought."

The specific loss the court found as a result of CIO Hong's actions should be understood in this context.

Slide 35. Here I wish to make one clarification that may assist the Tribunal. Unlike some other jurisdictions , in Korea, factual finding is not confined to the first instance court. Instead, the second instance court in Korea also is a fact finder, while the Supreme Court decides only questions of law. So the second instance court judgment represents the final determination on the fact. These facts help understand the following:

For CIO Hong, the first instance court found that CIO Hong breached his occupational duty and caused loss equivalent to the difference between what the financial status of NPS would have been had the mergers not been approved and the financial status as a result of the approval of the merger.

The Moon/Hong second instance court vacated the judgment of first instance court. So second instance court expressly rejected existence of such loss. Instead, the second instance court found a completely different type of loss. You see from the slide 36, the second instance court had to decide the two types of loss under the revised charges: first, loss based upon the difference between so-called appropriate merger ratio and actual merger ratio. As you can see, 1, 3 and 5 on the screen, this was a loss that any Samsung C&T shareholders could have potentially suffered and the same type of loss that Elliott argues in this proceeding. The Moon/Hong second instance court specifically rejected this.

Second, the additional benefit that NPS could have acquired had it actively leveraged its casting vote, which is a loss only unique to the NPS. The second instance court admits this, but in doing so rejected that a specific amount of loss can be calculated.

Mr President, members of the Tribunal, let me repeat: the Moon/Hong court did not admit any type of loss, quantifiable or not, that is being argued by Claimant in this proceeding. Instead, the court only recognised entirely different loss, that is unique to the NPS.

As a final point, CIO Hong was also charged for casting his own vote in favour of the merger as a member of the Investment Committee. However, second instance court rejected these charges. In other words, the second instance court did not hold CIO Hong had a duty to vote against the merger. Neither did it hold that he has a duty to make the NPS vote against the merger.

With that I briefly turn to the Merger Annulment judgment.

MR THOMAS: Just before you proceed, just so I understand the way in which the second instance court relates to the first instance court, is it possible for the second instance court to make a factual -- an implicit factual finding which is different from that made by the first instance court or, where it makes a different finding of fact, must it expressly do that by way of vacating some part of the lower court's decision?

MR KIM: Both is possible.

MR THOMAS: Thank you.

MR KIM: Yes.

Slide 38. In this case, the shareholders sought to annul the merger. The court dismissed the claim finding that the merger's purpose, ratio, timing and procedure were all lawful. The Merger Annulment court rendered its decision after considering the Moon/Hong first instance

judgment and its underlying testimonies.

Now, how do these court judgments fit together? We have -- we prepared a diagram at slide 39 to illustrate this. You see that the chain of events across the middle, the chain the Claimant says exists: the ROK's interference, the Investment Committee open voting, NPS's vote in favour and the merger.

The Moon/Hong judgment examined the first part of this chain. In the end the loss found was only unquantified loss unique to the NPS: lost opportunity to gain potential profit from actively leveraging its casting vote.

The Merger Annulment judgment examined the end parts of the chain and found no ground for annulment in merger's purpose, ratio, timing and/or procedure. As I will explain shortly, the JY Lee judgment examined this same ground once more in much greater detail, factual depth and came to the same conclusion.

Now, the shareholders' claim judgment examined the entire chain. The court took the conclusions of the Moon/Hong judgment as established, including that certain degree of influence may have been exerted on the Investment Committee. The court then asked whether such influence actually caused loss to the shareholders and its conclusion was the NPS vote was not affected. The court found no proximate causal relationship and no loss in value to

Samsung C&T shareholders. This is how this set of judgments sits alongside one another.

With that, let me turn to the JY Lee judgment. Slide 40. So far, I have explained to you how the Korean court cases made conclusions surrounding the decision-making process of the NPS. Now I explain to you about the JY Lee judgment, which dealt with the merger process in its entirety.

The defendants were JY Lee, former Samsung executives and outside accountant. They were indicted on 23 counts in total. Sixteen of these counts were for violation of the Capital Market Act and the remaining counts include breach of occupational trust owed to the former Samsung C&T and its shareholders, violation of the Audit Act, and perjury.

For the current purpose, I focus mainly on the charges for violation of the Capital Market Act and breach of occupational duty as they are more relevant to this arbitration.

Now, I direct your attention to the last column of this table. The verdict was not guilty in every count for every defendant. This outcome was consistently confirmed in all three instances up to the Supreme Court.

The JY Lee judgments are also unique in another aspect, for their comprehensive consideration of the record.

The first instance court judgment, 1,400 pages and the second instance court is another 800 pages. More than 100 hearings were held, only counting those held during the first instance court, and evidence of over 20,000 items were considered.

In particular, the JY Lee judgments expressly considered and referenced every earlier Korean court judgment as well as the award in this case and the Mason award. Nothing was left out. Whatever any court and Tribunal has said about the merger, the JY Lee court had it before them.

Slide 43. Let me give you one example: the JY Lee second instance court examined paragraph 979 of the Mason award where the Mason Tribunal "effectively disagreed with the Korean civil courts' ruling that the merger was not unfair in the stock appraisal price injunction decision". In doing so, the Mason award relied on the second instance decision of the Stock Appraisal proceedings. However, such finding was later reversed by the Korean Supreme Court.

The JY Lee court's conclusion was the Mason award's merger ratio determination was:

"... highly likely to have been made in a situation where sufficient review material has not been presented."

I note that the Mason Tribunal was also not

assisted by the Additional Judgments since the Tribunal rejected Korea's application to submit the first instance judgment of the shareholders' claim and JY Lee judgment.

Slide 44. Going back to JY Lee judgments, what do the Capital Market Act offences require? Two provisions matter, which is on the screen for your reference. Notably the defendants were charged with the Capital Market Act in relation to almost every process that relates to the merger. Therefore, the court examined the entire process of how the merger was conceived, how the ratio and timing was set and how the vote, including the NPS vote, were secured.

Now I turn to the JY Lee courts' findings. Given ultimately all charges were acquitted, I selectively explain to you the more relevant charges.

First, the phase leading to the board of directors' meeting. As to the allegation that the merger was unilaterally decided by JY Lee without the involvement of Samsung C&T, the court rejected it. Instead, the court found that the merger was decided following substantive review and discussion within both companies.

As to allegations that Samsung deliberately suppressed share price for merger ratio, that is more beneficial to JY Lee, the court found that no evidence exists.

Now to the next phase of Samsung C&T board of

directors' meeting when the merger was decided between two companies. The court rejected the merger agreement was decided solely for the benefit of JY Lee's succession. In doing so, the court made important factual findings that the merger had a reasonable business purpose and the resulting strengthening and stabilisation of group control aligned with the interest of Samsung C&T and the shareholders as well.

Next, the court rejected that the merger ratio was manipulated through suppressing Samsung C&T's share price while overvaluing Cheil. The court pointed to the market record. The court found that Cheil's shares were on the upward trend and there were various factors in favour of the increase of Cheil stock prices. At the same time, prior to the merger, Samsung C&T share price was already in downward trend.

Taking such fact—findings into account, the court further examined the merger ratio itself and rejected the allegation that the ratio was unfairly calculated.

Moving on to the general shareholders' meeting phase. The court rejected the allegation that the synergy effect of KRW6 trillion prepared by Samsung C&T task force and the Deloitte Anjin report that reviewed the merger ratio were fabricated.

On the synergy figure the court traced how the

number was produced and found that it is difficult to conclude that the synergy effect is false or groundless. It took into consideration that the numbers were calculated by going through numerous revisions and corrections based upon continued discussions with consideration to various aspects of the business.

The court, after careful examination of all relevant evidence, including a prosecutor's statement report and further court testimonies made under oath, concluded the same with Deloitte Anjin report.

The court also rejected the allegation that the defendant disseminated false information and intentionally distorted investors' decision—making. Instead, the court found that the defendants engaged in ordinary PR activities and it cannot be concluded that the defendant established a plan to unduly intervene in public opinion. So no scheme to distort public opinion, no pressure to news outlets, only ordinary PR plans.

Now slide 53. As the Tribunal are already well aware, consistent with findings of the Korean court, there was no specific quid pro quo relationship between bribery that JY Lee provided to President Park and this merger and the JY Lee court "reaffirmed" this and found that the defendant did not secure the NPS vote by encouraging President Park to assert undue influence.

In doing so the court relies on shareholders' claim judgment, the judgment I took you through earlier, which held no proximate causation exists. So the criminal court and the civil court approached the issue from different perspectives and on different legal standards, yet both reached the same conclusion.

The NPS decision-making was not actually affected. We just went through the lengthy decisions of the court on charges under Capital Market Act. I want to introduce one last charge, the breach of occupational duty.

The court rejected the allegation that former Samsung C&T executives breached their duty to Samsung C&T and its shareholders by allowing the merger to go through on a damaging merger ratio. Instead, the court found that no better proven alternative transaction conditions existed. Further, the court found that merger timing was necessary and an appropriate time.

Similar to the Moon/Hong case, the lost opportunity of potential profits of Samsung C&T's shareholders was tested here.

While the Moon/Hong judgment found loss to NPS that uniquely held to the casting vote, the JY Lee courts denied there were losses to Samsung C&T shareholders. This finding is consistent with shareholders' claim judgments as well.

In conclusion, the merger was tested on every ground. All phases of the merger were scrutinised on micro levels. Under scrutiny, the JY Lee courts reached a consistent conclusion that the merger had a reasonable business purpose, the ratio and timing was not unfair, the shareholders' meeting was not tainted by the scheme or false information, and the shareholder decision-making, including NPS, was not actually affected.

Those findings speak directly to the question in this arbitration: absent the influence what would NPS have decided as to the merger? The Korean court's answer is clear: NPS has every reason to vote exactly as it did.

I will conclude with this: all of the Korean court cases uniformly demonstrated that there is no causal link flowing from ROK's measure to Claimant's loss.

Responding to Mr Garibaldi's question on the burden of proof. It is annex B -- B/28, I'm sorry, annex B/28, page 12, standard of proof. It was page 12 -- Opus reference page {B/28/12}:

"The burden of proving these requirements lies with plaintiff. Under the principles of civil procedure, the requisite standard of proof requires establishing a high degree of probability (likelihood), sufficient to recognize the existence of a fact by comprehensively reviewing all evidence in light of the rules of experience."

