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

MASON CAPITAL L.P. AND MASON MANAGEMENT LLC

Claimants

v.

THE REPUBLIC OF KOREA

Respondent

RESPONDENT'S REPLY ON PRELIMINARY OBJECTIONS

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28 June 2019

Ministry of Justice of the Republic of Korea

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1. The Republic of Korea ("**Korea**" or "**Respondent**") hereby submits its Reply on Preliminary Objections ("**Reply**") in accordance with Procedural Order No. 2.[1] This Reply is accompanied by (i) an expert opinion on Cayman Islands law by Rachael Reynolds dated 28 June 2019 ("**Reynolds**");[2] and (ii) an expert opinion on Korean law by Professor Hyeok-Joon Rho dated 28 June 2019 ("**Rho**").[3] The Reply is also accompanied by exhibits R-2 through R-22 and legal authorities RLA-24 through RLA-59.

I. INTRODUCTION

2. Mason's Counter-Memorial obscures the commercial reality at the heart of Mason's alleged investment in Korea. This is a reality familiar to anyone who has entrusted money to another (whether a broker or investment manager or hedge fund) to try to make more money. When we engage a broker to make an investment on our behalf, the broker gets a fee or a percentage of the uptake, and the rest comes to us, whether as loss or gain. If we give $1 million to a broker, and the broker converts that $1 million into $1.2 million by sage investment, the broker is not the owner of that $1.2 million. The money belongs to us, and we pay the broker's fee out of our $1.2 million. Likewise, if the broker expected its investment to bring in $1.2 million and instead the investment ended up at $800,000, the broker has not lost $200,000. We have lost $200,000.

3. The underlying principle is no different where a hedge fund, such as Mason, is set up as a partnership. The investors in Mason Capital, Ltd. (the "**Limited Partner**"), a Cayman entity, contribute cash to another Cayman entity, Mason Capital Master Fund LP (the "**Cayman Fund**" or the "**Partnership**"), neither of which is a party to this arbitration. The general partner in the Cayman Fund, Mason Management LLC (the "**GP**"), then uses that cash to try to make more cash for the Cayman Fund and its investors, including here by betting that, notwithstanding

[1] Procedural Order No. 2 dated 5 Mar. 2019, at 2. Capitalized terms used but not defined in this Reply have the meaning attributed to them in Respondent's Memorial on Preliminary Objections ("**Memorial**").

[2] Ms. Reynolds is a partner and the Global Head of Dispute Resolution at the Cayman Islands law firm of Ogier. Her practice includes providing advice and representation to investors in and managers of exempted limited partnerships in the Cayman Islands.

[3] Professor Rho is a professor at the professional graduate school of Seoul National University School of Law, located in Seoul, Korea. His practice includes providing advice on various issues of corporate law and financial law in Korea to financial institutions, law firms, and government agencies, among others.

the announced merger of SC&T and Cheil, the merger would not go through and SC&T's share price would go up as a result.

4. The GP's bet did not work out, and the Cayman Fund and its Limited Partner did not make as much money from the Samsung Shares as the GP hoped they would.[4] The GP looked around for a way to sue, and found the Korea-U.S. FTA. The GP's problem, though, is that the FTA extends its protection only to U.S. investors in Korea (not Cayman investors such as the Cayman Fund and its Limited Partner) and a claimant under the FTA can bring claims only on its own behalf, for investments made by itself, not those of others. As Mason's Counter-Memorial confirms, the GP attempts to solve this problem by claiming as its own the contributions and losses of the Cayman Fund and the Limited Partner.

5. The artifice does not work under the FTA or international law or common sense. Mason's Counter-Memorial does not refute that, because the GP's alleged contributions to the Samsung Shares (and the associated risks) were those of the Cayman Fund and the Limited Partner, the GP itself did not make an investment and is not an investor within the meaning of the FTA. This is all the clearer in light of recently obtained evidence that, before starting this arbitration, Mason consistently held out the Cayman Fund (not the GP) as the investor in SC&T and Samsung Electronics. The GP never registered as a foreign investor as required under Korean law (the Cayman Fund did), and the GP was never registered as a shareholder on SC&T's and Samsung Electronics' shareholder register (the Cayman Fund was). Under Korean law, the GP therefore never owned or controlled the Samsung Shares.

6. Even assuming *arguendo* that the GP qualified as an investor under the FTA, it would lack standing to bring claims on behalf of parties that are not before this Tribunal (the Cayman Fund and the Limited Partner) for losses allegedly suffered by these third parties. The GP's damages claim for such losses allegedly suffered by third parties is also legally deficient under the FTA and should therefore be dismissed. Both the standing defect and the legal

[4] The Samsung Shares describe the shares in SC&T and Samsung Electronics which the GP allegedly owned and controlled on behalf of the Cayman Fund. *See* Memorial, ¶ 5. The Samsung Shares constitute approximately 64% of the total alleged lost value of SC&T and Samsung Electronics shares allegedly owned and controlled by Claimants. *See id.*, ¶ 7.

deficiency arise from the same basic point: the loss that the GP complains of in the arbitration was that of the Cayman Fund and its Limited Partner, not that of the GP.

II. REPLY ON THE FACTS

7. Claimants do not dispute that they carry the burden of proving the facts necessary to establish the Tribunal's jurisdiction as well as any facts alleged in response to Korea's preliminary objections.[5] Claimants have failed to sustain that burden. The Counter-Memorial confirms that the GP is merely a trustee that is bringing claims on behalf Cayman entities that are not protected under the FTA. The record also shows that, contrary to their arguments in this arbitration, Claimants consistently held out the Cayman Fund, not the GP, as the acquirer of the Samsung Shares and investor in Korea.

A. The GP purports to bring claims as a trustee on behalf of Cayman beneficiaries that are not protected under the FTA

8. Claimants' Counter-Memorial confirms that the GP is pursuing this arbitration not on its own behalf, but as a mere trustee for the Cayman Fund and the Limited Partner.

9. The GP purports to stand before this Tribunal to represent the interests of these third parties based on an alleged entitlement under Cayman law and the Partnership Agreement to file treaty claims on their behalf. As Claimants argue, under Cayman law and the partnership agreement governing the Cayman Fund, the GP is "exclusively responsible for the conduct of the [Cayman Fund's] investment business," "makes all decisions with respect to the [Cayman Fund's] business," and is "the only entity with capacity to engage in legal proceedings with respect to the [Cayman Fund's] assets."[6]

10. That Mason stands before this Tribunal on behalf of the Cayman Fund and its Limited Partner is also clear on the face of the Exempted Limited Partnership Law of the Cayman Islands ("**Partnership Law**") and the Second Amended and Restated Limited Partnership Agreement (the "**Partnership Agreement**"), entered into between the GP and the

[5] Claimants have not disputed Korea's submissions on burden of proof in paragraph 9 of the Memorial. *See also infra*, ¶ 24.

[6] Counter-Memorial, ¶ 18 (internal citations omitted; emphasis added).

Limited Partner to govern their partnership in the Cayman Fund. In accordance with the Partnership Law, the GP holds assets "upon trust as an asset of the [Cayman Fund]," and acts "at all times . . . in the interests of the [Cayman Fund]."[7] Under the Partnership Agreement, the GP has "the power by itself on behalf of and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership"[8] and, generally, to "act for and on behalf of the Partnership."[9] All legal proceedings in respect of the Cayman Fund's assets, including this arbitration, are submitted by the GP "on behalf and in the name of the Partnership."[10]

11. Mason's Cayman law expert, Rolf Lindsay, confirms that the GP is "the proper claimant in respect of any damages alleged to have been suffered by the Partnership or in respect of the Partnership assets, including the Samsung Shares."[11]

12. That the GP may have the authority as a matter of Cayman law or contract to file claims on behalf of the Cayman Fund and the Limited Partner does not mean, however, that this Tribunal has jurisdiction over such claims under the FTA and international law. Nor does it mean that the GP has standing under the FTA and international law to bring such claims on behalf of third parties. These matters are further developed in Sections IV and V below.

B. Claimants have failed to prove that the GP had any beneficial interest in the Samsung Shares

13. As Claimants' expert concedes, the Samsung Shares (which form the basis of the GP's claim in this arbitration) were the Cayman Fund's assets, not the GP's assets.[12] The GP held these assets as a mere trustee for the Cayman Fund, and Claimants have offered no evidence in their Counter-Memorial that the GP had any beneficial interest of its own in such shares.

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[7] Partnership Law (**CLA-22**), §§ 16(1), 19(1) (emphasis added). *See also id*. § 14(2) (providing that all contracts, instruments or documents are entered into by the GP "on behalf of the [Cayman Fund]").

[8] Partnership Agreement (**C-30**), Art. 3.02 (emphasis added).

[9] Partnership Agreement (**C-30**), Art. 3.02(o) (emphasis added). *See also id*., Arts. 3.03, 3.08 (providing that the GP is authorized to incur, and is entitled to be reimbursed for, "all costs and expenses it incurs on behalf of the [Cayman Fund] or for its benefit").

[10] Partnership Agreement (**C-30)**, Art. 3.02 (emphasis added).

[11] Expert Report of Rolf Lindsay ("**Lindsay**"), ¶ 42(b) (emphasis added).

[12] Lindsay, ¶ 42(b).

14. It is undisputed that the GP's beneficial interest in the Cayman Fund, including the Samsung Shares, is determined by reference to the contract governing the Cayman Fund, *i.e.*, the Partnership Agreement.[13] The Partnership Agreement provides that, at any given time, the GP's and the Limited Partner's respective beneficial interest (or "economic interest" as the Partnership Agreement calls it) is expressed as a percentage equal to "(i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners" ("**Partnership Interest**").[14] For example, assuming the GP's Capital Account balance at a given time was US$ 1 million, and the Limited Partner's balance was US$ 99 million, then the GP would have had a 1% Partnership Interest in the Cayman Fund, and the Limited Partner would have had a 99% Partnership Interest. If the GP's Account Balance was zero, the GP would have had no Partnership Interest.[15]

15. The Cayman Fund's profit or loss in a particular year is allocated to the Limited Partner's and the GP's respective Capital Accounts in proportion to their Partnership Interest, as assessed in that year.[16] Thus, the Limited Partner's and the GP's respective Capital Accounts reflect the initial contribution (if any) which each Partner made to the Cayman Fund, plus any profits or losses generated from the Cayman Fund's assets, less certain expenses and any amounts that may have been distributed to the Limited Partner and the GP from time to time.[17]

16. In exchange for its services as the Cayman Fund's trustee, the GP receives in its Capital Account 20% of any net profits allocated to the Capital Account of the Limited Partner in a given year (less certain fees and expenses), provided these net profits are higher than any

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[13] *See* Lindsay, ¶ 36 ("The entitlement of the partners, including the General Partner, to share in [the Partnership] assets . . . is the beneficial interest in each case and is determined for all partners, including the General Partner, by reference to the Partnership Agreement.").

[14] Partnership Agreement (**C-30**), Art. 2.12 ("'Partnership Interests' shall mean a Partner's interest in the Partnership. The Partner's economic interest shall be expressed as a percentage equal to (i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners at any given time."); Reynolds, ¶ 45.

[15] *See* Reynolds, ¶¶ 10, 45-46.

[16] *See* Partnership Agreement (**C-30**), Art. 4.06(a).

[17] Reynolds, ¶ 40. Under Article 4.09 of the Partnership Agreement, "the General Partner may make distributions in cash or in kind at the sole discretion of the General Partner at such time or times as it shall determine." *See* Partnership Agreement (**C-30**), Art. 4.09.

Cumulative Unrecovered Net Losses ("**Incentive Allocation**").[18] Stated simply, the Incentive Allocation is an annual performance fee designed to incentivize the GP to maximize returns on the Cayman Fund's assets, equivalent to 20% of any upside allocated to the Capital Account of the Limited Partner. The Incentive Allocation does not expose the GP to a risk of loss. If the Cayman Fund makes a net loss in a given year, the GP receives no Incentive Allocation; but the GP does not owe anything to the Cayman Fund in such a loss-making year. When it receives an Incentive Allocation, the GP may either withdraw this amount or retain it in its Capital Account.[19] In case the Incentive Allocation stays in the GP's Capital Account, the GP's Partnership Interest (and thus its beneficial interest in the Cayman Fund) increases going forward.

17. To date, the GP has submitted to this Tribunal no evidence showing the existence and extent of its Partnership Interest in the Cayman Fund, and thus the Samsung Shares, at the relevant time (2015).[20] The Partnership Agreement required the Limited Partner, but not the GP, to contribute a minimum amount of capital to the Cayman Fund.[21] The GP has not shown whether and to what extent it contributed to its Capital Account or received (and retained in its Capital Account) any past Incentive Allocations.[22] To the contrary, the evidence on the record suggests that the GP did not have any Partnership Interest. The investment registration application that the Cayman Fund completed in connection with the purchase of the Samsung Shares thus stated that the Cayman Fund was 100% owned by the Limited Partner and did not mention any ownership interest of the GP.[23] Claimants' unsupported assertion that the GP made a "contribution of funds" to the acquisition of the Samsung Shares rings hollow in light of the

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[18] Partnership Agreement (**C-30**), Art. 4.06(b). *See also id.*, Article 4.06(c) ("Cumulative Unrecovered Net Losses ('**CUNL**') for a Capital Account shall equal zero when the original Capital Contribution is made to such Capital Account. The CUNL shall subsequently be increased by any amount of Cumulative Net Losses allocated to such Capital Account for a Fiscal Year (as adjusted pursuant to the last sentence of this paragraph) and decreased (not below zero) by an amount of Cumulative Net Profits (as adjusted per the last sentence of this paragraph) allocated to such Capital Account for a Fiscal Year.").

[19] Reynolds, ¶¶ 38(e)-(f); Partnership Agreement (**C-30**), Art. 4.09.

[20] Reynolds, ¶¶ 11, 49.

[21] Partnership Agreement (**C-30**), Art. 4.01 ("The initial Capital Contribution by a Limited Partner shall not be less than $1,000,000.") (emphasis added). The Partnership Agreement does not prescribe any minimum contribution by the GP.

[22] *See* Reynolds, ¶ 49.

[23] *See infra*, ¶ 20.

absence of proof of the Capital Account.[24] Evidence of the GP's Partnership Interest in 2015 (if any) should be readily available.[25] The GP knows this well. That the GP has failed to submit such evidence is a failure of proof at the core of its claim.

18. Claimants argue that Cayman law grants the GP an "indivisible beneficial interest" in the "entirety" of the Cayman Fund's assets, including the Samsung Shares.[26] But as Korea's Cayman law expert, Ms. Reynolds, explains, the term "indivisible beneficial interest" refers merely to the circumstance that a partner's beneficial interest in the partnership is not separable until such time as the partnership assets are distributed, just as shareholders' interests in a company are not separable until the company's assets are distributed.[27] It does not mean, as Claimants suggest, that the GP's economic entitlement extends to 100% of the value of the Cayman Fund's assets.[28] This would contradict the terms of the Partnership Agreement, which sets out the calculation of the GP's Partnership Interest, and upend the commercial reality of the GP's role as a trustee of the assets it holds for the benefit of the Cayman Fund.

C. Claimants registered the Cayman Fund, not the GP, as the foreign investor and legal owner of the Samsung Shares with capacity to control them

19. Contrary to Claimants' position in this arbitration that the GP owned and controlled the Samsung Shares, the record shows that Claimants registered the Cayman Fund, not the GP, as a foreign investor and owner of the Samsung Shares in Korea.

