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

**MASON CAPITAL L.P.**

**MASON MANAGEMENT LLC**

*Claimants*

**v.**

**THE REPUBLIC OF KOREA**

*Respondent*

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**RESPONDENT'S MEMORIAL ON PRELIMINARY OBJECTIONS**

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25 January 2019

**Ministry of Justice of the  
Republic of Korea**

**Lee & Ko**

**WHITE & CASE<sup>LLP</sup>**

*Counsel for Respondent*

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## I. INTRODUCTION

1. The Republic of Korea (the “**ROK**” or “**Respondent**”) hereby submits its Memorial on Preliminary Objections in accordance with Articles 11.20.6 and 11.20.7 of the Free Trade Agreement between the Republic of Korea and the United States of America (the “**FTA**”).

2. Under Article 11.20.6 of the FTA, the Tribunal “shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made.” Under Article 11.20.7, the Tribunal “shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal’s competence.”<sup>1</sup> Respondent raises two preliminary objections pursuant to these provisions, each of which, if successful, would materially reduce the subsequent phase of the proceedings.

3. The claimants in this arbitration are Mason Management LLC (the General Partner or “**GP**”) and Mason Capital L.P. (together, “**Claimants**”), two entities belonging to the hedge fund Mason Capital Investments. Claimants allege that Respondent violated the FTA in relation to the merger between Samsung C&T Corporation (“**SC&T**”) and Cheil Industries, Inc. (“**Cheil**”) in July 2015; the merger allegedly caused Claimants to suffer damages.<sup>2</sup> Respondent denies Claimants’ allegations as to the violation of the FTA and damages in their entirety.

4. As demonstrated below, the GP’s claims fail at the jurisdictional level, for two reasons.

5. First, the GP held shares in SC&T and Samsung Electronics Co., Ltd. (“**Samsung Electronics**”) only as a nominal owner. The beneficial owner was another Mason entity with Cayman nationality. Under the FTA and international law, the GP is not permitted to bring claims on behalf of a third-party beneficiary. Moreover, the GP does not qualify as an investor under the FTA because it has not made an investment as required under Article 11.28 of the FTA. The GP’s claims thus fail for lack of jurisdiction *ratione personae*.

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<sup>1</sup> Article 11.20.7 of the FTA requires that a request for an expedited procedure be made within 45 days of the date that the Tribunal is constituted. As the Tribunal was constituted on 11 December 2018, the 45-day period ends on 25 January 2019.

<sup>2</sup> See Mason Notice of Arbitration and Statement of Claim dated 13 Sept. 2018, ¶¶ 64-89.

6. Second, independent of the *ratione personae* jurisdictional defect, the GP's damages claim is legally deficient, because the GP did not itself incur the alleged damage. Both the FTA and international law prevent the GP from claiming damages for the benefit of third parties. The GP's damages claim must therefore be dismissed under Article 11.20.6 of the FTA.

7. By application of the plain meaning of Articles 11.20.6 and 11.20.7 of the FTA, the Tribunal must ("shall") "suspend any proceedings on the merits" and decide as a preliminary matter "any objection" that the dispute is not within the tribunal's competence and "any 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. Under this language, there is no need for Respondent to show that, or for the Tribunal to consider whether, resolution of Respondent's preliminary objection in a bifurcated preliminary phase is appropriate as a matter of judicial economy. That said, under the facts as alleged by Claimants, should Respondent's preliminary objections be sustained, the claims of one of the two Claimants would be dismissed completely, reducing thereby the entirety of the claims in this case by approximately 64% in monetary value.<sup>3</sup>

8. Pursuant to Article 11.20.7 of the FTA, the ROK requests that its preliminary objections be decided on an expedited basis and that a hearing be held after the submission of written pleadings. The ROK's proposed procedural calendar is set out in Annex A.

