



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

Day 2

July 29, 2026

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1 Wednesday, 29 July 2026
 2 (2.00 pm BST)
 3 Housekeeping
 4 THE PRESIDENT: Good morning all and welcome to
 5 the second day of the hearing in these remitted proceedings.
 6 Are there any housekeeping issues from either
 7 side? On the Claimant's side.
 8 MR PARTASIDES: Good morning, Mr President,
 9 members of the Tribunal, there's one issue that we wish to
 10 raise.
 11 In addition to the 187 slides that we received
 12 yesterday from Respondent we also received, as you have this
 13 morning as well, two demonstratives. One of them,
 14 demonstrative E is a one—page timeline — timetable, which
 15 is based on the evidence on the record which we don't have
 16 an issue with.
 17 The other is demonstrative D, which is a 34—page
 18 compilation of extracts of Additional Judgment and
 19 Investment Committee member testimony, which seems to us
 20 stretches the boundary between demonstrative and further
 21 submission. This is an annex that could and should have
 22 been presented with the Respondent's Rejoinder just filed
 23 two weeks ago and, had it been, we would have had an
 24 opportunity to draw your attention during our opening
 25 submission to its incomplete and one—sided nature, which we

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1 have been deprived because it has only now been provided.
 2 We don't propose to object, Mr President, members of
 3 the Tribunal, to its admission, save to say that it is
 4 one—sided and incomplete and, to the extent the Tribunal
 5 finds this document to be useful at all, then we would
 6 reserve for ourselves the right to complete it at the same
 7 time that we file our written rebuttal to be discussed at
 8 the end of today.
 9 So no objection to it being raised with that proviso.
 10 THE PRESIDENT: Any comments on the Respondent's
 11 side on that?
 12 MR WARE: Given that there's no objection to our
 13 use of the demonstrative, I don't have much further to say.
 14 We would not object to the Claimant having an opportunity to
 15 present any additional summary of the evidence that it may
 16 wish to submit in response to this document.
 17 THE PRESIDENT: In connection with the rebuttals?
 18 MR WARE: In connection with the rebuttals.
 19 THE PRESIDENT: Okay. It looks like we have an
 20 understanding on how to proceed. Anything else?
 21 (Pause)
 22 The Tribunal's wish on this procedure is that if,
 23 you, the Claimant, decide to comment on that exhibit or
 24 demonstrative that you do it by way of a mark—up rather than
 25 a separate submission to make our life easier, as you did

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1 earlier.
 2 MR PARTASIDES: That makes complete sense. We
 3 shall do so, thank you.
 4 There are no other issues on our side,
 5 Mr President.
 6 THE PRESIDENT: Very good. So then we proceed, on
 7 the Tribunal's side, simply a reminder to the Respondent,
 8 Mr Ware, when you proceed that if you plan to address any
 9 protected information, please indicate that before you deal
 10 with that information so that we can suspend the broadcast
 11 and then also indicate when you are done with it. Thank you
 12 very much.
 13 Please proceed.
 14 Opening submissions by MR WARE
 15 MR WARE: Thank you very much. And good morning,
 16 members of the Tribunal.
 17 It's an honour to have the opportunity to present
 18 to you on behalf of Korea in these remitted proceedings.
 19 I'll be sharing the opening submissions today with
 20 Mr Peter Webster from Essex Court Chambers, to my left, and
 21 Mr Kevin Kim from the Peter & Kim firm to my right.
 22 Now, we begin, of course, with the issue that has
 23 been remitted by the English court and the court has
 24 formulated that issue with crystal clarity. The issue is:
 25 did the breaches of the Treaty found to have been

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1 constituted by the measures of the Blue House, the Minister
 2 of Health and Welfare and the Ministry of Health and
 3 Welfare, cause loss or damage to the Claimant and the relief
 4 to be awarded for such loss or damage?
 5 Now, Claimant has devoted much effort in trying to
 6 narrow the scope of the remitted issue as formulated by the
 7 court, but the terms of the order are clear. The first
 8 question is whether the Blue House measures caused any loss
 9 or damage to Claimant. The second question is what the
 10 remedy should be for any such loss or damage.
 11 Causation and loss. Those are the issues that
 12 have been remitted and that will be the focus of our
 13 submissions today.
 14 Now, we accept, as a starting point, that the
 15 Tribunal has already found that conduct by the Blue House,
 16 by Minister Moon and by the Ministry was in breach of the
 17 minimum standard of treatment under Article 11.5 of the
 18 treaty. That conduct, which the parties for convenience
 19 refer to as "the Blue House Measures", consisted of the
 20 President and the Blue House instructing Minister Moon and
 21 the Ministry to intervene in the merger, and Minister Moon
 22 and the Ministry then intervening in the NPS's vote on the
 23 merger and instructing the NPS to have the vote be taken by
 24 the Investment Committee, and to ensure that the vote be in
 25 favour of the merger; that's in award paragraph 602 (a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 narrative about the merger.

2 Elliott, for its part, described the merger as:
3 "So breathtakingly bad and designed to favour the
4 Lee family over the legitimate rights of the investing
5 public."

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

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

23 Well, every one of the prosecutor's allegations
24 upon which Claimant relied to argue that Samsung had engaged
25 in corruption, manipulation and deception in relation to the

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1 merger, every one of those allegations was rejected by the
 2 Korean courts in the JY Lee Unlawful Merger case. Mr Kim is
 3 going to address these points so, in the interests of time,
 4 I will not read these lists of rejected criminal allegations
 5 on slides 14 to 15, but I commend it to you.