20. As Professor Rho explains, under Korean law, a foreign investor is required to register with the Financial Supervisory Service[29] in order to acquire shares in a publicly listed

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[24] Counter-Memorial, ¶ 90, n. 138.

[25] *See* Partnership Agreement (**C-30**), Art. 9.03; Reynolds, ¶ 50.

[26] Counter-Memorial ¶ 76 ("[T]he General Partner's indivisible [beneficial] interest extended to the entirety of the Samsung Shares, and not merely to a proportion of those Shares.") (internal citations omitted). *See also id.*, ¶¶ 37, 105.

[27] Reynolds, ¶ 30.

[28] Reynolds, ¶ 30.

[29] The Financial Supervisory Service is an integrated financial regulator that provides supervisory services, consumer protection and other oversight and enforcement activities as delegated or proscribed by the Financial Services Commission. The Financial Services Commission is the financial regulatory watchdog that is responsible for rulemaking and licensing.

Korean company and to validly exercise shareholder rights in respect of that company.[30] The Cayman Fund, not the GP, was registered as a foreign investor in Korea. Its Application for Registration of Investment made no reference to the GP and stated that the Limited Partner (a Cayman limited company) was the only shareholder of the Cayman Fund, with 100% ownership:[31]

Name of foreign investor:	Mason Capital Master Fund L.P. [*i.e.*, the Cayman Fund]
Nationality of foreign investor:	Cayman Islands
Investor category:	Corporation
Law of establishment:	Cayman Islands
Majority shareholder:	Mason Capital Ltd. [*i.e.*, the Limited Partner], with 100% share of equity of the Cayman Fund
Trustee:	N/A
Management Company	Mason Management LLC, Cayman Islands
Advisory Company	Mason Capital Management LLC, Cayman Islands

21. Thus, only the Cayman Fund was registered as a foreign investor in Korea, entitled to own, directly or indirectly, shares in Korean companies. In addition, the Cayman Fund identified itself as a corporation with legal personality, rather than an unincorporated partnership, although the standard Application form provides for the option of registering as a

[30] Rho, § IV. *See* Financial Investment Services and Capital Markets Act ("**Capital Markets Act**") (**R-14**), Art. 168; Capital Markets Enforcement Decree (**R-16**), Art. 188-1. The registration is made via an Application for Registration of Investment, which calls for the disclosure of basic information about the investor, such as its nationality, place of establishment, and its owners. Regulations on Financial Business Investment (**R-17**), Art. 6-10 ("Any foreigner who intends to acquire or dispose of any of the following securities for the first time shall file an application for registration with the Governor of the Financial Supervisory Service in advance in the manner prescribed by the Governor of the Financial Supervisory Services.").

[31] Cayman Fund Application for Registration of Investment ("**Application**") (**R-7**).

partnership or fund.[32] Moreover, the Application presents the Cayman Fund and its associates as Cayman entities without any ties to the United States: the GP (a Delaware partnership) is not listed as trustee or shareholder, and the investment manager and investment advisor – Mason Management LLC and Mason Capital Management LLC, both Delaware partnerships – are incorrectly presented as Cayman entities.[33] The reasons for these misrepresentations by Claimants are not clear at this stage.

22. Similarly, it was the Cayman Fund, not the GP, that was registered as a shareholder on the shareholder registries of SC&T and Samsung Electronics.[34] Under Korean law, only the entity registered on a company's shareholder registry is entitled to exercise shareholder rights.[35] Under Korean law, an entity that is not registered as a shareholder cannot exercise any shareholder rights, regardless of any arrangements between the registered shareholder and another entity (whether by contract or by operation of a foreign law) that purportedly transfer all or part of such rights to the other entity.[36]

23. In other words, as a result of its decision not to register as a foreign investor and shareholder, the GP did not own or otherwise control the Samsung Shares under Korean law. This precludes any claim by the GP to be a protected investor under the FTA, as further discussed below in Section III.C.

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[32] Application (**R-7**).

[33] Application (**R-7**). It is unclear why the Cayman Fund misstated information in the Application. One possible explanation is that holding the Cayman Fund out as not having any US ties would have conferred tax benefits when trading securities in Korea. Under Article 6-13 of the Regulations on Financial Investment Business, in the event that "[t]here is any false representation or omission in the application for registration to make an investment," the Governor of the Financial Supervisory Service may reject an Application filed by a foreign investor or cancel a registration that has already been made. *See* Regulations on Financial Business Investment (**R-17**), Art. 6-13.

[34] Samsung C&T Corporation Register of Shareholders, dated 11 June 2015 (**R-8**); Samsung Electronics Co., Ltd. Register of Shareholders, dated 30 June 2015 (**R-9**).

[35] *See* Rho, § V.B; Supreme Court Decision Case No. 2015Da248342 dated 23 March 2017 (**R-10**), 1 ("[A] company ― regardless of whether it is aware that there are others, other than the shareholder whose name is in the shareholder registry, who have actually purchased or acquired shares ― may neither deny the exercise of rights by the shareholder whose name is in the shareholder registry nor acknowledge the exercise of rights by a person whose name has not yet been recorded therein.").

[36] Rho, § V.B.

III. THE GP DOES NOT QUALIFY AS AN INVESTOR UNDER THE FTA

24. Claimants do not dispute the fundamental principle of international law that no State may be brought before an international tribunal without that State's consent to jurisdiction.[37] Claimants have failed to sustain their burden of proving that the GP qualifies as an investor entitled to bring claims against Korea under the FTA.

A. The FTA protects only U.S. "investors" in Korea

25. The FTA applies only with respect to U.S. investors in Korea (and Korean investors in the United States).[38] Article 11.28 of the FTA sets out the definitions of "investor" and "investment":

> **investor of a Party** means a Party or state enterprise thereof, or 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;
>
> . . .
>
> **investment** means **every 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;[39]

26. To qualify for protection, the investor must thus have "made" an investment (or attempt to make or be in the process of making it) that has "the characteristics of an investment." The FTA's reference to "the characteristics of an investment," without an exhaustive definition, is a reference to the considerable body of authorities under international investment law that have considered the question of what constitutes an "investment." As observed by the Tribunal in *Nova Scotia Power v. Venezuela*, "contribution, duration and risk" are "well-established features [that] have been recognized by many an investment arbitration tribunal" as the "triad"

[37] *See* Memorial, ¶ 9.

[38] FTA (**CLA-23**), Art. 11.21 (Scope and Coverage).

[39] FTA (**CLA-23**), Art. 11.28 (emphasis added).

representing the "minimum requirements for an investment," both in ICSID and other cases.[40] As the *Salini v. Morocco* Tribunal observed already 16 years ago in one of the first reported decisions to grapple with the inherent characteristics of an investment, it is generally accepted that "investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction."[41]

27. Mason suggests that shareholding *per se* satisfies the definition of investment because shares and stocks are listed among the "[f]orms than an investment may take."[42] The enumeration of "[f]orms that an investment may take" is merely illustrative, however, and does not override the explicit requirement that the asset have "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." Mason's reading of Article 11.28 would deprive the reference to the "characteristics of an investment" of any purpose in violation of basic rules of treaty interpretation.[43] That reading is also contradicted by the commentary on the 2012 US

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[40] Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award of 30 Apr. 2014 ("***Nova Scotia Power v. Venezuela***") (**RLA-20**), ¶ 84. *See also Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award dated 26 Nov. 2009 ("***Romak v. Uzbekistan***") (**RLA-10**), ¶ 207 ("The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk") (emphasis added); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated 5 June 2012 ("***Caratube v. Kazakhstan***") (**RLA-12**), ¶ 360 ("The inherent meaning of the term investment identified by tribunals and commentators includes existence of a contribution over a period of time and requiring some degree of risk. Such minimum requirements have been identified not only by ICSID tribunals, but also in investment treaty arbitrations not based on the ICSID Convention.") (internal citation); *Republic of Italy v. Republic of Cuba*, Interim Award (Sentence Préliminaire), Ad Hoc Arbitral Tribunal dated 15 Mar. 2005 (**RLA-34**), ¶ 81 ("[U]nless otherwise specifically provided for in a Bilateral Investment Treaty, three elements are required for an investment to be made: a contribution, the taking of and duration of a risk by the investor.") (translation of French original); *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] dated 5 Mar. 2011 (**RLA-41**), ¶ 231.

[41] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction dated 16 July 2001 (**RLA-28**), ¶ 52.

[42] Counter-Memorial, ¶¶ 26, 41, 42.

[43] Under the principle of effectiveness (*effet utile*), "[p]reference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not." *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award dated 9 Apr. 2015 (**RLA-51**), ¶ 293. Each treaty provision is "supposed to have intended to have some significance and to achieve some end." Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES (2016) (**RLA-54**), at 170.

model BIT on which Mason relies.[44] The commentary observes that "[t]he enumeration of a type of an asset" in the model BIT's definition of investment, which is identical to Article 11.28, "is not dispositive as to whether a particular asset . . . meets the definition of investment; it must still always possess the characteristics of an investment."[45] The United States has endorsed this view in a recent non-disputing party submission in another case brought under the FTA, stating that "[t]he enumeration of a type of an asset in Article 11.28 . . . is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment."[46]

28. Thus, mere ownership or control of shares, without "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" by the investor, does not qualify for FTA protection.[47] In this respect, stock market and other portfolio investments tend not to involve the degree of commitment required by an investor to meet the characteristics of an investment.[48]

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[44] Counter-Memorial, ¶ 26, *citing* Lee M. Caplan and Jeremy K. Sharpe: *Commentaries on Selected Model Investment Treaties, in* OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown (ed.) 2013) ("***Commentaries on Selected Model Investment Treaties***") (**CLA-48**).

[45] *Commentaries on Selected Model Investment Treaties* (**CLA-48**), at 767-768 (emphasis added). Mason cites *Saluka v. Czech Republic*, but this case is inapposite, as the definition of investment in the Netherlands-Czech Republic BIT did not include any "characteristics of an investment" requirement. *See* Counter-Memorial, ¶ 41, *citing Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 ("***Saluka v. Czech Republic***") (**CLA-41**).

[46] *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117 (UNCITRAL), Submission of the United States of America dated 19 June 2019 (**RLA-58**), ¶ 15.

[47] *See also* Hanno Wehland, *Blue Bank International v. Venezuela: When are Trust Assets Protected Under International Investment Agreements?*, J. INT'L ARB. (2017) ("**Wehland**") (**RLA-22**), at 958 ("If one accepts that there can be no investment without these inherent investment characteristics, then mere legal ownership can never be sufficient, because it involves no commitment, no risk, and no expectation beyond the possible payment of a management fee.").

[48] *See, e.g.*, UNCTAD, Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II (2011) (**RLA-43**), at 29 ("Portfolio investment is investment of a purely financial character, where the investor remains passive and does not control the management of the investment. The main concern of portfolio investors is the appreciation of the value of their capital and the return that it can generate, regardless of any long-term relationship consideration or control of the enterprise. Portfolio investment does not lead to technology transfer, training of local employees and other benefits associated with direct investment."); *Ambient Ufficio S.P.A and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez dated 2 May 2013 (**RLA-46**) ¶¶ 262-263 ("It is the conviction of the author of the present Opinion that the answer of a good faith international law interpretation to that question [of whether portfolio investments may be qualified as investment in the sense of the ICSID Convention] cannot be but negative because those financial products do not meet the investment requirements derived from the inherent ordinary meaning of term 'investment' of Article 25(1) in its context and in the light of the object and purpose of the 1965 ICSID Convention.") (emphasis omitted).

29. The FTA includes an illustrative list of characteristics in Article 11.28: "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." That such list is merely illustrative is shown by the words preceding it ("including such characteristics as").[49] Mason argues that "the characteristics of an investment" are "straightforward and narrowly defined," but a term that is clarified only by reference to a non-exhaustive list of examples cannot be deemed to have a "defined" scope, let alone a "narrow" one.[50]

30. Mason further contends that the word "or" at the end of the illustrative list of characteristics means that "an investment need not have all three of these characteristics in order to come within the scope of the definition [of investment]."[51] Mason contrasts the definition of investment in Article 11.28 with that in the Korea-Chile FTA, which includes the same illustrative list of "characteristics of an investment" but replaces "or" with "and" (*i.e.*, it refers to "the expectation of gains or profits and the assumption of risk.").[52] This distinction is not meaningful, as the words "and" and "or" can be used interchangeably to connect a list of illustrative examples. Tellingly, the Korean versions of the US FTA and the Chile FTA, which are equally authentic as the English versions,[53] use the same word "또는" to connect the illustrative examples of the characteristics of an investment; that the Chile FTA translates "또는" as "and" and the US FTA translates it as "or" is thus a stylistic choice without a substantive difference.[54] In any event, the use by the drafters of the plural form ("characteristics of an investment") clarifies that an asset must have *several* characteristics to qualify as an investment under Article 11.28, and that no single characteristic is sufficient.

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[49] FTA (**CLA-23**), Art. 11.28. *See* Counter-Memorial, ¶ 39 ("[T]he list [of characteristics] is merely illustrative.").

[50] Counter-Memorial, ¶ 51.

[51] Counter-Memorial, ¶ 39.

[52] Counter-Memorial, ¶ 40, *citing* Korea-Chile Free Trade Agreement (**CLA-47**), Art. 10.1.

[53] *See* FTA (**CLA-23**), Art. 24.6 ("The English and Korean texts of this Agreement are equally authentic."); Korea-Chile Free Trade Agreement (**CLA-47**), Art. 21.7(1) ("The Korean, Spanish and English texts of this Agreement are equally authentic.").

[54] *See* Free Trade Agreement between the Republic of Korea and the United States of America (Korean version) (**RLA-36**), Art. 11. 28; Free Trade Agreement between the Republic of Korea and the Government of the Republic of Chile (Korean version) (**RLA-33**), Art. 10.1.

31. Mason says that "tribunals have repeatedly recognized that it is not their role to introduce additional limits into the Treaty beyond the agreement of the Contracting Parties."[55] This is uncontroversial, but beside the point. Korea is not seeking to add limits to the FTA, but to interpret the very limit that the Contracting Parties have stipulated.[56] The express reference to "the characteristics of an investment" reflects the Contracting Parties' intent to find guidance in, not derogate from, the weight of the authorities on the minimum characteristics of an investment.

B. The GP has not made an investment under the FTA

32. In order to qualify as a protected "investor" under Article 11.28 of the FTA, the GP must prove that it "made" an investment with "the characteristics of an investment," including the minimum requirements set out in Section III.A above (*i.e.*, contribution, duration, risk). Claimants have proven none of these characteristics.

1. Claimants have not established that the GP made a contribution

33. The first characteristic of an investment (explicitly listed by the FTA) is the "commitment of capital or other resources" by the investor.[57] Legal ownership or control of assets alone does not establish a contribution to an investment. As the Tribunal in *Quiborax v. Bolivia* found, "[w]hile shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets."[58] The question is whether the purported investor made a "substantial"[59] or

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[55] Counter-Memorial, ¶ 54.

[56] Mason's reliance on *Mera v. Serbia* and *Guaracachi v. Bolivia* is misguided for that reason. *See* Counter-Memorial, ¶¶ 53-54, *citing Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction dated 30 Nov. 2018 ("***Mera v. Serbia*") (CLA-35**) and *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 Jan. 2014 ("***Guaracachi v. Bolivia***") (**CLA-32**), ¶ 192. Korea is neither "importing" the definition of investment under Article 25 of the ICSID Convention into the FTA, nor disregarding the definition of investment in the FTA. On the contrary, Korea relies on the decisions of other investment tribunals to interpret the term "characteristics of an investment" in Article 11.28 of the FTA. The BITs in *Mera* and *Guaracachi* did not include a "characteristic of an investment" requirement. *See Mera v. Serbia* (**CLA-35**), ¶ 120; *Guaracachi v. Bolivia* (**CLA-32**), ¶ 162.

