

IN THE MATTER OF AN ARBITRATION  
UNDER THE ARBITRATION RULES OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

BETWEEN

MASON CAPITAL L.P.  
MASON MANAGEMENT LLC

*Claimants,*

AND

THE REPUBLIC OF KOREA

*Respondent.*

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**CLAIMANTS' COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS**

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April 19, 2019

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<b>Term</b>	<b>Meaning</b>
<b>Contracting Parties</b>	United States and Korea
<b>Domestic Fund</b>	Mason Capital L.P.
<b>ELP Law</b>	Cayman Islands: Exempted Limited Partnership Law (2014 Revision)
<b>General Partner</b>	Mason Management LLC
<b>Investment Manager</b>	Mason Capital Management LLC
<b>Korea</b>	The Republic of Korea
<b>KRW</b>	Korean Won
<b>Limited Partner</b>	Mason Capital, Ltd.
<b>LPA</b>	Second Amended and Restated Limited Partnership Agreement between the General Partner and Limited Partner
<b>Mason</b>	The General Partner and the Domestic Fund
<b>Mason Capital</b>	Mason and its related entities
<b>Samsung Shares</b>	Shares of SEC and SC&T
<b>SC&amp;T</b>	Samsung C&T Corporation
<b>SEC</b>	Samsung Electronics Co., Ltd.
<b>Treaty</b>	Free Trade Agreement between the Republic of Korea and the United States of America
<b>USD</b>	US Dollars

## **I. INTRODUCTION**

1. Pursuant to Procedural Order No. 2, Mason Capital L.P. (the “**Domestic Fund**”) and Mason Management LLC (the “**General Partner**”) (collectively, “**Mason**”) hereby submit their Counter-Memorial on Preliminary Objections in response to the Memorial on Preliminary Objections filed by the Republic of Korea (“**Korea**”) on January 25, 2019 (the “**Memorial**”).<sup>1</sup>
2. Mason’s Counter-Memorial on Preliminary Objections is supported by the following:
  - (a) Witness Statement of Kenneth Garschina (“**CWS-1**”), co-founder and co-Managing Member of the General Partner, and co-founder and Principal at Mason Capital Management LLC (the “**Investment Manager**”);
  - (b) Witness Statement of Derek Satzinger (“**CWS-2**”), Chief Financial Officer of the Investment Manager; and
  - (c) Expert Report of Rolf Lindsay (“**CER-1**”), partner in the Investment Funds group at Walkers, on the law of the Cayman Islands relevant to the General Partner’s investment.
3. Mason’s exhibits and legal authorities are submitted herewith in accordance with paragraphs 3.3 and 3.6 of Procedural Order No. 1.
4. Mason does not purport to address every last issue, claim and request raised by Korea in its Memorial. Any issue, claim and request that has not been addressed shall not be construed as an agreement with Korea, or as a concession as to the merits of its arguments.
5. Mason reserves the right to amend, supplement and expand the present Counter-Memorial on Preliminary Objections, and to submit any further evidence and arguments that it deems appropriate.

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<sup>1</sup> All defined terms herein, unless otherwise stated, have the same meaning as defined in the Claimants’ Notice of Arbitration and Statement of Claim, dated September 13, 2018.

## II. KOREA HAS NOT ESTABLISHED ITS OBJECTIONS TO THE TRIBUNAL’S COMPETENCE

6. The Tribunal’s jurisdiction is straightforward. The General Partner, a US investor, has brought its claim under the Free Trade Agreement (the “**Treaty**”) between the United States and the Republic of Korea (“**Korea**,” together with the United States, the “**Contracting Parties**”).<sup>2</sup> Like many other international investment agreements, the Treaty defines its personal and material scope by reference to the concepts of an “investor” and an “investment.”<sup>3</sup> The Treaty expressly and clearly defines both concepts, which the General Partner, and its investment in the shares of Korean companies Samsung Electronics Co., Ltd. (“**SEC**”) and Samsung C&T Corporation (“**SC&T**”) (collectively, the “**Samsung Shares**”), readily meet.
7. The Tribunal is not only empowered, but obliged, to exercise jurisdiction over the General Partner’s claim—it is not open to the Tribunal to “add other requirements which the [Contracting Parties] could themselves have added but which they omitted to add.”<sup>4</sup> Korea’s objections to the contrary should be rejected in full.
8. To assert its objections, Korea has manufactured additional limits on the personal and material scope of the Treaty, whether characterized as “standing” or jurisdictional requirements. To create these limits, Korea has read into the Treaty words that are not there, has placed strained, restrictive interpretations on the Treaty language, and has sought to elevate “general principles” of diplomatic protection above the Treaty’s express terms. These “requirements” have no bearing on the task before the Tribunal, which is to interpret and apply the clear terms of the Treaty that establishes its jurisdiction.
9. Rather, as discussed in detail below, the General Partner has satisfied the Treaty. *First*, the General Partner is an “investor,” and *second* the Samsung Shares are an

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<sup>2</sup> **CLA-23**, Treaty.

<sup>3</sup> See **CLA-23**, Treaty, art. 11.28 (“investment” and “investor of a Party”).

<sup>4</sup> See **CLA-41**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶¶ 240-241; **CLA-33**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 414, *see id.* ¶¶ 411-417 (citation omitted); *see also* **CLA-44**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, ¶ 36: “An international tribunal . . . **is bound to exercise, the measure of jurisdiction with which it is endowed**” (emphasis added).

“investment,” as these terms are used in the Treaty. *Third*, the additional “requirements” invented by Korea should be disregarded, as should the legal merit objection raised by Korea which follows from these “requirements.” The Tribunal must reject Korea’s objections and permit the General Partner to proceed to bring its worthy claim.

### **III. THE GENERAL PARTNER IS AN “INVESTOR” UNDER THE TREATY**

10. Article 11.28 of the Treaty defines “investor of a Party” to include:

. . . a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party . . . .<sup>5</sup>

11. The General Partner easily satisfies this definition. The General Partner is an enterprise of a party to the Treaty, the United States, and the General Partner made an investment in the territory of the other party, Korea, via the Samsung Shares.<sup>6</sup>

#### **A. The General Partner is an enterprise of the United States**

12. Article 1.4 of the Treaty defines “enterprise of a Party” to include corporations constituted or organized under the laws of the United States.<sup>7</sup> The General Partner, a company incorporated in the state of Delaware,<sup>8</sup> is certainly an “enterprise” of the United States under this definition.

13. While its incorporation alone is sufficient to show that the General Partner is a United States enterprise, the General Partner also performed substantially all of its business activities while operating in the United States. The General Partner was constituted in its current form in July 2000,<sup>9</sup> with the establishment of a hedge fund by Michael

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<sup>5</sup> **CLA-23**, Treaty, art. 11.28 (“investor of a Party”).

<sup>6</sup> Korea does not dispute that an investment in the Samsung Shares would be “an investment in the territory” of Korea for purposes of the Treaty, nor could it given that both SEC and SC&T are plainly Korean entities.

<sup>7</sup> **CLA-23**, Treaty, art. 1.4 (“enterprise of a Party;” “enterprise”) – “enterprise of a Party means an enterprise constituted or organized under a Party’s law,” “enterprise means any entity constituted or organized under applicable law . . . including any corporation.”

<sup>8</sup> **C-2**, Mason Management LLC Formation Certificate. Delaware is one of the fifty states in the United States.

<sup>9</sup> **C-2**, Mason Management LLC Formation Certificate.

Martino and Kenneth Garschina, both US nationals.<sup>10</sup> Mason Capital Management LLC (the “**Investment Manager**”), another Delaware company, was established shortly thereafter to employ the staff of Mason and its related entities (together, “**Mason Capital**”), lease Mason Capital’s offices in New York City and administer the operation of investment transactions as the General Partner’s agent and service provider.<sup>11</sup> Mr. Martino and Mr. Garschina were the managing members of both entities, and were ultimately responsible for all investments made by the fund.

14. As part of the fund’s operations, in or around 2009, the General Partner became the general partner of a Cayman Islands exempted limited partnership, called “**Mason Capital Master Fund, L.P.**”<sup>12</sup>
15. As explained in the expert report of Mr. Rolf Lindsay, unlike other entities referred to as “partnerships,”<sup>13</sup> an exempted limited partnership is not itself an “entity,” or legal person.<sup>14</sup> The exempted limited partnership cannot enter into contracts or hold title to property, nor does it have office-holders or directors.<sup>15</sup> Rather, it is a *sui generis relationship* recognized under Cayman law between (one or more) general partners and (one or more) limited partners. In the present case, the exempted limited partnership is made up of a sole general partner (the General Partner) and a sole limited partner (Mason Capital, Ltd. (the “**Limited Partner**”)).<sup>16</sup> As Mr. Lindsay explains, the relationship is “best described as a collection of statutory and contractual rights, obligations and limitations” distributed between the general partner(s) and limited partner(s).<sup>17</sup>

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<sup>10</sup> Garschina ¶ 1, **CWS-1**.

<sup>11</sup> **C-2**, Mason Management LLC Formation Certificate; Satzinger ¶ 8, **CWS-2**. The Investment Manager also performed similar functions for the Domestic Fund.

<sup>12</sup> Satzinger ¶ 10, **CWS-2**; Garschina ¶ 7, **CWS-1**.

<sup>13</sup> Such as the other claimant in these proceedings, the Domestic Fund.