THE PRESIDENT: Thank you very much.

MR KIM: Thank you.

Opening submissions by MR WEBSTER (continued)

MR WEBSTER: I will make some submissions on the legal aspects of factual causation and then we'll have Mr Ware making submissions on the facts. So if we could have slide 57, please.

There are three parts to our submissions. First, that international law does require a counterfactual enquiry in this case, that is to say that the Tribunal must ask what would have happened but for the Blue House measures. Now part of that can be taken very quickly, because that, as I understand it, is now common ground and the reference for that is the Claimant's slide 37 and transcript 66 to 67 yesterday. {Day1/66-67}. But there do still seem to be some points to make regarding the cases and in particular the belated reliance on the Amco decision.

THE PRESIDENT: If you could address, and you may address as you proceed, it seems to us that there are two kinds of but-for scenarios or but-for showings that need to be made. One is that but for the intervention the NPS would have voted against the merger; that's one scenario. And the second one is but for the intervention, the NPS would have voted in favour of the merger anyway. We would like to hear your views on who bears the burden of proof in these two

scenarios.

MR WEBSTER: I'm grateful for that. It may be we deal with that after the break when I've had a moment to reflect on it.

THE PRESIDENT: As you like. It's just we want to hear both parties.

MR WEBSTER: Yes.

The second point is applicable standard of proof, obviously, and the Tribunal will have seen by reference to Bilcon and also ICJ authority among others, Korea says the applicable standard is "in all probability" or "a sufficient degree of certainty".

In light of what was said yesterday, accepting that there does in principle need to be a but-for, we can skip over slides 59 to 63, which were just setting out some materials about that. And if you could pick up at 64, please. This is just providing the Tribunal with some illustrative cases of a but-for analysis being conducted in this type of situation. That is to say denial of justice or a sort of due process-type case, where there has been some interference or failure in a decision-making process.

Now, given the time I'll only develop two of these. The first obviously is Bilcon. As the Tribunal will recall, that's an arbitration chaired by Judge Simma and the Tribunal will have seen that Korea places considerable weight on it for three points.

First, that it supports the necessity of a but–for analysis and shows how it works.

Second, that it shows a Tribunal applying, because it views this as mandated by ICJ authority, the standard of proof that Korea contends should be adopted.

And third, it supports the availability here of a loss of a chance approach, albeit that the Claimant has chosen not to avail itself of that.

Just to recapitulate the facts for the Tribunal, if that is helpful, that was a claim regarding the rejection of permission to proceed with a project to develop and operate a quarry and marine terminal in Nova Scotia. It underwent a lengthy environmental assessment jointly conducted by the governments of Canada and Nova Scotia and that was referred to a joint review panel, ie an independent decision–making body. And in its final report that JRP recommended the rejection of the project. Now, a majority of the Tribunal holds that that process, the process that was actually followed, involved a breach of Article 1105 of NAFTA.

And there's then a separate stage of the case regarding quantum and if we go, please, on to slide 75, just to show you some of the Tribunal's language there, the Tribunal applies the counterfactual causation enquiry about

what the outcome of the JRP process would have been but for the treaty breach. And you see also that it's applying a demanding test when doing so, "in all probability", "with a sufficient degree of certainty".

It holds that the Claimant has not been able to discharge its burden of proof showing what would have happened had there not been the breach and we obviously know what it says about loss of a chance.

Just to highlight to you some of the language on slide 75. One sees there that the Claimant does not meet its burden of proof where all that Claimant can show is if there's a realistic probability of a differing outcome. And the Tribunal is also saying that even –– that the NAFTA–compliant Tribunal could reasonably have concluded that the project should be rejected and that conclusion, ie the Tribunal thinking that the JRP could reasonably have come to the same decision, is sufficient for the Bilcon Tribunal to conclude that but–for causation was not established.

If we could go back please to 65, the second case to highlight is Lemire v Ukraine. The facts in summary are set out on the slide. It's a significant case, in my submission, because this is a case of an FET breach because of one component of the breach is political interference with an independent decision–making body.

So "Breach of FET":

"Breach of FET when radio licences are not awarded to a Claimant because of political interference with what should have been the Independent National Council for TV and Radio Broadcasting."

The Claimant argues, come the causation element of the dispute, that the FET breach itself established causation and therefore there was nothing more to be asked. And one sees that at paragraph 154 of RLA–056. {I/56/48}. The Tribunal –– so that's the same argument that's being advanced here and it's rejected by the Tribunal. The Tribunal insists on carrying out a but–for and as part of that but–for, specifically at paragraph 171 of the award it says:

"You had to ask if the tenders had hypothetically been decided in a fair and equitable manner and the Claimant had participated in them, you have to show that he would have won the disputed frequencies."

It's also worth noting just before we leave this that Jan Paulsson was on the Tribunal in this case and I note that because of the weight that's been placed on Professor Paulsson's writing in respect of Amco.

Now, if we can then go on to 67, to look at Amco. This is the ––

MR GARIBALDI: Excuse me, I notice that you

skipped 66. And 66 has something to do with something that I said at the hearing and there's been a lot of quoting of what I said and at the hearing itself, it seems to me that I have to make it clear exactly what I meant and what I mean.

The Respondent in the case that was presented at the hearing in Geneva made an argument, as I understood it, that there was no causation in fact because the NPS could have voted differently. I made the point that I don't understand the legal basis, or even philosophical basis, for that argument.

Now I pointed out yesterday that I understand now that the Republic of Korea's making a different argument and the argument is that the NPS would have voted in favour of the merger anyway.

Now, would you please confirm that that is the argument that you are making?

MR WEBSTER: So both arguments are made, sir, and let me explain why, if I may. So I completely hear what you say that you do not accept the first argument. We respectfully submit that Bilcon does support it and the reason is that if one has to be satisfied to this elevated threshold of "in all probability" or "sufficient degree of certainty", then if one shows that it could have made the same decision, that is sufficient to allow you to say that

the Claimant has not discharged its burden of proof.
MR GARIBALDI: So you are making both arguments at the same time.
MR WEBSTER: Yes.
MR GARIBALDI: So that is helpful for you to clarify that, because at one point in your submissions, in written submissions, you do emphasise the "would". In other places you emphasise something along the lines of, well, the NPS was an independent organ and had the right to make a decision one way or the other. So -- and so that goes to the "could" and so -- and that introduced a confusion in my mind about exactly what is it that you're arguing, but now you're saying you are arguing on both points.
MR WEBSTER: Yes.
MR GARIBALDI: And the "could" point is based on Bilcon?
MR WEBSTER: Yes.
MR GARIBALDI: All right. Fine. I think that's enough clarification for the moment on both sides. Thank you very much.
MR WEBSTER: Thank you.
So the "would" argument, we would say, is only necessary if the Tribunal is not with us on the standard of proof, but there's no issue with running both arguments.
MR GARIBALDI: That part I don't understand

either, because the standard of proof, whatever it is, applies either to the "would" or to "could" and so it doesn't come into play. So if the standard of proof is, say, beyond a reasonable doubt, it can apply both to "could" or to "would", but both are judgments of probability and the question is -- and whatever level of -- whatever standard of proof applies to the judgment of probability, then would apply to both. But the "could" is possibility.
MR WEBSTER: Yes.
MR GARIBALDI: And "would" is probability. I correct what I just said before.
MR WEBSTER: Yes.
MR GARIBALDI: One thing is possibility. Another thing is probability. And those are two very different logical concepts.
MR WEBSTER: Yes. I'm very grateful for the clarification.
MR GARIBALDI: Right. So again, now that you say that it all depends on the burden of proof -- not on the burden of proof, on the standard of proof, then I am confused again.
MR WEBSTER: Okay, well, it may be a terminological issue with how one uses "standard of proof". As Korea understands the heightened "in all probability" threshold, if one establishes that there is

a possibility of the outcome being the same, that means the Claimant does not discharge, does not satisfy the Bilcon or ICJ standard, but in any event we say the proper analysis of the fact is that on a probabilistic analysis it is more likely than not that the NPS would still have approved the merger.
MR GARIBALDI: All right, but the "more likely than not standard" is different from the one you advocate?
MR WEBSTER: Yes. We say we don't need to show that, but if we do need to show it, we do show it.
MR GARIBALDI: I thought you were advocating "in all probability" and "sufficient certainty"?
MR WEBSTER: Yes. I understand Mr Ware wants to --
MR GARIBALDI: Thank you very much.
MR WARE: If I may assist just for the moment with apologies for the intervention. Our position is that it is Claimant's burden to establish what would have happened in all probability in the counterfactual scenario.
We do not bear the burden but we can present the evidence to you and ask you to draw conclusions from it. In order for us to show, to persuade you that Claimant has not met its burden to a sufficient degree of certainty, there are a couple of different ways that we can do that.
One, under the Bilcon standard, is to show that

the decision-maker could reasonably, could reasonably, have reached the same decision on the existing facts. For the Bilcon Tribunal, that was sufficient alone to defeat the "in all probability" showing.
Another way to do it, if you take away this "could" or possibility argument, and just look at the question of "has it been established to this high level of certainty what would have happened, has it been established that the decision would have been different", and if we can show, again it's not our burden, but if we can show a substantial likelihood that the decision would have been the same then that necessarily has demonstrated that Claimant has not met its burden.
So when Mr Webster says, we say it's more likely than not that the decision would have been the same, of course if it's more likely than not that the decision would have been going in this direction (indicating), then that means Claimant has not established to a sufficient degree of certainty that it would be going in the opposite direction.
I hope that helps to clarify.
MR GARIBALDI: (Inaudible: no microphone).
THE PRESIDENT: Now that we are beyond that issue, can you also repeat your answer by distinguishing between the two but-for scenarios that I mentioned earlier?

MR WEBSTER: Yes --

MR WARE: Yes, on that question I would respectfully say that those are not two different but-for scenarios; those are two different outcomes of the same but-for question. The same counterfactual analysis: but for the intervention would the NPS vote have been the same or different? It's one question and it's a question that has two answers, or potentially three. One answer is the decision would have nevertheless been the same. Another answer is that the decision would have been different. And a third potential answer is that it is simply impossible to say because it's so uncertain.

THE PRESIDENT: In the abstract yes, but in practice, when a party argues its case, it needs to know whether it needs to prove that the outcome would have been different or whether it needs to show that it would have been the same anyway.

