

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

BETWEEN

MASON CAPITAL L.P.
MASON MANAGEMENT LLC

Claimants,

AND

THE REPUBLIC OF KOREA

Respondent.

CLAIMANTS' REJOINDER ON PRELIMINARY OBJECTIONS

September 11, 2019

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TABLE OF DEFINITIONS

Term	Meaning
Contracting Parties	United States and Korea
Domestic Fund	Mason Capital L.P.
ELP Law	Cayman Islands: Exempted Limited Partnership Law (2014 Revision)
General Partner	Mason Management LLC
Investment Manager	Mason Capital Management LLC
FSC	Financial Services Commission, a Korean regulatory agency
FSS	Financial Supervisory Service, a Korean regulatory agency related to the FSC
Korea	The Republic of Korea
KRW	Korean Won
Limited Partner	Mason Capital, Ltd.
LPA	Second Amended and Restated Limited Partnership Agreement between the General Partner and Limited Partner
Mason	The General Partner and the Domestic Fund
Mason Capital	Mason and its related entities
Samsung Shares	Shares of SEC and SC&T
SC&T	Samsung C&T Corporation
SCB Korea	Standard Chartered Bank Korea
SEC	Samsung Electronics Co., Ltd.
Treaty	Free Trade Agreement between the Republic of Korea and the United States of America
UNCTAD	United Nations Conference on Trade and Development
USD	U.S. Dollars

I. INTRODUCTION

1. Pursuant to Procedural Order No. 3, Mason Capital L.P. (the “**Domestic Fund**”) and Mason Management LLC (the “**General Partner**”) (collectively, “**Mason**”) hereby submit their Rejoinder on Preliminary Objections in response to the Memorial on Preliminary Objections, filed by the Republic of Korea (“**Korea**”) on January 25, 2019 (the “**Memorial**”), and the Reply on Preliminary Objections, filed by Korea on June 28, 2019 (the “**Reply**”).¹
2. In addition to the materials filed by Mason with the Counter-Memorial on Preliminary Objections on April 19, 2019 (the “**Counter-Memorial**”), Mason’s Rejoinder on Preliminary Objections is supported by the following:
 - (a) Second Witness Statement of Kenneth Garschina (“**CWS-3**”), co-founder and co-Managing Member of the General Partner, and co-founder and Principal at Mason Capital Management LLC (the “**Investment Manager**”);
 - (b) Second Witness Statement of Derek Satzinger (“**CWS-4**”), Chief Financial Officer of the Investment Manager;
 - (c) Supplementary Expert Report of Rolf Lindsay (“**CER-2**”), partner in the Investment Funds group at Walkers, on the law of the Cayman Islands relevant to the General Partner’s investment; and
 - (d) Legal Opinion of Jae Yeol Kwon (“**CER-3**”), professor and Dean of the Kyung Hee University School of Law, on the law of Korea relating to legal capacity, share ownership, shareholder rights and investment registration.
3. Mason’s exhibits and legal authorities are submitted herewith in accordance with paragraphs 3.3 and 3.6 of Procedural Order No. 1, and Procedural Order No. 3.
4. As with the Counter-Memorial, Mason does not purport to address every last issue, claim and request raised by Korea in its Reply. Any issue, claim and request that has not been addressed shall not be construed as an agreement with Korea, or as a concession as to the merits of its arguments. Mason does not accept Korea’s

¹ All defined terms herein, unless otherwise stated, have the same meaning as defined in the Counter-Memorial, or Mason’s Notice of Arbitration and Statement of Claim, dated September 13, 2018.

characterization of matters in the Reply as “agreed” or “not disputed” except where expressly noted in the present Rejoinder.

5. Mason does not seek to restate its case as set-out in the Counter-Memorial, except as where necessary to respond to matters raised in the Reply. The present Rejoinder should be read in conjunction with the Counter-Memorial.
6. Mason reserves the right to amend, supplement and expand the present Rejoinder on Preliminary Objections, and to submit any further evidence and arguments that it deems appropriate.

II. KOREA HAS FAILED TO ESTABLISH ITS OBJECTIONS TO THE TRIBUNAL’S COMPETENCE

7. As Mason demonstrated in the Counter-Memorial, the Tribunal’s jurisdiction under the Free Trade Agreement between the United States and the Republic of Korea (the “**Treaty**”) is straightforward.
8. Mason Capital, a U.S. hedge fund based in New York, made an investment in Korea by acquiring an equity stake in Samsung, one of Korea’s largest corporate groups.
9. The General Partner, which is incorporated in Delaware, is exclusively responsible for the conduct of Mason Capital and makes all decisions with respect to the business. Accordingly, the General Partner is manifestly a U.S. *investor* under the Treaty. The Samsung Shares, as shares in a Korean enterprise, are the archetypal form of an *investment* under the Treaty. Nothing raised by Korea in its Memorial or Reply displaces those fundamental propositions.
10. As with any other equity investment, Mason’s investment in Samsung was not without risk. In making its investment, Mason assumed the risk that, *inter alia*, Samsung’s next smartphone would not be well received by the market, that Samsung’s semiconductor production mix would not align with demand, and that Samsung would continue to hoard cash reserves and pay limited dividends to shareholders. Mason did not assume the risk, however, that the Korean government would corruptly interfere with and damage Mason’s investment in Samsung in breach of the Treaty. Mason brought the present claim to remedy Korea’s breach.

11. Faced with the prospect of liability for its internationally wrongful acts, Korea has raised a series of formalistic preliminary objections based on the General Partner’s role in Mason’s investment structure. These objections are without merit. To sustain these objections:

- (a) Korea mischaracterizes the General Partner’s investment in Samsung, and the nature of the claim brought by the General Partner pursuant to the Treaty;
- (b) Korea continues to re-write the terms of the Treaty, in particular by retrospectively introducing new limitations on the scope of Korea’s international obligations;
- (c) Korea re-constructs the decisions of other tribunals, constituted to interpret and apply other treaties and other investments, and elevates these reconstructed decisions above the terms of the Treaty and customary international law; and
- (d) Korea now conjures up new features of its own laws, and “recently obtained” evidence relating to Mason’s investment registration. These laws did not prevent Korea from accepting and receiving the benefits of Mason’s investment when the investment was made, nor were they invoked at any time during the period of Mason’s investment. These laws have no impact whatsoever on the viability of Mason’s claim.

12. As discussed in detail below, the General Partner satisfies the Treaty’s jurisdictional requirements. The Tribunal should reject Korea’s objections and permit the General Partner to proceed with the merits of its claim.

III. MASON’S INVESTMENT STRUCTURE DOES NOT DEPRIVE THE GENERAL PARTNER OF THE TREATY’S PROTECTION

13. The Tribunal’s task in determining the preliminary objections raised by Korea is clear. That task starts and ends with the interpretation and application of the terms of the Treaty in accordance with the *Vienna Convention*.² As demonstrated in Mason’s Counter-Memorial, *nothing in the Treaty* deprives the General Partner of protection as

² This appears to be agreed by the Parties – see Respondent’s Reply on Preliminary Objections, dated June 28, 2019 ¶ 65 n. 139 (“**Reply**”).

a result of its decision to structure its investment using an exempted limited partnership, a *sui generis* relationship between the General Partner and the Limited Partner.

14. That relationship does *not*: (a) strip the General Partner of its U.S. nationality; (b) alter the status of the Samsung Shares as assets which are characterized by profit, risk, and the commitment of resources; (c) transform the General Partner's investigation into, decision to acquire, acquisition, ownership, active management, and decision to dispose of the investment—that is, all of the fundamental steps in *making* an investment—into steps taken by the Limited Partner, a passive entity with no control, influence, or involvement in any of these steps; nor (d) diminish the damages the General Partner suffered and continues to suffer as a result of Korea's internationally wrongful acts.
15. To the contrary, the Treaty explicitly contemplates and permits investment structures like that employed by the General Partner. According to the terms of the Treaty, an investment may be owned or controlled, *directly or indirectly*, by an investor.³ The Treaty recognizes the fundamental realities of contemporary cross-border investment, where investors may make investments through a series of corporate and non-corporate structures that are governed by a multitude of municipal laws. This flexibility aligns with the purpose of the Treaty— to liberalize and expand cross-border investment between the Contracting Parties, and to reduce or eliminate barriers to investment.⁴ As the tribunal in *S.D. Myers, Inc. v. Canada* observed:

Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above [investment of an investor of a Party].⁵

³ CLA-23, Free Trade Agreement, Korea and the United States of America ("**Treaty**"), art. 11.28.

⁴ CLA-23, Treaty, Preamble.

⁵ CLA-66, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 229.

16. Article 11.28 of the Treaty produces a series of effects on the scope of the Treaty's protection:
17. *First*, the Treaty permits claims to be brought by direct investors (the first entity in the chain of ownership or control), by intermediate entities in the chain, or by the ultimate parent or ultimate beneficiary of an investment as the last entity in the chain, as long as the claimant qualifies as a U.S. investor.⁶ Accordingly, the General Partner is a proper claimant here, regardless of whether the General Partner is characterized as a direct or indirect investor in the Samsung Shares (under Korean law or Cayman law) or whether the General Partner is the ultimate beneficiary of the investment.⁷
18. *Second*, claims may be made by one, some, or all of the direct investors, intermediate entities, parents, or ultimate beneficiaries. Such claims may involve overlapping interests (including non-equity interests arising from debt, derivatives or other financial products).⁸ This overlap does not limit the scope of the Tribunal's jurisdiction.⁹ As such, the issue before the Tribunal is whether the General Partner qualifies as *an* investor in the Samsung Shares, not *the* investor, or the *only* investor. As the tribunal in *RREEF v. Spain* observed regarding the Energy Charter Treaty:

Nothing in the ECT says there can only be one single investor for each investment. It cannot be the case that there can only be one single "investor" [for] each single "investment". The very concept of an indirect investor and an indirect investment contains within it the concept that there will be a chain of ownership and control that involve more than one entity.¹⁰

⁶ **CLA-50**, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford Univ. Press, 2009), p. 115; **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe, *United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., Oxford Univ. Press, 2013), p. 767, 771.