[57] FTA (**CLA-23**), Art. 11.28.

[58] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Decision on Jurisdiction dated 27 Sept. 2012 ("***Quiborax v. Bolivia***") (**RLA-45**), ¶ 233. *See also* Memorial, ¶ 21, *citing KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated 17 Oct. 2013 ("***KT Asia v. Kazakhstan***") (**RLA-17**), ¶¶ 188-206; *Caratube v. Kazakhstan* (**RLA-12**), ¶ 455.

"meaningful"[60] contribution from one treaty-country to another,[61] "using [the investor's] own financial means and at its own financial risk, with the objective of making a profit within a given period of time."[62]

34. Claimants assert that the GP made two kinds of contributions: paying the purchase price for the Samsung Shares and committing "other resources."[63] According to Claimants, the GP "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."[64] These assertions do not withstand scrutiny.

35. First, Claimants have offered no evidence that the GP paid any part of the purchase price of the Samsung Shares, let alone a substantial one. The Samsung Shares appear to have been purchased with the Cayman Fund's capital. Claimants have alleged, but not

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[59] *See, e.g., Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 Aug. 2004 (**RLA-5**), ¶ 53 ("[T]he project in question should have . . . a substantial commitment. . .") (emphasis added).

[60] *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award dated 16 July 2012 ("***Alapli Elektrik v. Turkey***") (**RLA-44**) ¶ 350 ("The Dutch entity . . . has not demonstrated that it actually made any investment in Turkey, in the sense of a meaningful contribution to Turkey.") (emphasis added); *id*. ¶ 389 ("Neither the ECT nor the Netherlands-Turkey BIT contemplates jurisdiction over a claim brought by an entity which played no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology.") (emphasis added).

[61] *See Alapli Elektrik v. Turkey* (**RLA-44**) ¶ 360 ("[T]he treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another.") (emphasis added); *Romak v. Uzbekistan* (**RLA-10**), ¶ 202 (*citing LESI-Dipenta v. Algeria* and *Pey Casado v. Chile*) ("[F]or a contract to be deemed an investment . . . the contracting party has made a contribution in the country in question.").

[62] *Caratube v. Kazakhstan* (**RLA-12**), ¶ 434. *See also Quiborax v. Bolivia* (**RLA-45**), ¶ 232 (holding that the contribution requirement is not met where there is "no evidence of an original contribution" and "[no] evidence that [the claimant] personally made a subsequent contribution"). Relying on *Mera v. Serbia*, Claimants suggest that passive holding of an investment such as the GP's acquisition of the Samsung Shares suffices to establish a contribution. *See* Counter-Memorial, n. 135, *citing Mera v. Serbia* (**CLA-35**). In *Mera*, it was not disputed that the claimant made substantial contributions to an investment vehicle's founding capital. The issue for the Tribunal was only whether the claimant must have been a Cyprus domicile at the time such contributions were made (*id.*, ¶¶ 98, 108-110).

[63] Counter-Memorial, ¶¶ 43, 45.

[64] Counter-Memorial, ¶ 45.

proven, that the GP contributed to the Cayman Fund's capital.[65] Had the GP made a contribution of capital, such evidence would be easy to show: it would be, for example, reflected in the Cayman Fund's Capital Accounts.

36. Second, the GP's alleged contribution of "other resources" does not satisfy Article 11.28 of the FTA. The GP's co-Managing Member, Kenneth Garschina, says that his team "spent hundreds of hours investigating and analyzing Samsung Electronics and Samsung Group" in order to "inform Mason's decision-making" on "whether Mason should invest in Korean technology."[66] But this analysis would have been performed in advance of acquiring the Samsung Shares in order to assess the merits of the acquisition;[67] such pre-investment activity did not transfer value and contribute to "Samsung's balance sheet and to the operations of its businesses," as Claimants suggest.[68] In any event, Claimants have failed to establish that any pre-investment analysis was in fact performed by the GP, as opposed to another Mason entity, such as Mason Capital Management, LLC.[69]

37. As Korea pointed out in its Memorial, the FTA is explicit in its requirement that the investor (not a third party) must have "made" the investment.[70] To that extent, the GP cannot piggyback on contributions made by others (including the Cayman Fund and the Limited Partner). Claimants assert that the phrase "attempts to make, is making, or has made an investment" in the definition of "investor" in Article 11.28 only "clarifies and expands the temporal scope of the protection of the Treaty; it does not introduce an independent limitation on

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[65] Counter-Memorial, ¶ 90, n. 138.

[66] Witness Statement of Kenneth Garschina, dated 17 Apr. 2019 ("**Garschina**"), ¶¶ 13-15.

[67] Claimants assert, in passing, that the GP "invested management time and effort . . . into its investment once made." Counter-Memorial, ¶ 45 (emphasis added). It is unclear what this means. In any event, it is a naked assertion without supporting evidence.

[68] Counter-Memorial, ¶ 43. *See also Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award dated 15 Mar. 2002 ("***Mihaly v. Sri Lanka***") (**RLA-3**), ¶¶ 60-61 ("The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States . . . to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as 'investment' . . . The Tribunal is consequently unable to accept as a valid denomination of 'investment', the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment.").

[69] Garschina, ¶ 6. *See also* Witness Statement of Derek Satzinger, dated 18 Apr. 2019, ¶ 8.

[70] Memorial, ¶ 20, *citing* FTA (**CLA-23**), Art. 11.28.

that protection."[71] There is no dispute that such phrase expands the temporal scope; the point, though, is that the provision requires that the investor "make" (or "attempts to make"), rather than merely hold or control, an investment. Tribunals interpreting similar treaty provisions have found that an investor must itself have made a contribution in order to have "made" an investment. As observed by the Tribunal in *Alapli v. Turkey*, "[t]o be an investor a person must actually make an investment, in the sense of an active contribution."[72] There are multiple other cases to the same effect.[73] The Tribunal in *Clorox v. Venezuela* notably confirmed the principle in a recent decision rendered in May 2019, requiring an "action of investing" on the part of an investor in order for the investor to be considered to have made an investment.[74]

38. Contrary to Claimants' suggestion, Korea's argument does not concern the source of the funds used to acquire the Samsung Shares.[75] Korea's position is that the GP is not an investor in its own right if it used the Cayman Fund's and/or the Limited Partner's capital to buy shares on the Cayman Fund's behalf.[76] The Cayman Fund's (and the Limited Partner's) capital

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[71] Counter-Memorial, ¶ 81.

[72] *Alapli Elektrik v. Turkey* (**RLA-44**), ¶ 350.

[73] *Quiborax v. Bolivia* (**RLA-45**), ¶ 233 ("According to Bolivia, a distinction should be made between the objects of an investment, 'such as shares or concessions [...] and the action of investing.' The Tribunal agrees.") (internal citation omitted); *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award dated 20 May 2019 ("***Clorox v. Venezuela***") (**RLA-57**), ¶¶ 799-836 (requiring an action of investing on the part of the investor). *See also KT Asia v. Kazakhstan* (**RLA-17**), ¶¶ 188-206 (passive ownership of shares insufficient to establish the existence of an investment); *Caratube v. Kazakhstan* (**RLA-12**), ¶ 455 (passive ownership of shares insufficient to establish the existence of an investment).

[74] *Clorox v. Venezuela* (**RLA-57**), ¶¶ 799-836.

[75] Counter-Memorial, n. 135. Claimants rely on an inapposite case, *Gavrilovic v. Croatia*, to argue that the source of funds is irrelevant. In *Gavrilovic*, the claimant obtained a loan from the Croatian government to finance the acquisition of the investment, in exchange for the claimant's unrelated contribution to the government's war efforts. The funds used for the acquisition were thus the claimant's own, acquired from the government by means of "*quid pro quo*" as acknowledged by the Tribunal. *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award dated 26 July 2018 (**CLA-31**), ¶ 325.

[76] The Tribunal in *Caratube* rejected the claimants' argument that "the origin of capital used in investments is immaterial," on the basis that "the capital must still be linked to the person purporting to have made an investment." *Caratube v. Kazakhstan* (**RLA-12**), ¶ 456. Relatedly, the *KT Asia* Tribunal made clear that, where a claimant "seek[s] credit for [the beneficial owner's] initial contribution," the claimant "disavows the separate personality which it invoked previously for purposes of nationality." *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 205.

that was used to acquire the Samsung Shares never was the GP's and is not a contribution by the GP for purposes of establishing the GP's status as an investor under the FTA.[77]

39. Claimants also argue that *KT Asia* and *Caratube* – where the Tribunals found that a claimant "must itself have made a contribution" rather than "benefit[ting] from a contribution made by someone else, [the] ultimate beneficial owner"[78] – are distinguishable because, unlike the claimants in those cases, the GP "actually pa[id] the prevailing market price [for the Samsung Shares], in an arm's-length transaction."[79] Price is not the issue. The *KT Asia* Tribunal found that the "real issue" was not that the claimants purchased the shares at an "undervalue" but, rather, "whether [the claimant] can at all rely on [the beneficial owner's] original contribution in support of the argument that it itself made an investment," *i.e.*, whether the claimant "must itself have made a contribution or whether it can benefit from a contribution made by someone else, here its ultimate beneficial owner."[80] The Tribunal determined that the claimant could *not* benefit from a contribution made by the beneficial owner.[81] The same conclusion applies here, where there is no evidence that the GP made a capital contribution of its own.[82]

40. In *Blue Bank v. Venezuela*, the Tribunal found that the claimant, Blue Bank, held the relevant investment only "as a trustee . . . for the ultimate benefit of third party interests" and,

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[77] *See also Société Civile Immobilière de Gaëta v. Republic of Guinea*, ICSID Case No. ARB/12/36, Award dated 21 Dec. 2015 (**RLA-52**) ¶ 221 ("Nevertheless, even if the origin, understood as the source of the investment, is not relevant to Article 25 of the ICSID Convention, one must still demonstrate that the investor made a contribution of some kind, which might have been obtaining financing or providing other services . . . . The investor must in particular show that it made the investment payment on its own behalf, and that the payment was in fact made. In other words, even if the investor received funds from third parties, it must actually assume the risk and demonstrate that it has done so.") (translation of the French original) (emphasis added).

[78] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 192.

[79] Counter-Memorial, ¶ 44.

[80] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 192.

[81] *See KT Asia v. Kazakhstan* (**RLA-17**), ¶¶ 192-206.

[82] Likewise, in *Caratube*, the relevant issue was whether there was a contribution "by the purported investor" in acquiring the investment, in accordance with the requirement that the investor engage in an economical operation "using its own financial means and at its own financial risk." (emphasis omitted). *Caratube v. Kazakhstan* (**RLA-12**), ¶ 434. As the claimant did not make a contribution of its own and failed to show any other contribution, the Tribunal concluded that "the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT." *Caratube v. Kazakhstan* (**RLA-12**), ¶¶ 434-435. *See also Quiborax v. Bolivia* (**RLA-45**), ¶ 232 (declining jurisdiction in respect of a claimant where there was "no evidence of an original contribution" by the claimant and "[no] evidence that [the claimant] personally made a subsequent contribution" to the investment).

therefore, had not "made" an investment.[83] Claimants assert that *Blue Bank* is distinguishable,[84] but the facts are analogous in all material respects. The trust in *Blue Bank* was governed by Barbadian law, which provided (similar to Cayman law in this case) that "title to the assets of the trust is held in the name of the trustee."[85] The Tribunal held that this type of trust arrangement did not establish Blue Bank's ownership of the investment,[86] and the Tribunal's President clarified that Blue Bank's control of the investment as trustee was "without relevance"; the "[d]eterminative . . . question [was] whether [Blue Bank] made the investment on which it relies in its own behalf or not."[87] The Tribunal found that a trustee who holds assets on behalf of third-party beneficiaries "cannot be considered as having committed any assets in its own right."[88] The same conclusion follows here, where the GP acquired the Samsung Shares on behalf of the Cayman Fund (and the Limited Partner) using their capital.[89]

2. Claimants have not established that the GP assumed risk

41. A second characteristic of an investment (explicitly listed by the FTA) is the "assumption of risk" by the investor. Claimants assert that the GP assumed three types of risks with respect to the Samsung Shares: (i) the risk that the value of the Samsung Shares would decrease;[90] (ii) "the inherent risk [that the benefit of an investment] will not result";[91] and (iii) an "unlimited liability in the event [that] the [Cayman Fund] becomes insolvent."[92]

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[83] *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated 26 Apr. 2017 ("***Blue Bank v. Venezuela***") (**RLA-23**), ¶¶ 163, 172 (emphasis added).

[84] Counter-Memorial, ¶ 91.

[85] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 162(b).

[86] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 163 ("As trustee, Blue Bank does not own the assets, but simply manages and administers them . . . to the benefit of a third party.").

[87] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 198.

[88] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 163.

[89] *See supra*, § II.B, ¶¶ 42-43.

[90] Counter-Memorial, ¶ 47.

[91] Counter-Memorial, ¶ 47, *citing Nova Scotia Power v. Venezuela* (**RLA-20**), ¶ 90. The GP says that it also assumed the risk of sovereign interference. *Id.*, ¶¶ 48-49. To the extent that the GP assumed such risk, it is unclear how the harmful consequences flowing therefrom would not be subsumed in the other three risks the GP alleges to have assumed.

[92] Counter-Memorial, ¶ 18 (internal citation omitted). *See also id.*, ¶ 90.

42. Claimants have failed to establish that any of these alleged risks constitutes an investment risk borne by the GP. To the contrary, the Partnership Agreement provides that any acquisition of shares with the Cayman Fund's capital is "for the account and risk of the Partnership."[93]

43. Investment tribunals have recognized that a claimant does not bear any risk associated with the acquisition of equity where it has not made any capital contribution to that acquisition (and instead benefited from another's contribution). In such circumstance, the *KT Asia* Tribunal concluded that the claimant "has made no contribution [to the investment] and, having made no contribution, incurred no risk of losing such (inexistent) contribution."[94] In *Blue Bank*, the Tribunal likewise observed that, where a claimant "acts in its own name" but "in furtherance of certain third party interests," it "cannot be considered as having committed any assets in its own right" or as "having incurred any risk."[95] The same conclusion follows here, where there is no evidence that the GP contributed any of its own capital to the acquisition of the Samsung Shares, and no evidence that the GP made an investment "at its own financial risk."[96] The GP was at all times acting "on behalf of" and "for the benefit of" the Cayman Fund.[97]

44. Further, in its capacity as trustee of the Cayman Fund, the GP was not "meant to absorb any financial losses"[98] from the Samsung Shares and was, in fact, contractually shielded from such risk. The Partnership Agreement provides that the GP shall not be liable to the Cayman Fund or the Limited Partner "for any loss suffered by the [Cayman Fund]" absent the GP's "Gross Negligence, willful misconduct or breach of fiduciary duty."[99] The Partnership Agreement further provides that the GP does not absorb any losses arising from "errors in

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[93] Partnership Agreement (**C-30**), Art. 1.05 ("The primary purpose of the Partnership shall be to purchase, sell or hold, for investment or speculation, Securities, on margin or otherwise, for the account and risk of the Partnership.") (emphasis added).

[94] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 219. *See also Quiborax v. Bolivia* (**RLA-45**), ¶ 234.