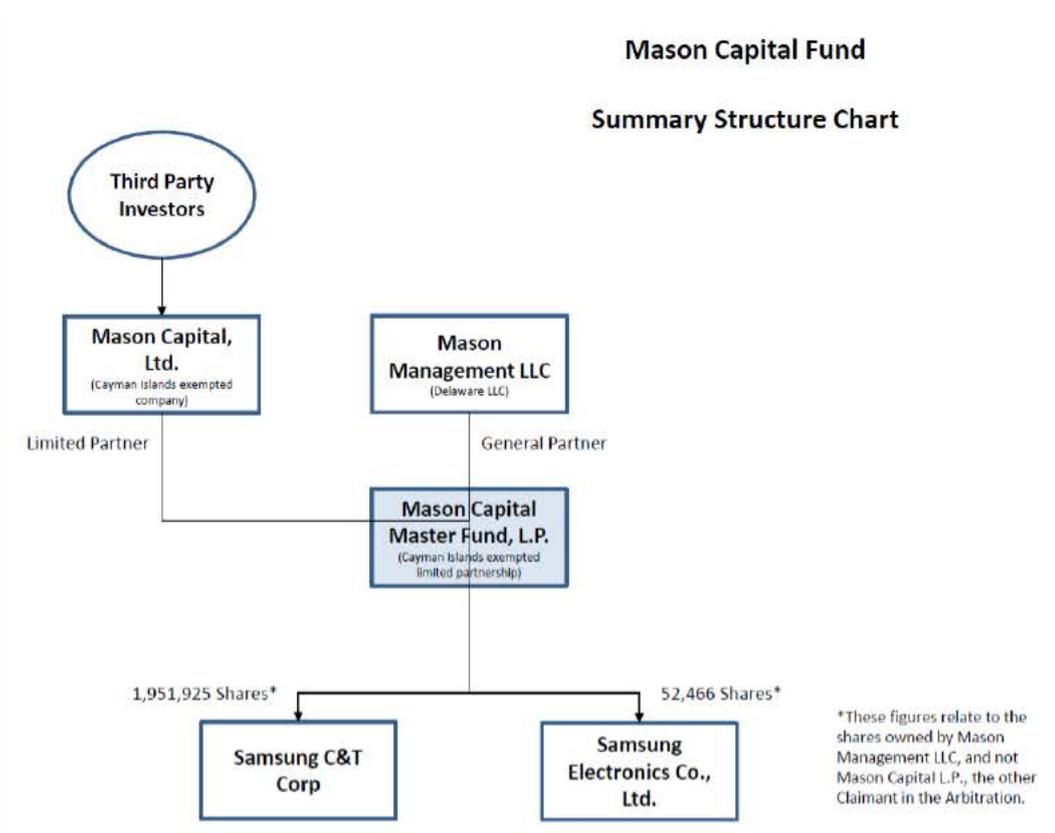
<sup>14</sup> Lindsay ¶ 15, **CER-1**.

<sup>15</sup> Lindsay ¶ 15, **CER-1**.

<sup>16</sup> **C-30**, Second Amended and Restated Limited Partnership Agreement, dated January 1, 2013 (“**LPA**”).

<sup>17</sup> Lindsay ¶ 15, **CER-1**.

16. Annex 3 to Mr. Lindsay’s expert report encapsulates the relevant parties in a summary chart:



17. The exempted limited partnership has no substantive connection with the Cayman Islands, and is not permitted to do business with the public in the Cayman Islands.<sup>18</sup> US investment funds, like Mason Capital, commonly use this kind of relationship—in Mr. Lindsay’s words, it is “an entirely usual and unremarkable structure.”<sup>19</sup> In particular, an exempted limited partnership structure is used by US investment funds with some capital ultimately sourced from US tax-exempt entities (including charities and workplace pensions) to ensure that that capital is not incidentally subject to US tax. The majority of the Limited Partner’s shareholders were US tax-exempt entities that, under a different structure, may have incurred US taxes through their investments.<sup>20</sup>

<sup>18</sup> Lindsay ¶ 20, CER-1; CLA-22, Cayman Islands: Exempted Limited Partnership Law (2014 Revision) (“ELP Law”) §§ 4(1), 38(1).

<sup>19</sup> Lindsay ¶ 31, CER-1.

<sup>20</sup> Satzinger ¶ 10, CWS-2.

18. The relationship between the General Partner and Limited Partner differs substantially from the relationships between “partners” as the term is used in traditional, non-limited “partnerships.” In an exempted limited partnership, the General Partner is exclusively responsible for the conduct of the investment business.<sup>21</sup> The General Partner makes all decisions with respect to the business,<sup>22</sup> enters into all contracts (including to acquire property and/or dispose of property),<sup>23</sup> and is the only entity with capacity to engage in legal proceedings with respect to the assets.<sup>24</sup> The General Partner bears sole, unlimited liability in the event the business becomes insolvent.<sup>25</sup>
19. The Limited Partner does none of these things. The Limited Partner not only takes no part in the business of the exempted limited partnership — it is expressly prohibited from doing so.<sup>26</sup> Rather, the Limited Partner’s role in an exempted limited partnership is simply to invest money in the partnership.

**B. The General Partner made an investment in the Samsung Shares**

20. The General Partner made its investment in Samsung by acquiring share “swaps,” i.e., a form of indirect equity participation, in SEC from May 2014, later to be replaced by a direct investment in the Samsung Shares through a sequence of purchases from share brokers from August 2014.<sup>27</sup>
21. From February 2014, the General Partner considered an investment strategy in the Korean tech sector, in particular in SEC and SK Hynix, two of the largest memory chip and semiconductor makers globally.<sup>28</sup> The General Partner eventually focused exclusively on SEC, the “crown jewel” of the Samsung corporate group (or *chaebol*) as the group underwent a fundamental structural transformation.<sup>29</sup>

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<sup>21</sup> Lindsay ¶ 17, **CER-1**; **CLA-22**, ELP Law § 14; **C-30**, LPA, art. 3.01.

<sup>22</sup> Lindsay ¶ 18, **CER-1**; **CLA-22**, ELP Law §§ 14, 23; **C-30**, LPA, arts. 3.01, 3.02.

<sup>23</sup> Lindsay ¶ 17, **CER-1**; **CLA-22**, ELP Law § 14(2); **C-30**, LPA, art. 3.02.

<sup>24</sup> Lindsay ¶¶ 24-25, **CER-1**; **CLA-22**, ELP Law § 33; **C-30**, LPA, art. 3.02(n).

<sup>25</sup> Lindsay ¶¶ 16, 32(c), **CER-1**; **CLA-22**, ELP Law §§ 4(2), 20(1).

<sup>26</sup> Lindsay ¶ 19, **CER-1**; **CLA-22**, ELP Law, §§ 14(1), 20(1).

<sup>27</sup> Garschina ¶ 16, **CWS-1**.

<sup>28</sup> Garschina ¶ 13, **CWS-1**.

<sup>29</sup> Garschina ¶ 15, **CWS-1**.

22. This strategy was first implemented in or around May 2014 through the purchase of swaps denominated in US Dollars (“USD”) over shares in SEC.<sup>30</sup> In early August 2014, the General Partner closed out its swaps and purchased shares directly in SEC.<sup>31</sup> By late October 2014, the General Partner had accrued a stake of more than 52,000 shares in SEC.<sup>32</sup> The value of the General Partner’s investment at that time was greater than 67 billion KRW—63 million USD at the prevailing exchange rate.<sup>33</sup> The General Partner maintained and grew this stake by purchasing additional shares, and by the beginning of June 2015, the General Partner’s direct investment in SEC had grown to a stake of approximately 102 billion KRW (approximately 91 million USD at the prevailing exchange rate).<sup>34</sup>
23. One of the reasons SC&T was attractive to the General Partner was that it held a large stake in SEC, in addition to its other assets and fundamentals.<sup>35</sup> At SC&T’s market price, the General Partner could indirectly invest in SEC (through SC&T’s ownership) at a discount to a direct investment. As such, in early June 2015, the General Partner began to purchase SC&T shares. By June 11, 2015, the General Partner’s investment in SC&T shares amounted to some 150 billion KRW (approximately 132 million USD at the prevailing exchange rate).<sup>36</sup> This direct stake in SC&T represented a significant indirect stake in SEC, given the size of SC&T’s shareholding in SEC.
24. These shares embody the General Partner’s investment. The General Partner *made* this investment by way of a sequence of share purchases at the prevailing market price. In doing so, it satisfied the clear, ordinary meaning of the Treaty.

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<sup>30</sup> C-32, Mason trading records SEC, dated August 12, 2015; Garschina ¶ 16, CWS-1.

<sup>31</sup> *Id.*

<sup>32</sup> C-32, Mason trading records SEC, dated August 12, 2015.

<sup>33</sup> Garschina ¶ 19, CWS-1; C-32, Mason trading records SEC, dated August 12, 2015; C-31, Korean Foreign Exchange Rates.

<sup>34</sup> C-32, Mason trading records SEC, dated August 12, 2015; C-31, Korean Foreign Exchange Rates

<sup>35</sup> Garschina ¶ 18, CWS-1.

<sup>36</sup> C-31, Korean Foreign Exchange Rates; C-33, Mason trading records SC&T, dated August 10, 2015.

#### IV. THE SAMSUNG SHARES ARE AN “INVESTMENT” UNDER THE TREATY

25. Article 11.28 of the Treaty provides a broad definition of “investment” as “[E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include . . . (b) **shares, stock, and other forms of equity participation in an enterprise . . .**” (emphases added).
26. The Samsung Shares readily meet this definition. The Samsung Shares were certainly assets that the General Partner owned and controlled and, if there could be any doubt, were “shares” and “stock,” which are identified in the Treaty itself as a form of “investment.” Indeed, they are an archetype of qualifying assets within the Treaty’s definition of investment.<sup>37</sup>
- A. The General Partner owned or controlled, directly or indirectly, the Samsung Shares**
27. Article 11.28 of the Treaty provides that the relevant assets are to be controlled or owned, directly or indirectly, by the investor. The concepts of “control” or “ownership” are not further limited by the Treaty, but rather are deliberately left open and undefined so that the Treaty language may “allow[] the investor to establish ownership or control in whatever way that the investor can,”<sup>38</sup> as these concepts “may vary depending on how an investment was structured,” and “involve[] factual situations that must be evaluated on a case-by-case[] basis.”<sup>39</sup>
28. By providing that an investor “owns **or** controls [an asset], directly **or** indirectly,” the Treaty’s plain language identifies any of four logical possibilities for satisfying the definition: direct control, indirect control, direct ownership, or indirect ownership of an

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<sup>37</sup> **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown ed., OSAIL 2013), p. 767 (“shares, stock, and other forms of equity participation in an enterprise” being a “principal form[] of many investments”).