⁷ Cayman law, returned to in Section VI.A; Korean law, returned to in Section VI.B.

⁸ **CLA-50**, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford Univ. Press, 2009), p. 117; **CLA-84**, Campbell McLachlan QC, Laurence Shore and Matthew Weiniger QC, *International Investment Arbitration: Substantive Principles* (Oxford Univ. Press, 2017), p. 253.

⁹ **CLA-76**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶ 86.

¹⁰ **CLA-67**, *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 142.

Even if the other entity in the structure, the Limited Partner, did have a claim concerning Samsung Shares (under another investment treaty, customary international law, municipal law, or otherwise), which it does not, the existence of that claim would have no impact on the General Partner's entitlement to bring its own claim.

19. *Third*, as Korea agrees,¹¹ the source of the funds used to make the investment is irrelevant. The investor may be capitalized entirely by a parent entity in the chain, or by a third party outside of the chain, that does not have the nationality required by the Treaty, without impugning the investor's nationality or its protected status under the Treaty. Equally, what happens to the fruits of the investment in the chain beyond the investor is also irrelevant.¹² As the tribunal in *Bridgestone Licensing Services, Inc. v. Panama* observed, in applying the US-Panama FTA,¹³

[W]hen considering whether an investment is owned or controlled by a claimant in a chain of companies the corporate veil is withdrawn when looking down the chain from the claimant, but the fact that all the benefits of the investment may ultimately pass up the chain to the parent is ignored.¹⁴

20. Neither the Limited Partner's initial or subsequent provision of funds to the General Partner, nor that the Limited Partner may ultimately share in the fruits of the General Partner's investment in the Samsung Shares, detracts from the General Partner's status as an investor under the Treaty.

¹¹ Reply ¶ 38.

¹² **CLA-28**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017, ¶ 185.

¹³ Of which all relevant provisions are identical to the Treaty.

¹⁴ **CLA-28**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017, ¶ 161.

The Tribunal further noted that "what happens to the fruits of an investment after they have been harvested does not impact on the value of those fruits." See also **CLA-68**, *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, August 12, 2016, ¶ 331 ("With regard to Respondent's alternative submission that only "the ultimate beneficiary of the investment" would be entitled to the Treaty's protection, the Tribunal observes that, as between Claimant and the ultimate beneficiary of the investment, there are indeed three layers of companies (see para. 106 above). However, the Tribunal notes again that the Treaty did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it.").

21. *Fourth*, as the *RREEF* tribunal explained, “[u]nless there is a reason under the relevant municipal law or investment treaty to conclude otherwise, there is no basis under international law to accord [a shell company that has “has little or no activity apart from owning or controlling directly or indirectly assets”] any less entitlement to the protections afforded under an investment treaty than any other commercial entity.”¹⁵ In the present Treaty, the Contracting Parties have expressly created a mechanism to limit the structures that investors may use, while remaining entitled to access the Treaty’s protections. That mechanism, in Article 11.11 of the Treaty, grants the Contracting Parties the right to deny the benefits of the Treaty to direct or indirect U.S. investors that do not have “substantial business activities” in the United States.¹⁶ And in the present case, Korea has not availed itself of that right as against the General Partner. Nor could it, given that the General Partner, headquartered in New York, undertakes substantially all of its business activities in the United States.
22. Given the “great flexibility” afforded by the Treaty, tribunals applying the Treaty may be, in the words of the *Société Générale* tribunal, confronted with complex or unique corporate structures that “have become a normal feature of international business.”¹⁷
23. In the present case, the structure used by the General Partner is neither exceptionally complex, nor especially unique. As an investment structure, as both parties’ experts agree, it is entirely unremarkable.¹⁸ Indeed, approximately USD 1,600 billion in cross-border investment across a multitude of jurisdictions uses a similar structure governed by Cayman law.¹⁹
24. As a matter of law, while an exempted limited partnership is a *sui generis* structure governed by Cayman law, the exempted limited partnership structure borrows heavily

¹⁵ **CLA-67**, *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 145.

¹⁶ **CLA-50**, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford Univ. Press, 2009), p. 116; **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe, *United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., Oxford Univ. Press, 2013), p. 769.

¹⁷ **CLA-77**, *Société Générale in respect of DR Energy Holdings Limited v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, September 19, 2008, ¶ 45.

¹⁸ Lindsay ¶31, **CER-1**; Reynolds ¶ 39, **RER-1**.

¹⁹ **C-69**, *Investments Statistical Digest (2017)*, Cayman Islands Monetary Authority, p. 7.

from other models—in particular, limited partnerships under English law.²⁰ English limited partnerships also lack a separate existence from their constituent partners, and allocate ownership and control between general partners and limited partners in a similar fashion.²¹

25. International investment tribunals have had no difficulty in exercising jurisdiction over the claims of general partners in English limited partnerships:

(a) In *Eiser Infrastructure Limited v. Spain*,²² the respondent raised objections to the tribunal’s jurisdiction under the Energy Charter Treaty, arguing that the general partner of an English limited partnership failed to prove that it had made an investment “in the objective sense” because it had not provided its own funds or incurred any risk.²³ The Tribunal emphatically rejected the objection,²⁴ finding that the general partner’s investment satisfied the alleged characteristics of an investment.

(b) In *RREEF Infrastructure (G.P.) Limited v. Spain*,²⁵ the tribunal likewise considered objections to its jurisdiction on the basis that the general partner was not the limited partnership, nor could it act on the limited partnership’s behalf in the arbitration, and that the investment manager, rather than the General Partner, “controlled” the investment.²⁶ Again, the tribunal rejected these objections, and affirmed jurisdiction over the general partner’s claim.²⁷

²⁰ Lindsay Supp. ¶ 5, CER-2.

²¹ Lindsay Supp. ¶ 5, CER-2.

²² CLA-78, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017.

²³ CLA-78, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 213-215.

²⁴ CLA-78, *Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 221-231.

²⁵ CLA-67, *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶¶ 139, 141.

²⁶ CLA-67, *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶¶ 129-134, 148-150.

²⁷ CLA-67, *RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶¶ 142-147, 156-160.

26. The same logic applies to general partners of Cayman exempted limited partnerships, like the General Partner. Korea’s formalistic objections to the Tribunal’s jurisdiction must be rejected on that basis.
27. Korea’s Reply is premised upon a series of mischaracterizations of Mason’s investment structure.
28. *First*, Korea incorrectly asserts that the General Partner’s claim is brought on behalf of a third party entity, the Cayman “Fund.”²⁸ This assertion is premised on a fundamental misunderstanding of an exempted limited partnership. As both parties’ Cayman law experts agree, the “Fund” has no legal personality, and no separate existence from the General Partner and Limited Partner.²⁹ The “Fund” has no separate capacity to contract, bring claims, or “own” or “control” assets. This, as Mr. Lindsay explains, is a “defining characteristic” of the investment structure.³⁰
29. The “Fund” is a convenient shorthand for the *bundle of assets* owned by the General Partner, and in respect of which the General Partner has fiduciary and contractual obligations to the Limited Partner, pursuant to the LPA and Cayman law.³¹ As such, to refer to the “Fund’s claim” is a misnomer. It the equivalent of referring to shipper’s claim for damage to assets in a container as “the container’s claim,” or a claim for damage to valuables stored in a bank as the “safe deposit box’s claim.”
30. Indeed, the tribunal in *Impreglio v. Pakistan* expressly recognized that entities that lack a separate legal personality, such as the Fund, cannot bring their own claims. The Tribunal observed that “[t]he fact that [the unincorporated joint venture] has no separate legal personality may lead to the conclusion that this cannot be [the joint venture’s] claim in any event.”³²

²⁸ See, for example, Reply ¶¶ 8-9.

²⁹ Lindsay ¶ 15, CER-1; Reynolds ¶ 24, RER-1.

³⁰ Lindsay Supp. ¶ 5, CER-2.

³¹ Lindsay Supp. ¶¶ 17-19, CER-2.

³² CLA-69, *Impreglio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶ 139.

31. Further, as Mr. Lindsay explains, the General Partner does not act in the name of “the Fund”—the General Partner in *its own name*, and in *that capacity* is properly the only claimant concerning matters affecting the Fund.³³
32. *Second*, as an alternative to the “Fund,” Korea claims the “real” investor under the Treaty is the Limited Partner, a Cayman entity.³⁴ Again, this claim rests on a fallacy. The Limited Partner provided capital to the General Partner to add to the *bundle of assets* the General Partner owned and controlled.³⁵ The Limited Partner retained the right to withdraw its funds from the partnership and retained rights in the event of a dissolution. The Limited Partner was otherwise entirely passive and played no role in the General Partner’s investment in Samsung.³⁶
33. *Third*, Korea paints the General Partner as a mere “trustee” that accepts a fee for providing a service. This characterization is divorced from the commercial reality of cross-border investment, and more specifically, the hedge fund industry in which Mason operates. While it is correct to say that the General Partner bears fiduciary obligations in respect of the bundle of assets under its ownership and control,³⁷ the role of a hedge fund and a “professional trustee” in the context of an investment are fundamentally different. A “professional trustee,” like in the *Blue Bank* decision relied upon by Korea, is a tool of the beneficiary. The beneficiary retains decision-making control; the trustee remains passive except to execute the beneficiary’s directions.³⁸ The trustee can be replaced by the beneficiary at the beneficiary’s convenience, including to select a trustee with a more favorable nationality, as in *Blue Bank*.³⁹

³³ Lindsay Supp. ¶ 5, CER-2.