[95] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 163.

[96] *Caratube v. Kazakhstan* (**RLA-12**), ¶ 434.

[97] *See supra*, §§ II.A-B.

[98] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 220.

[99] Partnership Agreement (**C-30**), Art. 3.06. *See also id.*, Art. 3.07 (providing that the GP is entitled to an indemnity against claims brought by third parties by reason of the GP's management of the Cayman Fund).

judgment" in managing the Cayman Fund's assets, or "for any acts or omissions that do not constitute Gross Negligence, willful misconduct or breach of fiduciary duty."[100]

45. Nor did the Incentive Allocation expose the GP to any investment risk. The Incentive Allocation is a one-sided arrangement that allowed the GP to share in the upside of market operations (such as the acquisition of the Samsung Shares) without any liability to share in their downside. If the Samsung Shares increased in value, the Incentive Allocation would offer the GP a fee for its services for the Cayman Fund. And if the Samsung Shares decreased in value, the Incentive Allocation would not impose any loss on the GP as trustee (that loss would be borne by the Cayman Fund).

46. Finally, that the GP bears "unlimited liability in the event the business becomes insolvent" is irrelevant.[101] Such risk is not specific to the acquisition of the Samsung Shares, and nothing in the record suggests that the Cayman Fund had inadequate assets such that losing part or even all of the funds used to acquire the Samsung Shares had any realistic chance of rendering the Cayman Fund insolvent.[102]

3. Claimants have not established that they intended to hold the Samsung Shares for a sufficient duration

47. A third characteristic of an investment is its duration. The duration requirement has repeatedly been acknowledged by international investment tribunals.[103]

48. Mason says that the duration requirement should not apply here and points out that Korea's Free Trade Agreement with Canada includes an illustrative list of "characteristics of an investment" (similar to Article 11.28 of the FTA) that expressly includes "a certain

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[100] Partnership Agreement (**C-30**), Art. 3.06.

[101] Counter-Memorial, ¶ 18. *See also* Lindsay, ¶ 44(d)(iii).

[102] In any event, any insolvency risk was mitigated, if not eliminated, by Article 7.01 of the Partnership Agreement, which provides that the Limited Partner cannot withdraw from the Partnership "unless all liabilities of the Partnership have been paid or unless the Partnership has sufficient assets to pay such liabilities, including contingent liabilities." Partnership Agreement (**C-30**), Art. 7.01.

[103] *See, e.g.*, *Nova Scotia Power v. Venezuela* (**RLA-20**), ¶ 84; *Romak v. Uzbekistan* (**RLA-10**), ¶ 207; *Caratube v. Kazakhstan* (**RLA-12**), ¶ 360; *Republic of Italy v. Republic of Cuba*, Interim Award (Sentence Préliminaire), Ad Hoc Arbitral Tribunal dated 15 Mar. 2005 (**RLA-34**), ¶ 81; *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] dated 5 Mar. 2011 (**RLA-41**), ¶ 231.

duration."[104] This difference does not mean that duration is a requirement under the Canada FTA and not under the FTA in this case.[105] Both FTAs include an illustrative list of "characteristics of an investment." The Canada FTA's reference to "a certain duration" confirms that duration is one of the "characteristics of an investment" that should be considered under Article 11.28. Mason's argument that the duration requirement is excluded because it is not expressly listed in Article 11.28 turns the non-exhaustive list of "characteristics of an investment" in Article 11.28 into an exhaustive definition. This is irreconcilable with the words "including such characteristics as," which precede the list.

49. In any event, the duration requirement is also implicit in and assessed in light of the FTA's express requirement of a "commitment" of capital and resources by the investor.[106] As the *Romak* Tribunal observed, the requirement that an investor's contribution "extend[] over a certain period of time" is one of the "hallmarks of an 'investment'" that is analyzed in light of the investor's "overall commitment."[107]

50. Here, there is no evidence that Mason intended to make anything more than a short-term speculative bet in acquiring the Samsung Shares. This falls short of meeting the duration characteristic of an investment. Mason suggests that "a couple of months" suffices to meet the duration requirement.[108] However, "duration is to be analysed in light of all the circumstances."[109] Brief investment periods of five[110] and 16 months[111] have been found

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[104] Counter-Memorial, ¶ 52, n.77, *citing* Free Trade Agreement between the Republic of Korea and Canada (**CLA-46**), Art. 8.45 (" . . . 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.") (emphasis added).

[105] Counter-Memorial, ¶ 52.

[106] *See, e.g., Romak v. Uzbekistan* (**RLA-10**), ¶ 225 ("Duration is to be analyzed in light of . . . the investor's overall commitment."); *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 208.

[107] *Romak v. Uzbekistan* (**RLA-10**), ¶¶ 207, 225 (emphasis omitted); *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 208.

[108] Counter-Memorial, ¶ 55.

[109] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 208.

[110] *Romak v. Uzbekistan* (**RLA-10**), ¶¶ 226-227.

[111] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 214.

insufficient to constitute "the kind of duration envisaged within the meaning of an 'investment.'"[112]

51. In order to assess the intended duration of an investment, tribunals review concrete evidence, such as internal business plans and contracts.[113] Claimants offer nothing of the sort. Claimants assert that the GP's "strategic intentions in investing in the Samsung Shares . . . more than meet any 'duration' requirement."[114] Claimants cite to Mr. Garschina's witness statement, but aside from his unsupported assertion that Mason acquired the Samsung Shares "believ[ing] that the next generation of leadership in the Lee Family would have a more modern approach to corporate governance," Mr. Garschina says nothing about how long the GP intended to hold the Samsung Shares.[115] Nor does Mr. Garschina offer any detail about the trading strategy pursued by Mason and how Mason intended to make money out of its acquisition of the Samsung Shares. In fact, Claimants fail to provide even a credible explanation for why a sophisticated hedge fund such as Mason would acquire SC&T Shares specifically at a time when SC&T's share price was fluctuating due to uncertainties surrounding the Merger, if the GP's intent was to invest with a long-term horizon as alleged, rather than to bet on short-term opportunities for profit.

52. To the contrary, Mr. Garschina's testimony suggests that Mason intended to hold the Samsung Shares for a very brief duration. Mr. Garschina thus concedes that "[o]ne of Mason's core strategies is to make event-driven investments," and that the Samsung Shares were acquired as one of such "event-driven investments."[116] Event-driven investing is a trading strategy whereby the hedge fund "anticipat[es] corporate actions and events, with an algorithmic

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[112] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 216.

[113] *See, e.g.*, *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 210 ("In the present case, the investment was supposed to last a very short period of time. In accordance with the Project Aquila Step Plan, KT Asia was to hold the shares of BTA for a period of weeks ('at least 3/4') before they were sold on to investors in a private placement.'"); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award dated 31 Oct. 2012 (**CLA-30**), ¶ 304 (referring to the duration of a hedging agreement).

[114] Counter-Memorial, ¶ 56.

[115] Garschina ¶ 15. *See generally* Garschina, § 4. Notwithstanding that a whole team of analysts purportedly spent hundreds of hours analyzing the Samsung Shares and, presumably, the optimal timing for selling them to maximize returns, there is not a single email communication, a report, or any other concrete evidence in the record showing how long the GP planned to hold the Samsung Shares.

[116] Garschina, ¶ 10.

approach" and "exploits mispricings that occur before or after analyst revisions, share buybacks, bankruptcies and the like."[117] The typical holding period is "[d]ays to weeks."[118] According to a due diligence report published by the Rhode Island Office of the General Treasurer, "Mason's investment horizon tends to be shorter than most event driven and distressed managers," with "an average holding period of 3 to 9 months."[119] Where the anticipated event is a merger, an event-driven investment fund "seek[s] to capture the spreads in the transaction bid and the trading price after a merger or acquisition announcement" over "several weeks up to several month[s]."[120]

53. The GP's event-driven investment strategy, combined with the timing of the Cayman Fund's acquisition of the SC&T Shares (*i.e.*, following the Merger announcement), indicates that Mason's intention was to exploit short-term fluctuations in share prices associated with the Merger, rather than to make a long-term commitment.[121] Claimants have submitted no evidence to the contrary.

C. The GP did not legally own or control the Samsung Shares under Korean law

54. Even if Claimants could show that the GP had made an investment (having "the characteristics of an investment") with respect to the Samsung Shares, the GP would still not be entitled to protection under the FTA. To qualify under Article 11.28 of the FTA, the investor must not only have "made" an investment with "the characteristics of an investment," but also "own[] or control[]" that investment.

55. Mason cannot make this showing. Mason asserts that the GP legally owned the Samsung Shares by virtue of the Partnership Law,[122] which provides that "[a]ny rights or property . . . that is . . . conveyed into or vested in the name of the [Cayman Fund] shall be held

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[117] Dani Burger, *Your guide to the many flavors of quant*, BLOOMBERG (24 Oct. 2017) (**R-11**).

[118] Dani Burger, *Your guide to the many flavors of quant*, BLOOMBERG (24 Oct. 2017) (**R-11**).

[119] Hedge Fund Investment Due Diligence Report, Mason Capital dated Dec. 2010 (**R-3**).

[120] Event Study Tools website showing "Event-Driven Investment Strategies" (**R-19**).

[121] Garschina, ¶ 19.

[122] Counter-Memorial, ¶ 36.

or deemed to be held by the [GP] . . . upon trust as an asset of the [Cayman Fund] in accordance with the terms of the [Partnership Agreement]."[123] Claimants further argue that the GP controlled the Samsung Shares because, under Cayman law and the Partnership Agreement, it "was the only entity permitted under Cayman law to . . . exercise any rights associated with the [Cayman Fund's] business and . . . assets."[124]

56. Cayman law has no relevance to the ownership of, and exercise of shareholder rights with respect, to shares in a Korean company, however. The appropriate choice of law for determining the existence or scope of property rights is the municipal law of the property or, in case of shares in a corporation, the law of the place of incorporation of the corporation.[125] As authorities have recognized, a corporation is a creature of national law whose existence and relationship with its shareholders is governed by the law of its place of incorporation.[126] Protection of an investment in shares is "contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated."[127] Thus, Korean law – not Cayman law – determines whether the GP had legal ownership or control of the shares in SC&T and Samsung Electronics. As explained below, the GP has failed to sustain its burden of proving that it legally owned or controlled the Samsung Shares under Korean law.

57. As discussed in Section II.C above, a foreign investor in Korea must satisfy two requirements under Korean law in order to be recognized as an owner of shares in a Korean

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[123] Partnership Law (**CLA-22**), § 16(1).

[124] Counter-Memorial, ¶ 30 (internal citation omitted).

[125] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge Univ. Press, 2009) ("**DOUGLAS**") (**RLA-39**), ¶ 87 ("[T]he *lex situs* rule for tangible property, which is universally applied by municipal courts … must be the appropriate choice of law rule for determining the existence or scope of property rights that comprise an investment. There is considerable authority for the proposition that the application of the *lex situs* rule is even *required* by general international law.") (internal citations omitted); *id*., ¶¶ 102-103 ("Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property. . . . Take the example of investment in shares. The protection of an investment treaty is contingent upon securing the legal rights to those shares in accordance with the relevant municipal law where the company is incorporated.") (internal citations omitted). *See also, e.g., Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Award dated 22 Mar. 2019 (**RLA-56**), ¶¶ 216-235 (applying Uruguayan law to determine the issue of legal ownership).

[126] *See*, *e.g*., International Law Commission's Draft Articles on Diplomatic Protection with Commentaries (2006) (**RLA-35**), at 53 ("[I]nternational law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on the subject . . . .").

[127] DOUGLAS (**RLA-39**), ¶¶ 102-103.

company and to exercise a shareholder's rights with respect to those shares: (i) an investor must acquire shares in the investor's own name after registering as a foreign investor with the Financial Services Commissions in accordance with the Capital Markets Act, and (ii) the investor must register as a shareholder in the shareholder registry of the Korean company.[128]

58. The GP satisfied neither of these requirements under Korean law. The Cayman Fund, not the GP, was registered as a foreign investor in Korea, and the Samsung Shares were acquired in the name of the Cayman Fund.[129] And the Cayman Fund, not the GP, was registered on the shareholder register of SC&T and Samsung Electronics.[130]

59. The fact that Claimants decided to register the Cayman Fund as the foreign investor and owner of the Samsung Shares without disclosure of the GP's purported interest has two consequences. First, Claimants cannot now be heard in good faith to argue that the GP, not the Cayman Fund, owned and controlled those shares.[131] Claimants are estopped from making such an argument to the extent that they did derive a benefit from the representations made on the foreign investment registration application (which was approved by the Korean authorities).[132]

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[128] Rho, § V. As explained by Professor Rho, the registration on the shareholder register will enable the investor to claim all shareholder rights including voting rights vis-à-vis the company. *See* Rho, ¶ 27.

[129] *See supra*, § II.C.

[130] *See supra*, § II.C.

[131] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953) (**RLA-40**), at 141 ("It is a principle of good faith that 'a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another … Such a principle has its basis in common sense and in common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted.'") (internal citation omitted); *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award dated 11 Dec. 2013 (**RLA-47**), ¶ 831 ("[G]ood faith would require that any party would not consciously conduct itself in such a way that should contradict the implications of that party's earlier behavior, a concept akin to the prohibition of estoppel.").

[132] Under the estoppel doctrine, a party may be precluded from denying a representation where the following elements exist: "(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed. 2006) (**RLA-59**), at 615. Here, Mason represented the Cayman Fund (not the GP) to be a foreign investor with separate legal personality. Korea relied on this representation in approving the Cayman Fund's Application for Registration of Investment, which enabled the Cayman Fund to be registered as a shareholder of the Samsung companies to its advantage.

60. Second, by acquiring the shares and registering as a shareholder in its own name, it was the Cayman Fund (and only the Cayman Fund) that established a shareholder relationship with SC&T and Samsung Electronics as a Cayman investor in its own right.[133] Any trust arrangement under Cayman law and the Partnership Agreement, which allegedly conferred legal ownership of the Samsung Shares on the GP as the Cayman Fund's trustee, was external to the relationship between the Samsung companies and their shareholder, the Cayman Fund, and of no effect under Korean law. At no time did the GP have a legal relationship with SC&T and Samsung Electronics. Thus, the GP never legally owned the Samsung Shares under Korean law; the Cayman Fund did.[134]

61. Nor can Claimants establish that the GP "control[led]" the Samsung Shares. Claimants argue that the GP's control "included the ultimate say over [the Samsung Shares'] acquisition, . . . the power to vote at shareholder meetings, to receive dividends, and to engage in advocacy as a shareholder."[135] But, because the GP was not registered as an owner on the shareholder registers of SC&T and Samsung Electronics, the GP did not have legal capacity to exercise any shareholder rights under Korean law.[136] Only the Cayman Fund was qualified to exercise shareholder rights over the Samsung Shares.[137]

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[133] *See* Rho, § VI. That the Cayman Fund lacks legal personality under Cayman law makes no difference under Korean law. *See* Rho, ¶ 19 ("[E]ven where a fund or partnership does not have the legal capacity to hold rights or to own shares pursuant to the laws of the place of establishment of the fund or partnership, or all property owned by the fund or partnership is deemed to be owned by a separate entity, Korean law does not take into account such arrangements").