## **II. THE TRIBUNAL LACKS JURISDICTION OVER THE GP**

9. It is a fundamental principle of international law that no State may be brought before an international court or tribunal without the State's consent to jurisdiction.<sup>4</sup> A State's consent is "not to be presumed, but must be established by an express declaration or by actions

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<sup>3</sup> The GP's shares in Samsung C&T Corporation and Samsung Electronics constitute approximately 64% of Claimants' total alleged investments. See Mason Notice of Arbitration and Statement of Claim dated 13 Sept. 2018, ¶ 25.

<sup>4</sup> As observed by Professors Dolzer and Schreuer, "[c]onsent to arbitration by the host state and by the investor is an indispensable requirement for a tribunal's jurisdiction." Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012) (**RLA-11**), at 254. See also *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent dated 3 July 2013 (**RLA-16**), ¶ 21 ("Few propositions are as well established in international law as that 'a State may not be compelled to submit its disputes to arbitration without its consent.'") (*quoting Ambatielos (Greece v. United Kingdom)*, Judgment of May 19, 1953, I.C.J. Reports 1953, at 19).

that demonstrate consent.”<sup>5</sup> Claimants bear the burden of providing affirmative evidence of consent.<sup>6</sup> Facts relevant to a tribunal’s determination on jurisdiction must be proven at the jurisdictional stage, including that the claimant was an “investor” and made an “investment” within the meaning of the relevant treaty.<sup>7</sup>

10. The terms of the ROK’s consent to arbitral jurisdiction are set out in Articles 11.16 and 11.28 of the FTA. As demonstrated below, the GP has failed to prove the facts necessary to establish the Tribunal’s jurisdiction with respect to the GP and its claim for damages.

#### A. The GP Lacks Standing to Bring Claims on Behalf of the Cayman Fund

11. Article 11.16.1 of the FTA allows the GP to “submit to arbitration” a claim “on its own behalf” and on behalf of subsidiaries incorporated in the ROK, but not on behalf of other

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<sup>5</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent dated 3 July 2013 (**RLA-16**), ¶ 21. See also *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award dated 3 April 2014 (**RLA-18**), ¶ 117 (citing ICJ and NAFTA jurisprudence) (“[T]here must be an ‘unequivocal indication’ of a ‘voluntary and indisputable’ acceptance of consent; and . . . a claimant ‘is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.’”).

<sup>6</sup> See *Emmis International Holding, B.V., et al. v. Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014 (**RLA-19**), ¶¶ 171-173 (“The Tribunal must decide this question finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. . . . In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation.”); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award dated 3 April 2014 (**RLA-18**), ¶ 118 (“[T]he burden of establishing jurisdiction, including consent, lies primarily upon the Claimant. Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal’s jurisdiction.”). See also 1976 Arbitration Rules of the United Nations Commission on International Trade Law, Art. 24(1) (“Each party shall have the burden of proving the facts relied on to support his claim or defence.”).

<sup>7</sup> See, e.g., *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction dated 25 July 2012 (**RLA-13**), ¶ 322 (“In the Tribunal’s view, facts relevant only to the Tribunal’s determination on jurisdiction must be proven at the jurisdictional stage.”); *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award dated 26 April 2017 (“**Blue Bank v. Venezuela**”) (**RLA-23**), ¶ 66 (“All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent”) (emphasis added); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award dated 17 September 2009 (**RLA-9**), ¶ 112 (“It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred”).

third parties.<sup>8</sup> This restriction echoes the “general principle of international investment law” that “claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties.”<sup>9</sup>

12. In its Notice of Arbitration and Statement of Claim (“**NOA**”), the GP asserts that it “qualifies for protection under the FTA” because it “legally owned and controlled 1,951,925 common voting shares of SC&T and 52,466 common voting shares of [Samsung Electronics]” (the “**Samsung Shares**”) on 17 July 2015, the date on which SC&T’s shareholders approved the merger with Cheil.<sup>10</sup> But the evidence that the GP has submitted to prove its legal ownership – a “statement of holdings” issued by Goldman Sachs – says that the Samsung Shares “were reflected on [Goldman Sachs’s] book and records for the accounts of . . . Mason Capital Master Fund LP,” an Exempted Limited Partnership under the laws of the Cayman Islands (the “**Cayman Fund**”).<sup>11</sup> Goldman Sachs’s statement of holdings does not establish the GP’s alleged legal ownership of the Samsung Shares; it establishes that the GP lacked legal ownership.