³⁴ See, for example, Reply, ¶¶ 37-38.

³⁵ Second Satzinger ¶¶ 12-15, CWS-4.

³⁶ Lindsay ¶ 19, CER-1.

³⁷ Lindsay ¶ 44(d)(ii), CER-1; Lindsay Supp. ¶30(a), CER-2.

³⁸ RLA-23, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated April 26, 2017, ¶¶ 167, 195-197.

³⁹ RLA-23, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated April 26, 2017, ¶ 188. It is also worth noting that the Tribunal’s decision in *Blue Bank* is currently the subject of pending annulment proceedings.

34. On the other hand, in an exempted limited partnership, the *Limited Partner* is the tool of the General Partner. The Limited Partner is the source of funds upon which the General Partner’s investment business relies to generate for itself “vast personal or institutional fortunes.”⁴⁰ As Mr. Lindsay notes, it is the General Partner that “controls the actions of the Partnership,” including admitting or consenting to the withdrawal of Limited Partners.⁴¹
35. *Finally*, Korea fixates on a particular defined term in the LPA, “Partnership Interest,” as the touchstone for a partner’s beneficial interest in the bundle of assets.⁴² Again, Korea’s reliance on this term reflects a misunderstanding of both the law and the commercial reality of a hedge fund investor.
36. As Mr. Lindsay explains, “Partnership Interest” is “used only in relation to Limited Partners” and is used only concerning the withdrawal or transfer of a Limited Partner, or the admission of an additional General Partner. Nothing that determines the right of the partners to share in the bundle of assets “relies upon or refers to [this] defined term.”⁴³ Indeed, the General Partner’s beneficial interest “associated with any asset is not determined by reference to its Partnership Interest. Instead, the beneficial interest is determined by reference to the increase or decrease in value of each relevant asset.”⁴⁴ Properly understood, Mason’s investment structure results in a straightforward application of the Treaty to Mason’s investment in Samsung. Therefore, Korea’s objections to the jurisdiction of the Tribunal fail.
37. The General Partner clearly satisfies each of the Treaty’s requirements (as well as the requirements Korea improperly attempts to write into the Treaty):
- (a) The General Partner is a U.S. *investor*;
 - (b) The Samsung Shares are a qualifying *investment*;

⁴⁰ Lindsay Supp. ¶ 31, CER-2.

⁴¹ Lindsay Supp. ¶ 24, CER-2; Lindsay ¶ 34, CER-1.

⁴² See for example, Reply ¶ 14; Reynolds ¶ 45, RER-1.

⁴³ Lindsay Supp. ¶ 19, CER-2.

⁴⁴ Lindsay Supp. ¶ 19, CER-2.

- (c) The General Partner *owns and controls* the Samsung Shares; and
- (d) The General Partner *has standing* to bring its claim.

IV. THE GENERAL PARTNER IS A U.S. “INVESTOR” UNDER THE TREATY

38. Article 11.28 of the Treaty defines the personal scope of the Treaty’s protections:

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

39. Korea does not dispute that the General Partner is an enterprise of the United States. Nor does Korea dispute that the expression “attempts to make, is making, or has made” has the purpose of expanding the temporal scope of the Treaty, including to pre-investment “attempts” to make an investment, or that the General Partner and its investment in the Samsung Shares fall within this extended temporal scope.⁴⁵ Accordingly, under a plain reading of Article 11.28, the General Partner is an investor under the Treaty and Korea cannot credibly contest the Tribunal’s jurisdiction *ratione personae* over the General Partner’s claim.
40. Instead, Korea attempts to construct two additional, extra-textual hurdles for investors seeking protection under the Treaty. First, Korea asserts that to meet the definition of an *investor* under the Treaty, a claimant must also demonstrate certain characteristics found in the definition of *investment*. To be clear, as detailed in Section V below, the General Partner’s investment in Samsung clearly meets the Treaty’s definition of investment. The scope of assets that comprise an investment under the Treaty has no bearing whatsoever on the General Partner’s status as an investor.
41. Second, Korea claims that the Treaty only affords protections to investors who make an “active contribution” and engage in an “action of investing.”⁴⁶ However, this

⁴⁵ Reply ¶ 37.

⁴⁶ Reply ¶ 37.

purported requirement finds no foundation in the text of the Treaty. The cases relied upon by Korea are outliers, both in their legal reasoning and core facts.⁴⁷

42. The tribunal in *Standard Chartered Bank v. Tanzania*,⁴⁸ chaired by Professor Park, was the first to espouse the outlier “activity” requirement for indirect investors. In that award, the tribunal undertook a granular grammatical analysis of the treaty to find that the treaty’s protection of an investment “of” an investor and/or “by” an investor, and “made whilst [the treaty] is in force” required that a claimant demonstrate “an active relationship between the investor and the investment.”⁴⁹
43. The tribunal noted a conspicuous absence in the treaty—“the [treaty] nowhere uses the verb “own” or “hold” in connection with an investment by or of an investor.”⁵⁰ That absence led the tribunal to find that “[p]assive ownership of shares in a company not controlled by the claimant where that company in turn owns the investment is not sufficient.”⁵¹ This alone distinguishes the findings of the case, given the present Treaty explicitly permits indirect ownership and/or control in Article 11.28.
44. Furthermore, subsequent tribunals have refused to apply the “activity” concept, or found that investors such as the General Partner have satisfied any such “activity” requirement.⁵² The cases relied upon by Korea are exceptional and should be regarded as outliers. In *Alapli*, Professor Park continued to espouse the necessity of an “active contribution,” on the basis of the dictionary definition of “investor,” and the use of the

⁴⁷ **CLA-84**, Campbell McLachlan QC, Laurence Shore and Matthew Weiniger QC, *International Investment Arbitration: Substantive Principles* (Oxford Univ. Press, 2017), ¶ 6.138.

⁴⁸ **CLA-81**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012.

⁴⁹ **CLA-81**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 230.

⁵⁰ **CLA-81**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 222.

⁵¹ **CLA-81**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 230.

⁵² See **CLA-70**, *Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8, 2017, ¶¶ 306, 310-313; **RLA-16**, *Garanti Koza LLP v. Turkmenistan* Decision on the Objection to Jurisdiction for Lack of Consent dated July 3, 2013, ¶¶ 230-232.

CLA-82, *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, September 8, 2006, ¶¶ 126-135.

word “of,” characterized by Professor Park as “the operative language for determining investor status in both relevant treaties.”⁵³ Notably, Professor Park’s co-arbitrators, Professor Stern and Marc Lalonde, did not adopt the same view.

45. Even a cursory examination of the cases relied upon by Korea highlights their distinct fact patterns:

- (a) In *Alapli*, Professor Park acknowledged that the case had “unique facts.” The case concerned “a Turkish national, backed by an American multinational, [who,] seeing a dispute looming with his own government, established a Dutch entity [the Claimant] which is claiming treaty protection for a proposed combined cycle power plant.”⁵⁴ Professor Park found that the Claimant was not involved in the procurement of the relevant contract, nor had any technological expertise. The Claimant’s bank account was solely used “as a revolving door of sorts,” in which “[b]ack-to-back payments by [...] reimbursed [the First Project Company] for monies sent to Claimant as capital contribution to [...], the Second Project Company.... Claimant thus acquired no dominion over the funds used for the statutory capital. Moreover, pursuant to the JDA, such funds were advanced without recourse... [t]he funds simply passed in transit through Dutch accounts en route from [X] to the Project.”⁵⁵
- (b) In *Quiborax S.A. v. Bolivia*, the tribunal observed that one of the claimants, Allan Fosk, had received one token share in a Bolivian mining company for no consideration.⁵⁶ This transfer occurred to comply with the Bolivian law requirement that the company have at least three shareholders. The tribunal found that it lacked *ratione materiae* jurisdiction over that token share as the share did not involve a contribution.

⁵³ **RLA-44**, *Alapli Elektrik B.V. v. Republic of Turkey* ICSID Case No. ARB/08/13, Excerpts of Award, dated July 16, 2012, ¶ 359.

⁵⁴ **RLA-44**, *Alapli Elektrik B.V. v. Republic of Turkey* ICSID Case No. ARB/08/13, Excerpts of Award, dated July 16, 2012, ¶ 311.

⁵⁵ **RLA-44**, *Alapli Elektrik B.V. v. Republic of Turkey* ICSID Case No. ARB/08/13, Excerpts of Award, dated July 16, 2012, ¶¶ 379-380.

⁵⁶ **RLA-45**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplın* ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶¶ 232-233.

(c) In *Clorox Espana v. Venezuela*, the tribunal found that Clorox Spain had received the entire share capital of Clorox Venezuela (the investment) from two US Clorox companies for no consideration, as part of an (arguably abusive) corporate restructuring. Clorox Spain had no intention of investing in Clorox Venezuela after acquiring the shares. Receipt of those shares occurred “by way of an operation that cannot be deemed as investment.”⁵⁷

46. Here, the General Partner was in no way a passive recipient of the Samsung Shares for no consideration, nor a “revolving door” account. As noted above, it was the General Partner that sourced the funds for the investment, researched the investment, made the decision to acquire the investment, committed hundreds of millions of dollars to acquire its investment, and spent hundreds of hours managing that investment. In other words, the investment in Samsung simply would not have occurred but for the actions of the General Partner. Accordingly, the position of the claimants in Korea’s cases bears no resemblance to the position of the General Partner.