[134] Even if Cayman law applied to the question whether the GP legally owned the Samsung Shares under Article 11.28 of the FTA (which it does not), the GP held the Samsung Shares only in trust for the Cayman Fund. The Samsung Shares were part of the Cayman Fund's estate, not the GP's estate. *See* Reynolds, ¶ 28. Any dividends or proceeds from a sale of the Samsung Shares would benefit the Cayman Fund, not the GP in its capacity as trustee. This situation is analogous to *Blue Bank v. Venezuela*, where the claimant, Blue Bank, held shares in trust for a third-party beneficiary. *Blue Bank v. Venezuela* (**RLA-23**), ¶ 161. Barbadian law, which governed the trust, provided that "title to the assets of the trust is held in the name of the trustee [Blue Bank]." *Id*., ¶ 16. Blue Bank argued that this established its legal ownership of the shares and thus its status as an investor under the Barbados-Venezuela BIT. *Id*., ¶¶ 132-133. The *Blue Bank* Tribunal rejected this argument. While it was undisputed that Blue Bank had title to the trust's assets under Barbadian law, the Tribunal found that "[a]s trustee, Blue Bank does not own the assets, but simply manages and administers them … to the benefit of a third party." *Id*., ¶ 163.

[135] Counter-Memorial, ¶ 31.

[136] *See* Rho, § V.B, ¶ 37.

[137] *See* Rho, § V.B, ¶ 37.

62. Ultimately, whatever control the GP exercised over the Samsung Shares was in the name of the legal owner, the Cayman Fund. For the purpose of establishing control, it is irrelevant who within the Cayman Fund exercised the Cayman Fund's shareholder rights in practice. What matters is that all relevant actions were taken in the name of, and on behalf of, the Cayman Fund. This is no different from a situation where a director exercises shareholder rights on behalf of a corporation; even if the director is free to exercise the corporation's rights as he sees fit, it is still the corporation, not the director personally, who controls the shares.

63. To the extent that the GP did not own or control the Samsung Shares, the GP does not qualify as an investor under Article 11.28 of the FTA and is thus not entitled to bring a claim against Korea.

IV. THE GP LACKS STANDING TO CLAIM ON BEHALF OF THIRD PARTIES

64. Even if the GP could establish that it was an investor under the FTA, its claims still would have to be dismissed for lack of standing, because the GP is claiming damages for losses suffered by third parties. The FTA and international law bar such claims on behalf of third parties.

A. The FTA bars claims submitted on behalf of third parties

65. Under Article 11.16.1 of the FTA, a claimant is permitted to submit only its own claims for its own losses, not claims on behalf of third parties for losses suffered by them.[138] This is clear from the ordinary meaning of Article 11.16.1,[139] which grants claimants standing to bring two types of claims: (i) a claim, "on its own behalf," that "the claimant has incurred loss or damage" arising from an FTA breach; and (ii) a claim, "on behalf of an enterprise of the

[138] Memorial, ¶ 11.

[139] Under Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") (**RLA-24**), a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The "objective is to find an interpretation that is simultaneously obvious (the ordinary meaning of terms), logical (an *acte clair*), and effective (a useful effect)." Jean-Marc Sorel & Valérie Boré-Eveno, *Article 31: General rule of interpretation, in* 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY (Olivier Corten & Pierre Klein (eds.) 2011) (**RLA-42**), at 808 (internal citation omitted). *See also Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award dated 26 June 2000 (**RLA-27**), ¶ 65 ("[T]he principal international law rules on the interpretation of treaties are found in the *Vienna Convention on the Law of Treaties*.").

respondent" owned or controlled by the claimant, that "the enterprise" has incurred loss arising from an FTA breach:

> 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 . . . an obligation under [the FTA's investment chapter] . . . 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 an obligation under [the FTA's investment chapter] . . . and
>
> (ii) **that the enterprise has incurred loss or damage** by reason of, or arising out of, that breach . . . .[140]

66. Under Article 11.16.1(a), a claim is submitted on the claimant's "own behalf" if the claimant seeks compensation for losses that it has incurred ("the claimant has incurred loss or damage").[141] A claim is not submitted on the claimant's "own behalf" (but, rather, on behalf of a third party) if the claimant seeks compensation for losses incurred by a third party. Article 11.16.1(b) permits such third-party claims in only one scenario, namely, where the third party is "an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." The exceptional nature of Article 11.16.1(b) is reinforced by Article

[140] FTA (**CLA-23**), Art. 11.16.1 (emphasis added).

[141] Article 11.28 of the FTA defines "claimant" as "an investor of a Party that is a party to an investment dispute with the other Party."

11.26.3 of the FTA, which provides that damages awarded for claims submitted under Article 11.16.1(b) must be paid directly to the enterprise incurring the loss, rather than to the claimant.[142]

1. Claimants' interpretation of Article 11.16.1 of the FTA as allowing claims on behalf of third parties defies the ordinary meaning of that provision

67. Claimants argue that "the expression 'on its own behalf' in Article 11.16(1)(a) is used merely to distinguish regular claims from derivative [claims] 'on behalf of an enterprise of the respondent' in Article 11.16(1)(b), which may otherwise not be permitted under the Treaty."[143] Claimants further argue that a claimant need not have any beneficial or economic interest in the investment that was harmed by an FTA breach; legal ownership or control of the investment suffices, Claimants say, to claim compensation for any loss in value of the investment.[144] This reading is irreconcilable with the ordinary meaning of Article 11.16.1.

68. First, Article 11.16.1 is comprehensive as to the types of claims that may be submitted to arbitration. There are two such types, and they are distinct from one another. Claimants ignore the consequence of that distinction, namely, that Article 11.16.1(b) defines the circumstance in which a claimant can bring claims on behalf of a third party. Such circumstance is that the other entity must be a *host-State* enterprise that the claimant owns or controls. If the third party is not a *host-State* "enterprise . . . that the claim owns or controls directly or indirectly," then the claimant cannot bring claims on such other party's behalf.[145] Claimants effectively read into Article 11.16.1 a sub-clause (c) that would allow claims on behalf of enterprises incorporated in jurisdictions other than the host State (in this case, claims on behalf of non-Korean (Cayman) entities).

69. Second, Article 11.16.1(a) provides that the claimant must have "incurred loss or damage" due to an FTA breach. To have "incurred loss or damage," the claimant must have had a beneficial interest in the investment that was harmed by the FTA breach, *i.e.*, the claimant must

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[142] FTA (**CLA-23**), Art. 11.26.3(a) ("[W]here a claim is submitted to arbitration under Article 11.16.1(b) . . . an award of restitution of property shall provide that restitution be made to the enterprise").

[143] Counter-Memorial, ¶ 65.

[144] Counter-Memorial, ¶ 58.

[145] FTA (**CLA-23**), Art. 11.16.1(b).

have been entitled to an economic benefit from the investment. If the claimant owned or controlled the investment on behalf of a third party, then any harm done to the investment would be suffered not by the claimant but by that third party.[146] Thus, the plain terms of Article 11.16.1(a) require that the claimant have a beneficial (*i.e.*, economic) interest in the investment.[147]

70. Mason's interpretation renders the distinction between Articles 11.16.1(a) and (b) ineffective.[148] If, as Mason asserts, a claimant is entitled to claim for the entire loss in value of an investment so long as it legally owns or controls the investment, there would be no need for Article 11.16.1 to distinguish between losses incurred by the claimant (sub-clause (a)) and losses incurred by a host-State enterprise owned or controlled by the claimant (sub-clause (b)). According to Mason's reading of Articles 11.16.1, the entire loss in either scenario would be that of the claimant, because in both scenarios the claimant indirectly owns or controls the investment (either because the host-State enterprise is the investment itself or because the investment is held by the host-State enterprise owned or controlled by the claimant). This is inconsistent not just with the plain terms of Article 11.16.1 but also with Article 11.26.3 of the FTA, which provides that any award under Article 11.16.1(b) must be paid to the host-State enterprise that suffered the loss, not to the claimant.

2. NAFTA jurisprudence confirms that Article 11.16.1 permits claimants to claim only for their own losses, not losses suffered by third parties

71. The jurisprudence on analogous treaty provisions in the North American Free Trade Agreement ("**NAFTA**") supports Korea's reading of Article 11.16.1 of the FTA.[149] Like

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[146] *See, e.g., Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Prof. Stern dissenting opinion dated 20 Sept. 2012 ("***Occidental Dissent***") (**RLA-15**), ¶ 161 ("Claimants have not been damaged with respect to AEC/Andes's 40%, since Claimants have no right to the economic benefits of that 40% in the first place."); Wehland (**RLA-22**), at 958, n. 64 ("[I]n the absence of any beneficial interest in an investment, there would be no damage to be compensated . . . . As a consequence, it would appear that, even if the tribunal had accepted the claimant's [Blue Bank's] contention that it had made an investment, its claims should still have failed for lack of any damage affecting the claimant.").

[147] The requirement that the claimant have "incurred loss or damage" has been described as a standing requirement. *See infra*, ¶ 72, n. 152, 153.

[148] *See supra*, n. 139 (on the doctrine of useful effect or *effet utile*).

[149] *See* VCLT (**RLA-24**), Art. 32(a) ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"). Other treaties concluded by the

Article 11.16.1, NAFTA's Articles 1116 and 1117 confer standing on an investor to submit two types of claims: a claim that "the investor" has "incurred loss or damage by reason of, or arising out of, [a treaty] breach" (Article 1116); and a claim, "on behalf of an enterprise of another Party . . . that the investor owns or controls directly or indirectly," that "the enterprise" has "incurred loss or damage by reason of, or arising out of, [a treaty] breach" (Article 1117).[150]

72. Article 1116 of NAFTA permits an investor to bring claims only insofar as the *investor* has incurred damage arising from a treaty breach. Even where the definitions of "investor" and "investment" have been satisfied, the treaty has an independent requirement that the investor have incurred "loss or damage" from the investment. As observed by the Tribunal in *Pope & Talbot v. Canada*, a claimant submitting a claim under Article 1116 must prove "that loss or damage was caused to <u>its interest</u>."[151] Academic commentary on NAFTA confirms that "Article 1116 requires that the investor have standing – that <u>it</u> must have suffered loss or damage."[152] Commentary on the 2004 US model BIT, whose Article 24 is analogous to Articles 1116 and 1117 of NAFTA, is also consistent.[153]

73. Where there are multiple stakeholders in an investment that is owned or controlled by the claimant, the extent of the loss suffered by the claimant determines the scope of its standing. As the Tribunal in *Clayton v. Canada* noted, allowing a claimant to recover the

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Contracting States with third States have been regarded as supplementary means of interpretation. *See, e.g.*, *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Decision on Jurisdiction dated 24 Feb. 2014 (**RLA-49**), ¶ 182 ("Treaties on the same subject matter concluded respectively by the United Kingdom and Indonesia with third States can legitimately be considered as part of the supplementary means of interpretation").

[150] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (**RLA-25**), Arts. 1116, 1117.

[151] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages dated 31 May 2002 (**RLA-30**), ¶ 80 (emphasis added). *See also Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 (**RLA-31**), ¶ 82 ("It may be noted that the United States did not really contest Mondev's standing under Article 1116, subject to the question whether it had actually suffered loss or damage.").

[152] Andrea K. Bjorklund, *Commentaries on Selected Model Investment Treaties, in* OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown (ed.) 2013) (**RLA-48**), at 501 (emphasis added).

[153] Kenneth J. Vandevelde, US INTERNATIONAL INVESTMENT AGREEMENTS (OUP 2009) (**CLA-50**), at 598 ("This language ["incurred loss or damage"] imposes three conditions on the claimant's right to submit a claim to arbitration: loss, a breach, and a causal link between the breach and the loss. <u>These are, of course, traditional elements of standing</u> . . . . They are useful, for example, in preventing the submission of claims that are not yet ripe, because no loss has occurred.") (emphasis added).

entirety of the lost value of an investment "could have an impact on other stakeholders, including other investors in the investment."[154] This is why damages in respect of claims made under Article 1117 (*i.e.*, a claim on behalf of a host-State enterprise owned or controlled by the claimant for losses incurred by the enterprise) are paid directly to the enterprise and "not to the investor pursuant to Article 1135(2)(b) [of NAFTA],"[155] which is analogous to Article 11.26.3 of the FTA.

74. The non-disputing party submissions made by the United States in *S.D. Myers v. Canada* and *Pope & Talbot v. Canada* are also consistent with Korea's position. The United States submitted that "Article 1116 provides recourse for an investor to recover for loss or damage suffered by it," whereas "Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment" (*i.e.*, the host-State enterprise).[156] The United States also observed that, if Article 1116 allowed an investor to claim the entire lost value of an investment in which multiple stakeholders hold an interest, "both Articles 1117 and 1135(2) would be rendered ineffective, contrary to the customary international law principle of effectiveness."[157] This reflects the general principle that claimants have standing to bring claims only on their own behalf, for damages that they suffered (not for damages suffered by third parties).

B. International law bars claims submitted on behalf of third parties

75. Article 11.16.1 of the FTA embodies the general principle of international law that "claimants are only permitted to submit their own claims, held for their own benefit, not

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[154] *William Richard Clayton et al. v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Damages dated 10 Jan. 2019 ("***Clayton v. Canada***") (**RLA-55**), ¶ 388.

[155] *Clayton v. Canada* (**RLA-55**), ¶ 388. *See also United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits dated 24 May 2007 (**RLA-37**), ¶ 35 ("If there were multiple owners and divided ownership shares for UPS Canada, the question of how much of UPS Canada's losses flow through to UPS – the question posed by Canada here – may have very different purchase.").

[156] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America dated 18 Sept. 2001 ("***S.D. Myers, US Submission***") (**CLA-39**), ¶ 6 (emphasis added); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, United States Seventh Article 1128 Submission dated 6 Nov. 2001 ("***Pope & Talbot, US Submission***") (**RLA-29**), ¶ 3. *See also Pope & Talbot, US Submission* (**RLA-29**), ¶ 5 ("When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor in its capacity as an investor are recoverable.") (emphasis omitted).

[157] *S.D. Myers, US Submission* (**CLA-39**), ¶ 8; *Pope & Talbot, US Submission* (**RLA-29**), ¶ 7.

those held (be it as nominees, agents or otherwise) on behalf of third parties."[158] International law grants relief to the "owner of the economic interest," and "only the beneficial owner . . . can claim for interference with his interests," while a claimant lacking beneficial interest has "no standing to claim in the name of the beneficial owner."[159]

76. Korea's Memorial cited six investment law decisions in support of this general principle of international law.[160] Notwithstanding the weight of these authorities, Mason makes a sweeping assertion that a "'general principle' that denies 'standing' to a party without 'beneficial ownership' does not exist in the regime of international investment law."[161] Mason wrongly contends that Korea's argument "relies upon a single case" *Occidental v. Ecuador*, which has "peculiar facts" and which is based on "inapposite" authorities on the law of diplomatic protection.[162] The remaining five authorities cited in the Memorial, Mason says, are also inapposite.[163] Mason's assertions do not withstand scrutiny.

77. *Occidental* is analogous to the present case in all material respects. Like the FTA, the US-Ecuador BIT in *Occidental* defined "investment" as "every kind of investment . . . owned or controlled directly or indirectly by [investors] of the other Party."[164] One of the claimants, OEPC, legally owned the entirety of the disputed investment;[165] according to Mason, this legal ownership should have satisfied the BIT's standing requirements and allowed OEPC to recover

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[158] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment dated 2 Nov. 2015 ("***Occidental Annulment***") (**RLA-21**), ¶ 262; Memorial, ¶ 11.

[159] *Occidental Dissent* (**RLA-15**), ¶ 151.