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

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

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

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

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

10 Opening submissions by MR WEBSTER

11 MR WEBSTER: Good morning.

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

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

14

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

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

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

15

1 parties had made in the arbitration about causation.

2 Second, it then asks itself — and this is
 3 paragraph 265:

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

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

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

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

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

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

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

4 So that's the overview.

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

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

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

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

25 At 244, he sets out his findings about the

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1 Blue House measures.

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

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

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

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

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

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1 is apparent from — so the other parts of the award are not
2 affected:

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

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

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

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

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

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

19

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

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

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

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

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

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

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

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

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

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

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

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1 821 of the award is about whether the NPS had the casting
2 vote in the shareholders' meeting. It's downstream from the
3 NPS. It's not the upstream connection between Blue House
4 measures and NPS decision. And that's also true if one
5 looks at the legal causation section.

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

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

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1 it's not.

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

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

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

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

8 Now, to the extent it matters, and in my
9 submission it doesn't, but just for the record, the
10 Republic of Korea was not relying on Integral Petroleum.
11 Integral Petroleum was the Claimant's case that it was
12 relying on. My submissions were about the severance test
13 not about Integral Petroleum. But in my submission one
14 doesn't need to get into all of that, because it's clear in
15 265 what the court has done.

16 In any event, even if, even if the court were in
17 265 applying some Integral Petroleum test, with respect, it
18 wouldn't help the Claimant, because we're still here. We'd
19 still be here with the remitted issue, with various
20 paragraphs of the award set aside, and with the court having
21 said that, in its view, on a fair reading of the award,
22 there are no existing findings of factual and legal
23 causation between the Blue House measures and loss.

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

24

1 Two quick final points on this, just by reference
 2 to the ruling that the court hands down alongside its order.
 3 And just to explain, perhaps the Tribunal's familiar with
 4 the English process, but just in case not, when a judgment
 5 is given it's up to the parties to try to agree an order.
 6 If they can't agree it, they submit a dispute about the
 7 formulation of the order to the court. This is the ruling
 8 in respect of those issues.
 9 Two points to flag. Paragraph 5(c) again, a
 10 specific finding in respect of paragraph 602, the paragraph
 11 on which the Claimant is repeatedly placing reliance. The
 12 judge says in terms:
 13 "Once those provisions of the award which find
 14 that the conduct of the NPS constituted a measure adopted or
 15 maintained by Korea are set aside, this paragraph simply
 16 involves a factual finding as to what the NPS did and under
 17 whose direction it acted."
 18 And so that's confirming the point which
 19 I've already shown you in 264, that the judge is saying
 20 these — that paragraph does not contain findings on
 21 a counterfactual causation question.
 22 The next point to show you here is over the page
 23 in subparagraph (l)(i). There was a dispute between parties
 24 about whether the entirety of the causation section had to
 25 be set aside or only parts of it. The judge only sets aside

25

1 parts of it. It's very important to see what he says. He's
 2 not setting aside 815. That's where you set out your
 3 factual causation test and he says:
 4 "The Tribunal's findings as to the test remain
 5 relevant to the issues which are remitted."
 6 He wouldn't be saying that if there was no factual
 7 causation issue back before you.
 8 Then 816 to 821, those are all findings about
 9 whether the NPS had a casting vote in the shareholders'
 10 meeting. And what he says is that those are relevant on
 11 a potential causal pathway. Again, he wouldn't be saying
 12 that if there was already a binding finding, as the Claimant
 13 would have it, that there is causation between Blue House,
 14 NPS and outcome. He's describing that as a potential causal
 15 pathway.
 16 So, members of the Tribunal, unless I can help
 17 further, that concludes my review of the judgment and the
 18 ruling. In my submission, it is crystal clear that both
 19 issues of fact — factual causation and legal causation are
 20 back before you and 602 does not have the status for which
 21 the Claimant contends.
 22 MR WARE: With the Tribunal's indulgence now,
 23 perhaps would be a good opportunity for the first of our
 24 comfort breaks this morning.
 25 THE PRESIDENT: Let's do that.

26

1 Shall we resume at 10 o'clock.
 2 Thank you.
 3 (2.48 pm BST)
 4 (A short break)
 5 (3.04 pm BST)
 6 THE PRESIDENT: Okay, let's proceed. Mr Ware or
 7 your colleague.
 8 Opening submissions by MR KIM
 9 MR KIM: Good morning, Mr President, members of
 10 the Tribunal. For the record I'm Kap—You Kim representing
 11 the Republic of Korea.
 12 My task this morning is to guide you through the
 13 two sets of Additional Judgments. In doing so I briefly
 14 revisit another two sets of the Korean court judgments that
 15 the Tribunal has previously reviewed, the Moon/Hong judgment
 16 and the Merger Annulment judgment. While I appreciate that
 17 the Tribunal has already reviewed each judgment, I ask for
 18 the Tribunal's indulgence in briefly revisiting them as
 19 doing so will help place the new judgment in proper context.
 20 Slide 25. Moving into the shareholder claim
 21 judgment, one thing I want to note here is that the
 22 shareholder claim court heard on this case for more than
 23 five years, two years in the first instance and three years
 24 in the second instance, and in doing so fully considered the
 25 Moon/Hong judgments in addition to other evidence. Yet, the