47. Even if such an “activity” requirement did exist, the General Partner not only satisfies the criteria, but is the only Mason entity that does so. The tribunal in *Standard Chartered* posited that to satisfy the requirement, a claimant “must demonstrate that the investment was made at the claimant’s direction . . . or that the claimant controlled the investment in an active and direct manner.”⁵⁸ As has been established here, the *General Partner* not only directed the investment to be made (the Limited Partner had no involvement with or knowledge of the investment), but also actively controlled the Samsung Shares by deciding when to acquire and dispose of the Shares, determining how to exercise voting rights, and engaging with Samsung concerning the General Partner’s investment.⁵⁹

V. THE SAMSUNG SHARES ARE AN “INVESTMENT” UNDER THE TREATY

48. The Samsung Shares readily meet Article 11.28’s broad definition of “investment”:

⁵⁷ **RLA-57**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela* PCA Case No. 2015-30, Award, dated May 20, 2019, ¶¶ 831-832, 834.

⁵⁸ **CLA-81**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, ¶ 230.

⁵⁹ See Garschina, **CWS-1**; Second Garschina, **CWS-3**.

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

49. As discussed in further detail below, the Samsung Shares are certainly assets that the General Partner owned and controlled. Moreover, in addition to being identified expressly as a form of “investment” in the Treaty itself, “shares” and “stock” are the archetypal form of an asset qualifying for investment treating protection:⁶⁰

(a) Shares in an enterprise invariably involve the commitment of capital and other resources in their acquisition and in their active management;⁶¹

(b) Shares in an enterprise likewise entail the expectation of gain or profit for the investor from an appreciation in the value of the shares or through the receipt of dividends; and

(c) Shares in an enterprise involve an assumption of risk—including the risk that the investor’s expectation of gains or profit may not materialize and, indeed, that the commitment originally made may be wasted or rendered entirely worthless.⁶²

50. Contrary to Korea’s assertion, Mason does not argue that the inclusion of “shares” and “stock” in the Treaty’s illustrative list automatically qualifies such assets as investments within the scope of the Treaty. Nevertheless, the express inclusion of “shares” and “stock” in the Treaty must be granted considerable weight. Otherwise, as the tribunal in the *Postová Banka A.S. v Hellenic Republic* case, relied upon by Korea, observed:

⁶⁰ **CLA-48**, Lee M. Caplan and Jeremy K. Sharpe, *United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., Oxford Univ. Press, 2013), p. 767 (“shares, stock, and other forms of equity participation in an enterprise” being a “principal form [] of many investments”).

⁶¹ The “receipt” cases, which are readily distinguishable on their facts as discussed above in Section IV, are the exception that proves the rule.

⁶² **RLA-17**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated October 17, 2013, ¶ 218.

[I]f the interpretation stops by simply indicating that any asset is an investment, the examples will be unnecessary, redundant or useless. Treaties are carefully drafted and negotiated, and the differences in the examples used in the treaties that contain a broad-based definition of assets are not fortuitous. States include categories of investments as examples for some purpose. Otherwise, it would be sufficient to define investment as any kind of assets of any nature without including examples of what may constitute an investment.⁶³

51. In its Reply, Korea makes two unavailing attempts to distort the Treaty’s definition of investment. *First*, Korea improperly applies the Treaty’s definition of qualifying *assets* to the Treaty’s definition of *investor*. *Second*, Korea asserts that the Treaty requires qualifying investments to be held for “a certain duration,” despite that requirement appearing nowhere in the text of the Treaty. Each distortion is addressed in turn.

A. Korea improperly applies the Treaty’s definition of qualifying *assets* to the Treaty’s definition of investor

52. Korea’s attempt to apply the definition of a qualifying asset to the definition of investor disregards the central functions of the definition of investment in Article 11.28. Rather than place additional requirements on potential qualifying investors, the definition’s purpose is to: (i) give flexibility to the Treaty to accommodate both existing and emergent forms of investment over the Treaty’s (indefinite) lifespan by adopting a broad, asset-based approach;⁶⁴ and (ii) delimit assets that have the “characteristics of an investment” and that are protected by the Treaty, from purely commercial transactions, contracts and cross-border sales that are not entitled to the Treaty’s protection.⁶⁵ Korea’s unsupported attempt to twist the definition to exclude the General Partner’s investment in the Samsung Shares runs counter to those principles.

53. In any event, even if the Tribunal were to adopt Korea’s (unsupported) assertion that the *General Partner* must satisfy the characteristics set forth in the Treaty’s definition of *asset*, the General Partner would still easily meet those criteria. As demonstrated in

⁶³ **RLA-51**, *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic* ICSID Case No. ARB/13/8, Award, ¶ 294.

⁶⁴ **CLA-50**, Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford Univ. Press, 2009), p. 114; **CLA-80**, Multilateral Agreement on Investment, Commentary to the Consolidated Text, dated April 22, 1998, p. 6.

⁶⁵ **RLA-10**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009, ¶ 185.

the Counter-Memorial, (i) the General Partner expected to gain or profit from its investment in the Samsung Shares; (ii) the General Partner committed resources to the acquisition and management of the Samsung Shares; and (iii) the General Partner assumed risk in relation to the Samsung Shares. Nothing in Korea's Reply disturbs those conclusions.

1. The General Partner expected to gain or profit from its investment in the Samsung Shares

54. Korea does not (and cannot) dispute that the General Partner had an expectation of gain or profit from its investment in the Samsung Shares. By virtue of the incentive allocation, the General Partner stood to gain from an appreciation in the value of its investment.⁶⁶

55. Korea continues to repeat the logic that each of the characteristics of an investment are interlinked, contending, for example, that a claimant who "has made no contribution . . . incurred no risk of losing such (inexistent) contribution."⁶⁷ However, that logic only serves to highlight the fallacy underling the entirety of Korea's objection. It defies all commercial sense that the General Partner stood to profit from an investment to which it did not make a commitment of resources or assume any risk. Indeed, the General Partner did both, as demonstrated in the Counter-Memorial and below.

2. The Samsung Shares reflected a commitment of capital and other resources

56. Korea disingenuously characterizes the issue of the General Partner's commitment of capital and resources as requiring the Tribunal to determine "whether the purported investor made a 'substantial' or 'meaningful' contribution from one treaty-country to another, '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.'"⁶⁸ First, nowhere does the Treaty require that a "commitment of capital and other resources" needs to be substantial, or meaningful. Second, as demonstrated in the Counter-Memorial, the

⁶⁶ Lindsay, ¶¶ 38-39, CER-1; Lindsay Supp. ¶¶ 17, 31 CER-2.

⁶⁷ Reply ¶ 43.

⁶⁸ Reply ¶ 33.

General Partner *did* make a substantial and meaningful commitment in respect of the Samsung Shares.

57. The General Partner committed the capital under its exclusive control to the acquisition of the Shares. Korea has claimed that the General Partner did not contribute to the funds used to make the acquisition. To the contrary, the funds making up that capital commitment ultimately derived from:
- (a) the Limited Partner’s initial and subsequent contributions of cash to the General Partner; *combined with*
 - (b) the General Partner’s historic contribution of its investment decision-making, management, and expertise to grow the capital available for investment.
58. The Limited Partner’s and General Partner’s contributions are significant. As of the time the General Partner first made its investment in the Samsung Shares, the Limited Partner’s initial and subsequent contributions totaled approximately USD 5.56 billion, and the General Partner’s historic contribution of its investment decision-making, management, and expertise totaled approximately USD 0.96 billion.⁶⁹
59. In addition to the capital contributions listed above, the General Partner contributed to its investment in the Samsung Shares via its active research into and management of its investment in the Samsung Shares;⁷⁰ its establishment of the Fund’s investment structure itself without which the investment in the Samsung Shares could not have been made; and its assumption of significant and material risks via its role as the General Partner.⁷¹
60. As Mr. Garschina, the Managing Member of the General Partner, explains, the Mason team under his supervision “spent hundreds of hours investigating and analyzing

⁶⁹ Second Satzinger ¶¶ 13-14, CWS-4.

⁷⁰ Garschina, CWS-1.

⁷¹ Lindsay ¶ 44(d), CER-1; Lindsay Supp. ¶¶ 25-31, CER-2.

The transfer of goodwill and know-how to an investment *vehicle* alone was sufficient to constitute an investment in CLA-72, *AIYY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award, June 29, 2018.

Samsung Electronics and the Samsung Group.”⁷² This work included reviewing analyst reports from local and international brokers, preparing economic models for the companies and working with other market participants.⁷³

61. While Korea asserts that the various non-capital contributions detailed above were performed “in advance of acquiring the Samsung Shares,” Korea provides no support for its apparent suggestion that pre-investment activity does not constitute a commitment of resources. To the contrary, the Treaty’s temporal scope extends to the pre-investment phase.⁷⁴ Moreover, the vast majority of the General Partner’s research and management occurred *after* the General Partner acquired the Samsung Shares.⁷⁵
62. Korea’s assertion that the General Partner failed to transfer value *to Samsung* likewise finds no support in the text of the Treaty itself. Further, as Mr. Garschina explains, the General Partner, as a significant minority shareholder, established an ongoing dialogue with the Samsung Group.⁷⁶ The Samsung Group, moreover, benefitted from that exchange of ideas by obtaining a better understanding of the views of foreign investors, which aided the Samsung Group in attracting additional capital.
63. In an attempt to diminish the General Partner’s capital investment in the Samsung Shares, Korean contends that the General Partner invested in the Samsung Shares using the capital of a third party, the “Fund.” As explained in Section III above, Korea’s mischaracterization of Mason’s structure ignores both the commercial and legal reality of the relationship between the General Partner and the Limited Partner. There is no “third party” separate from the General Partner and the Limited Partner. Under the structure, the General Partner and the Limited Partner brought their own contribution to the investment in the Samsung Shares—namely, the contributions to the funds available to purchase the Samsung Shares (by both parties), and the active management of the investment once made (by the General Partner).

⁷² Garschina ¶ 14, CWS-1.

⁷³ Garschina ¶ 14, CWS-1.

⁷⁴ CLA-23, Treaty, art. 11.28.