[160] *See* Memorial, § II.A (*citing Occidental Annulment* (**RLA-21**); *Blue Bank v. Venezuela* (**RLA-23**); *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award dated 24 Jan. 2003 ("***Zhinvali v. Georgia***") (**RLA-4**); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 ("***Impregilo v. Pakistan***") (**RLA-6**); *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 Jan. 2007 ("***PSEG v. Turkey***") (**RLA-7**); *Mihaly v. Sri Lanka* (**RLA-3**)).

[161] Counter-Memorial, ¶ 66.

[162] Counter-Memorial, ¶ 68.

[163] Counter-Memorial, ¶ 77.

[164] *Occidental Annulment* (**RLA-21**), ¶ 103 (emphasis added).

[165] *Occidental Annulment* (**RLA-21**), ¶¶ 208-209.

compensation for the entirety of the damage caused to the investment.[166] But the *Occidental* Annulment Committee found that legal ownership was not sufficient; beneficial ownership was required as well. The Committee based its decision on the "uncontroversial" principle that "international law grants standing and relief to the owner of the beneficial interest":[167]

> The position as regards beneficial ownership is a reflection of a more **general principle of international investment law**: **claimants are only permitted to submit their own claims, held for their own benefit, not those held** (be it as nominees, agents or otherwise) **on behalf of third parties not protected by the relevant treaty**. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument.[168]

78. The Annulment Committee endorsed Prof. Stern's dissenting opinion on this issue.[169] Having found that 40% of the investment was beneficially owned by a third party, AEC/Andes, the Annulment Committee concluded that the *Occidental* Tribunal had manifestly exceeded its powers when it compensated OEPC for losses in respect of this 40% interest, because "only the beneficial owner, AEC/Andes, can claim for interference with its interest, while the nominee, OEPC, lacks standing to claim in the name of the beneficial owner."[170]

79. Mason argues that the Annulment Committee's and Prof. Stern's decisions are "inapposite" because they relied, among other things, on legal authorities that establish a beneficial ownership requirement under the law of diplomatic protection.[171] This is wrong.

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[166] Mason argues *Occidental* is distinguishable because the claimant in that case did not control the investment. *See* Counter-Memorial, ¶ 67. However, the issue of control was irrelevant to the Annulment Committee's and Prof. Stern's decisions in *Occidental*. What mattered was that the claimant was a mere legal owner with respect to 40% of the investment, and that it could not bring claims for this 40% stake absent a beneficial interest. *See Occidental Annulment* (**RLA-21**), ¶¶ 265-266; *Occidental Dissent* (**RLA-15**), ¶ 151. *See also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012 ("***Occidental Award***") (**RLA-14**), ¶ 614, n.77 (acknowledging that if the transfer of the 40% interest to AEC had been effective, OEPC would have been entitled to damages corresponding to only 60% of the value of Block 15).

[167] *Occidental Annulment* (**RLA-21**), ¶ 259.

[168] *Occidental Annulment* (**RLA-21**), ¶ 262.

[169] *Occidental Annulment* (**RLA-21**), ¶ 259 ("[A]s Arbitrator Stern has stated in her Dissent the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee.").

[170] *Occidental Annulment* (**RLA-21**), ¶¶ 265-266.

[171] Counter-Memorial, ¶ 68. Mason contends that *Siag v. Egypt*, a case cited by Prof. Stern in her dissenting opinion "on the question of the standing of a legal/beneficial owner does not support the point." *Id.*, ¶ 68, n. 100. This is

Prof. Stern in her dissenting opinion, the majority of the Tribunal in the *Occidental* award, and the Annulment Committee all confirmed that the beneficial ownership requirement is a "general principle of international investment law," irrespective of the position under the law diplomatic protection.[172] The majority of the *Occidental* Tribunal confirmed the applicability of this principle in international investment arbitration but found that that principle did not apply to the facts of the case before it, because legal and beneficial ownership were not split in that case.[173] The Annulment Committee for its part held that this principle was so fundamental that the *Occidental* Tribunal's failure to apply it correctly to the facts of the case was a manifest error requiring the annulment of the Tribunal's award.[174]

80. That international investment law on beneficial ownership finds support in the law on diplomatic protection is ultimately irrelevant. The other investment law authorities cited in Korea's Memorial, and discussed below, show that the principle expounded in *Occidental* is well established in international investment law.[175] In *Impregilo v. Pakistan*, the Tribunal dismissed Impregilo's claims on behalf of an unincorporated joint venture (GBC) and its joint venture partners, which Impregilo brought in its alleged capacity as holder of a "contractual right and duty" under GBC's joint venture agreement "to represent GBC in all matters relating to the [construction] Contracts" at issue in the arbitration.[176] The *Impregilo* Tribunal found that it had

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incorrect. The *Siag* Tribunal held that the claimants could claim damages only to the extent that they had a beneficial interest in the investment. The Tribunal found that the claimants' beneficial interest in the land was only 50% and, accordingly, reduced the amount of damages claimed by the claimants by half. *See Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ("***Siag v. Egypt***") (**RLA-8**), ¶¶ 582, 584.

[172] *Occidental Annulment* (**RLA-21**), ¶ 262 (emphasis added); *Occidental Dissent* (**RLA-15**), ¶¶ 139-144.

[173] *See Occidental Award* (**RLA-14**), ¶¶ 614, 650.

[174] *Occidental Annulment* (**RLA-21**), ¶¶ 259-268.

[175] Claimants contend that "[e]ven in the discrete regime applicable to diplomatic protection, the continued application of the alleged 'general principle' [of beneficial ownership] has been questioned," and quote an excerpt from commentary by Francisco Orrego Vicuña. *See* Counter-Memorial, ¶ 66, n. 93. However, the quoted excerpt concerns the "continuance of nationality" rule, not the beneficial ownership requirement. *See* Francisco Orrego Vicuna, *Changing approaches to the nationality of claims in the context of diplomatic protection*, 15 ICSID Rev. Foreign Inv. L. J. (2000) (**CLA-51**), at 353.

[176] *Impregilo v. Pakistan* (**RLA-6**), ¶ 129. Impregilo also asserted it that, "in accordance with provisions of the Contracts and [joint venture agreement], it is responsible for directing and controlling the execution of the Contracts; it selects and pays the compensation of GBC's Project Manager, recruits GBC's expatriate staff, and supervises GBC's Site Management. It manages GBC's finances and has complete control over GBC's bank account.").

"no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of Impregilo's joint venture partners."[177]

81. Mason argues that *Impregilo v. Pakistan* is distinguishable because Impregilo had legal and beneficial ownership over only its own share of the joint venture, whereas the GP allegedly had legal and beneficial ownership over the entirety of the Samsung Shares.[178] However, Impregilo's legal ownership and control were irrelevant to the *Impregilo* Tribunal's decision. What mattered was Impregilo's limited beneficial interest in the investment, in that Impregilo could not claim "losses incurred by, either GBC itself, or any of Impregilo's joint venture partners" on account of their beneficial interest.[179] Impregilo could claim "only in respect of its own alleged loss," based on its own beneficial interest in the investment.[180]

82. Mason contends that *Blue Bank v. Venezuela*, too, is inapposite because the Tribunal in that case "did not find that the claimant's claim was precluded by virtue of a 'general principle' of international law" regarding beneficial ownership.[181] This is ignoring the substance of the *Blue Bank* decision, which confirms that claimants do not have standing to bring claims on behalf of third-party beneficial owners. The claimant in *Blue Bank* was a trustee who held the investment in trust for the benefit of a third party who was not protected under the applicable BIT.[182] The *Blue Bank* Tribunal held that the claimant was acting "on behalf of the trust in furtherance of certain third party interests," that the claimant could not be considered as having suffered any loss from the investment, and that the claimant could not claim damages in respect of that investment.[183] This is consistent with the general principle set out in *Occidental*.

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[177] *Impregilo v. Pakistan* (**RLA-6**), ¶ 153.

[178] Counter-Memorial, ¶ 77.

[179] *Impregilo v. Pakistan* (**RLA-6**), ¶ 153. Impregilo's liability for, and control over, its partners' joint venture shares were irrelevant for the same reason. In any event, Impregilo asserted broad contractual rights to control the entirety of the joint venture as its "Leader," not just over the portion in which it had a beneficial interest. *Id.*, ¶ 129.

[180] *Impregilo v. Pakistan* (**RLA-6**), ¶ 170.

[181] Counter-Memorial, ¶ 67, n. 94.

[182] *Blue Bank v. Venezuela* (**RLA-23**), ¶¶ 163-165.

[183] *Blue Bank v. Venezuela* (**RLA-23**), ¶ 163.

83. Mason dismisses *Zhinvali v. Georgia* and *PSEG v. Turkey* in a single sentence, asserting that they "are not concerned with . . . a 'general [international law] principle'" regarding beneficial ownership.[184] But both *Zhinvali* and *PSEG* illustrate and support the principle that – as the *Occidental* Annulment Committee put it – "claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty."[185]

a. In *Zhinvali v. Georgia*, the claimant sought damages not only for losses incurred by itself but also for losses incurred by its shareholders.[186] Georgia objected that the shareholders were trying to "'piggy-back' their claims against [Georgia] by having [the claimant] make those claims on their behalf without those shareholders assuming the risk of becoming parties to th[e] arbitration."[187] The Tribunal found that the claimant "does *not* possess the right to claim on behalf of its three shareholders," and that the claimant "must prove that all the claims asserted here are those of [the claimant] itself."[188]

b. In *PSEG v. Turkey*, the claimants sought to recover amounts that two third-party "sponsors" had invested in the claimants' coal mining project in Turkey.[189] The Tribunal held that it could not award "compensation . . . in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done [*i.e.*, the expenses were incurred] on behalf of one of the Claimants."[190] The Tribunal thus rejected the claimants' damages claim on behalf of the third-party sponsors.[191]

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[184] Counter-Memorial, ¶ 77, n. 116.

[185] *Occidental Annulment* (**RLA-21**), ¶ 262.

[186] *Zhinvali v. Georgia* (**RLA-4**), ¶ 395.

[187] *Zhinvali v. Georgia* (**RLA-4**), ¶ 395.

[188] *Zhinvali v. Georgia* (**RLA-4**), ¶ 405 (italics in original).

[189] *PSEG v. Turkey* (**RLA-7**), ¶¶ 322-323.

[190] *PSEG v. Turkey* (**RLA-7**), ¶ 325.

[191] *PSEG v. Turkey* (**RLA-7**), ¶¶ 325-326.

84. There are other cases to the same effect. In *Mihaly v. Sri Lanka*, the U.S. claimant, Mihaly (USA), brought treaty claims "in its own name as well as on behalf of its partner," Mihaly (Canada), a Canadian company.[192] Mihaly (USA) argued that Californian law on partnerships "empowered [Mihaly (USA)] to file a claim on its own behalf as well as on behalf of its other partner."[193] The Tribunal rejected this argument. It found that "the designated Claimant in the case at bar is unmistakably Mihaly (USA) *eo nomine* and not the [alleged partnership],"[194] and that it could not hear claims by a Canadian party. Mihaly (USA) was "entitled to file a claim in its own name against Sri Lanka in respect of the rights and interests it may be able . . . to establish,"[195] but it could not file claims on behalf of Mihaly (Canada).

85. Claimants refer to the *Mihaly* Tribunal's finding that the partnership arrangement between Mihaly (USA) and Mihaly (Canada) "could neither add to nor subtract from, the capacity of the Claimant [Mihaly (USA)] to file a claim against [Sri Lanka]."[196] Claimants appear to suggest that this supports the GP's claim on behalf of the Cayman Fund, because Cayman law empowers the GP to bring such a claim.[197] But *Mihaly* says the opposite. The Tribunal found that Mihaly (USA) could bring claims under the treaty only for its own interests, irrespective of its alleged entitlement under Californian law to file claims on behalf of its partner, Mihaly (Canada).[198] The *Mihaly* Tribunal had no jurisdiction over Canadian parties, and domestic law on partnerships could not create such jurisdiction.

86. Other investment tribunals have acknowledged and applied the principle that a claimant may claim damages only on its own behalf and not for the benefit of third parties. In *Khan Resources v. Mongolia*, one of the claimants, Khan Netherlands, asserted that it controlled the relevant investment through a 75% ownership stake, and that, based on this control, Khan

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[192] *Mihaly v. Sri Lanka* (**RLA-3**), ¶ 13.

[193] *Mihaly v. Sri Lanka* (**RLA-3**), ¶ 14.

[194] *Mihaly v. Sri Lanka* (**RLA-3**), ¶ 22.

[195] *Mihaly v. Sri Lanka* (**RLA-3**), ¶ 26 (emphasis added).

[196] Counter-Memorial, ¶ 77, *citing Mihaly v. Sri Lanka* (**RLA-3**), ¶ 26.

[197] Counter-Memorial, ¶ 78.

[198] *Mihaly v. Sri Lanka* (**RLA-3**), ¶¶ 22-24.

Netherlands was entitled to claim 100% of the damages arising from the investment.[199] The Tribunal rejected this argument. Khan Netherlands could recover damages only for losses that it had actually suffered, not for losses suffered by third parties:

> Principles of reparation in international law, as set out in *Chorzów Factory*, are clear that **a claimant is entitled to compensation for losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction. Only express wording to the contrary in a treaty could override this fundamental principle.** No such wording has been provided in the present circumstances and the Tribunal concludes it has no jurisdiction to award compensation in relation to the 25 percent interest in the licence owned by Khan Bermuda [a third party not protected under the ECT].[200]

87. In *Saluka v. Czech Republic*, relied upon by Mason,[201] the Czech Republic argued that the claimant, Saluka, was a shell company, and that "the real party in interest" was Nomura, a third party unprotected by the treaty.[202] The Tribunal held that the treaty's definition of "investor" was satisfied by virtue of Saluka's incorporation in the Netherlands.[203] However, the Tribunal made clear that "[its] jurisdiction is limited to claims brought by the Claimant, Saluka, in respect of damage suffered by itself," and that the Tribunal "does not have jurisdiction in respect of any claims of Nomura, or any claims in respect of damage suffered by Nomura and not by Saluka."[204] *Saluka* thus confirms the principle that a claimant can present claims only for its own losses based on its own economic (or beneficial) interest in the investment, not for losses incurred by third parties based on their economic (or beneficial) interest in the investment.

88. Claimants rely on commentary which suggests that a beneficial ownership requirement was dismissed by the Tribunal in *CSOB v. Slovakia*.[205] The *CSOB* Tribunal did not, however, address the question whether a claimant may bring claims for damage suffered by third

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[199] *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Award on the Merits dated 2 Mar. 2015 ("***Khan v. Mongolia***") (**RLA-50**), ¶ 388.

[200] *Khan v. Mongolia* (**RLA-50**), ¶ 388.

[201] Counter-Memorial ¶¶ 7, 41.

[202] *Saluka v. Czech Republic* (**CLA-41**), ¶ 180.

[203] *Saluka v. Czech Republic* (**CLA-41**), ¶ 241.

[204] *Saluka v. Czech Republic* (**CLA-41**), ¶ 244 (emphasis added).