27

1 court determined that there was no proximate causal
 2 relationship between Minister Moon and CIO Hong's action and
 3 damages to Samsung C&T shareholders.
 4 In this case, the plaintiffs were former
 5 Samsung C&T minority shareholders and the defendants were
 6 ROK. The plaintiff claimed damages for losses from the
 7 reduced value of Samsung C&T shares under the merger ratio.
 8 The court dismissed the plaintiffs' claims for damages.
 9 As you can see on slide 27, the factual matrix of
 10 the shareholders' claim case is comparable to this
 11 arbitration: the same type of parties, the same type of
 12 losses.
 13 Under Korean law, for a tort claim to be
 14 established a causal relationship between unlawful act and
 15 the damages is required. To answer that question the court
 16 employed the established jurisprudence that damages can be
 17 found if:
 18 "A proximate causal relationship between the
 19 public official's breach of duty and the plaintiff's damages
 20 exist, which shall be assessed based upon probability of
 21 a typical outcome."
 22 In deciding whether a proximate causal
 23 relationship exists, the court acknowledged that NPS's vote
 24 stood between Minister Moon's acts and approval of the
 25 merger. As the NPS exercised its shareholder rights

28

1 existing between the act of abuse of authority and approval
2 of the merger agreement, the court found that Korea could be
3 held liable for compensation on only two possible grounds.

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

9 The court elaborates further that:

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

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

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

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

29

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

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

16 On that basis, the court concluded that:

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

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

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

30

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

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

5 MR KIM: Level of probability.

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

8 MR KIM: Yes.

9 MR GARIBALDI: Thank you very much.

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

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

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

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1 the loss to the principal .

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

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

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

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

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

22 For CIO Hong, the first instance court found that
23 CIO Hong breached his occupational duty and caused loss
24 equivalent to the difference between what the financial
25 status of NPS would have been had the mergers not been

32

1 approved and the financial status as a result of the
 2 approval of the merger.
 3 The Moon/Hong second instance court vacated the
 4 judgment of first instance court. So second instance court
 5 expressly rejected existence of such loss. Instead, the
 6 second instance court found a completely different type of
 7 loss. You see from the slide 36, the second instance court
 8 had to decide the two types of loss under the revised
 9 charges: first, loss based upon the difference between
 10 so-called appropriate merger ratio and actual merger ratio.
 11 As you can see, 1, 3 and 5 on the screen, this was a loss
 12 that any Samsung C&T shareholders could have potentially
 13 suffered and the same type of loss that Elliott argues in
 14 this proceeding. The Moon/Hong second instance court
 15 specifically rejected this.
 16 Second, the additional benefit that NPS could have
 17 acquired had it actively leveraged its casting vote, which
 18 is a loss only unique to the NPS. The second instance court
 19 admits this, but in doing so rejected that a specific amount
 20 of loss can be calculated.
 21 Mr President, members of the Tribunal, let me
 22 repeat: the Moon/Hong court did not admit any type of loss,
 23 quantifiable or not, that is being argued by Claimant in
 24 this proceeding. Instead, the court only recognised
 25 entirely different loss, that is unique to the NPS.

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1 As a final point, CIO Hong was also charged for
 2 casting his own vote in favour of the merger as a member of
 3 the Investment Committee. However, second instance court
 4 rejected these charges. In other words, the second instance
 5 court did not hold CIO Hong had a duty to vote against the
 6 merger. Neither did it hold that he has a duty to make the
 7 NPS vote against the merger.
 8 With that I briefly turn to the Merger Annulment
 9 judgment.
 10 MR THOMAS: Just before you proceed, just so I
 11 understand the way in which the second instance court
 12 relates to the first instance court, is it possible for the
 13 second instance court to make a factual — an implicit
 14 factual finding which is different from that made by the
 15 first instance court or, where it makes a different finding
 16 of fact, must it expressly do that by way of vacating some
 17 part of the lower court's decision?
 18 MR KIM: Both is possible.
 19 MR THOMAS: Thank you.
 20 MR KIM: Yes.
 21 Slide 38. In this case, the shareholders sought
 22 to annul the merger. The court dismissed the claim finding
 23 that the merger's purpose, ratio, timing and procedure were
 24 all lawful. The Merger Annulment court rendered its
 25 decision after considering the Moon/Hong first instance

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1 judgment and its underlying testimonies.
 2 Now, how do these court judgments fit together?
 3 We have — we prepared a diagram at slide 39 to illustrate
 4 this. You see that the chain of events across the middle,
 5 the chain the Claimant says exists: the ROK's interference,
 6 the Investment Committee open voting, NPS's vote in favour
 7 and the merger.
 8 The Moon/Hong judgment examined the first part of
 9 this chain. In the end the loss found was only unquantified
 10 loss unique to the NPS: lost opportunity to gain potential
 11 profit from actively leveraging its casting vote.
 12 The Merger Annulment judgment examined the end
 13 parts of the chain and found no ground for annulment in
 14 merger's purpose, ratio, timing and/or procedure. As I will
 15 explain shortly, the JY Lee judgment examined this same
 16 ground once more in much greater detail, factual depth and
 17 came to the same conclusion.
 18 Now, the shareholders' claim judgment examined the
 19 entire chain. The court took the conclusions of the
 20 Moon/Hong judgment as established, including that certain
 21 degree of influence may have been exerted on the Investment
 22 Committee. The court then asked whether such influence
 23 actually caused loss to the shareholders and its conclusion
 24 was the NPS vote was not affected. The court found no
 25 proximate causal relationship and no loss in value to