13. The GP further asserts that it “held [the Samsung Shares] on statutory trust for the benefit of [the Cayman Fund].”<sup>12</sup> Even assuming that GP legally owned the Samsung Shares, title to the Shares was thus split between the GP as the legal or nominal owner and the Cayman Fund as the beneficial owner.

14. Where legal title to an investment is split between a beneficial and legal owner, “the dominant position in international law grants standing and relief to the owner of the

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<sup>8</sup> In respect of claims on behalf of subsidiaries, Article 11.16.1(b) of the FTA provides that “the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim . . . .”

<sup>9</sup> *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment dated 2 Nov. 2015 (“**Occidental Annulment**”) (RLA-21), ¶ 262 (emphasis added).

<sup>10</sup> NOA, ¶ 58 (emphasis added).

<sup>11</sup> Goldman Sachs Brokerage Letter, dated 10 September 2018 (C-29) (emphasis added).

<sup>12</sup> NOA, n.77 (emphasis added).

beneficial interest.”<sup>13</sup> Investment tribunals have applied this “uncontroversial” principle to dismiss claims brought by legal or nominal owners on behalf of beneficial owners.<sup>14</sup>

15. The Annulment Committee in *Occidental v. Ecuador*, for example, partially annulled the award because the *Occidental* Tribunal had wrongly assumed jurisdiction over the entirety of the claims brought by Occidental Exploration and Production Company (“**OEPC**”), although OEPC held only a 60% beneficial interest in the disputed investment. OEPC had sold the remaining 40% to a Bermudian corporation, AEC, which in turn had sold it to a Chinese corporation, Andes Petroleum Co. (“**Andes**”).<sup>15</sup> The Annulment Committee found that OEPC had “apparent ownership [over the 40% interest], but in substance act[ed] on behalf and for the benefit of the beneficial owner,” Andes.<sup>16</sup> The Annulment Committee concluded that “only the beneficial owner, AEC/Andes, can claim for interference with its interest, while the nominee, OEPC, lacks standing to claim in the name of the beneficial owner.”<sup>17</sup>

16. In partially annulling the *Occidental* award, the Annulment Committee affirmed the dissenting opinion of Professor Stern in the same case. In her dissenting opinion, Professor

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<sup>13</sup> *Occidental Annulment (RLA-21)*, ¶ 259. See also David J. Bederman, *Beneficial Ownership of International Claims*, 38 INT’L & COMPARATIVE L. Q. 935 (Oct. 1989) (**RLA-2**), at 936 (“International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner. . . . The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law.”) (emphasis added).

<sup>14</sup> *Occidental Annulment (RLA-21)*, ¶ 259. See also *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Prof. Stern dissenting opinion (“**Occidental Dissent**”) (**RLA-15**), ¶¶ 148-149 (“As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest.”); M.M. Whiteman, 8 *Digest of International Law* (1967) (**RLA-1**), at 1261-1263 (“[W]here the legal owner or trustee was a national of the [Contracting State], and the beneficiary or *cestui que trust* was a nonnational, in claims before that Commission, the claims were denied.”).

<sup>15</sup> See *Occidental Annulment (RLA-21)*, ¶¶ 265, 268. The Annulment Committee found that the majority of the *Occidental* Tribunal had made an error of fact in finding that OEPC had not validly transferred 40% of its beneficial interest in the investment to AEC/Andes. See *Occidental Annulment (RLA-21)*, ¶¶ 216-249. The majority of the *Occidental* Tribunal noted that it would have declined jurisdiction over the 40% interest had a transfer been made. See *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012 (**RLA-14**), ¶ 614, n.77.