[205] Counter-Memorial, ¶ 71, *citing* DOUGLAS (**RLA-39**), ¶ 559.

parties; rather, the issue was whether the claimant's assignment of its claims to the Czech Republic (after the institution of arbitration proceedings) could deprive the Tribunal of jurisdiction.[206] The *CSOB* Tribunal observed 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."[207] A claimant's beneficial interest in a "claim" or "outcome of the dispute" is not to be confused with a beneficial interest in an investment at the time of the alleged treaty breach.[208] Where, as in *CSOB*, a claimant transfers its beneficial interest *in a claim* after the institution of arbitration proceedings (and thus after the alleged treaty breach caused the claimant to incur a loss), the transfer does not deprive the claimant of its claim.[209] But where, as here, the claimant did not have a beneficial interest *in the investment* at the time the alleged treaty breach occurred, then the claimant has not incurred any economic loss and does not have a claim in the first place. *CSOB* is, therefore, inapposite to this case.[210]

89. Claimants also refer to *Saba Fakes v. Turkey*, where the Tribunal observed in *dictum* that "[n]either the ICSID Convention, nor the [Netherlands-Turkey] 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."[211] The parties in *Saba Fakes* made no submissions on the beneficial ownership requirement under international law, and the Tribunal did not consider this issue either. Rather, the *Saba Fakes* Tribunal declined jurisdiction in part because the claimant had not made any meaningful contribution to the investment.[212] The

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[206] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 ("***CSOB v. Slovakia***") (**RLA-26**), ¶ 31.

[207] *CSOB v. Slovakia* (**RLA-26**), ¶ 32 (emphasis added).

[208] *See, e.g.*, Wehland (**RLA-22**), at 956, n. 54 (*citing CSOB v. Slovakia*) ("This decision did not deal with the question of whether the absence of beneficial ownership might affect the protection of certain assets, but with the different matter of whether the absence of a claimant's economic interest in a claim or the outcome of a dispute should affect its standing").

[209] *CSOB v. Slovakia* (**RLA-26**), ¶ 31.

[210] *CSOB v. Slovakia* (**RLA-26**), ¶ 31.

[211] Counter-Memorial, ¶ 88, *citing Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award dated 14 July 2010 ("***Saba Fakes v. Turkey***") (**CLA-40**), ¶ 132 (internal citation omitted).

[212] *Saba Fakes v. Turkey* (**CLA-40**), ¶¶ 139-140. Based on, *inter alia*, the claimant's lack of contribution, the Tribunal found that the claimant had not acquired legal ownership of the investment. *Id.*, ¶ 147.

Tribunal commented on beneficial ownership only in passing and only in relation to the ICSID Convention and the Netherlands-Turkey BIT, neither of which applies to this case. *Saba Fakes* does not support Claimants' position that legal owners of an investment can recover damages on behalf of third-party beneficiaries of the investment.

90. There is thus a considerable body of authority for the proposition, endorsed by the *Occidental* Annulment Committee, that, in international law, "claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties."[213] As explained below, nothing in the FTA detracts from that principle.

C. The FTA does not derogate from the international law principle barring claims submitted on behalf of third parties

91. Claimants argue that "[a]s a matter of international law, 'general principles' cannot override the *lex specialis* regime created by the [FTA]" and that the principles regarding standing and beneficial ownership "could not usurp the clear terms of the [FTA], which extend their scope to assets an investor owns or controls, directly or indirectly."[214]

92. Claimants' argument lacks merit, in that the FTA is subject to and consistent with international law principles on standing and beneficial ownership. Article 11.22.1 of the FTA provides that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[215] A treaty provision is *lex specialis* vis-à-vis rules of international law only if the provision expressly regulates the same subject matter with more specificity.[216] As observed by investment tribunals, "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the

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[213] *Occidental Annulment* (**RLA-21**), ¶ 262; Memorial, ¶ 11.

[214] Counter-Memorial, ¶ 72.

[215] FTA (**CLA-23**), Art. 11.22.1 (emphasis added). Applicable rules of international law include "all such rules which according to their self-determined scope of application cover the legal issue arising in the particular case." *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 Dec. 2016 (**RLA-53**), ¶ 1202.

[216] Rep. of the Study Grp. of the Int'l Law Comm., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (2006) (**RLA-38**), ¶ 56 ("[I]f a matter is being regulated by a general standard as well as a more specific rule than the latter, then the latter should take precedence over the former").

absence of words making clear an intention to do so."[217] An intent to derogate from an established principle of international law cannot be presumed; it requires clear evidence that overturning such a principle was the intention of the contracting States, as indicated by "express provisions" that are "at variance with the continued operation of the relevant principle of international law."[218]

93. None of the FTA's provisions derogates from the beneficial ownership requirement under international investment law, *i.e.*, the principle that a claimant may bring claims only for its own losses arising from an investment, and not for losses suffered by third parties. To the contrary, as explained in Section IV.A above, Article 11.16.1 of the FTA expressly endorses this principle insofar as it gives standing to a claimant to submit, "on its own behalf," a claim that it "has incurred loss or damage" arising from an FTA breach.

94. Contrary to Claimant's suggestion, the definitions of "investment" and "investor" in Article 11.28 of the FTA do not derogate from the beneficial ownership requirement under Article 11.16.1 and international investment law.[219] Article 11.28 provides the conditions for satisfying the definitions of "investor" and "investment," but it does not say that satisfying the two definitions is a sufficient, rather than a necessary, condition to establish the claimant's standing to bring claims. Much less does Article 11.28 exhibit an intention by the Contracting Parties that a claimant's bare legal ownership or control of an investment allows that claimant to claim compensation for losses incurred by a third-party beneficial owner of the investment.

95. The definition of "investment" in Article 11.28 is similar to that in the US-Ecuador BIT in *Occidental*, which provided that an "'investment' means every kind of investment … owned or controlled directly or indirectly by nationals or companies of the other

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[217] *See*, *e.g.*, *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ("***Loewen Group v United States***") (**RLA-32**), ¶ 160 (*citing Elettronica Sicula SpA (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15,42, ¶ 42). *See also id*., ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away").

[218] *Loewen Group v. United States* (**RLA-32**), ¶¶ 160-162 ("An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so . . . . Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.").

[219] *See* Counter-Memorial, ¶ 72.

Party."[220] Neither the *Occidental* Tribunal nor the Annulment Committee found that this definition overrode the beneficial ownership standing requirement under international investment law. The same conclusion applies to the definition of "investment" in Article 11.28 of the FTA.

96. The authorities on which Claimants rely to argue that the FTA precludes the application of the beneficial ownership standing requirement do not support Claimants' position:

a. In *KT Asia v. Kazakhstan*, Kazakhstan argued the definition of "nationals" in Article 1(b) of the Netherlands-Kazakhstan BIT should be overridden by the principle of "real and effective nationality" under the law of diplomatic protection, so as to deny the claimant company's Dutch nationality and recognize the Kazakh nationality of the individual behind the claimant instead.[221] *KT Asia* is distinguishable on that basis alone, as Korea is not seeking to apply the law of diplomatic protection to the FTA. As explained above, the beneficial ownership requirement is a principle of *international investment law* and enshrined in Article 11.16.1 of the FTA.[222] In addition, the *KT Asia* Tribunal rejected Kazakhstan's argument because "the definition of nationals" was "precisely the subject of Article 1(b),"[223] and the law of diplomatic protection could not "trump the specific regime created by the [BIT]."[224] By contrast, beneficial ownership is not "precisely the subject" of Article 11.28 of the FTA, as Claimants suggest; and Article 11.16.1 confirms that the standing requirement applies under the FTA.

b. Claimants refer to the *Waste Management* Tribunal's observation that "[w]here a treaty spells out in detail and with precision the requirements for maintaining a

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[220] *Occidental Annulment* (**RLA-21**), ¶ 103.

[221] *KT Asia v. Kazakhstan* (**RLA-17**), ¶¶ 97-98, 126.

[222] *See supra*, § IV.B.

[223] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 120. Article 1(b) of the BIT provided that "the term nationals shall comprise . . . legal persons constituted under the law of [a] Contracting Party," and the claimant was incorporated in the Netherlands. *See id.*, ¶ 113.

[224] *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 128. Claimants quote the *KT Asia* Tribunal's observation that "attempts by respondents to substitute or supplement the test of nationality in a BIT with rules of diplomatic protection have failed in an overwhelming number of cases." Counter-Memorial, ¶ 73, *citing KT Asia v. Kazakhstan* (**RLA-17**), ¶ 129. This observation is irrelevant to this case. The test of nationality is not at issue and Korea does not argue that the law of diplomatic protection should apply to this case.

claim, there is no room for implying into the treaty additional requirements."[225] This is uncontroversial. Korea is not implying any additional requirements into the FTA; it is applying Article 11.16.1 in accordance with its plain meaning. Similarly, as the definition of "investment" in Article 11.28 does not address the issue of beneficial ownership and standing, it does not preclude the application of the beneficial ownership requirement under international law (just as the similar definition of "investment" in the US-Ecuador BIT did not preclude the application of the beneficial ownership requirement in *Occidental*).[226] In fact, the *Waste Management* Tribunal acknowledged the applicability of the beneficial ownership requirement when it observed that "[t]here is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, <u>if the beneficial ownership at relevant times is with a NAFTA investor</u>."[227]

c. In *RosInvest v. Russia*, the claimant purchased shares in Yukos and then transferred its economic interest in the shares to a third party, pursuant to so-called Participation Agreements.[228] The Participation Agreements were later terminated and the economic interest in the Yukos shares returned to the claimant.[229] The *RosInvest* Tribunal found that the claimant satisfied the definition of "investor" and "investment" in the UK-USSR BIT, notwithstanding its lack of economic interest in the Yukos shares.[230] However, the Tribunal made clear that "the value attributed to that investment" for the purposes of assessing

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[225] Counter-Memorial, ¶ 72, *citing Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 ("***Waste Management v. Mexico***") (**CLA-19**), ¶ 85.

[226] In *Waste Management*, Mexico argued that the claimant was not an "investor" because it did not have "a <u>direct</u> interest in the investment. *Waste Management v. Mexico* (**CLA-19**), ¶ 76 (emphasis added). The Tribunal rejected this argument, because NAFTA defines "investment" as "an investment owned or controlled directly <u>or indirectly</u> by an investor," and the investment was "owned or controlled indirectly by the Claimant. *Id.*, ¶¶ 84-85 (emphasis added). These facts bear no resemblance to the present case.

[227] *Waste Management v. Mexico* (**CLA-19**), ¶ 80.

[228] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award dated 12 Sept. 2010 ("***Rosinvest v. Russia***") (**CLA-38**), ¶¶ 323, 341, 388.

[229] *Rosinvest v. Russia* (**CLA-38**), ¶ 387.

[230] *Rosinvest v. Russia* (**CLA-38**), ¶ 405.

damages was a "separate question."[231] As the claimant had "no real economic interest of its own in the Yukos shares during the period the Participation Agreements were in force," the amount of claimant's damages could be assessed only as of the date that the Participation Agreements were terminated and the economic interest in the shares returned to the claimant.[232] This finding is consistent with the principle that claimants cannot recover damages if they lack a beneficial interest in the investment.

d. In *Hulley Enterprises v. Russia*, ownership of the investment was not split between a legal and beneficial owner; rather, Russia argued that the claimant was "a shell company beneficially owned and controlled by Russian nationals,"[233] and that the Tribunal should ignore the shell company's ownership of the investment in favor of the "real" Russian ownership.[234] The present case involves a different issue, *i.e.*, split ownership between the GP as legal owner (trustee) and the Cayman Partnership as beneficial owner. *Hulley* does not support Claimants' argument that legal owners of an investment can bring claims on behalf of third-party beneficial owners who are not protected under the applicable treaty.

e. Similarly, *von Pezold v. Zimbabwe* did not involve split ownership of the investment. Zimbabwe argued that claimants' claims in respect of certain assets should be dismissed, because "the identity and holding that might otherwise benefit from [the BIT]" and "the intermingled holdings, control, beneficiaries (named and unnamed), trustee and ultimate decision-makers" were "not

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[231] *Rosinvest v. Russia* (**CLA-38**), ¶ 388.

[232] *Rosinvest v. Russia* (**CLA-38**), ¶ 672 ("Claimant had no real economic interest of its own in the [investment] during the period the Participation Agreements were in force and thus 'had nothing to lose'. Therefore, for valuation purposes of damages, the date must be applied where that risk was taken over by Claimant at the time the Participation Agreements were terminated."), ¶¶ 674-675.

[233] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA226, Interim Award on Jurisdiction and Admissibility dated 30 Nov. 2009 ("***Hulley v. Russia***") (**CLA-33**), ¶ 407.

[234] *Hulley v. Russia* (**CLA-33**), ¶¶ 420-421. Russia argued that the claimant was "totally dominated by . . . Russian oligarchs" who had "*de facto* ownership" of the investment through a "chain of nominal ownership and control." *Hulley v. Russia* (**CLA-33**), ¶ 71, *quoting* Russia's Skeleton Argument, ¶ 44.

determinable."[235] The Tribunal found that *prima facie* proof of legal ownership was sufficient to establish jurisdiction.[236] But the Tribunal did not find that a claimant had standing to recover damages for losses suffered by third parties. To the contrary, the Tribunal criticized the claimants for having failed "accurately to arrive at the portion of the [asset's] value actually attributable to the [claimants]," and reduced the damages award in light of the claimants' partial ownership of the assets (the balance of which was owned by third parties).[237]

97. None of these cases supports Claimants' *lex specialis* argument with respect to the definition of investment in Article 11.28 of the FTA. None of these cases involved discussion of a treaty provision such as Article 11.16.1 of the FTA (which gives the claimant's standing only to bring claims only "on its own behalf" for "loss or damage" incurred by the claimant)[238] and none of them stands for the proposition that a claimant lacking an economic interest in an investment may nonetheless claim damages for that investment. To the contrary, *RosInvest* and *von Pezold* are consistent with the international law principle that a claimant's economic interest in an investment is the marker of its loss or damage, and that a claimant may not recover more than its own economic interest. And *Waste Management* alludes to the beneficial ownership requirement in *dictum*.

D. The GP brings claims on behalf of, and for the benefit of, Cayman entities that are not protected by the FTA

98. As discussed above, Article 11.16.1(a) of the FTA provides that a claimant can submit claims only "on its own behalf," for losses that it has actually incurred as a result of an FTA breach ("the claimant has incurred loss or damage"). A claimant cannot submit claims on

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[235] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ("***Von Pezold v. Zimbabwe***") (**CLA-27)**, ¶¶ 295-296.

[236] *Von Pezold v. Zimbabwe* (**CLA-27**), ¶ 314.

[237] *Von Pezold v. Zimbabwe* (**CLA-27**), ¶¶ 838(d), 839.

[238] *Waste Management* was a case under NAFTA, which includes a provision analogous to Article 11.16.1. As discussed above, the *Waste Management* Tribunal alluded to the beneficial ownership requirement in *dictum* and its decision is, in any event, consistent with Korea's position. *See supra*, ¶ 96(b). None of the treaties in the other cases cited by Claimants included a similar provision.

behalf of third-party beneficial owners of an investment, for losses incurred by them.[239] The same principle applies under international law.[240]

99. Here, the GP stands before this Tribunal not to claim compensation for its own losses, but for losses purportedly suffered by the Cayman Fund (and by its Limited Partner).[241] The GP claims the entirety of the alleged loss in value of the Samsung Shares that it held on trust for the benefit of the Cayman Fund, irrespective of the existence and extent of the GP's own loss (which depends on the GP's Partnership Interest in the Samsung Shares, if any).

100. The GP has failed to establish that it had any Partnership Interest in the Samsung Shares, although the relevant evidence is readily available.[242] The GP contends that it had an "indivisible beneficial interest" that "extended to the entirety of the Samsung Shares, and not merely a proportion of those Shares" corresponding to the Partnership Interest.[243] As explained above, however, the term "indivisible beneficial interest" means only that the partners' respective beneficial interests in partnership assets are not separable until these assets are distributed.[244] An "indivisible beneficial interest" says nothing about the extent of that interest and does not mean that the GP's beneficial interest extended to 100% of the Cayman Fund's assets in 2015.