MR WARE: I see.

THE PRESIDENT: If we look at it -- let's look at it from the Claimant's perspective, are you saying that the Claimant would have to prove both, that the vote would have been against as well as that the vote would have been the same?

MR WARE: I understand the question now. Thank you.

We are saying that Claimant's burden is to show that the vote would have been against; that is their burden. We are presenting to you a body of evidence to show that the vote would have been the same.

THE PRESIDENT: Does the Respondent have the burden of proof on that issue?

MR WARE: We do not. We offer that evidence as a way to demonstrate that Claimant has not met its burden.

THE PRESIDENT: Okay. So you are using that to rebut the Claimant's case that the vote would have been against?

MR WARE: Yes.

THE PRESIDENT: Okay. Understood. Thank you.

MR WARE: Thank you.

MR GARIBALDI: Just for the record it seems to me when we are talking about a vote for rejecting the merger, we are also talking about rejecting or abstaining?

MR WARE: Correct.

MR GARIBALDI: Okay, thanks.

MR WARE: Thank you. Apologies for the intervention.

MR WEBSTER: Not at all. Thank you very much.

If it's helpful to the Tribunal, I'll go through the Amco case.

So at slide 67 in its reply, the Claimant

introduces the Amco award as purported support for the following proposition: that when a state has subverted a decision-making process it is not then open to the state to cavil with causation, in the Claimant's words, by positing what an honest or fair decision-maker would have done.

Now, the Tribunal will note the immediate and obvious inconsistency with the Lemire case that I have just referred to and, before turning to the detail of Amco, I think it's worth noting that despite this being a decision from 1990, Amco is first being relied upon for the first time in this remission proceeding in what is at least the sixth round of written pleadings and after extensive oral argument already and also that the Claimant is not pointing to other decisions in the [36] years afterwards in which Amco has been followed and that, in my submission, is rather revealing of the weakness of the point.

Korea says that Amco is distinguishable and in any event has been criticised and is not reflective of the proper approach in law.

As to why it's distinguishable. A brief recap of the facts. It involved -- before one gets to the decision of the state body -- the Indonesian Army and police assisting an Indonesian company with the physical seizure of a hotel and apartment complex that the Claimant was meant to

be managing. One sees that from paragraphs 10 and 11 of the decision.

Then subsequently there is this decision by the BKPM, which revokes the investment licence. One of the claims is about the revocation of the licence. It is said it was both procedurally and substantively illegal. Indonesia sought to say even if there had been procedural illegality, nevertheless the licence could have been lawfully revoked by BKPM.

Three particular things to flag about the reasoning. First, the Tribunal -- and one sees this from 75 to 76 of the award -- took into account all of that background, the military and police seizure, and that is the generally tainted background that one sees the Tribunal referring to in 75 and that's obviously absent here.

Then at paragraphs 136 and 137 of the award, the Tribunal seems to have reasoned that what was dispositive for rejecting Indonesia's argument was the simple fact that there had been a denial of justice. So the Tribunal, as I understand it, was saying that if there is a denial of justice, one doesn't get into this type of counterfactual enquiry.

And I would just ask the Tribunal to put as a mental footnote there, because I've shown you already in respect of Lemire, and will show you subsequently even in material cited by the Claimant, that is not the generally accepted position now.

Then third, at paragraph 174, and that's the paragraph on which the Claimant places particular weight and it's the one on the slide [slide 67] in front of you, what the Tribunal was considering there was an argument by Indonesia that the loss -- it was specifically put that the loss was caused by Amco's own fault, because Amco's conduct entitled BKPM to terminate the licence. That's the specific context in which those findings are made and in which the Tribunal says that it can't pronounce on what a fair BKPM would have done.

Now, in my submission, Amco is not good law in any event, but even if one were to think it is, the situation here is very different, because you're not being asked to decide the equivalent question to Amco. As you noted yesterday, sir, in Amco it's the state body whereas -- which is -- you are having to analyse how it would have decided. And the question here is how the NPS, an independent body, would have decided.

There's also no parallel to the other two points that I've just highlighted, ie this argument that the outcome should change because it was the Claimant's own fault, and there's no background of that physical seizure of the investment which was a material factor in the Amco

Tribunal's decision-making process.

Next slide [slide 68], if we can, just to make good the point that Amco has been criticised as bad law for failing to apply a counterfactual and one sees that in this slide: Professor Douglas criticises it on that basis. And obviously I've also highlighted to you that in Lemire the Tribunal there does do a counterfactual.

And then the next slide [slide 69], please, this is just engaging with the new material on which the Claimant relied, albeit quite lightly, in its oral submissions yesterday, namely the Jan Paulsson 2020 lecture.

As we note on the slide [slide 69] and in the box at the top, actually previously Paulsson was critical of the Amco decision for skipping over this but-for analysis. Then in his 2020 lecture he advances an argument that the outcome could be justified in the case of, as he puts it, pretextual state action, and he draws this distinction between interfering in property rights to put an end to the Claimant's activities or to deploy a power of eminent domain to allow a different use of land, in both cases pursuing the perceived public interest.

As I understand it, Professor Paulsson is saying, in respect of that category of case, the Amco approach would not be followed. And then he says: well, if you've got the taking over of a profitable business and continuing to

exploit it in the same way, he seems to be supporting the Amco approach. That doesn't provide any support for Claimant's position here, in our submission.

Turning then on to the applicable standard of proof. If we could go to 71, please, that slide is just making the very obvious point that, contrary to what's being suggested, it's not just Bilcon that Korea is relying on, but this is supported by ICJ authority.

The next slide [slide 72], please. Claimant advances various arguments that there are findings in the award which are inconsistent, Claimant says, with the Tribunal applying the Bilcon approach and it relies in particular on 266 and 581.

Now, in Korea's submission you're not there rejecting the application of the Bilcon approach to a causal enquiry. 581, in particular, is a finding about merits, it's a finding about breach. It's not dealing with causation.

But if we go to the next slide [slide 73], please, actually in 931 there does see the Tribunal applying the "in all probability" standard in the context of a counterfactual in the causation enquiry.

And Korea respectfully says that the Tribunal was right to apply that standard there and also that there would be no principled basis for approaching the current

counterfactual enquiry in any different way.

MR GARIBALDI: Counsel, I have some questions about this. Can you point out, not necessarily now, but later, to a passage in the Chorzow Factory case, in which this reference to "in all probability" is used in the context of causation of the loss as distinguished from the calculation of the loss? This is a very important point and I think that you just glossed over it.

I would like to see if Chorzow Factory has any statement to the effect that "in all probability" applies to the causation but-for point that you are talking about. Thank you.

MR WEBSTER: We'll certainly look at that, sir.

I would emphasise that it's not just Chorzow Factory and Korea also relies on the Bosnian Genocide with the "sufficient certainty" formulation but we will certainly look at that.

MR GARIBALDI: That's a different standard.

MR WEBSTER: Yes.

The final point to make before handing back to Mr Ware is just to give -- one reference to the Tribunal in answer to the President's question yesterday about burden of proof. One actually sees in the US non-disputing party's submission in this arbitration, the position being adopted by the US, which obviously aligns with Korea's position that it's the investor which has the burden of proof as a matter of the ordinary meaning of the treaty in this case and the Opus reference is {B/5/3}. That's all I was going to say and I'll hand over to Mr Ware.

MR WARE: Mr President, would now be an appropriate time for our second short break for the morning?

THE PRESIDENT: Yes, I think it could be. Let's break for ten minutes until quarter past. Quarter past, whatever it is. I'm confused with Central European Time.

(4.06 pm BST)

(A short break)

(4.15 pm BST)

THE PRESIDENT: Let's proceed. Mr Ware.

Opening submissions by MR WARE (continued)

MR WARE: Thank you very much.

Members of the Tribunal, I will now address the evidence as it relates to factual causation.

In the course of this part of the presentation, we will from time to time be referring to protected material and before doing so I will make a note.

So with that, let me proceed. As we just discussed in the back and forth with the Tribunal, the question that we are grappling with is how to determine the counterfactual enquiry, how to decide the but—for question, how should the Tribunal analyse what is highly likely to

have happened absent the Blue House measures.

And we say that the way to approach that decision is to look at the evidence of how the decision was made in the actual world. What was the information and data that was available? What factors were considered? What factors were given weight and how important to the decision was what we call the tainted information? So the tainted factors. And if we take those tainted factors out, how likely is it that the decision would have been different?

That is the approach that we commend to you and we will now take you through the evidence as it relates to that question.

Now, before diving in in detail to the NPS's decision—making, one perspective that you may wish to consider is to ask: are there other actors that were faced with a similar decision and were not impacted by the Blue House measures? Because if there were such other similarly situated actors, one could look to their decision, to their decisions and the outcome of those decisions, to give some guidance as to how the NPS would have decided in the absence of the Blue House measures.

And here of course we do have evidence of the decision—making by a large number of investors that were not impacted by the Blue House measures, including institutional investors, whose investment profiles in some respects shared

similarities with that of the NPS.

Let me start with a basic proposition that is stated in the JY Lee unlawful merger judgment as quoted on this slide, 78. The court says:

"In particular, given that Samsung Group's shareholding in SC&T amounted to a mere 13.59%, it was virtually impossible for a proposal that was clearly detrimental to the shareholders to meet the requirements for a special resolution approval."

And of course, the requirements for a special resolution approval were a two—thirds supermajority of the shareholders present in addition to another threshold.

We say it's hard to argue with this general proposition and we know, of course, as we see in the award, that the merger ultimately was approved by 69.53% of the shareholders present and attending, corresponding to nearly 59% of all of SC&T's total issued and outstanding shares.

We also know from the award, and this is paragraph 242, that most of the domestic institutional investors and approximately one—third of foreign shareholders voted in favour of the merger and these foreign shareholders that voted in favour of the merger included several large sovereign wealth funds.

Now, in the original proceedings, our friends opposite, as experienced counsel, understood that this was

a difficult point for the Claimant, how to explain why all of these other large, sophisticated institutional investors, both domestic and foreign, could have voted in favour of this merger that Claimant says was self—evidently bad.