<sup>38</sup> **CLA-50**, Kenneth J. Vandeveld, US INTERNATIONAL INVESTMENT AGREEMENTS (Oxford Univ. Press, 2009), p. 598.

<sup>39</sup> **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown ed., OSAIL 2013), p. 767.

asset comprising an investment.<sup>40</sup> Here, the General Partner independently satisfied at least three of these possibilities with respect to the Samsung Shares, as it (a) had direct control over the Shares, (b) had indirect control, through its supervision of the Investment Manager, and (c) directly owned the Samsung Shares.

### 1. The General Partner controlled the Samsung Shares

29. Korea does not dispute that the General Partner controlled the Samsung Shares, *de jure* and *de facto*. The General Partner’s control of the Shares is sufficient, by itself, to satisfy the jurisdictional requirements of the Treaty, independent of the question of ownership, given the plain language of the treaty.<sup>41</sup>
30. Here the General Partner exercised *direct* control over the Samsung Shares by virtue of its complete and exclusive power over these shares. The General Partner was the only entity permitted under Cayman law to engage in the conduct of the business<sup>42</sup> and exercise any rights associated with the business and its assets.<sup>43</sup> The General Partner’s power to control the Samsung Shares was further affirmed and elaborated upon by the Limited Partnership Agreement between the General Partner and the Limited Partner, which provided, *inter alia*, that “[t]he management, control and the conduct of the business of the Partnership shall be vested exclusively in the General Partner.”<sup>44</sup>
31. As Derek Satzinger, the Investment Manager’s CFO, explains, where the Investment Manager formally acted with respect to the Samsung Shares, the Investment Manager did so under the General Partner’s supervision, as the General Partner’s agent and service provider.<sup>45</sup> In keeping with Cayman law, the General Partner’s control over the Samsung Shares included the ultimate say over their acquisition,<sup>46</sup> as

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<sup>40</sup> **CLA-23**, Treaty, art. 11.28 (emphases added).

<sup>41</sup> *Id.*

<sup>42</sup> Lindsay ¶¶ 17-18, **CER-1**; **CLA-22**, ELP Law § 14.

<sup>43</sup> Lindsay ¶¶ 22-26, **CER-1**; **CLA-22**, ELP Law § 16.

<sup>44</sup> **C-30**, LPA, art. 3.01.

<sup>45</sup> Satzinger ¶ 8, **CWS-2**. The two managing members of both the General Partner and the Investment Manager were the same individuals, who both had ultimate authority over investments. Garschina ¶ 6, **CWS-1**.

<sup>46</sup> Lindsay ¶ 17, **CER-1**; **CLA-22**, ELP Law § 14(2); *see also* **C-30**, LPA, art. 3.02 of the LPA (the General Partner has “the same rights and powers as any general partner in a partnership formed under the laws of the Cayman Islands . . .”).

well as, once acquired, the power to vote at shareholder meetings, to receive dividends, and to engage in advocacy as a shareholder.<sup>47</sup>

32. Indeed, the General Partner exercised this power with respect to the Samsung Shares, including by having its agents communicate with Samsung’s investor relations representatives to express the General Partner’s concerns as a shareholder<sup>48</sup> and exercising its vote against the SC&T-Cheil merger. The General Partner also had the ability to determine when and how to dispose of the Samsung Shares<sup>49</sup> and how to exercise any other proprietary rights.<sup>50</sup>
33. By contrast, the Limited Partner was legally *prohibited* from involvement in the decision-making process (and in fact played no part in that process with respect to the Samsung Shares), and could not direct the General Partner in the exercise of its rights.<sup>51</sup> If the Limited Partner had sought to have become involved in these decisions, which it did not, doing so would have caused it to be deemed a general partner and be subject to all of the liabilities and responsibilities that entailed.<sup>52</sup>

## 2. The General Partner owned the Samsung Shares

34. As the General Partner had the legal power to control the Samsung Shares, and exercised control in fact over the Samsung Shares, the General Partner falls within the Treaty’s definition of “investor,” and is entitled to bring a claim with respect to the Shares—regardless of ownership.
35. However, for the sake of completeness, the General Partner separately falls within the Treaty’s definition of “investor” as the *owner* of the Samsung Shares: the General Partner exclusively held ownership rights and obligations in the Shares. Like the concept of “control,” “ownership” is not defined by the Treaty, but the General Partner

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<sup>47</sup> Lindsay ¶ 26, **CER-1**.

<sup>48</sup> Garschina ¶ 17, **CWS-1**.

<sup>49</sup> See **C-30**, LPA, art. 3.02(a).

<sup>50</sup> For example, to lend the Shares or use the Shares as security (**CLA-22**, ELP Law § 16(2) and (3); **C-30**, LPA, arts. 3.02(c), (d) and (f), and art. 3.04) as well as secondary rights, such as the right to bring proceedings to enforce its primary proprietary rights with respect to the Shares (**CLA-22**, ELP Law § 33; **C-30**, LPA, art. 3.02 (k) and (n)).

<sup>51</sup> Lindsay ¶¶ 9(b), 19, **CER-1**; **CLA-22**, ELP Law § 16.

<sup>52</sup> Lindsay ¶ 19, **CER-1**; **CLA-22**, ELP Law § 20(1).

plainly meets any ordinary meaning of the term, which would necessarily accommodate the variety of different assets which may comprise an investment, the significant differences between property law in municipal legal systems, and the myriad ways in which an investment may be structured in international commercial practice.

36. The General Partner had *direct* (and exclusive) legal ownership of the Samsung Shares.<sup>53</sup> As Mr. Lindsay explains, Cayman law is unambiguous that, as the “partnership” is not an entity and cannot hold property, all property of the business is legally owned by the General Partner, whether that property is in the General Partner’s name, or the name of the partnership, as it was in the present case.<sup>54</sup>
37. As Mr. Lindsay further explains, the General Partner also had an indivisible beneficial ownership interest in the Samsung Shares (and all assets it owned as part of the exempted limited partnership).<sup>55</sup> This material interest is crystallized, and becomes divisible upon the withdrawal of the Limited Partner, or the winding-up or liquidation of the partnership.<sup>56</sup>
38. The General Partner’s beneficial interest in the business is reflected in its right to an “incentive allocation”—a proportion of the capital appreciation of the business.<sup>57</sup> This allocation accrued yearly, in consideration for, *inter alia*, the General Partner’s expertise and ultimate management of the business.<sup>58</sup>

#### **B. The Samsung Shares have the characteristics of an investment**

39. Article 11.28 also provides that an asset qualifies as an “investment” if it has “the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, **or** the assumption of risk.”<sup>59</sup> As the plain language of the Treaty in using the conjunction “or” makes clear, and as

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<sup>53</sup> Lindsay ¶¶ 22-23(a), **CER-1; CLA-22**, ELP Law § 16(1).

<sup>54</sup> Lindsay ¶ 23(a), **CER-1; CLA-22**, ELP Law § 16(1).

<sup>55</sup> Lindsay ¶¶ 23(b), 36-39, **CER-1; CLA-22**, ELP Law § 16(1).

<sup>56</sup> Lindsay ¶¶ 23(b), 36, **CER-1**.

<sup>57</sup> Lindsay ¶¶ 38-39, **CER-1; C-30**, LPA, art. 4.06.

<sup>58</sup> Lindsay ¶¶ 32, 39, **CER-1**.

<sup>59</sup> **CLA-23**, Treaty, art. 11.28 (“investment”) (emphasis added).

commentators have otherwise noted,<sup>60</sup> an investment need not have all three of these characteristics in order to come within the scope of the definition, and the list is merely illustrative.

40. If there could be any doubt, Korea well knows how to draft a treaty that defines the “characteristics of an investment” in a mandatory and cumulative fashion—for example, Korea’s agreement with Chile (which predates the Treaty) defines the term “investment” under that agreement as “every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits **and** the assumption of risk.”<sup>61</sup>
41. In any event, the Samsung Shares, as shares in an enterprise, easily satisfy each of the characteristics of an investment under the Treaty.<sup>62</sup> The Treaty expressly contemplates shares in an enterprise as an asset that forms a qualifying investment,<sup>63</sup> and countless investor-state tribunals have recognized the same. For example, in *Saluka v Czech Republic*, the tribunal noted that “[t]here seems no room for doubt that a qualified investor’s holding of shares in a Czech company such as IPB constitutes an investment within the scope of the definition. . . . Most purchases of shares are made with the hope that, in one way or another, the result will in due course be a degree of profit on the transaction.”<sup>64</sup>

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<sup>60</sup> **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown ed., OSAIL 2013), p. 767.

<sup>61</sup> **CLA-47**, Free Trade Agreement Korea-Chile art. 10(1), April 1, 2004 (KCFTA) (emphasis added).

<sup>62</sup> The “characteristics” relate to whether *an asset* comprises an investment, as is plain from the ordinary reading of the definition. The footnotes to the definition, which clarify that for certain categories of assets, whether particular sub-categories of assets (like licenses and permits), “ha[ve] the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has [in the license/permit],” confirms this ordinary meaning. **CLA-23**, Treaty, art. 11.28 (“investment”), footnote 11.

<sup>63</sup> **CLA-23**, Treaty, art. 11.28 (“investment”).

<sup>64</sup> **CLA-41**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶¶ 205, 209.

**1. The Samsung Shares reflected a commitment of capital or other resources**

42. It is uncontroversial that an equity stake in a commercial enterprise, in the form of shares, involves a commitment of capital. The capital tied up in the equity stake is “committed” in that it is no longer available for use in otherwise profit-generating activities. As the majority in *Tokios Tokelés* observed, “[t]he Claimant made an investment for the purposes of the [ICSID] Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere.”<sup>65</sup>
43. As of July 2015, the Samsung Shares reflected a commitment of more than 200 billion KRW (or approximately 180 million USD)—capital which contributed to Samsung’s balance sheet and to the operations of its businesses. The General Partner made this commitment instead of employing the capital in other ventures, paying down leverage over other assets, or simply holding the capital in its cash accounts. In exchange for acquiring ownership and control over the Samsung Shares, the General Partner paid valuable consideration for the Samsung Shares — the prevailing market price.<sup>66</sup>
44. In actually paying the prevailing market price, in an arm’s-length transaction, the General Partner’s commitment in the Samsung Shares is distinguishable from the cases relied upon by Korea. For instance, in *KT Asia*, the putative investors “agreed to buy the [shares] at an undervalue” from its affiliates “and in the event paid nothing for those shares and that lack of payment cannot be explained.”<sup>67</sup> Similarly, in *Caratube Int’l Oil Co.*, “[a] putative transaction to pay USD 6,500 for 92% for an enterprise [predominantly to the investor’s cousin] into which over USD 10 million have been invested and for which later a relief of over USD 1 billion is sought calls for explanation and justification,” but “[n]o documentation was provided and [the investor] . . . did not answer questions.”<sup>68</sup>

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<sup>65</sup> **CLA-44**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, ¶ 80.

<sup>66</sup> *Id.*

<sup>67</sup> **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 204.

<sup>68</sup> **RLA-12**, *Caratube Int’l Oil Co. LLP v. The Republic of Kazakhstan*, ICSID, Case No. ARB/08/12, Award, June 5, 2012, ¶¶ 437-438.

45. In addition to the General Partner’s commitment of *capital* through its share purchases, the General Partner also committed its *other resources* to its investment in the Samsung Shares. In particular, the General Partner invested management time and effort into the process and decision to invest in the Samsung Shares, as well as into its investment once made, including hundreds of hours of its analysts’ time in ongoing research, meetings with experts in Korea and conversations with the Samsung Group’s investor relations representatives.<sup>69</sup>

## 2. The Samsung Shares involved an expectation of gain or profit

46. It is equally obvious that an investment in the equity of a commercial enterprise (like SEC and SC&T) involved an expectation to gain or profit from that equity stake (whether by way of dividend, or by capital appreciation followed by eventual disposal).<sup>70</sup> That the Samsung Shares involved an expectation of gain or profit is not disputed by Korea.<sup>71</sup>

## 3. The Samsung Shares required an assumption of risk

47. Risk is inherent to an investment in the equity of a commercial enterprise, like the Samsung Shares. As explained by the Tribunal in *KT Asia*, relied upon by Korea, “[a]s a general matter, an investment through the acquisition of equity in a corporation entails the risk that the value of the equity decreases or is even completely lost. Such a risk certainly qualifies as an investment risk for the purposes of the definition of investment under the ICSID Convention and the BIT.”<sup>72</sup> But such an investment does not only involve a risk of “loss” in the strict sense, as Korea suggests.<sup>73</sup> As the cases relied on

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<sup>69</sup> Garschina ¶ 14, **CWS-1**.

<sup>70</sup> **CLA-41**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶ 209.

<sup>71</sup> Indeed, it is not discussed by Korea, as Korea relies on extrinsic tests based on the “inherent” meaning of “investment” or the definition of “investment” in other treaties, which do not refer to an “expectation of gain or profit” as a relevant characteristic.

<sup>72</sup> **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 18.

<sup>73</sup> Korea’s Memorial on Preliminary Objections dated January 25, 2019 (“**Korea’s Memorial**”) ¶¶ 24, 28.

by Korea illustrate, investment risk extends to the “hope of receiving a benefit (including the inherent risk one will not result).”<sup>74</sup>

48. This risk is enhanced for publicly traded shares when the value of the equity may be subject to rapid change based on the behavior of government, other shareholders and market participants rather than inherent changes in the underlying enterprise.
49. Indeed, that risk materialized for the General Partner. As a result of the Korean government’s interference in the merger, the value of the General Partner’s equity stake in SEC and SC&T significantly and rapidly declined — by approximately 20 billion KRW in less than two weeks following the merger vote.<sup>75</sup>

**4. No additional “characteristics of investment” may be introduced into the Treaty**

50. Article 11.28 of the Treaty expressly identifies the relevant “characteristics of investment.”
51. In its Memorial, Korea attempts to introduce limitations on the scope of the Tribunal’s jurisdiction not found in the Treaty and never agreed upon by the Contracting Parties, going so far as to replace the straightforward and narrowly defined “characteristics of investment” in the Treaty with definitions more favorable to its position found in *other* treaties, or as applied to other treaties where, unlike the Treaty, these characteristics are *not* otherwise defined.
52. In particular, Korea attempts to introduce a requirement of a certain “duration.”<sup>76</sup> This “requirement” has no textual foundation in the Treaty. Korea does not attempt to suggest it does. To the contrary, that other treaties, including those entered into by

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<sup>74</sup> The *Nova Scotia* tribunal applied this logic to the example of the *Deutsche Bank* case where Deutsche Bank “hoped that its investment in hedging commitments would bear a good return, but it could not be sure.” **RLA-20**, *Nova Scotia Power Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, April 30, 2012, ¶ 94.

<sup>75</sup> At the date of the merger vote (July 17, 2015), the General Partner owned 52,466 shares in SEC (with a market value of approximately KRW 1,232,317 per share), and 1,951,925 shares in SC&T (with a market value of approximately KRW 65,192 per share). By July 31, 2015, the market value of SEC and SC&T shares had declined to approximately KRW 1,185,000 and KRW 56,267, respectively, equating to an approximate decline of KRW 19.9 billion in value, based on the stake held at the date of the merger vote.

<sup>76</sup> Korea’s Memorial ¶¶ 21, 23, 27.

Korea, include a certain “duration” requirement,<sup>77</sup> while the Treaty does not, which demonstrates that the Contracting Parties were well aware of their ability to create such a requirement, and chose not to do so.

53. Rather, Korea suggests that a certain “duration” is an “inherent” and mandatory requirement of an investment, regardless of what the Treaty actually prescribes. To support that proposition, Korea relies on the exceptional decision in *Romak*, where the Tribunal found a mechanical application of the Treaty’s definition (which extended to “every kind of asset” without limitation) would produce “a result which is manifestly absurd or unreasonable.”<sup>78</sup> As other tribunals have explained, the *Romak* decision was a “very ‘fact-specific’ case[] that can partially explain [its] reasoning, which remains exceptional in the case law outside the ICSID system.”<sup>79</sup> It is simply “not appropriate to import “objective” definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration,”<sup>80</sup> and a tribunal would “would need compelling reasons to disregard such a mutually agreed definition of investment.”<sup>81</sup>
54. More broadly, tribunals have repeatedly recognized that it is not their role to introduce additional limitations into the Treaty beyond the agreement of the Contracting Parties. As the *Mera* tribunal recently observed, “[i]t is **reiterated time and again** by investment tribunals that “it is not for tribunals to impose limits on the scope of

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<sup>77</sup> For example, in Korea’s FTA with Canada, “investment” is defined as “any asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, **and a certain duration** . . .”) **CLA-23**, Free Trade Agreement Canada and Korea art. 8.45, January 14, 2015 (CKFTA) (emphasis added).

<sup>78</sup> **RLA-10**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009, ¶ 174.

<sup>79</sup> **CLA-32**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 364.

<sup>80</sup> **CLA-32**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 364.

<sup>81</sup> Even in the context of an arbitration under the ICSID Convention, as the Tribunal was in that case. **CLA-31**, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, ¶ 192. The tribunal continued to note that it “[would] not impose additional requirements beyond those expressed on the face of the BIT and the ICSID Convention.”

[bilateral investment treaties] not found in the text, much less limits nowhere evident from the negotiating history” (emphasis added).<sup>82</sup>

55. Furthermore, even the decisions relied upon by Korea on “duration” (as applied to other treaties where the characteristics of investment are not otherwise defined) suggest that, even if the Tribunal considered “duration” to be a relevant metric, which it should not, any “duration” requirement should be focused on the *intention* of the investor. For example, in the *Romak* decision relied upon by Korea, the tribunal observed that it “[did] not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. **Short-term projects are not deprived of “investment” status solely by virtue of their limited duration.**”<sup>83</sup> The tribunal in *Deutsche Bank* “concur[red] with the statement made by the Tribunal in *Romak*,” further noting “[w]ith respect to duration, the Tribunal once again agrees with Schreuer that ‘[duration] is a very flexible term. It could be anything from a couple of months to many years.’”<sup>84</sup> And the tribunal in the *KT Asia* decision relied upon by Korea approved the observations of both the *Romak* and *Deutsche Bank* tribunals, noting that (as was also found by the tribunal in *Deutsche Bank*) it was the “**intended** duration period that should be considered to determine whether the [investment] criterion is satisfied.”<sup>85</sup>
56. Here, the General Partner’s strategic intentions in investing in the Samsung Shares, as explained by its Managing Member,<sup>86</sup> more than meet any “duration” requirement, even if one were added to the Treaty.

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<sup>82</sup> **CLA-35**, *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, November 30, 2018, ¶ 149.

<sup>83</sup> **RLA-10**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009, ¶ 225 (emphasis added).

<sup>84</sup> **CLA-30**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, October 31, 2012, ¶ 303 (emphasis added).

<sup>85</sup> **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 209 (emphasis added).