⁷⁵ Second Garschina ¶¶ 9-16, CWS-3.

⁷⁶ Second Garschina ¶¶ 10-12, CWS-3.

64. The cases cited by Korea in its Reply do not hold otherwise. *KT Asia* and *Caratube* are readily distinguishable because in each case an investor who was not protected by the applicable treaty transferred the investment—for no consideration (in the case of *KT Asia*⁷⁷) or for a nominal amount (in the case of *Caratube*⁷⁸)—to an entity that was covered by the treaty. *Blue Bank* presents similar facts. There, a professional trustee, Blue Bank, who was protected by the treaty was substituted for an unprotected trustee.⁷⁹ Blue Bank was not involved with and had no control over the acquisition or disposal of the investment; contributed no capital, expertise or other resources over the life of the trust; held the assets on behalf of a third party legal entity; and had no control over, nor exposure to, the performance of the investment.⁸⁰
65. Not surprisingly, the tribunals in *KT Asia*, *Caratube*, and *Blue Bank* held that the “transferee” parties had not committed resources to the investments and therefore were not protected investors. However, those cases bear no resemblance to the facts at hand. Here, as detailed above, the General Partner contributed millions of dollars of capital to the investment in the Samsung Shares, devoted hundreds of hours to analyzing that investment, met directly with the Samsung Group on multiple occasions, had total control over the management and disposition of the investment in the Samsung Shares, and assumed risk in relation to the investment.

3. The General Partner assumed risk in relation to the Samsung Shares

66. Korea does not dispute that the Samsung Shares carried investment risk sufficient to meet the Treaty’s definition of investment. Instead, Korea asserts that the *General Partner* did not assume any risk associated with the investment. Korea’s argument rest on a series of mischaracterizations. Contrary to Korea’s assertions, the “Fund” *is not* a third party that assumed any risk in connection with the General Partner’s investment

⁷⁷ **RLA-17**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated October 17, 2013, ¶¶ 203-204.

⁷⁸ **RLA-12**, *Caratube International Oil Co. LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated 5 June 2012, ¶ 435.

⁷⁹ **RLA-23**, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated April 26, 2017, ¶ 188.

⁸⁰ **RLA-23**, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated April 26, 2017, ¶¶ 167, 196-197.

in the Samsung Shares; the General Partner has a concrete economic interest in the Samsung Shares; and the General Partner's role in connection with the investment is in no way akin to a disinterested professional trustee. In other words, as detailed by Mr. Lindsay in his report, Korea's "analysis of risk is simply wrong, legally and commercially."⁸¹

67. As demonstrated in the Counter-Memorial,⁸² the General Partner assumed a range of risks arising from its investment in the Samsung Shares—principally, the risk that, despite its commitment of capital and other resources, the Samsung Shares would not appreciate in value. As a result, the General Partner's commitment would have been wasted, and the General Partner would not be entitled to a gain or profit in respect of that investment. As Mr. Lindsay illustrates, with every investment the General Partner makes it also assumes a number of "fiduciary, statutory and third-party risks."⁸³
68. Korea's assertion that the structure of the General Partner's incentive allocation demonstrates that the General Partner is not subject to investment risk is simply wrong as a matter of commercial reality. If the Samsung Shares lose value, the General Partner will receive zero return for that investment notwithstanding its ongoing commitment of significant resources to analyze and manage the investment.
69. Investment losses also expose the General Partner to further risks:
- (a) As illustrated in the schedule to Mr. Lindsay's supplemental expert report, a loss suffered by one investment contaminates all of the other investments made by the General Partner and diminishes (or even potentially eliminates) the General Partner's entitlement to receive an incentive allocation for those other investments. As Mr. Lindsay explains, "the General Partner has lost not only the potential benefit that it might derive in generating any Incentive Allocation from the Samsung Shares, but also that the loss suffered in respect of that asset

⁸¹ Lindsay Supp. ¶ 5, CER-2.

⁸² Counter-Memorial ¶¶ 47-49.

⁸³ Lindsay Supp. ¶ 30, CER-2.

will have an ongoing adverse effect on the ability of the General Partner to generate any Incentive Allocation from other more profitable assets.”⁸⁴

- (b) That “contamination” effect in turn creates the risk of “significant and material financial and reputational damage” to the General Partner.⁸⁵ This damage threatens the General Partner’s ongoing existence as well as the General Partner’s ability to use its capital and investment expertise to make further investments.

70. The indemnification provisions in the LPA do not materially diminish these risks. As Mr. Lindsay explains, the indemnity is set at its lowest possible threshold and puts the General Partner in “an unusually risky position for the general partner of an investment fund to be in.”⁸⁶ Further, “[a]n indemnity is only as good as the assets that support it.”⁸⁷ To the extent that these assets have been depleted, the General Partner remains personally liable for any shortfall.⁸⁸

B. Korea improperly asserts that the Treaty requires qualifying investments to be held for a certain duration

71. Article 11.28 of the Treaty expressly identifies the “relevant characteristics of an investment.” In addition to improperly treating those characteristics as requirements that must be satisfied by the investor rather than the relevant asset, Korea attempts to introduce an additional requirement—that the investment be held for a certain duration—that has no textual foundation in the Treaty.⁸⁹

72. The purported basis for Korea’s attempt to import a duration requirement into the treaty is the “the considerable body of authorities under international investment law that have

⁸⁴ Lindsay Supp. ¶ 30(b), CER-2.

⁸⁵ Lindsay Supp. ¶ 31, CER-2.

⁸⁶ Lindsay Supp. ¶ 27(a), CER-2.

⁸⁷ Lindsay Supp. ¶ 27, CER-2.

⁸⁸ Lindsay ¶ 44(d)(iii), CER-1.

⁸⁹ Importantly, Korea concedes (i) that the “characteristics of an investment” are intended to be illustrative and (ii) that a failure to meet any individual characteristic is not disqualifying. Thus, whether or not the General Partner’s investment in the Samsung Shares satisfies Korea’s extra-textual “duration” requirement does not impact the Tribunal’s analysis. Nevertheless, the General Partner’s investment in the Samsung Shares easily satisfies Korea’s so-called requirement.

considered the question of what constitutes an ‘investment.’”⁹⁰ However, the authorities cited by Korea for that proposition concern the definition of “investment” under Article 25 of the ICSID Convention, and tribunals analyzing non-ICSID treaties, like the Treaty here, have consistently *refused* to apply those principles. Most recently, the tribunal in *Clorox Espana v. Venezuela* observed:

[I]n deciding whether this is tantamount to an investment, the Tribunal wishes to stress that it deems the debate between the Parties as to the applicability of the Salini test to be somewhat sterile. **The Tribunal does not need to refer to arbitral case law developed within the framework of ICSID arbitration and which unfolded with little coherence, in order to interpret the term “investment” in accordance with the Treaty.** The guidelines of the aforementioned Vienna Convention are sufficient in this regard. There is no doubt that, in its ordinary meaning, an investment comprises the use of money or other assets with the expectation of gaining a benefit.⁹¹

73. Accordingly, Korea’s attempt to import a duration requirement finds no support in the applicable case law.
74. Korea next argues that the Tribunal should import a “duration” requirement in order to give full effect to Treaty, pursuant to the *effet utile* principle. That argument falls into the trap noted by Gerald Fitzmaurice, one of the fathers of the *Vienna Convention*. As Fitzmaurice stresses, the *effet utile* principle “is all too frequently misunderstood as denoting that agreements should always be given their *maximum possible* effect, whereas its real object is merely . . . to prevent them failing altogether.”⁹² Korea cannot credibly contend that the Treaty would “fail altogether” absent an extra-textual duration requirement and, consequently, Korea’s reliance on the *effet utile* principle is of no consequence.⁹³ To the contrary, by ignoring the Treaty’s plain language—which

⁹⁰ Reply ¶ 26.

⁹¹ **RLA-57**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, dated May 20, 2019, ¶ 819 (emphasis added). Korea’s authorities to the contrary—*Romak v. Uzbekistan* and *Alps Finance v. Slovak Republic*—were “very fact-specific” cases that have been explicitly disavowed by subsequent tribunals because their logic “remains exceptional in the case law outside the ICSID system.” **CLA-32**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 364.

⁹² **RLA-54**, Tarcisio Gazzini, *INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES*, p. 170 n. 53.

⁹³ Korea’s strained interpretation of the expression “attempts to make, is making, or has made an investment” in the definition of *investor*, discussed in Section IV above, falls into the same trap.

reflects the requirements the parties consciously chose to include and *omit*—Korea seeks to render the Treaty *less* effective. As noted in the Counter-Memorial, the omission of a separate duration requirement is backed by legitimate policy considerations.⁹⁴

75. Importantly, Korea concedes that (i) the “characteristics of an investment” are intended to be illustrative and (ii) a failure to meet any individual characteristic is not disqualifying. Thus, whether or not the General Partner’s investment in the Samsung Shares satisfies Korea’s extra-textual “duration” requirement does not impact the Tribunal’s analysis. Regardless, as demonstrated in the Counter-Memorial, the General Partner more than satisfies Korea’s purported “duration” requirement.
76. As noted by the tribunal in *KT Asia*, Korea’s primary “duration” case, the key consideration in assessing the duration of an investment is the *intended* duration period.⁹⁵ Focusing on intended duration ensures that a respondent state cannot benefit from its own internationally wrongful act by expropriating an investment shortly after it is made. Consequently, Korea cannot credibly argue that the General Partner’s investment in the Samsung Shares was of insufficient duration when it was *Korea’s* intentionally wrongful acts that forced the General Partner to dispose of its investment.
77. As explained by Mr. Garschina and evidenced by Mason’s contemporaneous documents, the General Partner’s investment in the Samsung Shares clearly satisfies any alleged duration requirement. Mason’s investment thesis was that the progressive unwinding of Samsung’s complex corporate structure, combined with Samsung’s apparent efforts to align its corporate governance with global peers, would ultimately unlock the fundamental value of Samsung’s electronics business, the group’s “crown jewel.” To maximize Mason’s return on investment, Mason needed to make the

⁹⁴ Namely, an “objective test and the necessary level of certainty for putative investors”. **CLA-49**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press, 2009) p. 190-191.