So Claimant argued in the original proceedings the following —— and I quote this quote on the slide from the Geneva hearing, Day 1, Claimant's counsel:

"A vote by any shareholder in favour of this merger must also be viewed with a certain scepticism. Korea's prosecutor has described this so—called dialogue of persuasion as involving the dissemination of false information by Samsung to major foreign institutional investors. The public prosecutor has recognised that Samsung made efforts to buy off some major shareholders, that the approval of the Saudi Arabian Monetary Agency and the Abu Dhabi Investment Authority were also solicited by the sharing of false information."

Now, as I mentioned and as Mr Kim explained, those allegations by the prosecutor were tested in a court of law and found to be without merit and lacking in evidentiary support. And I quote here from —— again from the JY Lee judgment on slide 81:

"While the prosecutor alleges that the defendants explained false information, et cetera, to foreign shareholders that could distort their investment decisions, such allegation of the prosecutor is without merit."

THE PRESIDENT: Is it of any relevance whether these other shareholders had the same proportional shareholding in SC&T and in Cheil?

MR WARE: The overall profile and complexity of their investment portfolio would certainly be a relevant factor to considering how much weight to give to their votes. So —— and I don't know, as I sit here, to what degree we have in the record information as to the complexity of those portfolios . We know, and I will discuss in detail in a moment, that the NPS's portfolio of holdings in the Samsung Group was extensive. There are indications in the record and we'll see some of this in a moment, that some of the sovereign wealth funds also had extensive holdings in the Samsung Group and were approaching this transaction from the perspective of impact on the Samsung Group. So in that sense we say there is an important and relevant parallel .

Now, I'm going to ask that my colleague hand out just a loose leaf copy of one of the exhibits in the record. This is exhibit R—127 and it's a document that I will be referring to and that I commend to you.

So at this point I want to sort of transition away from votes of other shareholders and focus in on the NPS and its decision—making.

And the reason I begin with R—127 which is titled:

"Analysis regarding the merger of Cheil Industries and Samsung C&T."

Is that this document compiles the information, data, the analysis that was collected and analysed by the NPS and that was presented to the Investment Committee at its —— in connection with its 10 July 2015 decision as an aid to its deliberations . It is , I would submit, an indispensable record of the inputs to the Investment Committee's decision in the actual world.

I would also point out that this is a very even—handed and neutral document, prepared by the NPS. As we will see, it gives equal air time to views in favour of the merger and against the merger. You will see that in a moment. But if you flip —— if you just sort of flip through it with me very quickly we see it begins first , of course, with the table of contents and then on pages 1 to 2 we have an outline of the merger and you'll see on page 2 you' ll notice the diagram showing the change in the governance structure of the Samsung Group that would result from this merger.

On page 3, you see references to legal disputes related to the merger and there's a reference there which I' ll come back to, to the Merger Injunction decision, which had recently been issued and was on the minds of the NPS.

If you turn over, beginning at page 7, you see the NPS's analysis of the merger plan result and it's broken down into different categories.

It begins with a category 1, "Impact on the stock price by item", and that's looking particularly at the impact on the stock price of Cheil Industries and Samsung C&T and it looks at the impact under a successful merger scenario and a failed merger scenario.

Then over to page 8, you see the impact on the share prices of Samsung Group companies, again under successful and failed merger scenarios. You see the status of the fund's investments listed in the Samsung Group. I' ll come back to that in a moment.

Beginning on page 9, you see the impact on the stock market.

On page 10, the impact on the economy.

Then beginning on page 11, there is a review of merger—related issues, beginning with the discussion of synergies. There's a discussion of positive views of synergies.

Over on to page 12, you see some negative views of synergies and I point out there you' ll see, on the negative side:

"Doubtable synergy effect of the merger and insufficient grounds for post—merger profits and growth."

That's just one example of this report being neutral and even—handed and describing views both for and against.

Beginning on page 13, there's an extended review and discussion and analysis of the appropriateness of the merger ratio, again analysing both positive and negative aspects, which I will come back to in a moment. That spans quite a number of pages.

Then coming over to page 17, you see the analysis of the impact on the fund's portfolio of changes to the merger ratio and, again, in a very even—handed way, the NPS recognising that a higher merger ratio would be better for the fund and a lower merger ratio is less good for the fund's value.

Then starting on page 19, you have the different stakeholder opinions, including Elliott 's position which is described in further detail in an attachment. The position of several of the proxy analysts, including KCGS and ICC.

Then on page 20 we have the stock price reaction to the merger announcement and then we get into a series of attachments beginning on page 21. 21 discusses Elliott's claims against the merger. Attachment 2 on page 22 describes the make—up of the shareholders of SC&T, which is a useful chart.

And then attachment 4 —— sorry, I misspoke a moment ago, attachment 1 on page 21 was the claims of SC&T in favour of the merger. It's attachment 4, on page 24, that describes the claims of Elliott against the merger.

Attachment 5 gives an overview of the Samsung Biologics business and I'll come back to discussing the significance of that in a moment.

Then there are some financial documents. And of significance, we'll come back to look at it again, but beginning on page 30, attachment 7, you will see a comparison of fair value valuations. Here you have the NPS's own valuation followed by the valuations by Deloitte, then by KPMG, that's page 34, by E&Y on page 36, and so forth.

And then again, at page 38, the final attachment addressing the impact on the fund portfolio of various different merger ratios.

So that's by way of introduction. I meant -- I also wish to mention that the tainted synergy projections that we have heard so much about and that form part of the wrongful conduct in the Moon/Hong case are not in this document. They're not present in this document. That was presented in a separate document. So no tainted synergy projections in R-127.

MR GARIBALDI: Counsel, please clarify one point. We have heard evidence that the fair -- let me

call it the fair merger ratio -- was recalculated several times. To what extent does this document reflect that or reflect the latest of the figures?

MR WARE: So in this section -- so in the attachment that gives the comparison of fair valuation, so that's attachment 7. The first of the fair valuations that is compared is the NPS's own valuation. That's then followed, as I mentioned, by Deloitte's valuation, KPMG's valuation and E&Y's valuation.

This, on page 30, this summary of the NPS's fair valuation reflects the last iteration, the third iteration of the NPS's internal valuation. And I am going to come back to the question of the valuations later, but since the question is posed I will raise one point which is that there were three iterations. The Claimant does not mention what happened in those three iterations. Each iteration gives a range of fair value and takes the mid-point of that range as the reference that's used for analysis purposes.

So we hear the end values. Here we hear -- for example, can you see on page 30 it says that:

"The research team has indicated that the merger ratio between the two companies falls within the internally reviewed range, which was from 1 to 0.34 through 1 to 0.68."

That's the range. The mid-point of that range, 0.46, is the one that you see a lot of references to in

a number of documents.

Now, the three iterations -- that range shifted -- and if you look at the mid-points, what happened is the first mid-point was, I think, at around [1] to 0.68. The second mid-point, second iteration, went very far down to -- I have to double check, but somewhere around 1 to 0.3-something, very far down. And then in the third iteration it was re-evaluated up to where it ended up at 1 to 0.46, as the mid-point. So it went down and then up. And we know exactly why that happened, because all of this was examined in great detail in the Moon/Hong proceedings.

There was -- there were differences of view within the NPS as to the subject -- various subjective valuation decisions, the inputs, the assumptions that should be used. And one of those differences of view had to do with the value of the Samsung Biologics subsidiary.

And between the second and the third iteration, NPS itself, members who felt that that Biologics had been overvalued, spoke up and said: we don't agree with this, it's too high. They revised it downwards and that's why the merger ratio then went back up.

So there's a narrative that has been presented that there was pressure and that was just moving down, manipulated down and down and down as far as it could go. That's not actually what happened in the actual course of

events.

In any event, as I will come back to, our goal today is going to be taking this out and the tainted merger synergy projections out as -- assuming that these are tainted, and looking at the other inputs that were available and looking at the other factors that were considered, to see if we can identify what the NPS's likely decision would be in the absence of any taint.

Is that helpful to answer the question?

MR GARIBALDI: Yes. Thank you, but I would appreciate the reference to the documents on the record for all of these fluctuations. Thank you.

MR WARE: Thank you very much. We would be happy to provide that.

MR GARIBALDI: Thank you.

MR WARE: Now, the second document that you have, that we have prepared and distributed as an aid to you, as you go through this process of trying to construct the counterfactual scenario and to determine what the likely decision would have been absent the Blue House measures, is demonstrative D, which is the evidence of the reasons behind the Investment Committee's vote.

I would like to take a few minutes to walk you through what this is and how you can -- how you can use it. We hope that it will be helpful and we have no objection, as

I mentioned, to any additions or corrections that Claimant may wish to make.

Now, if we could begin by taking a look at the table of contents. You will see that this demonstrative [D] includes three tables. The first table identifies the factors that were considered by the Investment Committee in the actual world.

And for convenience, we have grouped those factors into four categories: factors specific to the fund's holdings in the two merging companies, SC&T and Cheil; factors relevant to the fund's overall portfolio of holdings in the Samsung Group; third, factors relevant to stability and public benefit factors; and four, contemporaneous market opinions. So that's table 1 and I'll be discussing that table in a little bit more detail in just a moment.

Table 2 sets out testimony by the Investment Committee members regarding their understanding of the nature of synergy projections.

And table 3, which I suspect will be very helpful for the Tribunal, sets out the court testimony of the Investment Committee members concerning the tainted synergy calculation specifically.

Now, if you could take a look at table 1, so I'm on page 1, table 1 -- and apologies for the large size of this demonstrative, but it's just to show you how it

works. Each of the factors that was actually considered in the actual world is listed in the first column, the factor description. So we begin with -- the very first factor is:

"SC&T's sluggish growth and need for diversification and new growth opportunities through business synergy."

That's the first factor that we know was considered in the actual world.

The second column, contemporaneous documentary evidence, I want to explain exactly what that means. This is not all of the evidence related to this issue. This is simply evidence demonstrating that the Investment Committee in fact considered this factor. So that will be, for example, the R-127 document that we just looked at or the meeting minutes from the Investment Committee meeting, but this is contemporaneous evidence that this factor was indeed considered.

The next column, "Korean court findings" column. This column will indicate if the Korean courts have confirmed whether this factor was considered in the actual world.

And then the final column is the court testimony by the members of the Investment Committee in which they discuss their consideration of this particular factor, why and how it was important or not important to their decision.

So that is table 1 and it goes through a long series of factors. Many are the same factors that I'll be discussing briefly with you today, but this provides the back-up to that discussion.