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1 Samsung C&T shareholders. This is how this set of judgments
 2 sits alongside one another.
 3 With that, let me turn to the JY Lee judgment.
 4 Slide 40. So far, I have explained to you how the Korean
 5 court cases made conclusions surrounding the decision-making
 6 process of the NPS. Now I explain to you about the JY Lee
 7 judgment, which dealt with the merger process in its
 8 entirety.
 9 The defendants were JY Lee, former Samsung
 10 executives and outside accountant. They were indicted on 23
 11 counts in total. Sixteen of these counts were for violation
 12 of the Capital Market Act and the remaining counts include
 13 breach of occupational trust owed to the former Samsung C&T
 14 and its shareholders, violation of the Audit Act, and
 15 perjury.
 16 For the current purpose, I focus mainly on the
 17 charges for violation of the Capital Market Act and breach
 18 of occupational duty as they are more relevant to this
 19 arbitration.
 20 Now, I direct your attention to the last column of
 21 this table. The verdict was not guilty in every count for
 22 every defendant. This outcome was consistently confirmed in
 23 all three instances up to the Supreme Court.
 24 The JY Lee judgments are also unique in another
 25 aspect, for their comprehensive consideration of the record.

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1 The first instance court judgment, 1,400 pages and the
2 second instance court is another 800 pages. More than
3 100 hearings were held, only counting those held during the
4 first instance court, and evidence of over 20,000 items were
5 considered.

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

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

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

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

25 I note that the Mason Tribunal was also not

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

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

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

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

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

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

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

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

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

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

25 On the synergy figure the court traced how the

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

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

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

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

40

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

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

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

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

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

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

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

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

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

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

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1 THE PRESIDENT: Thank you very much.

2 MR KIM: Thank you.

3 Opening submissions by MR WEBSTER (continued)

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

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

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

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1 scenarios.

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

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

7 MR WEBSTER: Yes.

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

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

22 Now, given the time I'll only develop two of
23 these. The first obviously is Bilcon. As the Tribunal will
24 recall, that's an arbitration chaired by Judge Simma and the
25 Tribunal will have seen that Korea places considerable

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1 weight on it for three points.
 2 First, that it supports the necessity of a but—for
 3 analysis and shows how it works.
 4 Second, that it shows a Tribunal applying, because
 5 it views this as mandated by ICJ authority, the standard of
 6 proof that Korea contends should be adopted.
 7 And third, it supports the availability here of
 8 a loss of a chance approach, albeit that the Claimant has
 9 chosen not to avail itself of that.
 10 Just to recapitulate the facts for the Tribunal,
 11 if that is helpful, that was a claim regarding the rejection
 12 of permission to proceed with a project to develop and
 13 operate a quarry and marine terminal in Nova Scotia. It
 14 underwent a lengthy environmental assessment jointly
 15 conducted by the governments of Canada and Nova Scotia and
 16 that was referred to a joint review panel, ie an independent
 17 decision-making body. And in its final report that JRP
 18 recommended the rejection of the project. Now, a majority
 19 of the Tribunal holds that that process, the process that
 20 was actually followed, involved a breach of Article 1105 of
 21 NAFTA.
 22 And there's then a separate stage of the case
 23 regarding quantum and if we go, please, on to slide 75, just
 24 to show you some of the Tribunal's language there, the
 25 Tribunal applies the counterfactual causation enquiry about

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1 what the outcome of the JRP process would have been but for
 2 the treaty breach. And you see also that it's applying
 3 a demanding test when doing so, "in all probability", "with
 4 a sufficient degree of certainty".
 5 It holds that the Claimant has not been able to
 6 discharge its burden of proof showing what would have
 7 happened had there not been the breach and we obviously know
 8 what it says about loss of a chance.
 9 Just to highlight to you some of the language on
 10 slide 75. One sees there that the Claimant does not meet
 11 its burden of proof where all that Claimant can show is if
 12 there's a realistic probability of a differing outcome. And
 13 the Tribunal is also saying that even — that the
 14 NAFTA-compliant Tribunal could reasonably have concluded
 15 that the project should be rejected and that conclusion, ie
 16 the Tribunal thinking that the JRP could reasonably have
 17 come to the same decision, is sufficient for the Bilcon
 18 Tribunal to conclude that but—for causation was not
 19 established.
 20 If we could go back please to 65, the second case
 21 to highlight is Lemire v Ukraine. The facts in summary are
 22 set out on the slide. It's a significant case, in my
 23 submission, because this is a case of an FET breach because
 24 of one component of the breach is political interference
 25 with an independent decision-making body.

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1 So "Breach of FET":
 2 "Breach of FET when radio licences are not awarded
 3 to a Claimant because of political interference with what
 4 should have been the Independent National Council for TV and
 5 Radio Broadcasting."
 6 The Claimant argues, come the causation element of
 7 the dispute, that the FET breach itself established
 8 causation and therefore there was nothing more to be asked.
 9 And one sees that at paragraph 154 of RLA-056. {1/56/48}.
 10 The Tribunal — so that's the same argument that's being
 11 advanced here and it's rejected by the Tribunal. The
 12 Tribunal insists on carrying out a but—for and as part of
 13 that but—for, specifically at paragraph 171 of the award it
 14 says:
 15 "You had to ask if the tenders had hypothetically
 16 been decided in a fair and equitable manner and the Claimant
 17 had participated in them, you have to show that he would
 18 have won the disputed frequencies."
 19 It's also worth noting just before we leave this
 20 that Jan Paulsson was on the Tribunal in this case and
 21 I note that because of the weight that's been placed on
 22 Professor Paulsson's writing in respect of Amco.
 23 Now, if we can then go on to 67, to look at Amco.
 24 This is the —
 25 MR GARIBALDI: Excuse me, I notice that you