<sup>86</sup> Garschina ¶ 4, **CWS-1**.

**V. THE TREATY DOES NOT IMPOSE FURTHER JURISDICTIONAL REQUIREMENTS, HOWEVER CHARACTERIZED**

57. As detailed above, the General Partner satisfies the Treaty’s definition of “investor” and the Samsung Shares, the definition of “investment.” The Tribunal’s jurisdiction over the General Partner’s claim with respect to the Samsung Shares is manifest.
58. Notwithstanding the clarity of the position under the Treaty, Korea has decided to raise preliminary objections to the Tribunal’s competence. Korea’s objections in turn rely upon creating limits, whether characterized as “standing” or jurisdictional requirements, with no basis in the Treaty, all stemming from its misguided attempt to read a requirement of “beneficial” ownership into the Treaty, which is not there. Indeed, as discussed *supra* in Section IV.A , “control” over investments is sufficient to meet the Treaty’s requirements, and Korea does not dispute the General Partner’s control. “Ownership” is not required by the Treaty at all, let alone “beneficial” ownership.
59. Korea’s erroneous assumption manifests itself in Korea’s objections:
- (a) on the basis of the “standing” of the General Partner;<sup>87</sup> and
  - (b) on the basis that the General Partner has not contributed capital or assumed risk, and therefore has not “made” an “investment.”<sup>88</sup>
60. Even if either of these objections is considered, neither has any basis. The General Partner’s control and ownership of the Samsung Shares is more than sufficient to give it “standing” to bring a claim, and the idea that the General Partner has not contributed capital or assumed risk is simply wrong.
- A. The General Partner’s claim is not precluded by a “standing” requirement premised on “beneficial ownership”**
61. Korea seeks to import a “standing” requirement into the Treaty that would require a prospective claimant to have “beneficial ownership” over its putative investment. Such a requirement has no basis in the terms of the Treaty, and indeed contradicts the Treaty’s express terms. A freestanding “general principle” of international investment law to

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<sup>87</sup> Korea’s Memorial, Section II(A).

<sup>88</sup> Korea’s Memorial, Section II(B).

that effect does not exist, and in any event cannot usurp the clear terms of the Treaty, a *lex specialis*.<sup>89</sup> Further, even if there were such a requirement, and that requirement did usurp the terms of the Treaty, the General Partner satisfies that requirement.

62. *First*, the terms of the Treaty do not support Korea’s assumption of an independent “standing” requirement premised on “beneficial ownership.” Korea relies upon the most tenuous of hooks in the Treaty to support that assumption, stretching the function and ordinary meaning of the provision beyond breaking point.
63. Korea erroneously suggests that Article 11.16(1) of the Treaty introduces a requirement of “beneficial ownership” from the expression “*on its own behalf*.”

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, **on its own behalf**, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,
    - (B) an investment authorization, or
    - (C) an investment agreement;and
  - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, **on behalf of an enterprise of the respondent** that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
  - (i) that the respondent has breached
    - (A) an obligation under Section A,
    - (B) an investment authorization, or
    - (C) an investment agreement;and
  - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

64. Contrary to Korea’s tortured reading, Article 11.16(1) instead clarifies the rights of investors to make claims with respect to their “local” enterprises for losses suffered directly by those enterprises (“derivative” claims), rather than an investor’s indirect losses. In other words, the Article “creates a derivative right of action, allowing an

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<sup>89</sup> **CLA-29**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, May 31, 2016, ¶ 188.

investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls.”<sup>90</sup>

65. As such, the expression “on its own behalf” in Article 11.16(1)(a) is used to distinguish regular claims from derivative claims “on behalf of an enterprise of the respondent” in 11.16(1)(b), which may otherwise have not been permitted under the Treaty.<sup>91</sup> The expression does *not* create a requirement that an asset comprising an investment must be “beneficially owned” by an investor. Such a requirement would contradict the express terms of Article 11.28, which, as noted above, permits an investor to “own” or “control” an asset, directly or indirectly.
66. *Second*, an independent, freestanding “general principle” that denies “standing” to a party without “beneficial ownership” does not exist in the regime of international investment law, pursuant to international investment agreements, as distinct from the customary international law regime of diplomatic protection.<sup>92</sup> Even in the discrete regime applicable to diplomatic protection, the continued application of the alleged “general principle” has been questioned.<sup>93</sup>

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<sup>90</sup> **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown ed., OSAIL 2013), p. 825.

<sup>91</sup> As the United States has explained with respect to substantially similar provisions in the NAFTA (Articles 1116 and 1117), these articles “serve distinct purposes,” with the first providing recourse to an investor for its own damage, and the second permitting an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment. **CLA-39**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, September 18, 2001, ¶ 6.

<sup>92</sup> The two regimes are discrete and distinct, as recognised by the International Court of Justice in **CLA-26**, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, May 24, 2007, ¶¶ 88-90. The exceptional role of treaties had been recognized even in Whiteman’s 1967 text (before the development of modern investment law) relied upon by Korea, Professor Stern and the Annulment Committee in *Occidental (RLA-1*, Whiteman Digest of International Law 1264 (1967)).

<sup>93</sup> For example, an article on diplomatic protection relied upon by Professor Stern and the Annulment Committee in *Occidental (RLA-21, Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, November 2, 2015, ¶ 261n. 192) notes that, “in the context of globally structured financial markets where shares, bonds and other instruments change hands, and consequently nationality, constantly and speedily, the application of the traditional rule can only be regarded as an anachronism that could amount in given instances to depriving legitimate owners and investors of protection on the part of States of nationality.” (**CLA-51**, Francisco Orrego Vicuna, “*Changing approaches to the nationality*

67. Korea relies upon a single case,<sup>94</sup> *Occidental v Ecuador*, in support of this assertion, which must be understood in the context of its peculiar facts. In that case, the claimant had transferred “the sole risk, cost and expense” of part of its investment to a third party,<sup>95</sup> including “the complete bundle of “rights and obligations” that formed [the claimant’s] legal position under the Contract”.<sup>96</sup> The claimant was also obliged to act “as [the third party] shall direct ‘as if [the third party] were a party to [the claimant’s investment contract] owning legal title to a 40% interest in such Contract.’”<sup>97</sup> The Committee concluded that, for the 40% share, “it was [the third party] who actually controlled a 40% share in the [investment].”<sup>98</sup> This “nominee” arrangement was devised as a temporary state (before full legal and beneficial title was to be transferred) in order to circumvent restrictions on outright transfers absent ministerial consent under Ecuadorian law.<sup>99</sup> Unlike the claimant in *Occidental*, the General Partner owned and controlled the investment (which is, in itself, sufficient for the Treaty (*see supra*, Section IV.A), and shared the risk and reward in the Samsung Shares (*see supra*, Section IV.B).

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*of claims in the context of diplomatic protection,”* 15 ICSID Review, Foreign Inv. L. J. (2000), p. 353).

<sup>94</sup> **RLA-6**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, also cited by Korea, does not relate to the question of beneficial ownership. **RLA-23**, *Blue Bank Int’l & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, which considered the question of beneficial ownership, did not find that the claimant’s claim was precluded by virtue of a “general principle” of international law.

<sup>95</sup> **RLA-14**, *Occidental Petroleum Corp. et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, ¶¶ 330-331; **RLA-21**, *Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 208.

<sup>96</sup> **RLA-21**, *Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 198.

<sup>97</sup> **RLA-21**, *Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 194.

<sup>98</sup> **RLA-21**, *Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 205.

<sup>99</sup> **RLA-21**, *Occidental Petroleum Corp., et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 201.

68. Notwithstanding the peculiar facts of the case, the decision, as well as the materials cited by the dissenting opinion and the Annulment Committee in that matter,<sup>100</sup> are inapposite as they rely on an entirely different framework: the development of the law of diplomatic protection and the case law of claims commissions, the latter which are founded on different jurisdictional instruments containing different terms,<sup>101</sup> and which serve a different object and purpose than the *investment treaty* at issue here.
69. As the *Perenco v Ecuador* tribunal, chaired by the (then) President of the International Court of Justice identified,

an additional distinguishing factor in this jurisprudence [of the claims commissions] is the term used in its constitutive document, usually a settlement agreement, with respect to standing. The term commonly used is “interest,” whether “directly or indirectly, an interest” (Iran-US Claims Tribunal) or “substantial and bona fide interest” (American-Mexican Claims Commission)” (emphasis added).<sup>102</sup>

70. Further, as the Iran-US Claims Tribunal itself noted, in the *Saghi* decision upon which Professor Stern and the Annulment Committee rely,

[t]he Tribunal’s **concern for beneficial interests flows naturally from the terms of the Algiers Accords**, in particular, General Principle B which states the purpose of both Parties “to terminate all litigation as between the government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration” . . . The **evident purpose** of these claims

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<sup>100</sup> See **RLA-1**, Whiteman Digest of International Law (1967) (a 1967 digest on diplomatic protection); **RLA-2**, David J. Bederman, *Beneficial Ownership of International Claims*, 38 INT’L & COMPARATIVE L. Q. 935 (Oct. 1989) (a 1989 article on diplomatic protection and the practice of claims commissions); **CLA-51**, Franciso Orrego Vicuna, “Changing approaches to the nationality of claims in the context of diplomatic protection,” ICSID Review, Vol 15, 2000, p. 352 (an article on diplomatic protection). The sole investment case relied upon by Professor Stern (**RLA-8**, *Waguih Elie George Siag and Clorinda Vechhi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 87-90; **RLA-15**, *Occidental Petroleum Corp. et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, September 20, 2012, ¶ 149), on the question of the standing of a legal/beneficial owner does not support the point, and the Annulment Committee does not refer to an investment case on the question of the standing of a legal/beneficial owner.

<sup>101</sup> **CLA-37**, *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014, ¶ 523.