And then if we take a look just quickly at the other two tables, table 2 begins on page 22. Table 2 is testimony -- each of the Investment Committee members was asked on examination in the Moon/Hong proceedings questions concerning their understanding of what is a synergy projection, what does it mean, how did you -- what did you understand it to be, and so this table sets out those questions and answers in terms of what is the nature of a synergy projection.

And then table 3, which begins on page 25, sets out the in-court testimony of the Investment Committee members concerning the tainted synergy projections specifically. Now, you have heard quite a bit on this issue, both at the Geneva hearing and in these remitted proceedings. So you will recall that the Investment Committee members were questioned about the -- one of the very key questions that you are tasked with grappling with is: what impact did the tainted synergy projections have on the decision-making of the NPS in the actual world? And this provides the testimony, good and bad, from our perspective, in terms of -- we didn't try to put a filter on

it in terms of whether it's helpful to one position or another. But this is the in-court testimony about the tainted synergy projections.

MR THOMAS: Mr Ware, just before you continue, there are five witnesses that are listed in this table. Is that the totality of the Investment Committee members who testified in the proceeding?

MR WARE: That is the totality of Investment Committee members who testified and who were asked questions about the tainted synergy projections. So the filter we applied was if there was any testimony concerning the synergy projections, we included that person on this list. There were a few who did not testify at all and then there were one or two who testified but were not asked questions about this particular issue.

And, of course, we also limited this to the Investment Committee members who voted in favour of the merger, because the question is: would they have voted differently but for the Blue House measures? So we have not included testimony from other Investment Committee members.

For example, there were Investment Committee members who abstained and who said -- you know, who testified: well, I didn't believe in the synergies and that was part of the reason why I abstained. That is not here. We are happy to add that in if the Tribunal would find that helpful to have that part as well.

MR THOMAS: Speaking personally I would rather see more than less.

MR WARE: Very good. We are very happy to add any discussion of the tainted synergy projections by any Investment Committee member that's on the record.

Now, what is not -- what we have not included in this demonstrative, and this is an important point, is criminal prosecution records and I would like to take a few moments to talk about why that is the case.

Now, throughout these proceedings Claimant has referred extensively and placed heavy reliance on prosecutorial records from the Korean criminal investigations. The Claimant has relied on statement reports given by Investment Committee members to the investigators and has contended that those statements show that those members confirmed that they would not have supported the merger absent the fabricated synergy effect calculation presented to them.

Yesterday, I was surprised to hear the suggestion that those prosecutorial records should be treated as important primary evidence and even should be preferred to the factual findings of the Korean courts. And that was in relation to the Deloitte Anjin report and we reserve our opportunity in the rebuttal round to discuss the substance

of that point, but that's from the Day 1 transcript, 94 to 95. {Day1/94-95}.

Prosecutorial records lie very low on the scale of evidentiary reliability. These statement reports, what are they? I fear that there could be confusion because they look like a transcript. They have -- it says Q&A, question and answer. It seems as if you're seeing in the prosecution reports a transcript of a discussion. But the statement reports are prepared by the prosecutors following a witness interview. They are intended to help the prosecutors develop their theory of the case.

They are not transcripts. They are the prosecutor's summary of the interview, written in the prosecutor's own language and shaped to advance the prosecutor's theory of the case. These statement reports omit leading questions that the prosecutor posed to the witness. They omit the context in which the witness gave statements. The nuance is often completely missing. These witness interviews take place in an environment that is controlled by the prosecution.

No -- rarely are attorneys present and, even when they are, they are given very limited opportunity to speak on behalf of their clients. The interviews are often long, involving repeated leading questions, and they may run into the night. You may have noticed that a number of the

prosecutorial records in the record in this case have in the title, the notation "Consent to late night examination".

Unsurprisingly, the prosecutors may seek to apply psychological pressure on the interviewees, sometimes who are the subject of criminal investigation, including the threat of designating the witness as a suspect.

It is known to be routine for witnesses to sign those statements without making corrections. We understand, and would be happy to admit to the record, if the Tribunal is interested, that the rules of criminal procedure in Korea have even been amended to make these statement reports of interviews with defendants categorically inadmissible in criminal proceedings against those defendants, unless the defendants give consent to their admissibility.

Now, of course, witness testimony given in a Korean court is entirely different. That testimony is given in open court. It is transcribed verbatim by a stenographer, with no second layer of editing. It's given before the judge and the parties' rights of examination are ensured.

And, of course, in their court testimony witnesses have the opportunity to challenge the accuracy and completeness of the prosecutor's statement reports to the extent that those are being offered.

So we say, and you see on this slide, 84, that in

terms of a scale of reliability of evidence, the Korean courts' determination of the facts after having considered all of the evidence, including the live testimony, the credibility of the witness, examination in a process that includes all the due process safeguards, that's at the highest end of reliability. And beneath that the witness testimony, the full transcript of the witness's testimony in court, is also reliable. It's a reliable record of what -- of the question and answer. And very, very far beneath that, in terms of evidentiary value or reliability, are these statement reports.

And I have some examples, if we have time, of a couple of examples from the record of where the court testimony illuminated that the statement report was entirely inaccurate.

So with that, let me then proceed to a discussion of what the evidence shows in terms of the factors that were actually considered by the NPS.

And I will move this as quickly as I can. On slide 86 this is a -- this reprises a slide that the Claimant presented at the Geneva hearing. In that hearing Claimant emphasised two of the five fund management principles that govern the NPS's voting. And I should preface this by saying that this first segment is focusing on the relevant operating rules and guidelines that governed the NPS's decision-making in the actual world and would have also governed its decision-making in the counterfactual world.

So in Geneva, the Claimant emphasised, in yellow highlight, principle 1, the principle of profitability, and principle 5, the principle of management independence. We've added in blue two additional important principles that were not emphasised. The second principle there is the principle of stability -- I'll read it out, the text is small. It says:

"The fund must be managed in a stable manner, such that volatility of profit and risk must be within allowable limits."

That's the principle of stability.

The third is the principle of public benefit. It says:

"Because the National Pension Fund is a system for all citizens and the amount of fund accumulation constitutes a significant part of the national economy, it should be managed in consideration of the ripple effect on the national economy and the domestic financial markets."

So, put simply, the fund's investments in the market are so large that the fund's investment decisions can move the market, can have a ripple effect on the market and on the national economy, and it is imperative on the NPS in

making its decisions about how to invest and how to exercise its voting rights that it consider the ripple effect on the economy and the domestic financial markets.

Now, the voting guidelines likewise emphasise a long-term shareholder value, stability and responsible investment. You see in Article 4 that:

"The fund shall exercise its voting rights to increase shareholder value in the long term."

And Article 4-2:

"The fund shall exercise its voting rights in consideration of factors of responsible investment such as the environment, society and corporate governance in order to enhance long-term and stable rate of return."

The NPS is not a short-term investor. It is not a one-company, a one-stock investor. Its considerations and time horizons for investment are very different from those of an investor such as Elliott.

Now, the next factor that was taken into consideration is critically important and that is the NPS's portfolio view of both positive effects and negative effects.

And we begin here with -- this is, again, a reprise of a slide that was presented in the Geneva hearing, you may recall, showing the sheer size of the fund's holdings in Samsung Group companies as of the

relevant time, end of June 2015. There are 17 companies listed and you will see, at the bottom right of the second box where it says "Entire Samsung Group", the total market value of the fund's holdings in the Samsung Group was KRW23 trillion. Converting that to dollars, using the relevant exchange rate at the time, is USD20 billion. USD20 billion. That was the size of the fund's stake in the Samsung Group at the time. It was so large it accounted for one-fourth of the domestic equity portfolio of the entire National Pension Fund.

And if you want to look at it at an individual company level, if you look in the first box you can see Samsung Electronics accounts for a very significant majority, KRW15 trillion in market value, and underneath that, number 2, you see Cheil Industries. The NPS's holding in Cheil was KRW1.14 trillion. And if you skip down to number 6, you see SC&T, a roughly comparable market value of KRW1.25 trillion.

So the impacts of this merger on the NPS's portfolio of holdings in the Samsung Group weighed very heavily on the minds of the NPS in the actual world and would have done so in the but-for world as well.

Now I will move quickly through these next slides, but the Korean courts -- I'm on slide 90 now -- have confirmed that the NPS not only did in fact consider the

portfolio effect, but it had to consider the portfolio effect. It was incumbent upon the NPS to consider the effect of the merger on its portfolio of holdings. So you see the quote to that effect from the Moon/Hong court on slide 90. And then on slide 91 you see, at the top box, the Merger Annulment judgment and I'll read that, because I think it's an important finding it says:

"With approximately KRW23 trillion out of KRW550 trillion of NPS assets invested in Samsung Group shares, it appears that one cannot make a value decision based solely on individual shares such as SC&T and Cheil. And because one must consider long-term and stable prospects in relation to shareholder value in accordance with the guidelines on the exercise of voting rights, so that loss of investment could not be determined purely by reference to the merger ratio."

The following slide is going to contain protected information so I'll pause for just a moment.

(Pause)

Thank you. I'll go ahead.

Now, this is just a reminder to us to take a look at our demonstrative, slide 92, and if you could turn with me to the demonstrative, table 1, and here I'm beginning on page 9 you will see that this is where we discuss -- [redacted]

[redacted]

Now, we can go off of the protected information.

(Pause)

So just very briefly what were these positive and negative portfolio effects that were expected? Slide 93 shows an analysis that was performed by the NPS one year prior to this merger. So this is completely independent of any interference. And the NPS did a review of what happened when Chaebols made a transformation from a cross-shareholding structure to what they call a holding company structure, a more traditional simplified corporate structure. And what they found was there was a marked enhancement in shareholder value, improved stock price performance and they give figures -- they quantify it in

terms of excess rates of return, both in terms of percentages and basis points.

And they contemplated at the time that Samsung had not yet gone through any such conversion, but they contemplated that Samsung might do so and even contemplated the possibility of a merger involving Cheil, which at that time was referred to as Everland.

So the NPS was focused from an early point in time on the benefits to the stock performance if the Samsung Group were to transform to a holding company structure and the merger was an important step toward changing over to that structure. So when we get to the time of considering the merger, on slide 94, you see that the NPS summarised that the predominant view was that as the Samsung Group makes that transition from the cross-shareholding structure to a holding company structure there will be an increase in dividends paid out to shareholders.