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1 skipped 66. And 66 has something to do with something that
 2 I said at the hearing and there's been a lot of quoting of
 3 what I said and at the hearing itself, it seems to me that
 4 I have to make it clear exactly what I meant and what
 5 I mean.
 6 The Respondent in the case that was presented at
 7 the hearing in Geneva made an argument, as I understood it,
 8 that there was no causation in fact because the NPS could
 9 have voted differently. I made the point that I don't
 10 understand the legal basis, or even philosophical basis, for
 11 that argument.
 12 Now I pointed out yesterday that I understand now
 13 that the Republic of Korea's making a different argument and
 14 the argument is that the NPS would have voted in favour of
 15 the merger anyway.
 16 Now, would you please confirm that that is the
 17 argument that you are making?
 18 MR WEBSTER: So both arguments are made, sir, and
 19 let me explain why, if I may. So I completely hear what you
 20 say that you do not accept the first argument. We
 21 respectfully submit that Bilcon does support it and the
 22 reason is that if one has to be satisfied to this elevated
 23 threshold of "in all probability" or "sufficient degree of
 24 certainty", then if one shows that it could have made the
 25 same decision, that is sufficient to allow you to say that

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

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1 either, because the standard of proof, whatever it is,
 2 applies either to the "would" or to "could" and so it
 3 doesn't come into play. So if the standard of proof is,
 4 say, beyond a reasonable doubt, it can apply both to "could"
 5 or to "would", but both are judgments of probability and the
 6 question is — and whatever level of — whatever standard of
 7 proof applies to the judgment of probability, then would
 8 apply to both. But the "could" is possibility.
 9 MR WEBSTER: Yes.
 10 MR GARIBALDI: And "would" is probability. I
 11 correct what I just said before.
 12 MR WEBSTER: Yes.
 13 MR GARIBALDI: One thing is possibility. Another
 14 thing is probability. And those are two very different
 15 logical concepts.
 16 MR WEBSTER: Yes. I'm very grateful for the
 17 clarification.
 18 MR GARIBALDI: Right. So again, now that you say
 19 that it all depends on the burden of proof — not on the
 20 burden of proof, on the standard of proof, then I am
 21 confused again.
 22 MR WEBSTER: Okay, well, it may be
 23 a terminological issue with how one uses "standard of
 24 proof". As Korea understands the heightened "in all
 25 probability" threshold, if one establishes that there is

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

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

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1 MR WEBSTER: Yes —

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

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

18 MR WARE: I see.

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

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

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

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

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

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

12 MR WARE: Yes.

13 THE PRESIDENT: Okay. Understood. Thank you.

14 MR WARE: Thank you.

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

18 MR WARE: Correct.

19 MR GARIBALDI: Okay, thanks.

20 MR WARE: Thank you. Apologies for the
21 intervention.

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

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

25 So at slide 67 in its reply, the Claimant

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

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

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

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

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

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

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

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

23 And I would just ask the Tribunal to put as
24 a mental footnote there, because I've shown you already in
25 respect of Lemire, and will show you subsequently even in

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1 material cited by the Claimant, that is not the generally
 2 accepted position now.
 3 Then third, at paragraph 174, and that's the
 4 paragraph on which the Claimant places particular weight and
 5 it's the one on the slide [slide 67] in front of you, what
 6 the Tribunal was considering there was an argument by
 7 Indonesia that the loss — it was specifically put that the
 8 loss was caused by Amco's own fault, because Amco's conduct
 9 entitled BKPM to terminate the licence. That's the specific
 10 context in which those findings are made and in which the
 11 Tribunal says that it can't pronounce on what a fair BKPM
 12 would have done.
 13 Now, in my submission, Amco is not good law in any
 14 event, but even if one were to think it is, the situation
 15 here is very different, because you're not being asked to
 16 decide the equivalent question to Amco. As you noted
 17 yesterday, sir, in Amco it's the state body whereas — which
 18 is — you are having to analyse how it would have decided.
 19 And the question here is how the NPS, an independent body,
 20 would have decided.
 21 There's also no parallel to the other two points
 22 that I've just highlighted, ie this argument that the
 23 outcome should change because it was the Claimant's own
 24 fault, and there's no background of that physical seizure of
 25 the investment which was a material factor in the Amco

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1 Tribunal's decision—making process.
 2 Next slide [slide 68], if we can, just to make
 3 good the point that Amco has been criticised as bad law for
 4 failing to apply a counterfactual and one sees that in this
 5 slide: Professor Douglas criticises it on that basis. And
 6 obviously I've also highlighted to you that in Lemire the
 7 Tribunal there does do a counterfactual.
 8 And then the next slide [slide 69], please, this
 9 is just engaging with the new material on which the Claimant
 10 relied, albeit quite lightly, in its oral submissions
 11 yesterday, namely the Jan Paulsson 2020 lecture.
 12 As we note on the slide [slide 69] and in the box
 13 at the top, actually previously Paulsson was critical of the
 14 Amco decision for skipping over this but—for analysis. Then
 15 in his 2020 lecture he advances an argument that the outcome
 16 could be justified in the case of, as he puts it, pretextual
 17 state action, and he draws this distinction between
 18 interfering in property rights to put an end to the
 19 Claimant's activities or to deploy a power of eminent domain
 20 to allow a different use of land, in both cases pursuing the
 21 perceived public interest.
 22 As I understand it, Professor Paulsson is saying,
 23 in respect of that category of case, the Amco approach would
 24 not be followed. And then he says: well, if you've got the
 25 taking over of a profitable business and continuing to