<sup>102</sup> **CLA-37**, *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014, ¶ 523 n.828.

settlement arrangements **could not be fully implemented** unless the Tribunal's jurisdiction **were broad enough to permit the beneficial owners of affected property interests to present their claims** and have them decided on their merits by the Tribunal.<sup>103</sup>

71. As Douglas explains,

[a]s control is the touchstone for the quality of the relationship between the claimant and its investment, **other possible contenders must be excluded. Among them is the suggested requirement of beneficial ownership.** This additional criterion has been dismissed by at least one tribunal, albeit solely in relation to the jurisdictional test in Article 25 of the ICSID Convention. In **CSOB v Slovak Republic**, it was stated that **“absence of beneficial ownership by a claimant in a claim or the transfer of the economic risk in the outcome of a dispute should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding.”** This conclusion would be incompatible with the rules on the nationality of claims in diplomatic protection, but **such rules do not form part of the test for jurisdiction *ratione personae* in the investment treaty regime.**<sup>104</sup>

72. *Third*, even if such a “general principle” were to exist, it could not usurp the clear terms of the Treaty, which extend their scope to assets an investor owns or controls, directly or indirectly. As a matter of international law, “general principles” cannot override the *lex specialis* regime created by the Treaty,<sup>105</sup> except if those “general principles” amount to *jus cogens*.<sup>106</sup> As the tribunal made clear in *Waste Management, Inc. v. United Mexican States*, “[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty

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<sup>103</sup> **CLA-34**, *James M. Saghi, Michael R. Saghi and others v The Islamic Republic of Iran*, Award, IUSCT Case No. 298 (544-298-2), January 22, 1993, ¶24 (emphasis added).

<sup>104</sup> **CLA-49**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press, 2009), ¶ 559.

<sup>105</sup> **CLA-23**, Treaty, art. 11.17 (“Consent of Each Party to Arbitration”) (“Each Party consents to the submission of a claim to arbitration under this Section **in accordance with this Agreement**”) (emphasis added). With respect to a substantially identical provision in the DR-CAFTA, the *Corona* tribunal observed, “[c]onsent is thus expressly conditioned on the claimant’s submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.” **CLA-29**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, May 31, 2016, ¶ 188.

<sup>106</sup> See **CLA-19**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 85.

additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.”<sup>107</sup>

73. Tribunals, including those cited by Korea in support of its objection, have roundly rejected attempts to import “general principles” of diplomatic protection to override the clear terms of a jurisdictional instrument. For example, the tribunal in *KT Asia*, relied upon by Korea in a different respect, “concur[red] with the wide consensus that emerges from case law according to which **rules of customary international law applicable in the context of diplomatic protection do not apply** where they have been **varied by the *lex specialis* of an investment treaty**.”<sup>108</sup> The tribunal noted that “attempts by respondents to substitute or supplement the test of nationality [i.e., jurisdiction *ratione personae*] in a BIT with rules of diplomatic protection have **failed in an overwhelming number of cases**,” citing the paragraph in *CSOB* excerpted by Douglas above, concerning the suggested requirement of “beneficial ownership.”<sup>109</sup>
74. The tribunal in *RosInvestCo v Russia* (cited by the tribunal in *KT Asia* as an example of such a failure) rejected Russia’s argument, with respect to the tribunal’s *ratione personae* jurisdiction, that:

the Participation Agreements with Elliott International [which assigned beneficial ownership to another entity] **preclude the definition [of investor] applying to Claimant as Claimant was a mere nominal owner**. This analysis is **not supported by a plain reading of the definition in the IPPA**. The Tribunal is **bound by the Article 31 VCLT when interpreting the definition**. The plain meaning of the definition encompasses Claimant. Claimant’s submissions and supporting evidence bear out its qualification as an investor under the

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<sup>107</sup> *Id.*; **CLA-42**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, July 21, 2017, ¶ 475 (“[t]he provisions of the Treaty supersede principles of customary international law unless those principles are general principles of international law in the nature of *jus cogens*.”).

<sup>108</sup> **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶¶ 140, 143 (emphasis added).

<sup>109</sup> **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 129 (emphasis added). The tribunal specifically rejected the “nationality of claims” rule (the basis of the “general principle” in diplomatic protection), which had been argued rendered the claim “inadmissible as a result of the beneficial ownership of the claim itself,” finding “there is a triangular relationship in investment treaty arbitration that is different from the one which exists in matters of diplomatic protection under customary international law” **RLA-17**, *KT Asia Inv. Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶¶ 140, 143.

IPPA in light of this plain reading. **The Tribunal is prevented from imposing a stricter interpretation on the IPPA’s definition in light of its very wide drafting.** Accordingly, the Participation Agreements have no bearing in terms of the definition of investor contained in Article 1(d)(ii).<sup>110</sup>

75. The tribunals in *Hulley Enterprises*,<sup>111</sup> and *von Pezold*,<sup>112</sup> likewise rejected attempts to introduce a beneficial ownership requirement into their respective treaties—for example, as the tribunal in *von Pezold* found, there is “no requirement that beneficial ownership be proven in either the [relevant] BITs,” and “no basis on which such a requirement should be read into the BITs. In the present case, the Tribunal finds that the Claimants **have provided prima facie evidence of legal ownership which has not been rebutted and this is sufficient to establish jurisdiction.**”<sup>113</sup>
76. *Fourth*, even if such a requirement were to be imported into the Treaty by the Tribunal, by way of a “general principle of international investment law,” which it should not, the General Partner satisfies that requirement. As explained in Section IV.A.2 *supra*, the General Partner *did* have a beneficial ownership interest in the Samsung Shares, in addition to its legal ownership and control over the Shares.<sup>114</sup> While the relationship between the General Partner and Limited Partner remained in effect, the General Partner’s indivisible interest extended to the entirety of the Samsung Shares, and not merely a proportion of those Shares.<sup>115</sup>
77. *Finally*, the other cases relied upon by Korea are not concerned with such a “general principle” and do not support Korea’s objection.<sup>116</sup> *Impregilo* involved a joint venture

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<sup>110</sup> **CLA-38**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, September 12, 2010, ¶ 323 (emphasis added).

<sup>111</sup> **CLA-33**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 429 (“Respondent’s submission that simple legal ownership of shares does not qualify as an Investment under Article 1(6)(b) of the ECT finds no support in the text of the Treaty. The breadth of the definition of Investment in the ECT is emphasized by many eminent legal scholars.”).

<sup>112</sup> **CLA-27**, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 314.

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> Lindsay ¶¶ 22, 23(b), 36-39, **CER-1**.

<sup>115</sup> Lindsay ¶¶ 23(b), 36-39, **CER-1**.

<sup>116</sup> **RLA-7**, *PSEG Global, Inc. and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, concerned pre-

where ownership (legal and beneficial),<sup>117</sup> liability,<sup>118</sup> and control<sup>119</sup> were divided proportionally between joint venture members. In the present case, as explained in Section IV.B.2 *supra*, the General Partner’s legal and indivisible beneficial ownership extended to all of the Samsung Shares,<sup>120</sup> as did the General Partner’s assumption of unlimited liability,<sup>121</sup> and its exercise of complete control.<sup>122</sup> In *Mihaly*,<sup>123</sup> relied upon by Korea, the tribunal noted that:

[t]he existence of an international partnership, wherever and however formed, could neither add to **nor subtract from, the capacity of the Claimant . . . to file a claim against the Respondent . . .** The fact remains undisputed that the designated Claimant in the case at bar is unmistakably Mihaly (USA) *eo nomine* and not the Mihaly International or Binational Partnership (USA and Canada) . . . The Tribunal finds, nonetheless, that Mihaly International (USA) is entitled to file a claim in its own name against Sri Lanka in respect of the rights and interest it may be able subsequently to established in the proposed power project.<sup>124</sup>

78. The General Partner is the only entity that has the capacity to enforce its proprietary rights and interest in the Samsung Shares against third parties,<sup>125</sup> and the Treaty clearly

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investment expenditure by non-claimants; **RLA-4**, *Zhinvali, Development Ltd v. Republic of Georgia*, ICSID Case No. ARM/00/1, Award, January 24, 2003, concerned a corporate entity seeking to bring the claims of its shareholders, who were not claimants.

<sup>117</sup> **RLA-6**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶¶ 116, 122.

<sup>118</sup> **RLA-6**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶ 123.

<sup>119</sup> **RLA-6**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶ 138, where the tribunal found that there was “an intricate internal management structure comprising a Board of Representatives as well as an Executive Committee” which comprised “representatives of each of the parties” (¶ 159(d)).

<sup>120</sup> *See supra*, Section IV.A.2.

<sup>121</sup> Lindsay ¶¶ 16, 32(c), **CER-1**; **CLA-22**, ELP Law §§ 4(2), 20(1).

<sup>122</sup> *See supra*, Section IV.A.1.

<sup>123</sup> **RLA-3**, *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, March 15, 2002, ¶¶ 22, 26.

<sup>124</sup> Likewise, in *Impregilo*, the tribunal observed that “[t]he fact that [the joint venture] GBC has no separate legal personality may lead to the conclusion that this cannot be “GBC’s claim” in any event.” **RLA-6**, *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶139.

<sup>125</sup> The General Partner is also the only party entitled, as the owner of the “secondary” proprietary rights in the Samsung Shares, to enforce property rights over the Shares.

permits it do to so. This is the claim that the General Partner has brought before the Tribunal.