So again the NPS looking at this from the perspective of its own long-term shareholder value as a holder of USD20 billion in equity in these companies, stock price improvement, increased dividend payouts.

Next slide 95 --

MR THOMAS: Mr Ware, a very quick question and it might have to be answered by Mr Kim. Looking at the transcripts, does Korean procedure control leading questions

as in the common law -- in a common law jurisdiction?

Some of the questions look very leading to me and I'm not criticising them. I'm just saying: is this a standard practice of the examination of witnesses irrespective of whether the witness is being examined by his or her own lawyer or by the other side?

MR KIM: Yes, the leading question is not desirable but in practice in the Korean court in many cases leading questions are allowed in practice.

MR THOMAS: Thank you.

MR KIM: Because the testimony was given under oath and for the efficiency it's more liberal to allow leading questions in practice.

MR THOMAS: Thank you.

MR WARE: Slide 95, just to read to you a finding from the JY Lee unlawful merger judgment:

"After very carefully examining the purposes, objectives and anticipated effects of the merger from a corporate governance perspective [it says that] those objectives included enhancing stability of corporate control over SC&T by strengthening the Group's control of SC&T, bolstering its status as a de facto holding company, resolving circular shareholdings, and simplifying the corporate governance structure. All of these effects can be considered as also aligning with the interests of both SC&T

and its shareholders as well."

The court then went on -- and this is in the second box on slide 95 -- to describe the position of two of the sovereign investment funds that appear to have determined that the merger would be positive in terms of increasing governance transparency, considering the Group's overall portfolio and also expressing that with the merger there will be an effect of simplifying the corporate governance structure and that this is certainly beneficial for investors.

So that is the Korean court summarising evidence as to the reasons why the sovereign wealth funds -- part of why the reason why they voted in favour of the merger is that they felt that these changes to the corporate governance structure of the Samsung Group would have a benefit to their overall holdings of investments in the Samsung Group. So that's on the positive side of how the merger would positively impact the fund's portfolio.

Let's talk for a moment about the negative portfolio effect. And this relates to what would happen if the merger failed. What is the consequence if the merger failed? And this first slide on slide 96 is not advice that was available to the NPS. It was advice that was presented to Elliott at the time, but it's useful to set the context and the Tribunal will be familiar with this Spectrum Asia report.

You can see in the second box it states that:

"There is a national consensus that the successful operation of Samsung Group companies is essential to the national economy."

And then in bold:

"A merger between SC&T and Cheil Industries is also perceived as a necessary and impactful event. Samsung and the Lee family cannot afford to fail or the effect on the Group would be far-reaching, unpredictable and possibly destructive to the economy as a whole."

That was advice that Elliott received at the time. And I asked -- I'm going to refer for the next slide to protected information.

(Pause)

Next slide, slide 97. [redacted]

And the headline there is that volatility will

grow in the mid to long term. You will recall under the fund operation guidelines the NPS has a mandate to control and keep volatility in check and within limit.

[redacted]

In the first quote you see in the bold part the Investment Committee member says:

[redacted]

The next quote from R-292, testimony by an Investment Committee member who [was asked]:

[redacted]

And he answered:

[redacted]

And the third quote -- I won't read the third quote, it's too long.

Let's go to the next slide, please, but I do note that the demonstrative in the pages that I indicated earlier does include significant additional testimony from the Investment Committee members concerning their consideration of negative portfolio effects.

I'm going to pick up the pace. The next factor had to do with the condition of SC&T and its need for a new driver of growth. So let's turn the page to slide 98, please -- and this is a quote I found very interesting from the ISS report. You may recall from the original proceedings that one of the proxy reports that was relied on and was discussed extensively was that of ISS and ISS actually had a meeting with the company, with SC&T management, to discuss their views on the merger and to understand why it was that they felt that the merger was positive from the perspective of the company.

And in the ISS report, ISS notes that the management presented to them a bleak outlook of Samsung C&T. So the Samsung C&T management said to them: our business, and I'm here just paraphrasing, is struggling. And you see reference after reference in the documents to sluggish growth and they conveyed this to ISS. ISS was not persuaded from their perspective that this was a sufficient reason to enter into this particular merger.

Let's -- sorry, the next slide refers to protected

information. Thank you.

(Pause)

So slide 100. The NPS itself was aware of SC&T's acute need for new drivers of growth. You see from the minutes of the -- you see from R-127 the reference to [redacted], and that:

[redacted]

Then you see in the minutes of the Investment Committee meeting again the reference to:

[redacted]

Now -- and that's the end of the protected information.

Going to slide 101, the JY Lee Unlawful Merger Judgments go into significant detail on this question and we do commend them to you, because you will recall that among the defendants there were the members of the board of directors, who approved this merger, and so there was a very detailed examination of what was the condition of the company.

Let's look at what the JY Lee unlawful merger court determined. This appears on two slides, the first slide is 101. Court says:

"Considering SC&T's operational and financial circumstances, it can be said that the merger timing was a necessary and appropriate time to proceed. Up until the very moment the merger was executed, SC&T was experiencing stagnant growth and the materialisation of losses from large-scale overseas projects, whilst the external environment, including the sharp fall in oil prices, was deteriorating; it therefore appears that this was a time when measures needed to be taken to enhance the company's growth prospects and improve its financial structure."

If we look to the next slide, slide 102, you see the court's further finding that:

"Had the merger been delayed until SC&T's share price rebounded, the company would likely have suffered a significant financial shock in the interim once losses in its overseas construction and trading divisions were reflected in its financials. This, in turn, would likely have been reflected in the share price, resulting in substantial losses for SC&T's shareholders."

Now, you may recall in my introduction I mentioned a 2.6 trillion loss that was recognised shortly after the merger and that the merged company was able to absorb. Had it not been for the merger, a standalone SC&T would have suffered, in the view of the court, a significant financial shock with substantial losses to its shareholders as a result of those construction losses.

MR GARIBALDI: Just one point: was this fact known at the time the Investment Committee voted or is it later in time?

MR WARE: So what was known at the time was that the company was struggling, that its profitability was stagnating, and that there were losses being incurred and those losses were -- the magnitude of the losses was not known, that was disclosed to the market after the merger.

Now, one of the most promising aspects of the merger had to do with the fact that both SC&T and Cheil both held shares in the biopharmaceutical business called Samsung Biologics.

And the NPS had already, before even the merger was announced, identified this high-growth biobusiness as a bright spot. The NPS was actively making investments in Cheil throughout the period leading up to -- prior to the merger announcement in light of its view that this biopharmaceutical business was very promising.

Now, slide 104, you can see --

THE PRESIDENT: I see you still have some 90 slides to go. We were supposed to finish the Respondent's opening statement at 20 past noon. We recognise that the Tribunal has had quite a few questions, so there is some time available, but can you just tell us where you are in your presentation?

MR WARE: Yes. May I ask how much time does the Tribunal have -- how much time do we have available? I understand that by our calculation we have 35 minutes available for our overall presentation, but I want to be conscious most importantly of the Tribunal's -- I understand there's travel constraints.

TRIBUNAL SECRETARY: Yes, we have -- based on my records, the Respondent has 34 minutes left.

MR WARE: Are we safe to use all of those minutes?

THE PRESIDENT: I think we are. We still need some 10 or 15 minutes at the end to discuss housekeeping. We don't know whether the parties have been able to discuss the issues that we need to discuss, but let's get to it after you complete.

MR WARE: I will significantly streamline the remainder of the presentation and I am thankful to the Tribunal for its patience.

If we advance to slide 105, please. The only quick point that I'll make on Samsung Biologics is that, as you see on slide 105, Cheil held 46% of Samsung Biologics and SC&T held 4.9% of Samsung Biologics, and through the merger their combined stake would take them over the 50% threshold. They would be a full controlling majority shareholder of Samsung Biologics and would have -- thus have the structural incentive to continue to invest strongly in

that high-growth business.

I'm going to go ahead and skip several slides that refer to Korean court findings, that it was reasonable for the NPS to have taken a positive view on Samsung Biologics.

Slides 108 and 109 reflect the findings of the JY Lee unlawful merger court, that in fact Samsung Biologics has outperformed even the optimistic expectations that existed at the time of the merger.

Now, slide 110. I'll move then to additional sort of positive expected benefits to shareholder value from the merger. I need, unfortunately, over the next two slides to refer to protected information.

(Pause)

So there were a variety of positive benefits of the merger which are often described as synergies. There are a number of different synergy effects. There are different kinds of synergies. Generally in a merger when we say that the total is greater than the sum of the parts with two companies coming together and one plus one is equal to something more than two, we refer to that as a synergy.

The NPS at the time considered that one of the very important positive benefits or synergies that would result from the merger is that the newly combined company, new SC&T, would become the de facto holding company of the entire Samsung Group. The NPS assessed, based on its review of what had happened in other holding company structures, that that holding company would then have the opportunity to capture brand royalties for the Samsung Group. So this could be potentially a very significant new source of additional revenues for the company. That's a kind of synergy that's unrelated to the tainted revenue synergies that we'll discuss later.

Slide 112, [redacted]. That is another kind of synergy.

We can go off of protected information. Thank you.

Slide 113 shows a projection that was provided to the NPS at the time by the Samsung Group, projecting KRW6 trillion in synergies by -- in the period from 2015 to 2020 -- sorry, by 2020, that there would be KRW6 trillion in revenue synergies. That's broken down into the different business units of the consolidated entity.

The Tribunal, of course, will recall that there were allegations that that synergy projection had been fabricated or was fraudulent and the JY Lee unlawful merger court analysed that question and found as a matter of fact that actually the merger task force had prepared the synergy

calculation by going through a number of revisions and corrections based on discussions with the persons in charge of each of the business units and that therefore could not be concluded that the figure was false or groundless.

Now let's talk about the -- one of the other factors that was taken into account in the actual world and that no doubt would have been considered in the but-for world which is the potential loss from the merger ratio.

If we could go to slide 115. I mentioned as we walked through a moment ago exhibit R-127 that the NPS itself gave extended attention in that document to issues with the merger ratio and they considered things from what they called a positive side and a negative side.

On slide 115 you see a snip of R-127. On the positive side -- I would like to read those points. The first is that the merger ratio was legitimately calculated as per the relevant laws. So there was compliance with legal procedures. And as to the appropriateness of the ratio, the second point is that:

"In an efficient stock market, stock prices properly reflect a company's current and future values."