⁹⁵ While Korea contends that *KT Asia* stands for the proposition that an investment period of 16 months does not meet Korea’s purported “duration” requirement, the case is clear that the Tribunal based its holding on investment’s *intended* duration of “a period of weeks.” Reply ¶ 51.

investment early in the corporate transition, and attempt to positively influence that process over a period of *years*.⁹⁶

78. In May 2014, when Mason first made its investment in Samsung, Samsung asserted that the transition to corporate governance in line with its global peers would take some “2~3 years,” and the corporate restructuring of the Samsung Group was “unlikely to be a near-term event” given “the amount of tax, money and other logistics involved” and “could take easily 5+ years to come to fruition.”⁹⁷ Samsung’s prediction proved true, as Samsung had still not unwound its circular ownership structure as of 2018.⁹⁸
79. Moreover, the evidentiary record and commercial logic demonstrates that the General Partner intended to hold the Samsung Shares for a considerable duration, as the General Partner’s actions before, during, and after it acquired the Samsung Shares are incompatible with a short-term investment. For example, the General Partner (i) spent months researching the Korean electronics market, including meetings with Samsung, its competitors, and analysts, before making an investment; (ii) applied for Korean investment registration so that it could exchange its investment in Samsung swaps for a direct investment in the Samsung Shares; (iii) sent analysts to Korea to meet with Samsung and industry experts; (iv) established a relationship and held regular meetings with Samsung; and (v) invested in the Samsung Shares a year before the announcement of the SC&T-Cheil merger.⁹⁹
80. Korea’s contention that the General Partner has not explained how it intended to profit from its investment in the Samsung Shares ignores Mr. Garschina’s witness statements. As he explained, Mason has a “value-driven investment business [which] takes a bottom-up view of the fundamental value of the businesses we invest in and identify any catalysts that are likely to improve the value of the investment, especially where the business is undervalued by the market.” In the present case, Mason identified that Samsung was undervalued, and that certain events, including changes to Samsung’s

⁹⁶ Second Garschina ¶ 9, CWS-3.

⁹⁷ Second Garschina ¶¶ 9-10, CWS-3.

⁹⁸ C-70, Timothy W. Martin, *Samsung to Simplify Ownership Structure, Loosening the Lee Family’s Ties*, WALL STREET JOURNAL (April 29, 2018); C-71, Park Ga-young, *Time still on Samsung’s side to improve ownership structure: FTC Chief*, KOREA HERALD (September 2, 2018).

⁹⁹ Reply ¶¶ 34, 59.

corporate governance approach and structure, would unlock that value. After those changes took place—which, again, Samsung cautioned could take more than *five years*—Mason could then sell the Samsung Shares at a profit.

81. Korea’s next argument—that the General Partner’s acquisition of the SC&T shares during a period of price fluctuation suggests that the General Partner intended to profit based on short-term price fluctuations—is likewise belied by Mr. Garschina’s witness statements and the contemporary documentary evidence. At the time of Mason’s investment in SC&T, SC&T was significantly undervalued – so much so that SC&T was valued below the value of the listed securities it owned.¹⁰⁰ As one Mason analyst explained, “if you buy [SC&T] ([KRW 9 trillion]) you are buying SEC for its [market] value [KRW 9 trillion] and getting for free the other listed companies ([KRW 4 trillion]) plus the non listed business and the core business ([KRW 3-4 trillion]).”¹⁰¹
82. Korea’s remaining “evidence” of the General Partner’s supposed “short-term speculative bet” on Samsung is even less convincing. The due diligence report Korea cites expressly states that “[w]hile the fund may be invested in situations that play out over extended periods of time and thus is exposed to market risk, Mason expects to produce returns that are independent of market movements by focusing on hard catalyst driven situations” such as the Samsung corporate restructuring.¹⁰²
83. Setting aside Korea’s attempt to conflate the Treaty’s definitions of “investment” and “investor,” and Korea’s attempt to create a “duration” requirement out of whole cloth, it is telling that Korea does not substantively engage with the actual question before the Tribunal: *Are the Samsung Shares an investment as defined by the Treaty?* As explained above in in the Counter-Memorial, the answer to that question is clearly yes.
84. Korea’s engagement on this question is limited to the bare assertion that “portfolio investments” tend not to have the “characteristics of an investment.” This assertion does not withstand scrutiny:

¹⁰⁰ Second Garschina ¶ 16, CWS-3.

¹⁰¹ Second Garschina ¶ 16, CWS-3.

¹⁰² R-3, Hedge Fund Investment Due Diligence Report, Mason Capital, December 2010, p. 6.

- (a) Korea primarily relies on a UNCTAD “Issues in International Investment Agreements” report. The report, directed to states drafting investment treaties, contemplates that states could narrow the scope of the term “investment” by “[e]xcluding [] portfolio shares by restricting the asset-based approach to [foreign] direct investment only.”¹⁰³ In particular, the report suggest that states could do so by (i) “setting a benchmark, for example, 10% of ordinary shares,” (ii) defining investment to include only “direct investment . . . which give[s] the possibility of exercising an effective influence on [] management,” or (iii) defining investment to expressly exclude portfolio investments.
- (b) The Treaty clearly does not take any of those approaches. To the contrary, the Treaty expressly recognizes forms of investment even further from the anachronistic foreign direct investment model, including “(d) futures, options, and other derivatives” – the precise kinds of investment criticized by the dissenting arbitrator in *Ambient Ufficio*, also cited by Korea.

85. Korea’s objections notwithstanding, commentaries, case law, and treaty practice have long recognized that portfolio investments like the Samsung Shares have the characteristics of an investment.¹⁰⁴

VI. THE GENERAL PARTNER OWNED AND CONTROLLED THE SAMSUNG SHARES UNDER THE TREATY

86. Article 11.28 of the Treaty provides that an investment means “every asset that an investor owns or controls, directly or indirectly.” Korea does not dispute that (i) the General Partner had an ownership interest in the Samsung Shares under Cayman law; (ii) the General Partner had legal control over the Samsung Shares under Cayman law; and (iii) the General Partner had *de facto* control over the Samsung Shares. As each of

¹⁰³ **RLA-43**, UNCTAD, Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II , p. 5.

¹⁰⁴ **CLA-85**, Christoph Schreuer *Investments, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oxford Univ. Press, 2012), ¶36; **CLA-73**, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Award, March 9, 1998; **CLA-80**, Multilateral Agreement on Investment, Commentary to the Consolidated Text, dated April 22, 1998, p.8.

those three elements are independently sufficient to meet the Treaty’s definition of investment, the Tribunal’s jurisdiction over the General Partner is indisputable.¹⁰⁵

87. Nevertheless, Korea lodges two meritless objections to the Tribunal’s jurisdiction. First, relying upon a misinterpretation of the LPA, Korea argues that the General Partner does not have a beneficial interest in Samsung Shares. Second, relying upon a misinterpretation of Korean law, Korea argues that the “Fund” is the direct owner of the Samsung Shares. Each objection is addressed in turn.

A. The General Partner has a beneficial interest in the Samsung Shares.

88. As noted above, Korea no longer disputes the General Partner’s legal ownership of the Samsung Shares under Cayman law. That concession alone is sufficient to establish the Tribunal’s jurisdiction over the General Partner.¹⁰⁶ However, Korea nevertheless continues to argue that the Tribunal lacks jurisdiction over the General Partner because the General Partner has not established that it has a beneficial ownership interest in the Samsung Shares.

89. Korea’s argument is premised entirely on the analysis of the LPA performed by its Cayman law expert, Ms. Reynolds. While both experts agree that the General Partner’s beneficial interest is determined by the terms of the LPA, Ms. Reynolds’ contention that the General Partner’s beneficial interest is determined *by the definition of “Partnership Interest” in the Partnership Agreement* is incorrect. Put simply, Ms. Reynolds “does not consider properly the provisions of the Partnership Agreement or the commercial context of the Partnership.”¹⁰⁷

90. As an initial matter, the plain terms of the LPA make clear that the term “Partnership Interest” is used only in relation to Limited Partners—not the General Partner—and

¹⁰⁵ **CLA-74**, *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Award, November 30, 2009. Faced with the same issue, the Tribunal in *Yukos Universal v. Russian Federation* (Award on Jurisdiction and Admissibility) refused to limit ownership to beneficial owners only and permitted a variety of nominal (but not beneficial) owners of shares to make claims.

¹⁰⁶ Lindsay Supp. ¶ 11, **CER-2**.

¹⁰⁷ Lindsay Supp. ¶ 5, **CER-2**.

addresses issues not relevant here.¹⁰⁸ Indeed, there is no provision of the LPA that determines the partners rights vis-à-vis assets such as the Samsung Shares, “that relies upon or refers to the defined term “Partnership Interest.”¹⁰⁹ In other words, the calculation of the General Partner’s “Partnership Interest” is irrelevant to the issue at hand—whether the General Partner has an indivisible beneficial interest in the Samsung Shares.

91. Instead, the General Partner’s beneficial interest in assets such as the Samsung Shares derives primarily from the LPA’s incentive allocation provisions. Considering these provisions, Mr. Lindsay concludes that “the General Partner’s beneficial interest in the Net Profit or Net Loss associated with any asset is not determined by reference to its Partnership Interest. It is determined by reference to the increase or decrease in value of each relevant asset.” Accordingly, under the terms of the LPA, the General Partner has a beneficial interest associated with each of its investments, including the Samsung Shares.