**B. The definition of “investor” does not impose a requirement of “beneficial ownership”**

79. As with its alleged “standing” requirement, Korea imports a requirement of “beneficial ownership” into the definition of “investor,” construing the expression “that attempts to make, is making, or has made an investment” to create a multitude of “requirements” needed to bring a claim under the Treaty. Again, setting aside the fact that these “requirements” have no basis in the Treaty, the General Partner meets these criteria.
80. *First*, Korea suggests that the expression “that attempts to make, is making, or has made an investment” in Article 11.28 of the Treaty is the basis of a requirement that an asset must be “beneficially owned” by an investor to qualify for the Treaty’s protection.<sup>126</sup>
81. The ordinary meaning of the expression “that attempts to make, is making, or has made an investment” in the Treaty’s definition of “investor” is clear on its face. The expression clarifies and expands the temporal scope of the protection of the Treaty; it does not introduce an independent limitation on that protection. As Vandeveld explains, “the definition makes clear that one becomes an investor by seeking to make an investment, even if the investment is not established successfully. Such a definition is necessary because the BIT imposes on the host state obligations applicable to the establishment of investment, and thus those seeking to invest have BIT protected rights even before an investment exists.”<sup>127</sup>
82. Caplan and Sharpe concur, noting the expression “refers to the complete life cycle of investment – from pre-establishment through dissolution . . . [it] therefore clarifies that, in certain cases, [the Treaty] affords protection to ‘investors of a Party’ while they are pursuing, but have not yet established, an investment.”<sup>128</sup>

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<sup>126</sup> Korea assert that “[a]bsent a beneficial interest in an investment, ‘an ‘investment’ will typically not have been made.’” Korea’s Memorial ¶ 25.

<sup>127</sup> **CLA-50**, Kenneth J. Vandeveld, *US INTERNATIONAL INVESTMENT AGREEMENTS* (Oxford Univ. Press, 2009), p. 156.

<sup>128</sup> **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in *OXFORD COMMENTARIES ON INTERNATIONAL LAW* (Chester Brown ed., OSAIL 2013), p. 768.

83. Again, the expression is intended to *expand*, rather than limit, the scope of the Treaty’s protection. It does not create a requirement that an asset comprising an investment must be “beneficially owned” by an investor, or even relate to that question. That question is answered explicitly in Article 11.28, which, as noted above, contains no requirement of “beneficial ownership,” or “ownership” at all.
84. *Second*, Korea distorts the illustrative “characteristics of investment,” from the definition of “investment,”<sup>129</sup> to introduce a new jurisdictional limit on enterprises which may qualify as an “investor.” This is not permissible.
85. Korea’s reliance on so-called “inherent” or “underlying” meanings of “investment”<sup>130</sup> to import new jurisdictional criteria into the Treaty’s definition of “investor” is unavailing. None of Korea’s suggestions as to the definition of investment, such as “a contribution of money or assets,” an “injection of fresh capital,” the “[use of an investor’s] own financial means,” or any “duration” requirement,<sup>131</sup> are found anywhere in the Treaty.<sup>132</sup> Indeed, Korea’s insistence that “mere ownership . . . is insufficient” is expressly contrary to the plain language of the Treaty, which expressly defines an investor to include one with direct or indirect ownership of an investment.<sup>133</sup>
86. It is nonsensical to re-define the express terms of a Treaty by reference to different concepts invoked by tribunals attempting to illustrate the meaning of “investment” where it is not defined. For example, Korea demands that the General Partner’s investment be “initiated and conducted by an entrepreneur using its own financial means and at its own financial risk,” when the tribunal in that case observed that such a concept only “becomes relevant” “in the absence of specific criteria or definitions in the ICSID Convention.”<sup>134</sup>

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<sup>129</sup> See *supra* at Section IV.

<sup>130</sup> The impermissibility of reference to an “inherent meaning” of investment, when the Treaty clearly defines the term “investment,” is even more patent when applied to define the term “investor,” to which it does not relate.

<sup>131</sup> See *supra* at Section IV.B.4.

<sup>132</sup> Korea’s Memorial ¶¶ 21-22, 25-26, 28.

<sup>133</sup> **CLA-23**, Treaty, art. 11.28.

<sup>134</sup> **RLA-12**, *Caratube Int’l Oil Co. LLP v. The Republic of Kazakhstan*, ICSID, Case No. ARB/08/12, Award, June 5, 2012, ¶ 434.

87. Not only do these new jurisdictional “criteria” have no basis in the terms of the Treaty, they also recall discredited conceptions about, *inter alia*, the relevance of the origin of funds committed to an investment,<sup>135</sup> and contradict the Treaty’s clear jurisdictional regime.<sup>136</sup>
88. As the tribunal in *Saba Fakes v Turkey* observed (cited by the tribunal in the *KT Asia* decision relied upon by Korea), with respect to the impact of beneficial ownership on the “characteristics of an investment,”

the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a fiducie or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. **The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.**<sup>137</sup>

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<sup>135</sup> For example, in relation to the use of an investor’s “own financial means,” see *Gavrilovic v. Croatia* (“the source of the funds is irrelevant for purposes of determining whether there was an “investment” under the BIT. The BIT contains no requirement that funds used to purchase an investment come from the personal assets or accounts of an investor, and the Tribunal sees no reason to impose one.”). **CLA-31**, *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, ¶ 209. In relation to the putative “activity” criteria, see *Mera v Serbia* (“To the extent that there is a requirement of activity when determining the status of an investor – of which the Arbitral Tribunal is not convinced – the Arbitral Tribunal considers that this is satisfied in the present case. . . . “making investments” comprises more than the funding and acquisition of investments, but as well, the holding and management of investments. . . . the Claimant actively held and managed the investments. . . . thereby “making investments” in Serbia.”). **CLA-35**, *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, November 30, 2018, ¶¶ 106-107.

<sup>136</sup> For example, in relation to the “injection of fresh capital” criteria, Article 1.4 of the Treaty clearly extends its protection to investments “*in existence* . . . or established, *acquired*, or expanded,” which contemplates the acquisition and protection of brownfield investments (i.e., without new, fresh capital).

<sup>137</sup> Noting the Tribunal considered that contribution, duration and risk were characteristics of investment required by the ICSID Convention, ¶ 110. **CLA-40**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 134.

89. Nevertheless, notwithstanding that these “requirements” have no basis in the Treaty, the General Partner’s investment in the Samsung Shares satisfies these manufactured “requirements.”
90. In addition to its contribution of other resources, the funds used to acquire the Samsung Shares included funds contributed by the General Partner, both directly and historically through its investment management.<sup>138</sup> The General Partner, in acquiring and managing its investment in the Samsung Shares, was not a “mere owner.” The General Partner actively identified and researched the opportunity to invest in Samsung as the *chaebol* (corporate group) was expected to undergo a structural transformation.<sup>139</sup> Of any party involved, it was the General Partner that was the “entrepreneur.” In performing that role, the General Partner was not controlled by “certain third party interests” — it remained at the General Partner’s complete discretion as to when and how its investment was acquired, managed and disposed.<sup>140</sup> In making those decisions, the General Partner clearly intended to maximize its own reward (from its beneficial interest in the partnership assets),<sup>141</sup> and minimize its risk (given it retained unlimited liability).<sup>142</sup>
91. The position of the claimant in *Blue Bank*,<sup>143</sup> the core case relied upon by Korea to ground its objection, could not be any more different. In *Blue Bank*, the claimant was not involved in the acquisition of the assets,<sup>144</sup> and “[did] not own the assets, but simply manage[d] and administere[d] them.”<sup>145</sup> Nevertheless, even the claimant’s powers of administration were “extremely limited”<sup>146</sup>—the claimant had “no power and no

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<sup>138</sup> The money used by the General Partner to acquire new assets (at any given time) is a function of the (historical) contribution of funds of both the General Partner and the Limited Partner, as well as the General Partner’s (historical) contribution of investment expertise to grow the funds available for new acquisitions or reinvestment.

<sup>139</sup> Garschina ¶ 15, **CWS-1**.

<sup>140</sup> *See supra*, Section IV.A.

<sup>141</sup> *See supra*, Section IV.B.2.

<sup>142</sup> *See supra*, Section III.A.

<sup>143</sup> **RLA-23**, *Blue Bank International & Trust (Barbados) Ltd. V. Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017.

<sup>144</sup> **RLA-23**, *Blue Bank*, ¶¶ 148-151.

<sup>145</sup> **RLA-23**, *Blue Bank*, ¶ 163.

<sup>146</sup> **RLA-23**, *Blue Bank*, ¶ 167.

discretion over the trust assets,”<sup>147</sup> and “[could not] perform many essential trustee functions independently, but with respect to them, [was] under the control of Hampton.”<sup>148</sup> The claimant was precluded by law from “hav[ing] an interest of any nature whatsoever in [the] assets,”<sup>149</sup> and received an annual fixed fee for its services, unrelated to the nature, size or performance of the assets.<sup>150</sup> Hampton had the power to remove the claimant from its position at will (as it had removed the claimant’s predecessor, which had been incorporated in a jurisdiction without an applicable investment treaty).<sup>151</sup> It was *Hampton* who “exercise[d] all powers necessary or useful to carry on the business of the Trust” and who the Tribunal found was, “for all intents and purposes, the “real” owner of the purported investment.”<sup>152</sup>

## **VI. KOREA HAS NOT ESTABLISHED ITS OBJECTIONS TO THE GENERAL PARTNER’S DAMAGES CLAIM**

92. In Mason’s Notice of Arbitration and Statement of Claim (the “NOA/SOC”), Mason establishes Korea’s commission of internationally wrongful acts, in violation of protections offered to Mason under the Treaty. The General Partner’s entitlement to compensation, in accordance with the standard in *Chorzów Factory*,<sup>153</sup> flows directly from those breaches of the Treaty. In the NOA/SOC, Mason reserved its position with respect to its damages case, including the question of quantum of damages, to be further detailed at an appropriate stage of proceedings.<sup>154</sup>
93. In addition to its objections to the Tribunal’s competence, Korea raises an objection under Article 11.20.6 of the Treaty, namely an objection that “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made

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<sup>147</sup> **RLA-23**, *Blue Bank*, ¶ 171.

<sup>148</sup> **RLA-23**, *Blue Bank*, ¶ 196.