So here the point is that the stock prices do in fact reflect an objective value of the company, including both -- not only its current assets but also its future potential.

And the third point is that:

"The stock prices at the point of the merger announcement reflected factors such as governance improvement effect and long-term growth prospects of Cheil as well as poor construction performance of SC&T."

So again here the NPS is noting that the market is already taking into account that SC&T is struggling. The market is aware that SC&T is struggling in its construction business and that's part of the reason why the SC&T stock is low. And the market has a positive view on the growth potential of the biopharmaceutical company and the long-term prospects of Cheil Industries.

Next slide, 116. Of course, the NPS also considered negative views of the merger ratio and I think it's helpful at this point for us to take a look at the merger ratio demonstrative that we have prepared for the Tribunal. This is demonstrative E which you have before you.

Here, in order to address the concerns that had been raised about the fairness or adequacy of the merger ratio, the NPS gathered as much as it could, as much valuation data as it could. There's a lot of evidence in the record, including in the JY Lee unlawful merger decision, about how hard the NPS was working to obtain some of these valuation reports at the time. And it obtained the

valuation report that had been prepared by Big Four accounting firm Deloitte and you can see the fair merger ratio range that Deloitte had indicated. It had the report from KPMG. You see the range there. It had the proxy report from KCGS which had indicated in its view the merger ratio should be at least 1 to 0.42.

We discussed with Mr Garibaldi a moment ago that the NPS research team itself had calculated a valuation range, which has been the subject of much discussion in this case. We know that ISS gave not a range but a standalone value point. They made a major revision on the eve of the Investment Committee meeting. Originally they gave a value of 1 to 0.95. They revised that very significantly upward the night before the Investment Committee meeting. And then we have the Ernst & Young report which shows a range that is very far apart from the others that are illustrated here.

Now, just a couple of points. Each of these reflects subjective valuation decisions. How do you get a merger ratio -- how do you do a merger ratio calculation? You have to value SC&T and then you have to value Cheil and you compare those two values and that's how you get your exchange -- your fair exchange ratio. These are large diversified companies. Valuing each of them is a complex process that involves a number of subjective decisions.

It's not -- we do know the reason why there is such a difference, why there is such a range between these different valuations and we can take a look at that quickly together over the next series of slides and you may find it helpful to follow along in R—127 or we can do it on the slides, but in R—127 we're beginning with page 32 and the —— and I'm on slide 118.

This is the Deloitte valuation which indicated that the merger ratio was within a fair range. Just two points that I think are worth highlighting. One is this —— you can see it on the slide and the value of the non—business assets. So this is particularly important in the valuation of SC&T. The Tribunal may recall that SC&T held a very large stake in Samsung Electronics and so there was a question of how that large stake in Samsung Electronics should be valued. You can see that Deloitte began with the market value of those shares, so their public market cap, and then applied a discount rate and a corporate tax rate. So the corporate tax —— in other words, if SC&T ever were to try to sell those shares they would have to pay corporate taxes of 24% and if it tried to sell the shares, because it's such a large block of shares, the very act of selling would depress the price and lead to a discount and so that's why a 6% block deal discount was applied.

If you add those two numbers together, 24% and 6%, you got you know roughly 30%. That's roughly the discount

rate that was applied to SC&T's shareholding in Samsung Electronics.

When you ask why was the Ernst & Young valuation so far —— so different, Ernst & Young did not apply —— Ernst & Young did not apply the 6% block deal discount to those shares, so that change in and of itself reflects a significant difference in the value. Another very significant piece of this is one of the most important and potentially valuable parts of Cheil was its non—public holding in Samsung Biologics. And so you had to value this high—growth company that did not yet have a lot of revenue and profits but was expected to have high growth prospects. One thinks of the AI companies going public today and the valuations that are putting —— being put on those companies: they don't reflect the revenues that have been earned; they reflect potential growth. And you can see that Deloitte put a KRW13 trillion value on Samsung Biologics.

The next, slide 34, shows KPMG's valuation was very close to that. And when you get to slide 120 you see Ernst & Young again, on the left side pane, no block discount for the Samsung Electronics shares. And on the right side you see a dramatically different valuation of Samsung Biologics at only KRW1 trillion for the entire company.

So these are subjective valuation decisions. We

don't make a value judgment on them. They were all available and presented to the NPS and the NPS had to make its own judgment as to what was the value of Samsung Biologics and what was the right way to discount the holding in Samsung Electronics.

Slide 121. So just returning for the last minute to this issue of the different valuations. We know that in the actual world the NPS was concerned about the merger ratio and if you look at this demonstrative E, one thing that is apparent in fairness is that the actual merger ratio, 1 to 0.35, it's at the very low end of what could be considered a reasonable or fair valuation. So there certainly were grounds for concern about the fairness or adequacy of this merger ratio.

And so the NPS went through the exercise of trying to determine what loss it would suffer by virtue of this merger ratio and that loss is calculated by comparing the actual merger ratio to some fair measure of valuation and, as we know, they adopted the mid—point of their own valuation, which is 1 to 0.46, and they determined that the loss that would result from the difference between those two figures was KRW138 billion.

Yesterday, learned counsel may have misspoken when saying that that's the equivalent of USD150 million; at the time it was the equivalent of USD120 million. So that was

what the NPS considered to be the potential loss arising from this inadequacy of the merger ratio.

Next slide. So just a few words on the Merger Injunction decision. Next slide. The Tribunal, of course, will recall that in this time period Elliott made an application to enjoin the merger from going forward. And the key concern that Elliott presented was that the merger ratio was unfair and we know that the court denied that injunction and it's important not just that the injunction was denied, but what court said in its decision.

I'm on slide 124. And it says that, you know, the new provisions of the Securities Act contain a formula, so this is the statutory formula that must be followed when calculating the merger price for stock—listed corporations to merge. It says:

"This is because it is necessary to regulate the merger value in order to protect the investors since a considerable number of investors invest in stock—listed corporations."

So the purpose of the statutory merger ratio formula is to protect investors. Also it says:

"Also, since stock—listed corporation's shares are freely traded by investors in an open market, the share price set at the open market at any given point can be seen to reflect an objective value of the shares."

So this is the view that we don't need to compare the merger ratio to some subjective valuation of fair value. The stock market value itself is the objective fair value and it's set in that way specifically to protect investors. That decision was upheld by the Seoul High Court and that decision was known to and relied on by the Investment Committee in the actual scenario.

And I will not read the testimony concerning that, but we have the evidence of that on slides 126 through 127.

Now, where does this review of the data, the facts, the information that was available to the NPS and the factors it had considered, where does it leave us in terms of our understanding of the counterfactual analysis?

I'm on slide 129. I'm going to borrow from the language of the Bilcon case and describe four outcomes that the NPS could have reasonably concluded —— could have reasonably reached, in the counterfactual scenario. And I think these are important.

So in a decision—making process free of unlawful government interference, the NPS could have reasonably concluded that the merger was in the fund's interests by determining that the merger ratio appropriately reflected the objective fair market value of the merging companies.

So this is potential decision 1, so we have already discussed all the positives of the merger. The one

negative is the merger ratio but you could reasonably determine, as the court has repeatedly emphasised, that you don't need to compare the merger ratio to subjective valuations because the merger ratio itself is an objective fair value. The NPS could reasonably have reached that decision.

Slide 130. Alternatively, in a treaty—compliant process the NPS could reasonably have determined that the merger ratio would cause some loss to the fund as compared to some subjective measure of value, but that that loss was outweighed by the expected long—term gains for the fund's portfolio from the merger. And those gains could include enhanced shareholder value from the Samsung Group's move towards a holding company structure, the new revenue from becoming a de facto holding company of the Samsung Group, high growth in the biobusiness, and other benefits and synergies. That's the second possible decision in a treaty compliant process.

Third, in a treaty—compliant process the NPS could have determined that the merger ratio would cause some loss to the fund, but that that loss, for example the USD120 million loss that we just discussed, was smaller than the expected losses to the fund over the long term from a failure of the merger.

And the fourth potential decision in

a treaty—compliant process, the NPS could have reasonably concluded that the merger ratio would result in some loss but that that loss was outweighed by some combination of the expected long—term gains to the fund's portfolio from the merger and the avoidance of expected losses to the fund's portfolio from failure of the merger.

Now this, we say, is not only a theoretically possible decision, it also is the likely outcome in the counterfactual scenario because it aligns completely with the reasoning and decision—making and ultimately decision of the Investment Committee and the Investment Committee members as they described it in the actual world.

And if you take out the tainted factors, we submit this is exactly where you would nevertheless remain.

Now, let me very quickly talk about how we say this likely would have played out at the EVC or the Investment Committee in the counterfactual scenario.

First at the EVC. And I will avoid discussing the protected information that's reflected on this slide [slide 134], but the chronology is so important. The Minister instructed that this decision be taken by the Investment Committee and not referred to the EVC when he was presented with a report suggesting that it was uncertain how the EVC would vote.

He felt that that was not sufficiently guaranteed.

This is very, very different from a projection that the EVC would have voted "no". Rather, it meant that the EVC result was unpredictable, was uncertain.

Now, Claimant has emphasised repeatedly that the EVC would have —— they say would have voted "no" because the EVC voted "no" on the recent prior SK merger transaction and we say the evidence shows that there were multiple, critically important differences between these situations.

I'm going —— on slide 135 I need to refer to protected information. I just want to highlight that the first critical point of difference is that the SK merger did not impact the fund's overall portfolio of investments. The fund did not have a big stake in SK companies and so all of the documents and evidence that we just discussed showing concern about positive and negative impacts to the effect on the fund's portfolio of Samsung Group holding companies, those considerations were not present in relation to the SK merger. And here you have the testimony of one of the Investment Committee members explaining that:

[redacted]

We can go off protected information.

Of course, we know from the evidence of Mr Cho in this case that another critical difference between the SK merger situation and this situation was the existence of the Merger Injunction decision. He considered that that decision was very important and we have set out on slides 136 through 138 his testimony on that point and I commend it to the Tribunal. He thought it was so important he had planned to print it out, provide copies to all members of the EVC, and to explain its importance and his view that it would be very difficult for the EVC to make a decision departing from that of the court.

Now let me move to slide 141 -- 139. And I think this is -- it really ties in very nicely with the point that I made earlier about the criminal prosecution reports.