B. Korean law does not affect the General Partner’s ownership interests or ability to control the Samsung Shares

92. As noted above, Korea does not dispute that, under Cayman law, the General Partner controlled the Samsung Shares. Likewise, Korea does not dispute that the General Partner, regardless of its legal control over the Samsung Shares, had *de facto* control over them. Instead, Korea challenges the General Partner’s ownership and control over the Samsung Shares under Korean law. Based on the report of its Korean law expert, Korea argues the “Fund”—not the General Partner—had direct ownership of the Samsung Shares and was the party entitled to exercise shareholder rights vis-à-vis Samsung. That argument fails for two reasons.
93. *First*, Korea does not dispute that the Treaty protects direct as well as indirect investors. Accordingly, even if Korea were correct that the “Fund” directly owns the Samsung Shares (as demonstrated below, Korea is incorrect on this point), the General Partner nevertheless owns and controls the Samsung Shares for the purposes of the Treaty

¹⁰⁸ Specifically, the withdrawal or transfer of a Limited Partner’s interest, or calculating the consent of Limited Partners to admission of a new General Partner. Lindsay Supp. ¶ 18, CER-2.

¹⁰⁹ Lindsay Supp. ¶ 19, CER-2.

because the General Partner owns and controls *the “Fund”* and, consequently, qualifies as indirect investor entitled to the Treaty’s protections.

94. Indeed, Korea concedes that ownership and control of the “Fund” is governed by the municipal law of the “Fund,”—that is, by Cayman law.¹¹⁰ As demonstrated in detail in the Counter-Memorial, the General Partner owns and controls the “Fund” and its assets, including the Samsung Shares.¹¹¹
95. *Second*, Korean law is clear that the “Fund” lacks legal capacity to own the Samsung Shares. Under Korea’s private international law, or “conflicts of law” statute, the legal capacity of a foreign organization is determined by reference to that organization’s personal foreign law—here, the law of the Cayman Islands—*not* Korean law.¹¹² Both parties’ Cayman law experts agree that, because the “Fund” does not exist as an entity separate from the General Partner and the Limited Partner, the “Fund” has no legal capacity under Cayman law to “own” assets in its own right.¹¹³ Therefore, pursuant to Korea’s conflict of laws statute, the Fund also lacks legal capacity under Korean law.
96. Moreover, a foreign organization lacking legal capacity to have rights—such as the “Fund”—“*cannot* be attributed with share ownership” under Korean law. Instead, “attribution of share ownership lies in some or all of the fund or partnership’s members according to the fund or partnership’s internal legal relations.”¹¹⁴ As explained above in Mr. Lindsay’s report, the LPA and the ELP Law dictates that the General Partner, not the Fund, is the direct owner of the Samsung Shares.¹¹⁵
97. Korea’s reliance on the various Korean financial regulations cited in its Reply is misplaced. As explained by Professor Kwon, those statutes serve to avoid regulatory arbitrage by subjecting certain foreign organizations to Korea’s regulatory regime despite the fact that those foreign organizations lack legal capacity under Korean law.

¹¹⁰ Reply ¶ 56.

¹¹¹ Counter Memorial ¶¶ 25, 28.

¹¹² Kwon ¶¶ 20-21, **CER-3**.

¹¹³ Reynolds ¶¶ 24-27, **RER-1**.

¹¹⁴ Kwon ¶ 38, **CER-3**.

¹¹⁵ Lindsay ¶ 23, **CER-1**.

However, the statutes do not contravene Korea’s conflict of laws statute, do not govern the attribution of share ownership, and do not vest legal capacity under Korean law where it otherwise does not exist.¹¹⁶

98. Korea’s reliance on the shareholder registry for the Samsung Shares is similarly misplaced. As explained by Professor Kwon, “because a shareholders’ registry is merely an internal document prepared by the company itself (which is not even legally required to be prepared or maintained by the company under Korean law), recordation or non-recordation in the shareholders’ registry does not determine share ownership.”¹¹⁷ The same is true for Mason’s registration with Korea’s Financial Services Commission (the “FSC”). The FSC’s “investment registration regime is in place for administrative purposes to supervise compliance with certain investment restrictions placed on foreign investors, and has no bearing on the question of attribution of share ownership.”¹¹⁸

99. In sum, regardless of whether and/or how the Tribunal applies Korean law, the end result is the same: the General Partner qualifies under the Treaty as an investor in the Samsung Shares, thereby obligating the Tribunal to exercise its jurisdiction over the General Partner’s investment.

VII. ARTICLE 11.16 OF THE TREATY DOES NOT PRECLUDE THE GENERAL PARTNER’S CLAIM

100. Korea’s effort to import a vague “standing” requirement into the Treaty suffers from several critical flaws. First and foremost, such a requirement appears nowhere in the text of the Treaty. Second, Korea fails to demonstrate any basis in international investment law for its purported “standing” requirement premised on beneficial ownership. Third, Korea misapplies basic principles of international law in an effort to ignore that the express terms of the Treaty do not require a claimant to satisfy its alleged “standing” requirement. Fourth, even if Korea’s phantom “standing” requirement did exist, the General Partner clears that hurdle with ease.

¹¹⁶ Kwon ¶ 53, CER-3.

¹¹⁷ Kwon ¶ 53, CER-3.

¹¹⁸ Korea’s unavailing argument that Mason’s FSC registration somehow estops the General Partner from establishing ownership of the Samsung Shares is addressed below in Section VIII.

101. *First*, Korea’s attempt to bar the General Partner’s claim for lack of “standing” finds no support in the terms of the Treaty. Korea relies exclusively upon Article 11.16 of the Treaty, which, by its plain terms, does not require a potential claimant to demonstrate “standing” premised on beneficial ownership.
102. As Mason explained in the Counter-Memorial, Article 11.16 clarifies that an investor may make a claim on behalf of “local” enterprises the investor owns or controls for losses suffered directly by those enterprises (often referred to as “derivative” claims). To illustrate, had Korea’s actions caused damage *to Samsung* (and the General Partner owned or controlled Samsung and not just shares in Samsung), the General Partner would be obliged to bring a claim under Article 11.16(2) of the Treaty to remedy that injury.
103. As Korea acknowledges, commentaries, jurisprudence, and the submissions of non-disputing contracting parties have extensively discussed functionally identical derivative claims mechanisms.¹¹⁹ None of those discussions support Korea’s position; rather, they highlight the actual purpose of the Article, as described above.
104. For example, as the United States noted in a recent non-disputing party submission in *Clayton v. Canada*, the United States’ “position on the on the interpretation and functions of [the derivative claims mechanisms in] Articles 1116(1) and 1117(1) is long-standing and consistent,” and makes no mention of Korea’s purported “standing” requirement:

Articles 1116 and 1117 serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 1116. However, where the alleged loss or damage is only to an enterprise that the investor owns or controls, the investor’s injury is only *indirect*, and therefore, the investor must bring a derivative claim under Article 1117.¹²⁰

¹¹⁹ Reply ¶ 71.

¹²⁰ **CLA-75**, *Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States, December 29, 2017, ¶4 (internal citations omitted).

105. *Second*, Korea fails to identify any legal support for its fabricated “standing” principle. The reason is clear: no such principle exists.¹²¹ Instead, Korea cobbles together a set of vaguely related findings—which address different legal issues, interpret the particular terms of different treaties, and concern factual circumstances different from those at hand—and passes them off as a “well-established” and binding legal principle.
106. In reality, the decisions cited by Korea reflect no such principle. Moreover, as detailed in Mason’s Counter-Memorial, each case is distinguishable on its facts and/or on the terms of the applicable treaty.¹²² Korea’s attempts to suggest otherwise in the Reply are to no avail.
107. The source of the alleged principle is a single case, *Occidental v. Ecuador*. But a single case is hardly sufficient to establish “a general principle of international investment law.” Moreover, as detailed in Korea’s Counter-Memorial, the tribunal’s decision in *Occidental* turned on the claimants’ use of an idiosyncratic, temporary contractual arrangement for the purpose of circumventing Ecuadorian law.¹²³ Unlike the claimant in *Occidental*, the General Partner owned and controlled the Samsung Shares and was subject to the risk and reward of its investment. Accordingly, *Occidental* lacks any persuasive value here.
108. In an effort to build a “general principle” from *Occidental*’s already shaky foundation, Korea misconstrues a handful of additional cases. However, even a cursory review of those holdings demonstrates that no such principle exists:
- (a) Korea asserts that the tribunal held that the claimant’s standing in *Impreglio v. Pakistan* was circumscribed by its “limited beneficial interest in the investment,”¹²⁴ despite the fact that the tribunal made no reference to the concept of beneficial ownership whatsoever in its award.

¹²¹ Tellingly, the principle is variously referred to as the “beneficial ownership requirement,” a principle that “a claimant’s economic interest in an investment is the marker of its loss” and that a claimant has no standing to bring the claims of third parties, amongst other articulations. Reply ¶¶ 71-90.

¹²² Counter Memorial ¶¶ 67-75.

¹²³ Counter Memorial ¶ 67.

¹²⁴ Reply ¶ 81.