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1 exploit it in the same way, he seems to be supporting the
 2 Amco approach. That doesn't provide any support for
 3 Claimant's position here, in our submission.
 4 Turning then on to the applicable standard of
 5 proof. If we could go to 71, please, that slide is just
 6 making the very obvious point that, contrary to what's being
 7 suggested, it's not just Bilcon that Korea is relying on,
 8 but this is supported by ICJ authority.
 9 The next slide [slide 72], please. Claimant
 10 advances various arguments that there are findings in the
 11 award which are inconsistent, Claimant says, with the
 12 Tribunal applying the Bilcon approach and it relies in
 13 particular on 266 and 581.
 14 Now, in Korea's submission you're not there
 15 rejecting the application of the Bilcon approach to a causal
 16 enquiry. 581, in particular, is a finding about merits,
 17 it's a finding about breach. It's not dealing with
 18 causation.
 19 But if we go to the next slide [slide 73], please,
 20 actually in 931 there does see the Tribunal applying the "in
 21 all probability" standard in the context of a counterfactual
 22 in the causation enquiry.
 23 And Korea respectfully says that the Tribunal was
 24 right to apply that standard there and also that there would
 25 be no principled basis for approaching the current

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1 counterfactual enquiry in any different way.
 2 MR GARIBALDI: Counsel, I have some questions
 3 about this. Can you point out, not necessarily now, but
 4 later, to a passage in the Chorzow Factory case, in which
 5 this reference to "in all probability" is used in the
 6 context of causation of the loss as distinguished from the
 7 calculation of the loss? This is a very important point and
 8 I think that you just glossed over it.
 9 I would like to see if Chorzow Factory has any
 10 statement to the effect that "in all probability" applies to
 11 the causation but—for point that you are talking about.
 12 Thank you.
 13 MR WEBSTER: We'll certainly look at that, sir.
 14 I would emphasise that it's not just
 15 Chorzow Factory and Korea also relies on the Bosnian
 16 Genocide with the "sufficient certainty" formulation but we
 17 will certainly look at that.
 18 MR GARIBALDI: That's a different standard.
 19 MR WEBSTER: Yes.
 20 The final point to make before handing back to
 21 Mr Ware is just to give — one reference to the Tribunal in
 22 answer to the President's question yesterday about burden of
 23 proof. One actually sees in the US non-disputing party's
 24 submission in this arbitration, the position being adopted
 25 by the US, which obviously aligns with Korea's position that

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1 it's the investor which has the burden of proof as a matter
2 of the ordinary meaning of the treaty in this case and the
3 Opus reference is {B/5/3}. That's all I was going to say
4 and I'll hand over to Mr Ware.

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

7 THE PRESIDENT: Yes, I think it could be. Let's
8 break for ten minutes until quarter past. Quarter past,
9 whatever it is. I'm confused with Central European Time.
10 (4.06 pm BST)

11 (A short break)

12 (4.15 pm BST)

13 THE PRESIDENT: Let's proceed. Mr Ware.

14 Opening submissions by MR WARE (continued)

15 MR WARE: Thank you very much.

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

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

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

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1 have happened absent the Blue House measures.

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

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

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

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

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1 similarities with that of the NPS.

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

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

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

13 We say it's hard to argue with this general
14 proposition and we know, of course, as we see in the award,
15 that the merger ultimately was approved by 69.53% of the
16 shareholders present and attending, corresponding to nearly
17 59% of all of SC&T's total issued and outstanding shares.

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

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

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

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

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

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

23 "While the prosecutor alleges that the defendants
24 explained false information, et cetera, to foreign
25 shareholders that could distort their investment decisions,

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1 such allegation of the prosecutor is without merit."

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

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

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

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

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1 And the reason I begin with R-127 which is titled:
2 "Analysis regarding the merger of Cheil Industries
3 and Samsung C&T."

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

11 I would also point out that this is a very
12 even-handed and neutral document, prepared by the NPS. As
13 we will see, it gives equal air time to views in favour of
14 the merger and against the merger. You will see that in
15 a moment. But if you flip — if you just sort of flip
16 through it with me very quickly we see it begins first,
17 of course, with the table of contents and then on pages 1 to
18 2 we have an outline of the merger and you'll see on page 2
19 you'll notice the diagram showing the change in the
20 governance structure of the Samsung Group that would result
21 from this merger.

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

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

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

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

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

16 On page 10, the impact on the economy.

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

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

24 "Doubtable synergy effect of the merger and
25 insufficient grounds for post-merger profits and growth."

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

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

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

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

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

25 And then attachment 4 — sorry, I misspoke

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1 a moment ago, attachment 1 on page 21 was the claims of SC&T
2 in favour of the merger. It's attachment 4, on page 24,
3 that describes the claims of Elliott against the merger.

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

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

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

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

24 MR GARIBALDI: Counsel, please clarify one point.

25 We have heard evidence that the fair — let me

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

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

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

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

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

24 That's the range. The mid-point of that range,
25 0.46, is the one that you see a lot of references to in

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1 a number of documents.