<sup>149</sup> **RLA-23**, *Blue Bank*, ¶ 161.

<sup>150</sup> **RLA-23**, *Blue Bank*, ¶ 163.

<sup>151</sup> **RLA-23**, *Blue Bank*, ¶¶ 171, 196, 197, 140-145.

<sup>152</sup> **RLA-23**, *Blue Bank*, ¶ 197.

<sup>153</sup> As set out in Claimants’ Notice of Arbitration ¶ 84, in the absence of a *lex specialis*, customary international law applies to the valuation of damages payable to the General Partner as a consequence of Korea’s violations of the investment protections afforded to the General Partner under the Treaty.

<sup>154</sup> Claimants’ Notice of Arbitration ¶ 82; UNCITRAL Rules, art. 20.

under Article 11.26.”<sup>155</sup> This objection is in essence a reformulation of Korea’s “standing” and jurisdictional objections concerning “beneficial ownership” of the Samsung Shares, and suffers from the same flaws. It is premised on limitations that have no place in the Treaty. It likewise is founded on a misunderstanding of the role of the General Partner and its proprietary rights with respect to the Samsung Shares.

94. Given the premature stage of proceedings, and the danger of prejudging the merits of a case without the benefit of the parties’ full pleadings or factual evidence, Korea bears the burden to prove, to an extremely high standard of proof, that an award of damages in favor of the General Partner is demonstrably doomed to failure. Korea has not come close to meeting this burden.

**A. Korea bears the burden of proving the General Partner’s claim is “demonstrably doomed to failure” and “legally hopeless” at this stage of proceedings**

95. As the party raising the objection under Article 11.20.6, Korea bears the burden of establishing each aspect of that objection.<sup>156</sup>

96. Article 11.20.6 imposes an extremely high standard of proof on the party making the objection. Korea must establish that in no circumstances an award *may* be made in favor of the General Partner, even assuming the facts asserted by the General Partner to be true.<sup>157</sup> Tribunals considering the same language have explained this standard as requiring objecting parties to prove that the claims are “demonstrably doomed to failure,” and “legally hopeless.”<sup>158</sup>

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<sup>155</sup> **CLA-23**, Treaty, art. 11.20.6 (“Conduct of the Arbitration”).

<sup>156</sup> **CLA-36**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶ 111.

<sup>157</sup> **CLA-23**, Treaty, art. 11.20.6(c) (“Conduct of the Arbitration”).

<sup>158</sup> **CLA-28**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017, ¶ 97 (“Article 10.20.4 [the substantially identical provision in the US-Panama TPA] is designed to enable a tribunal to dismiss at an early stage claims that are demonstrably doomed to failure”); **CLA-43**, *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4, December 18, 2014, ¶ 206 (“when addressing an Article 10.20.4 [the substantially identical provision in the US-Peru TPA] objection for legal insufficiency of a claim, a tribunal will be called to decide whether the claim is ‘legally hopeless.’”).

97. As the Tribunal in *Pac Rim* explained,

[T]o grant a preliminary objection, a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, **there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.**<sup>159</sup>

98. Korea has the burden of proof and, as discussed below, has completely failed to discharge it.

**B. Korea has not come close to discharging its burden of proof**

99. Korea's objection is not about the *extent* of the General Partner's entitlement to claim, the *quantum* of damages claimed, or factors that may *limit* the General Partner's entitlement to damages (for example, contributory fault on the part of the General Partner). These matters have not been fully pleaded, and the General Partner continues to reserve its case until an appropriate stage of the proceedings.<sup>160</sup> Korea's complaint is that it is legally hopeless for the General Partner to be awarded any compensation at all.<sup>161</sup> This argument is meritless.

100. Under the *Chorzów Factory* standard, the General Partner is entitled to compensation to "as far as possible, wipe out all of the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>162</sup>

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<sup>159</sup> **CLA-36**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶ 110 (emphasis added).

<sup>160</sup> Article 20 of the UNCITRAL Rules notes that, "[d]uring the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate. . . ." Mason intends to file an amended Statement of Claim following the tribunal's decision on Korea's preliminary objection.

<sup>161</sup> Korea's Memorial ¶¶ 35, 36 ("given that the GP was not the beneficial owner of the Samsung Shares, the GP's claim for damages is legally deficient" as "any resulting benefit" and "any resulting loss would have been that of the Cayman Fund, not that of the GP").

<sup>162</sup> **CLA-1**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17, p. 47.

101. As such, to establish its assertions that the General Partner “cannot have been damaged with respect to [its investment in the Samsung Shares],”<sup>163</sup> Korea must prove that its wrongful acts had no consequences for the General Partner (to be wiped out), and the General Partner’s situation remained unaffected by those acts (with no need for that situation to be reestablished).
102. The basis for Korea’s objection is that the General Partner did not have a “beneficial interest” in the Samsung Shares.<sup>164</sup> But, as has been established above, the General Partner *did* have an indivisible beneficial interest over the assets of the partnership, including the Samsung Shares.
103. Korea’s wrongful acts affected the value of the Samsung Shares, and thus the General Partner’s partnership interest, including the General Partner’s entitlement to an incentive allocation. Appreciation of the assets of the partnership, including the Samsung Shares, grows the funds available for further investment, further growth and further entitlement to an incentive allocation.<sup>165</sup> Such appreciation permits the General Partner to extend its leverage, again to grow its investments and opportunities to profit.<sup>166</sup> In that sense, capital appreciation has a “multiplier effect” on the assets of the partnership and the General Partner’s interest in that partnership. Damage to the Samsung Shares, conversely, has a negative “multiplier effect” on the General Partner’s interest. Korea’s suggestion that the General Partner has no true economic interest in the Samsung Shares is simply incorrect.
104. Nevertheless, even if Korea were to prove that the General Partner did not have a “beneficial interest” in the Samsung Shares, which it has not, Korea has not proven that damage to the value of the Shares nevertheless had no other consequences for the General Partner, including as the party bearing ultimate liability for the business in the event of insolvency.<sup>167</sup> In reality, such damage increased the General Partner’s risk

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<sup>163</sup> Korea’s Memorial ¶ 32.

<sup>164</sup> Korea’s Memorial ¶ 35.

<sup>165</sup> Garschina ¶ 11, **CWS-1**; Satzinger ¶¶ 12-13, **CWS-2**.

<sup>166</sup> Garschina ¶ 11, **CWS-1**; Satzinger ¶¶ 12-13, **CWS-2**.

<sup>167</sup> Lindsay ¶ 16, 32(c), **CER-1**.

profile, including its ability to leverage its assets.<sup>168</sup> Further, Korea has not proven that the damage to the General Partner’s investment in the Samsung Shares had no consequences for the General Partner’s legal and controlling interests in the Shares, including the right to participate in meetings of the companies and to influence the direction of the companies.<sup>169</sup>

105. Korea has not substantiated its assertion that “[a]n award of damages to the [General Partner] for a beneficial interest that it did not possess would unjustly enrich the [General Partner].”<sup>170</sup> As explained above, the General Partner held a beneficial interest with respect to all of the Samsung Shares. An award of damages to the General Partner with respect to the Samsung Shares would be held in the same way that the Samsung Shares originally were (as dividends, and other amounts paid with respect to assets are), and as such would restore the position that existed but for Korea’s wrongful interference.<sup>171</sup> As Korea has not discharged its burden of proof, its preliminary objection should be rejected in full.

**VII. KOREA’S OBJECTIONS SHOULD NOT HAVE BEEN RAISED IN A PRELIMINARY PHASE, OR AT ALL**

106. The General Partner maintains its objection that the objections raised by Korea in its Memorial are not appropriate for preliminary determination, and should not have been raised in this process.<sup>172</sup> In particular, the Tribunal’s examination of the question of damages risks prejudging the merits of the General Partner’s claim without access to the full factual record, and without giving the General Partner a “full opportunity” to present its case, as it is entitled under the UNCITRAL Rules.<sup>173</sup>
107. Korea’s objections are frivolous in that they are made speculatively, without due care and without consideration of the relevant factual and legal material. Indeed, Korea has not put forth any expert submission on Cayman law, and does not appear to have

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<sup>168</sup> Garschina ¶ 11, **CWS-1**.

<sup>169</sup> Lindsay ¶ 26, **CER-1**.

<sup>170</sup> Korea’s Memorial ¶ 35.

<sup>171</sup> In that respect, the case cited by Korea (**RLA-8**, *Siag v Egypt*) does not assist.

<sup>172</sup> Letter from the Claimants to the Tribunal, dated February 13, 2019.

<sup>173</sup> UNCITRAL Arbitration Rules, art. 15(1) (1976).

consulted a Cayman law expert. In the circumstances, the Tribunal should award Mason its costs in relation to this phase of the proceedings, including attorneys' fees and expenses, expert witness costs and the costs of the arbitration and compound interest on all such costs.<sup>174</sup>

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<sup>174</sup> **CLA-23**, Treaty, art. 11.20.8 provides the Tribunal with the specific power to award costs. The Tribunal is nevertheless entitled to do so as part of its general powers with respect to costs under Article 38 of the UNCITRAL Arbitration Rules (1976).

## **VIII. REQUEST FOR RELIEF**

108. For the reasons set out in this Counter-Memorial, Mason respectfully requests that the Tribunal render an award:

- a. declaring the General Partner's claim admissible, and that the Tribunal has jurisdiction over that claim;
- b. rejecting Korea's objections to the Tribunal's competence;
- c. rejecting Korea's objection to the General Partner's claim under Article 11.20.6 of the Treaty;
- d. ordering that Korea pay all of Mason's costs incurred in relation to this phase of the proceedings, including attorneys' fees and expenses, expert witness costs and the costs of the arbitration, and compound interest on all such costs; and
- e. ordering such other relief as the Tribunal may deem appropriate,

and proceed to the merits of Mason's claims.

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