- (b) Korea asserts that *Blue Bank* stands for the proposition that “claimants do not have standing to bring claims on behalf of third-party beneficial owners.” However, it is apparent from the decision that the tribunal did not reject the Blue Bank’s claim on the basis of a standing defect. Instead, the tribunal found that Blue Bank had no ownership rights (nominal, beneficial or otherwise) in the assets and therefore did not meet the definition of “investment” under the relevant treaty. The tribunal’s decision reflects its interpretation and application of the terms of the treaty at hand, not a general principle applicable regardless of those terms.
- (c) While Korea contends that *Zhinvali v. Georgia* and *PSEG v. Turkey* “illustrate and support” Korea’s purported “standing” principle, Korea concedes in its Reply that the two cases do not even address the issue of beneficial ownership.¹²⁵

109. In addition to the lack of any case law supporting its phantom “standing” principle, Korea fails to meaningfully distinguish the clear contrary authority cited by Mason in the Counter-Memorial. For example, a leading commentator has observed that “other possible contenders [for the requisite relationship between the claimant and its investment] must be excluded. Among them is the suggested requirement of beneficial ownership.”¹²⁶ Similarly, the *Saba Fakes* tribunal held that “[n]either the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.”¹²⁷ That these observations were made at all is compelling evidence that Korea’s purportedly “well-established” general principle of standing does not exist.

110. *Third*, Article 11.28 of the Treaty expressly addresses the relationship between an investor and its investment required to bring a claim—namely, that the investor need only own or control the investment, directly or indirectly. The Contracting Parties

¹²⁵ Reply ¶ 81.

¹²⁶ **CLA-49**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press, 2009), p. 190-191.

¹²⁷ **CLA-40**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 134.

chose not to further qualify that relationship., and the law is clear that the Tribunal must respect that decision. In an effort to convince the Tribunal to ignore Article 11.28, Korea misapplies fundamental principles of international law.

111. Most fundamentally, Korea misconstrues the process by which general or customary international law develops. Decisions of tribunals interpreting other treaties do not “create” international law capable of supervening the parties’ agreement embodied in the Treaty.
112. Additionally, Korea misapplies the *lex specialis* doctrine, positing that “a treaty provision is *lex specialis* vis-à-vis international law only if the provision expressly regulates the same subject matter with more specificity.” The *lex specialis* doctrine operates at a general, subject matter-level. For example, an investment claims regime established by a treaty is *lex specialis* vis-à-vis customary international law rules concerning diplomatic protection.¹²⁸ Korea’s absurd argument—that a “beneficial ownership requirement” should be imported into the Treaty because “beneficial ownership” is not precisely the subject of Article 11.28 (which addresses “ownership”)—turns the *lex specialis* doctrine on its head and finds no support whatsoever in international law.
113. Finally, the General Partner easily satisfies Korea’s purported “standing” requirement. As Mason and Mr. Lindsay have repeatedly explained,¹²⁹ the General Partner is not bringing a claim on behalf of a “third party.” To the contrary, the General Partner is enforcing *its own* rights under the Treaty as a legal and beneficial owner and controller of the Samsung Shares.

VIII. MASON’S INVESTMENT REGISTRATION DOES NOT PRECLUDE ITS CLAIM UNDER THE TREATY

114. Under Korea’s Capital Markets Act, a foreign investor who wishes to acquire shares of a publicly-listed Korean company must first register with Korea’s Financial Services

¹²⁸ **CLA-29**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, May 31, 2016, ¶ 188.

¹²⁹ Lindsay Supp. ¶ 7, **CER-2**.

Commission (“FSC”).¹³⁰ The registration process, which is a “mere formality,” entails completing a short application form and, as Korea’s Foreign Supervisory Service (“FSS”) explains, takes “no more than four hours” from start to finish.¹³¹ However, a foreign investor cannot complete the registration on its own, and instead must enlist a local agent. In the case of the General Partner’s investment in the Samsung Shares, Mason submitted its registration via its broker, Goldman Sachs’s local agent, Standard Chartered Bank Korea (“SCB Korea”).¹³²

115. After receiving initial instructions from Goldman Sachs, a Mason employee completed an initial draft of Mason’s registration application and submitted it to SCB Korea via Goldman Sachs. Notably, in the initial draft, the nationality section is left blank in accordance with the pre-filled template provided by SCB Korea. Additionally, the registration materials included a power of attorney and a tax form, each of which noted Mason Capital Master Fund LP’s U.S. address. After reviewing the initial draft of the registration materials, SCB Korea instructed Mason to revise the form to “state the client’s nationality as Cayman Islands.” Mason did as instructed and shortly thereafter was provided with a Korean registration number.¹³³
116. Korea now argues, for the first time on Reply, that because Mason did as SCB Korea instructed and listed “Cayman Islands” as Mason Capital Master Fund LP’s nationality on the registration form, the General Partner is somehow precluded from proceeding with its claim. This contention finds no support in the law.
117. As Professor Kwon notes, “in case of a foreign collective investment vehicle (i.e., a fund), the investment registration may be made in the name of such fund,” even though the fund does not have separate existence or legal capacity under Cayman (or Korean) law and therefore will not legally own any shares purchased pursuant to the registration.¹³⁴ Accordingly, contrary to Korea’s assertion, Mason did not err when

¹³⁰ Kwon ¶ 50, CER-3.

¹³¹ C-72, *Guide to Investing in Korea*, Financial Supervisory Service, December 2012, p. 21.

¹³² Second Satzinger ¶ 4, CWS-4.

¹³³ Second Satzinger ¶ 8, CWS-4.

¹³⁴ Kwon ¶¶ 51-52, CER-3.

listing “Cayman Islands” as Mason Capital Master Fund LP’s nationality on the registration form.

118. But even if an error did occur, it would be of no legal consequence here because mistakes made in a registration form have “no effect on ownership of shares.”¹³⁵ Even in the extreme case where a party submits a fraudulent registration form, “the FSS may only cancel or suspend the foreign investment registration,” which has no impact on share ownership rights.¹³⁶
119. Neither does the investment registration otherwise preclude the General Partner’s claim here. Mistakes (to the extent a mistake was in fact made) in the process of making an investment deprive an investor of protection under the treaty only in the rare circumstances not present here.¹³⁷ Indeed, in the words of the *Tokios Tokelès* tribunal, to “exclude an investment [from the protection of the treaty] on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.”¹³⁸
120. Likewise, Korea has not demonstrated that Mason’s purported registration “error” estops the General Partner from arguing that it is within the Treaty’s jurisdiction. To invoke estoppel, Korea has the burden to establish each element of the affirmative defense, and even a brief review of the elements reveals that Korea has not done so:
- (a) Korea has not proven that Mason made any false representations whatsoever, let alone misrepresentations that were clear and unambiguous. As explained by Professor Kwon, Mason’s registration application was completed in accordance with the FSS’s guidance.

¹³⁵ Kwon ¶ 55, CER-3.

¹³⁶ Kwon ¶ 55, CER-3.

¹³⁷ Those rare circumstances are (i) where the “investment had been vitiated by an illegality,” or (ii) where the investor “would [not] have received a [correct] certificate if had believed it was necessary and requested it.” CLA-82, *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, September 8, 2006, ¶¶151-152; CLA-83, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, ¶117. Indeed, Korea does not even attempt to demonstrate that any such circumstance applies here.

¹³⁸ CLA-44, *Tokios Tokelès v. Ukraine* ICSID Case No. ARB/02/18, Award, April 29, 2004, ¶ 86.

- (b) Korea has not proven reliance on Mason’s representations. Korea does not even attempt to demonstrate—because it cannot—that Mason would have been denied registration had it identified Mason Capital Master Fund LP as a U.S. entity in its registration application. To the contrary, a foreign investor’s entitlement to registration is not dependent on its nationality, structure or ownership.
- (c) Korea does not attempt to demonstrate that it suffered detriment from Mason’s representations in its registration, or that Mason obtained a benefit from those representations.

121. In sum, Korea’s newfound fixation on Mason’s investment application is little more than a red herring meant to distract the Tribunal from the General Partner’s clear entitlement to proceed with its claim.

IX. KOREA HAS NOT ESTABLISHED ITS OBJECTION TO THE GENERAL PARTNER’S DAMAGES CLAIM

122. Korea invokes Article 11.20.6 of the Treaty, which provides that a respondent may raise an objection that “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.” To prevail on this objection, Korea must establish that in no circumstances an award *may* be made in favor of the General Partner, even assuming the facts asserted by the General Partner to be true. Tribunals considering the same language have explained this standard as requiring objecting parties to prove that the claims are “demonstrably doomed to failure,” and “legally hopeless.”¹³⁹ Korea fails to carry that hefty burden.

123. Korea’s objection rests on the same fundamental mischaracterizations of the General Partner’s claim that permeates both the Memorial and the Reply, including that the General Partner is espousing the claim of a third party, the “Fund.” As demonstrated above, this characterization is misplaced. The General Partner is pursuing its own claim based on *its own* rights under the Treaty as the legal and beneficial owner of the Samsung Shares.

¹³⁹ See Counter-Memorial ¶¶ 95-98.

124. While Korea asserts that the General Partner “suffered no economic loss and cannot claim damages on its own behalf,” Korea does not (and cannot) dispute that the Samsung Shares’ loss in value reduced the General Partner’s entitlement to an incentive allocation (both immediately and in respect of future years in which the Samsung Shares may have appreciated in value), and that the General Partner personally suffered loss as a result. Moreover, the General Partner alleges that the Samsun Shares’ loss in value gave rise to potentially “significant and material financial and reputational damage.”

125. Accordingly, Korea has failed to carry its burden and its objections should be rejected in full.

X. KOREA’S OBJECTIONS ARE WITHOUT MERIT AND SHOULD NOT HAVE BEEN RAISED AT ALL

126. In the Counter-Memorial, Mason observed that Korea’s objections are frivolous in that they are made speculatively, without due care, and without consideration of the relevant factual and legal material. Korea’s Reply reinforces this observation.

127. As such, Mason reiterates its request for an award of its costs in relation to this phase of the proceedings, including attorneys’ fees and expenses, expert witness costs, and the costs of the arbitration and compound interest on all such costs.

XI. REQUEST FOR RELIEF

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

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

(e) ordering such other relief as the Tribunal may deem appropriate;
and proceed to the merits of Mason's claims.

Dated: September 11, 2019



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