101. Thus, the GP's claim falls foul of Article 11.16.1(a) and international law. The GP lacks standing to bring claims in respect of the Cayman Fund's (and its Limited Partner's) beneficial interest in the Samsung Shares; only the Cayman Fund and its Limited Partner would have standing to "claim for interference with [their] interest."[245] However, the Cayman Fund and the Limited Partner are both Cayman entities who are not protected under the Korea-US FTA.

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[239] *See supra*, § IV.A.

[240] *See supra*, § IV.B.

[241] The GP contends that Cayman law and the Partnership Agreement empower it to bring such a claim. *See* Partnership Agreement (**C-30**), Art. 3.02(n); Lindsay, ¶ 42. *See supra*, § II.A.

[242] *See* Partnership Agreement (**C-30**), Art. 9.03; Reynolds, ¶ 50.

[243] Counter-Memorial, ¶¶ 76, 102.

[244] Reynolds, ¶ 30.

[245] *Occidental Annulment* (**RLA-21**), ¶¶ 265-266.

102. Mason insists that the GP is "exclusively responsible for the conduct of the [Cayman Fund's] investment business," "makes all decisions with respect to the [Cayman Fund's] business," and is "the only entity with capacity to engage in legal proceedings with respect to the [Cayman Fund's] assets."[246] But all this is irrelevant to the GP's standing under the FTA.[247] Such standing cannot be modified by domestic law or through a contract (the Partnership Agreement) to which Korea is not a party.[248] Nor is it relevant that the Cayman Fund lacks legal personality.[249] As observed by the *Impregilo* Tribunal, lack of legal personality "does not convert [a partnership's] claim into [the claimant's] own claim"; rather, such a claim is "tantamount to a claim on behalf of the other . . . partners," *i.e.*, the Limited Partner in this case.[250]

103. For all these reasons, the GP lacks standing to claim on behalf of the Cayman Fund and its Limited Partner for injury to their beneficial interests in the Samsung Shares. The GP's standing is limited to the extent of its beneficial interest in the Samsung Shares, which is determined by its Partnership Interest (which has not been proven). The Tribunal should thus dismiss the GP's claims for losses incurred by the Cayman Fund and the Limited Partner on account of their beneficial interest in the Samsung Shares.

V. THE GP'S DAMAGES CLAIM IS LEGALLY DEFICIENT

104. Even if the Tribunal were to find that it has jurisdiction over the GP, the GP's claim for losses incurred by the Cayman Fund (and, indirectly, the Limited Partner) should be dismissed under Article 11.20.6 of the FTA, because it is not a claim for which an award in favor of the GP may be made.

A. Applicable legal standard for Article 11.20.6 objections

105. Under Article 11.20.6 of the FTA, the Tribunal "shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted

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[246] Counter-Memorial, ¶ 18.

[247] *See Impregilo v. Pakistan* (**RLA-6**), ¶ 137.

[248] *Impregilo v. Pakistan* (**RLA-6**), ¶ 136.

[249] Counter-Memorial, ¶ 15.

[250] *Impregilo v. Pakistan* (**RLA-6**), ¶ 139.

is not a claim for which an award in favor of the claimant may be made under Article 11.26." Article 11.20.6(c) provides that "the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration."

106. Only factual allegations made in the Notice of Arbitration "benefit[] from a presumption of truthfulness," and not those made in subsequent written or oral submissions.[251] The notion of "factual allegation" does not include "a mere conclusion unsupported by any relevant factual allegation," or "a legal allegation clothed as a factual allegation."[252] The Tribunal may also consider relevant facts not in dispute between the parties.[253]

107. Contrary to Claimants' argument, "a claim . . . for which an award in favor of the claimant may [not] be made" is not limited to "legally impossible" claims.[254] The *Pac Rim* Tribunal observed that such words were "significantly absent" in a CAFTA provision analogous to Article 11.20.6 of the FTA, even though they could have been used by the States parties to CAFTA.[255] The question is whether the Tribunal has "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."[256]

108. Claimants assert that, to prevail under Article 11.20.6, Korea "must prove that [the alleged FTA breaches] had no consequences for the General Partner," and that "the General Partner's situation remained unaffected by [these alleged breaches]."[257] This mischaracterizes Korea's objection. Korea's objection is that, absent a beneficial interest in the Samsung Shares, the GP suffered no economic loss and cannot claim damages on its own behalf. The GP cannot claim damages for economic losses allegedly suffered by the Cayman Fund and the Limited

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[251] *See, e.g., 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 dated 2 Aug. 2010 ("***Pac Rim v. El Salvador***") (**CLA-36**), ¶ 90.

[252] *Pac Rim v. El Salvador* (**CLA-36**), ¶ 91.

[253] *Pac Rim v. El Salvador* (**CLA-36**), ¶ 100.

[254] *Pac Rim v. El Salvador* (**CLA-36**), ¶ 108.

[255] *Pac Rim v. El Salvador* (**CLA-36**), ¶ 108.

[256] *Pac Rim v. El Salvador* (**CLA-36**), ¶ 110.

[257] Counter-Memorial, ¶ 101.

Partner based on *their* beneficial interest in the Samsung Shares. No award in favor of the GP may be made for such claims, which should therefore be dismissed under Article 11.20.6.

B. Under the FTA and international law, a claimant may bring claims only on its own behalf for its own losses, not claims on behalf of third-party beneficiaries for their losses

109. As established in Sections IV.A and IV.B above, a claimant may bring claims only on its own behalf for losses that it has incurred as the beneficial owner of the investment; a claimant may not bring claims on behalf of third-party beneficiaries for losses suffered by them. This is the ordinary meaning of the words in Article 11.16.1(a) of the FTA that "the claimant, on its own behalf, may submit to arbitration … a claim … that the claimant has incurred loss or damage."[258] If the claimant has no right to the economic benefits of an investment (*i.e.*, a beneficial interest), a claimant will not have suffered economic loss from harm allegedly done to that investment.[259] The same principles apply as a matter of international law.[260]

110. Claimants fail to engage with the substance of Korea's objection. Claimants have nothing to say about the Article 11.16.1(a) requirement that "the claimant" have "incurred loss or damage" in respect of an investment.

111. Mason refers to the *Chorzów* standard of compensation[261] but ignores the Permanent Court of Justice's statement in *Chorzów* that one must "exclud[e] from the damage to be estimated [any] injury resulting for third parties."[262] As the *Occidental* Annulment Committee found:

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[258] FTA (**CLA-23**), Art. 11.16.1(a) (emphasis added).

[259] *See, e.g., Occidental Dissent* (**RLA-15**), ¶ 161 ("Claimants have not been damaged with respect to AEC/Andes's 40%, since Claimants have no right to the economic benefits of that 40% in the first place."); Wehland (**RLA-22**), at 958, n. 64 ("[I]n the absence of any beneficial interest in an investment, there would be no damage to be compensated . . . As a consequence, it would appear that, even if the tribunal had accepted the claimant's [Blue Bank's] contention that it had made an investment, its claims should still have failed for lack of any damage affecting the claimant.").

[260] *See supra*, § IV.B.

[261] Counter-Memorial, ¶ 100.

[262] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ, Rep. Series A No. 17, Decision on the Merits dated 13 Sept. 1928 (**CLA-1**), at 31.

> The **dictum in *Chorzów Factory* confirms the Committee's conclusion**: as a matter of international law, the [*Occidental*] Tribunal was precluded from awarding Claimants damages reflecting 100% of the investment, because **it was required to exclude from the compensation the injury caused to a third party, who was the beneficial owner of a 40% interest in the expropriated investment**.[263]

112. Claimants offered nothing but a conclusory response to *Siag v. Egypt*, cited in Korea's Memorial, stating that this "case . . . does not assist."[264] However, the *Siag* Tribunal found that the claimants' beneficial interest in the investment at issue was only 50%[265] and, therefore, reduced the amount of damages claimed by the claimants by 50%.[266] This was yet another application of the principle that a claimant cannot obtain damages for a treaty breach without a beneficial interest in the investment.

C. The GP's damages claims on behalf of the Cayman Fund and the Limited Partner, for losses that they allegedly incurred, should be dismissed

113. Korea showed in its Memorial that the GP's damages claim is not a claim for which an award in favor of the claimant may be made, because the GP claims compensation for the "flow of benefits" that third parties, not the GP, "would have been reasonably expected to earn . . . in the state of the world in which the [wrongful act] hypothetically did not occur."[267] In response, Claimants argue that the GP's damages claim in respect of losses suffered by Cayman entities is not legally deficient because: (i) appreciation of the assets of the Partnership "grows the funds available for . . . further entitlement to an incentive allocation," (ii) any award of damages "would be held in the same way that the Samsung Shares originally were,"[268] and (iii) even if the GP did not have beneficial interest in the Samsung Shares, the alleged FTA breaches had "other consequences" entitling the GP to a claim for damages, such as "the right to

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[263] *Occidental Annulment* (**RLA-21**), ¶ 291 (emphasis added).

[264] Counter-Memorial, ¶ 105, n. 171.

[265] *Siag v. Egypt* (**RLA-8**), ¶ 582 (finding that "in the event of a sale of the Property, the Claimants would have received 50% of the sale value" and that "this [is an] objective measure of the Claimants' beneficial interest in the Property").

[266] *Siag v. Egypt* (**RLA-8**), ¶¶ 581, 583-584.

[267] Memorial, ¶¶ 31-35.

[268] Counter-Memorial, ¶ 103.

participate in meetings of the companies and to influence the direction of the companies."[269] These assertions lack merit, as shown below.

114. First, Claimants appear to contend that the GP can claim damages suffered by the Limited Partner because any amounts recovered would be re-invested on the Cayman Fund's behalf, and thus potentially generate future benefits for the GP. Such a potential future benefit does not get around the fact that the GP and the Limited Partner had distinct beneficial interests in the Samsung Shares at the time of the alleged injury to those shares, giving rise to distinct economic losses and, accordingly, distinct entitlements to bring claims. Were the prospect of profiting from a third party's recovery of damages enough to allow a claimant to recover such damages, this would eviscerate the restriction under Article 11.16.1(a) of the FTA and international law that claimants can recover damages only for their own losses.

115. Second, Claimants contend that the GP will not be unjustly enriched if it was awarded damages for the entirety of the Samsung Shares, because any award of damages "would be held in the same way that the Samsung Shares originally were,"[270] *i.e.*, would be held on the Cayman Fund's behalf in accordance with Cayman law and the Partnership Agreement. But such arrangements under domestic law cannot circumvent Article 11.16.1(a) of the FTA and the beneficial ownership requirement under international law (as well as the fact that neither the Cayman Fund nor the Limited Partner are before this Tribunal). In *Impregilo v. Pakistan*, the Tribunal rejected a similar argument, namely, that Impregilo should be allowed to recover damages on behalf of its joint venture partners because those damages would have to be passed on to them under their joint venture agreement because doing so would "unilaterally expand the ambit of a BIT":

> [T]hat Impregilo may be obliged to account to its partners in respect of any damages obtained in these proceedings is also an internal [joint venture] matter, which has no bearing on Pakistan's agreed exposure under the BIT. If this were not so, any party would be at liberty to

[269] Counter-Memorial, ¶ 104.

[270] Counter-Memorial, ¶ 105.

> conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT.[271]

116. The *Impregilo* Tribunal further held that a contractual agreements to share a damages award is irrelevant because an investment "tribunal has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants [in accordance with such an agreement]."[272]

117. Even if the GP would hold an award of damages in the "same way that the Samsung Shares originally were," *i.e.*, on trust for the Cayman Fund, this would only confirm that the GP is bringing claims on the Cayman Fund's and the Limited Partner's behalf.[273] These Cayman entities are not entitled to protection under the FTA; they must not be permitted to obtain such protection through the back door, *i.e.*, through the GP. Korea never agreed to grant Cayman entities such FTA protection.[274]

118. Third, that the alleged FTA breaches had "other consequences" for the GP, such as "the right to participate in meetings of the companies and to influence the direction of the companies,"[275] is irrelevant to the GP's economic interest in the Samsung Shares and says nothing about its entitlement to claim damages for harm allegedly done to the Cayman Fund's and the Limited partner's economic interests.

VI. COSTS

119. In accordance with Article 11.20.8 of the FTA, the Tribunal may "award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection." Notwithstanding the FTA's express limitations and well-established

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[271] *Impregilo v. Pakistan* (**RLA-6**), ¶ 151.

[272] *Impregilo v. Pakistan* (**RLA-6**), ¶ 152.

[273] *See supra*, § II.A; Partnership Agreement (**C-30**), Art. 4.06(a).

[274] *See also Occidental Dissent* (**RLA-15**), ¶ 144 ("[E]ither OEPC will not transmit 40% of the amount received in damages to Andes, and it will then be unjustly enriched, in violation of the international principle of unjust enrichment; or OEPC will indeed transmit 40% of the amount received in damages to Andes, and the Tribunal would therefore have compensated Andes through OEPC, in violation of the principles of its limited jurisdiction *ratione personae*. This would be an improper recovery on behalf of an entity not protected by the U.S.-Ecuador BIT.") (emphasis added).

[275] Counter-Memorial, ¶ 104.

principles of international law as regards beneficial ownership and the characteristics of an investment, the GP has submitted claims in respect of assets held on trust on behalf of third parties, and claims compensation for injury to third-party interests. As the GP's claim was brought without regard to such basic requirements of the FTA as well as established principles of international law, the Tribunal should order Claimants to bear all costs incurred in connection with this preliminary phase of the proceeding, including Korea's attorney's fees and expenses.

120. Mason asserts that the objections raised by Korea in its Memorial are "not appropriate for preliminary determination, and should not have been raised in this process, because the Tribunal's examination of the question of damages "risks prejudging the merits of the [GP's] claim without access to the full factual record."[276] To the contrary, whether and to what extent the GP holds Partnership Interest in the alleged investments does not require an inquiry into the "full factual record" and, to the contrary, only requires evidence of the amounts allocated in the Capital Accounts of the GP and the Limited Partner at the relevant times.[277]

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[276] Counter-Memorial, ¶ 106.

[277] As Ms. Reynolds explains, such evidence may be found in the books of the Cayman Fund. Article 9.03 of the Partnership Agreement requires the GP to maintain "full and true of the business and investments of the [Cayman Fund] in which shall be entered fully and accurately each transaction of the [Cayman Fund] books of account." Partnership Agreement (**C-30**), Art. 9.03. *See also* Reynolds, ¶¶ 38(c), 50.

VII. REQUEST FOR RELIEF

121. For all the reasons set forth above, Korea respectfully requests that the Tribunal:

a. Declare that the Tribunal lacks jurisdiction over the GP's claims on the basis that: the GP has not made an investment in accordance with Article 11.28 of the FTA; and/or the GP did not own or control the Samsung Shares, and, accordingly, dismiss all of the claims brought by the GP;

b. In the alternative:

(i) Dismiss the GP's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that: the GP lacks standing to submit claims on behalf of third parties under Article 11.16.1; and/or the GP's claim in respect of such portion is, as a matter of law, not a claim for which an award in favor of the GP may be made under Article 11.20.6; and

(ii) Declare that the GP can claim damages only to the extent of its own Partnership Interest in 2015;

c. Order Claimants to bear in full the costs of this preliminary phase of the arbitration and all of Korea's costs of legal representation and other expenses; and

d. Order any other relief the Tribunal deems appropriate.

Respectfully submitted on 28 June 2019

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