2 Now, the three iterations — that range shifted —
3 and if you look at the mid-points, what happened is the
4 first mid-point was, I think, at around [1] to 0.68. The
5 second mid-point, second iteration, went very far down to —
6 I have to double check, but somewhere around 1 to
7 0.3—something, very far down. And then in the third
8 iteration it was re-evaluated up to where it ended up at 1
9 to 0.46, as the mid-point. So it went down and then up.
10 And we know exactly why that happened, because all of this
11 was examined in great detail in the Moon/Hong proceedings.

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

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

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

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1 events.

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

9 Is that helpful to answer the question?

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

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

15 MR GARIBALDI: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 helpful to have that part as well.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 And I will move this as quickly as I can. On
20 slide 86 this is a — this reprises a slide that the
21 Claimant presented at the Geneva hearing. In that hearing
22 Claimant emphasised two of the five fund management
23 principles that govern the NPS's voting. And I should
24 preface this by saying that this first segment is focusing
25 on the relevant operating rules and guidelines that governed

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1 the NPS's decision—making in the actual world and would have
2 also governed its decision—making in the counterfactual
3 world.

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

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

14 That's the principle of stability.

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

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

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

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

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

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

9 And Article 4—2:

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

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

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

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

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

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

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

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

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

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

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

19 (Pause)

20 Thank you. I'll go ahead.

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

25 [REDACTED]

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1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 Now, we can go off of the protected information.
 14 (Pause)
 15 So just very briefly what were these positive and
 16 negative portfolio effects that were expected? Slide 93
 17 shows an analysis that was performed by the NPS one year
 18 prior to this merger. So this is completely independent of
 19 any interference. And the NPS did a review of what happened
 20 when Chaebols made a transformation from
 21 a cross-shareholding structure to what they call a holding
 22 company structure, a more traditional simplified corporate
 23 structure. And what they found was there was a marked
 24 enhancement in shareholder value, improved stock price
 25 performance and they give figures — they quantify it in

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1 terms of excess rates of return, both in terms of
 2 percentages and basis points.
 3 And they contemplated at the time that Samsung had
 4 not yet gone through any such conversion, but they
 5 contemplated that Samsung might do so and even contemplated
 6 the possibility of a merger involving Cheil, which at that
 7 time was referred to as Everland.
 8 So the NPS was focused from an early point in time
 9 on the benefits to the stock performance if the Samsung
 10 Group were to transform to a holding company structure and
 11 the merger was an important step toward changing over to
 12 that structure. So when we get to the time of considering
 13 the merger, on slide 94, you see that the NPS summarised
 14 that the predominant view was that as the Samsung Group
 15 makes that transition from the cross-shareholding structure
 16 to a holding company structure there will be an increase in
 17 dividends paid out to shareholders.
 18 So again the NPS looking at this from the
 19 perspective of its own long-term shareholder value as
 20 a holder of USD20 billion in equity in these companies,
 21 stock price improvement, increased dividend payouts.
 22 Next slide 95 —
 23 MR THOMAS: Mr Ware, a very quick question and it
 24 might have to be answered by Mr Kim. Looking at the
 25 transcripts, does Korean procedure control leading questions

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1 as in the common law — in a common law jurisdiction?
 2 Some of the questions look very leading to me and
 3 I'm not criticising them. I'm just saying: is this
 4 a standard practice of the examination of witnesses
 5 irrespective of whether the witness is being examined by his
 6 or her own lawyer or by the other side?
 7 MR KIM: Yes, the leading question is not
 8 desirable but in practice in the Korean court in many cases
 9 leading questions are allowed in practice.
 10 MR THOMAS: Thank you.
 11 MR KIM: Because the testimony was given under
 12 oath and for the efficiency it's more liberal to allow
 13 leading questions in practice.
 14 MR THOMAS: Thank you.
 15 MR WARE: Slide 95, just to read to you a finding
 16 from the JY Lee unlawful merger judgment:
 17 "After very carefully examining the purposes,
 18 objectives and anticipated effects of the merger from
 19 a corporate governance perspective [it says that] those
 20 objectives included enhancing stability of corporate control
 21 over SC&T by strengthening the Group's control of SC&T,
 22 bolstering its status as a de facto holding company,
 23 resolving circular shareholdings, and simplifying the
 24 corporate governance structure. All of these effects can be
 25 considered as also aligning with the interests of both SC&T

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1 and its shareholders as well."
 2 The court then went on — and this is in the
 3 second box on slide 95 — to describe the position of two of
 4 the sovereign investment funds that appear to have
 5 determined that the merger would be positive in terms of
 6 increasing governance transparency, considering the Group's
 7 overall portfolio and also expressing that with the merger
 8 there will be an effect of simplifying the corporate
 9 governance structure and that this is certainly beneficial
 10 for investors.
 11 So that is the Korean court summarising evidence
 12 as to the reasons why the sovereign wealth funds — part of
 13 why the reason why they voted in favour of the merger is
 14 that they felt that these changes to the corporate
 15 governance structure of the Samsung Group would have
 16 a benefit to their overall holdings of investments in the
 17 Samsung Group. So that's on the positive side of how the
 18 merger would positively impact the fund's portfolio.
 19 Let's talk for a moment about the negative
 20 portfolio effect. And this relates to what would happen if
 21 the merger failed. What is the consequence if the merger
 22 failed? And this first slide on slide 96 is not advice that
 23 was available to the NPS. It was advice that was presented
 24 to Elliott at the time, but it's useful to set the context
 25 and the Tribunal will be familiar with this Spectrum Asia

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1 report.