In the lead-up to this hearing, Claimant added to the record some additional translation of the statement of -- the prosecutor's statement report of Mr [redacted] and this is exhibit C-456. Mr [redacted] was a member of the experts voting committee. We had anticipated that Claimant may have intended to use this evidence at the hearing, so of course we reviewed it carefully. I don't believe that they did end up using it yesterday.

Let's look at what it says. So on slide 139 you have the excerpt from Mr [redacted]'s statement to the prosecutor

and here again, in question and answer form, but we know it's not a transcript, the prosecutor is said to ask:

[redacted]

And the answer that is given -- I'm on slide 139:

[redacted]

THE PRESIDENT: Mr Ware, you have now five minutes left.

MR WARE: Thank you:

[redacted]

You see that.

[redacted]

Now, next slide, we have -- we can compare that prosecutor report to the in-court testimony of Mr [redacted] on this issue:

"Question: [redacted]

"Answer: [redacted]"

Now this is entirely different from the impression that one would have -- having just read the prosecutor statement. [redacted]

Now I realise that I'm at the end of my time, and with significant apologies to my colleague Mr Webster who had been prepared to address you on the issues of legal causation and loss of chance, I want to just wrap up and leave you with this.

The evidence that we have presented, including all of the testimony that's included in this demonstrative and all of the contemporaneous evidence constitutes a large and

significant body of evidence that can guide you to safely determine what the likely outcome of this decision would have been in the absence of the wrongful conduct. We do not ask you to speculate. We ask you to hold Claimant to its burden, to prove with sufficient certainty, meaning a high likelihood that the outcome would have been different. And we say that the evidence is just not there. The evidence is not there and Claimant has emphasised the statement reports to the prosecutors by the Investment Committee members suggesting that they would have voted differently if they had known of the fabrication of the synergy effect.

But two points on that, which I didn't have the opportunity to present in full, but the two critical points are, first, the statement reports are unreliable; you should look at the court testimony. And second, when you look at the court testimony you will see that each of these members, who voted in favour of the merger, is very clear that they voted in favour on the basis of a large number of factors that were very important, that had nothing to do with the projected synergies.

They were also very clear that they were very troubled to learn that the synergies had been fabricated. And when asked by the prosecutor, "The research team has already told me this document was fabricated, are you saying you would have voted for it on the basis of a fabricated document?" Well, no. Anyone would -- the only reasonable answer to that question is, no, of course not, I'm not going to vote for a merger on the basis of a fabricated document. But that's not the question that you must answer.

The question is: if you remove the wrongful act, if you remove the fabrication itself, would the result nevertheless have been the same, because of the overwhelming other reasons already described and given and backed up by evidence in favour of this merger.

Thank you very much for your attention, for your patience. I want to also thank the Tribunal and our friends opposite for the adjustments to the schedule that were necessary in light of my illness this week. It's very much appreciated. Thank you very much.

THE PRESIDENT: Thank you very much, Mr Ware, and it's good to see you in action. We don't see any residual impact of the condition over the weekend. Thank you very much.

Housekeeping

THE PRESIDENT: Now, we have a few housekeeping issues that we need to address. Three of them require -- may have already required some consultation between counsel.

On Monday, when we had the procedural conference, one of the issues that was discussed was the rebuttal submissions and I believe we ended up on a consensus -- with

a consensus that they would be submitted in writing. We left it for parties to try to agree on a deadline. We encouraged parties to try to fix a very short deadline for that submission given where we are in the proceedings.

I don't know if the parties have been able to confer and agree on a deadline for the post-hearing submissions or rebuttal submissions, rather.

MR PARTASIDES: Unfortunately, we have not had that opportunity to confer. We have our position, hopefully it will be agreeable, and I'm happy to set that out for you now if it suits.

We've heard the Tribunal describe how any date beyond 7 August would be disruptive for you. We were to give those rebuttals today and so we will endeavour to submit our written rebuttal by 7 August, which I think was the day, Mr President, that you mentioned as being the last that would not be disruptive.

We believe, subject to questions that the Tribunal may have, that 30 pages should be sufficient given what has been said over the last two days.

And I would add, finally, members of the Tribunal, recognising the pressure that this imposes upon you, that we once before invited Korea to agree that the Korean translation of your English language award should follow rather than precede the rendering, because that will free up

some more time for the Tribunal that already will have to work through August.

We repeat that invitation. We see no good reason why it isn't accepted, particularly from a party that is simultaneously suggesting that you may want to release yourselves from the 30 September deadline that we would not agree to. And so that offer is repeated now.

And with those comments, members of the Tribunal, I should say we do have one point of order, an important one regrettably, that I will raise once these housekeeping points have been discussed.

THE PRESIDENT: Okay, let's do it item by item. So rebuttals, what is the Respondent's position on those?

MR WARE: Thank you very much and apologies that I was not present for the prior procedural conference.

Our first position is to invite the Tribunal with all sincerity to consider inviting parties to make an application to the English court to move the 30 September deadline. If the Tribunal were to indicate that it needs more time and to instruct parties to make such an application, we would make the application and it would be granted. This is just a formality.

THE PRESIDENT: Let's do this step by step. So the first question is the proposed deadline. Is 7 August good?

MR WARE: I make that -- I raise that as a first point just simply because the schedule of this case has already imposed significant hardship on our team, on myself and I think trying to do a 30-page submission over the course of the next days when the team was anticipating resting, and for my part, I had anticipated to be on leave, would be a significant hardship. It would be quite difficult for us to do that within that time.

So our position would be to ask the Tribunal if this can be extended outside of the -- this 7 August window, otherwise it seems quite difficult on our side.

THE PRESIDENT: What is the proposed date?

MR WARE: I have not yet had an opportunity to confer either with client or counsel team as to a particular alternative date but, from my own perspective, even extending maybe one full week beyond the 7th would significantly alleviate the impact.

THE PRESIDENT: The 14th. How about the question of the page limit?

MR WARE: Sorry, what was that?

THE PRESIDENT: Page limit.

MR WARE: On our side we have not had the opportunity to consider that, but my initial impression is that the limit proposed by my friend, 30 pages, seems reasonable.

THE PRESIDENT: Thank you very much. The Tribunal will consider the deadline after this hearing.

The next item would be cost submissions. We know that both parties have already made submissions on the costs and on the allocation of costs. It seems to us that the only thing that remains is the quantification of the claims and there's no need for any further argument. That is our view on basically what we have seen.

If that is agreeable the parties would only need to quantify their costs and refer to the submissions that are already on the record on costs. So the remaining issue would be the deadline for the cost statements, which we understand would have to be after the filing of the rebuttal submissions.

Do the parties have a sense of what would be a reasonable time? How many days after the Tribunal to -- for the deadline to be fixed for the rebuttal submissions you would be able to file cost statements?

MR PARTASIDES: Subject to the Tribunal's convenience, recognising it probably won't slow you down on much of your work, we would propose that that ought to be done within either seven or 14 days of the post-hearing briefs as it's just a quantification amount.

MR WARE: I would suggest 14 days. It typically takes some time for the accounts departments to pull

together all the final numbers.

THE PRESIDENT: Okay.

Then the transcript. Why don't we leave it for parties to discuss and agree on a deadline for the correction of the transcript? That is not an extensive task so if you come back to us by Friday this week.

In the meantime, the Tribunal will consider the directions on these other issues and to the extent that there is no agreement on them.

The final point from our side would then be the Tribunal's questions. They will be sent by the secretary after this hearing. We'll have a quick discussion to see whether anything needs to be amended in the draft that we have already prepared and that would be communicated to you later today so that you can take it into account when you are preparing your rebuttal submissions.

There are not going to be many questions. It is simply for the purposes of clarifying some items that are not necessarily entirely clear at this stage for the Tribunal. But that's all we have from our side.

Anything else that either party would like to raise in terms of housekeeping?

MR PARTASIDES: There is one matter, Mr President, members of the Tribunal, and I recognise that we're all against the clock now and I apologise for my colleagues who

have to rush off to the airport and send their apologies.

THE PRESIDENT: We made arrangements earlier this week for deliberations on Wednesday morning and some of us (overspeaking) by this afternoon.

MR PARTASIDES: Fully understandable and we appreciate your flexibility.

The point of order is an important one. It is this: I referenced yesterday repeatedly Korea's repeated stipulation on facts of its illegal intervention, which we're all aware of, something you recorded in your award, that survives in your award. We and you were entitled to rely on that.

Despite that, we heard today doubts expressed repeatedly as to the accuracy of the statement reports produced by the prosecutor's office. Let's be clear about who we're talking about here: we're talking about Korea's prosecutor. You may have noticed, members of the Tribunal, that Korea at this hearing is represented by five representatives of its prosecutor's office and yet you were told that the statement reports are unreliable. That is a recanting of the stipulation that was previously given. You will reach your own conclusion as to how attractive it is for Korea to suggest to you, represented by the prosecutor's office, the statement reports are unreliable.

Putting that to one side, that recanting would

give rise to a due process concern, if it were accepted by this Tribunal, and I think it's appropriate, as the only basis for the recanting is not new evidence as to the unreliability of those statements, but rather statements by counsel, I think it is appropriate that we put that concern, that due process concern, on the record.

THE PRESIDENT: And of course you will be able to express your concern also in writing in rebuttal submissions because it would be in response to what the Respondent has said. But simply for the record I'll give an opportunity for the Respondent to briefly comment.

MR WARE: Thank you very much. I will reserve the opportunity to respond more fully in writing, but as an initial point I do not understand Korea at any point in the proceedings to have stipulated to the reliability as evidence of criminal prosecution reports. I am aware, of course, that Korea accepted the findings of the Korean courts and we do accept the findings of the Korean courts. That does not mean that prosecutorial evidence is reliable evidence. It can be considered. It is considered by the courts and ultimately the courts make a decision as to whether to incorporate the information that's in them or to clarify or reject them. So that's my understanding of the position, but we will respond further in writing.

THE PRESIDENT: On that note, the parties will have an opportunity to address that issue in your rebuttal submissions. I'm afraid we have to stop here, unless there is anything else on the Respondent's side?

MR WARE: Nothing on our side, thank you.

THE PRESIDENT: Thank you very much.

MR PARTASIDES: Thank you, members of the Tribunal.

THE PRESIDENT: We close the hearing. Thank you very much for your assistance during this hearing. Thank you.

(6.12 pm BST)

(The hearing concluded)

I N D E X