2 You can see in the second box it states that:

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

6 And then in bold:

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

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

15 (Pause)

16 Next slide, slide 97. [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 And the headline there is that volatility will

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

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

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

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

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

20 [REDACTED]
21 [REDACTED]

22 And he answered:

23 [REDACTED]

24 And the third quote — I won't read the third
25 quote, it's too long.

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

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

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

25 Let's — sorry, the next slide refers to protected

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1 information. Thank you.

2 (Pause)

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

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

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

12 [REDACTED]

13 Now — and that's the end of the protected
14 information.

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

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

25 "Considering SC&T's operational and financial

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

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

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

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

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

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

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

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

19 Now, slide 104, you can see —

20 THE PRESIDENT: I see you still have some
 21 90 slides to go. We were supposed to finish the
 22 Respondent's opening statement at 20 past noon. We
 23 recognise that the Tribunal has had quite a few questions,
 24 so there is some time available, but can you just tell us
 25 where you are in your presentation?

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

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

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

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

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

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

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1 that high—growth business.

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

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

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

13 (Pause)

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

21 The NPS at the time considered that one of the
 22 very important positive benefits or synergies that would
 23 result from the merger is that the newly combined company,
 24 new SC&T, would become the de facto holding company of the
 25 entire Samsung Group. The NPS assessed, based on its review

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1 of what had happened in other holding company structures,
2 that that holding company would then have the opportunity to
3 capture brand royalties for the Samsung Group. So this
4 could be potentially a very significant new source of
5 additional revenues for the company. That's a kind of
6 synergy that's unrelated to the tainted revenue synergies
7 that we'll discuss later.

8 Slide 112, [REDACTED]
9 [REDACTED]
10 [REDACTED]. That is another kind of
11 synergy.

12 We can go off of protected information. Thank
13 you.

14 Slide 113 shows a projection that was provided to
15 the NPS at the time by the Samsung Group, projecting
16 KRW6 trillion in synergies by — in the period from 2015 to
17 2020 — sorry, by 2020, that there would be KRW6 trillion in
18 revenue synergies. That's broken down into the different
19 business units of the consolidated entity.

20 The Tribunal, of course, will recall that there
21 were allegations that that synergy projection had been
22 fabricated or was fraudulent and the JY Lee unlawful merger
23 court analysed that question and found as a matter of fact
24 that actually the merger task force had prepared the synergy
25

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

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

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

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

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

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

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1 And the third point is that:

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

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

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

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

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

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

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

25 It's not — we do know the reason why there is

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1 such a difference, why there is such a range between these
2 different valuations and we can take a look at that quickly
3 together over the next series of slides and you may find it
4 helpful to follow along in R-127 or we can do it on the
5 slides, but in R-127 we're beginning with page 32 and the ---
6 and I'm on slide 118.

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

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

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

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

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

25 So these are subjective valuation decisions. We

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And the fourth potential decision in

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

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

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

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

18 First at the EVC. And I will avoid discussing the
19 protected information that's reflected on this slide [slide
20 134], but the chronology is so important. The Minister
21 instructed that this decision be taken by the Investment
22 Committee and not referred to the EVC when he was presented
23 with a report suggesting that it was uncertain how the EVC
24 would vote.

25 He felt that that was not sufficiently guaranteed.

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

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

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

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 We can go off protected information.

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

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

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

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

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

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

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

7 [REDACTED]
8 [REDACTED]

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

11 MR WARE: Thank you:

12 [REDACTED]
13 [REDACTED]

14 You see that.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

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

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1 "Question: [REDACTED]

2 [REDACTED]
3 [REDACTED]

4 "Answer: [REDACTED]

5 [REDACTED]
6 [REDACTED]

7 [REDACTED]
8 [REDACTED]

9 [REDACTED]"

10 Now this is entirely different from the impression
11 that one would have — having just read the prosecutor
12 statement. [REDACTED]

13 [REDACTED]
14 [REDACTED]

15 [REDACTED]
16 [REDACTED]

17 [REDACTED]
18 [REDACTED]

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

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

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

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

21 They were also very clear that they were very
22 troubled to learn that the synergies had been fabricated.
23 And when asked by the prosecutor, "The research team has
24 already told me this document was fabricated, are you saying
25 you would have voted for it on the basis of a fabricated

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1 document?" Well, no. Anyone would — the only reasonable
2 answer to that question is, no, of course not, I'm not going
3 to vote for a merger on the basis of a fabricated document.
4 But that's not the question that you must answer.

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

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

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

19 Housekeeping

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE PRESIDENT: What is the proposed date?

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

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

20 MR WARE: Sorry, what was that?

21 THE PRESIDENT: Page limit.

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

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

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

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

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

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

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

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1 together all the final numbers.

2 THE PRESIDENT: Okay.

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

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

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

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

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

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

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

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

5 MR PARTASIDES: Fully understandable and we
6 appreciate your flexibility.

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

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

25 Putting that to one side, that recanting would

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

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

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

25 THE PRESIDENT: On that note, the parties will

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1 have an opportunity to address that issue in your rebuttal
2 submissions. I'm afraid we have to stop here, unless there
3 is anything else on the Respondent's side?
4 MR WARE: Nothing on our side, thank you.
5 THE PRESIDENT: Thank you very much.
6 MR PARTASIDES: Thank you, members of the
7 Tribunal.
8 THE PRESIDENT: We close the hearing. Thank you
9 very much for your assistance during this hearing. Thank
10 you.
11 (6.12 pm BST)
12 (The hearing concluded)

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I N D E X

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6	Opening submissions by MR KIM27
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