<sup>16</sup> *Occidental Annulment (RLA-21)*, ¶ 268. See also *Blue Bank v. Venezuela (RLA-23)*, ¶ 167 (“At bottom, the trustee (Blue Bank) simply performs a service to third party interests – ultimately the beneficiary . . . – in exchange for a fee.”).

<sup>17</sup> *Occidental Annulment (RLA-21)*, ¶ 265.

Stern observed that “[a]s far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest.”<sup>18</sup> Professor Stern found that “only the beneficial owner, AEC/Andes, can claim for interference with his interests, OEPC having no standing to claim in the name of the beneficial owner.”<sup>19</sup> Exercising jurisdiction over the entirety of OEPC’s claims would be tantamount to compensating Andes, a Chinese corporation, under the US-Ecuador bilateral investment treaty.<sup>20</sup> Accordingly, OEPC could “only claim, on its own behalf, the value of its reduced investment, and not of the investments made by another, non-American company.”<sup>21</sup>

17. The Tribunal in *Impregilo v. Pakistan* similarly declined jurisdiction over claims brought by Impregilo on behalf of an unincorporated joint venture, GBC, holding that neither GBC nor the joint venture partners were protected investors under the applicable Italy-Pakistan bilateral investment treaty.<sup>22</sup> Impregilo argued that it was entitled to assert claims for the entirety of GBC’s losses given its contractual right and duty to represent and manage GBC in all matters relating to the investments.<sup>23</sup> The Tribunal rejected this argument, noting that the Tribunal “has no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of Impregilo’s joint venture partners” because GBC and the joint venture partners do not qualify as protected investors under the relevant treaty, and “[t]here [was] nothing in the BIT to extend

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<sup>18</sup> *Occidental Dissent* (RLA-15), ¶ 148 (emphasis added).

<sup>19</sup> *Occidental Dissent* (RLA- 15), ¶ 151. See also *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award dated 24 Jan. 2003 (RLA-4), ¶¶ 396-405 (holding that the claimant lacked standing to bring claims on behalf of its shareholders).

<sup>20</sup> *Occidental Dissent* (RLA-15), ¶ 144. See also *Occidental Annulment* (RLA-21), ¶ 264 (“[P]rotected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party, and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To hold the contrary would open the floodgates to an uncontrolled expansion of jurisdiction *ratione personae*, beyond the limits agreed by the States when executing the treaty.”).

<sup>21</sup> *Occidental Dissent* (RLA-15), ¶ 144.

<sup>22</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 (“*Impregilo v. Pakistan*”) (RLA-6), ¶¶ 144-152.

<sup>23</sup> *Impregilo v. Pakistan* (RLA-6), ¶¶ 125, 129.



[Pakistan’s consent to jurisdiction] to claims of nationals of any other state, even if advanced on their behalf by Italian nationals.”<sup>24</sup>

18. The same conclusion applies here, where title to the Samsung Shares was split between the GP as the legal or nominal owner and the Cayman Fund as the beneficial owner. In accordance with Article 11.16.1 of the FTA and the general principles of international law set out above, the GP lacks standing to bring claims on behalf of the Cayman Fund. The GP’s claims thus fail for lack of jurisdiction *ratione personae*.

19. Even were the Tribunal to find that the GP has standing to bring claims on behalf of a third party (which it should not), the GP’s claims would fail because it is not an “investor” within the meaning of the FTA.

#### **B. The GP Does Not Qualify As an Investor Under the FTA**

20. Article 11.28 of the FTA defines an “investor” as “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.”<sup>25</sup> Thus, the GP must establish not only the existence of an investment, but also that it “has made” the investment.<sup>26</sup>

21. The FTA defines an “investment” as “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.”<sup>27</sup> These defining characteristics of an investment have been endorsed

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<sup>24</sup> *Impregilo v. Pakistan (RLA-6)*, ¶¶ 136-139, 144-153. See also *PSEG Global, Inc., and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 Jan. 2007 (**RLA-7**), ¶ 325 (concluding that compensation could not be “awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf . . . of the Claimants”); *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award dated 15 March 2002 (**RLA-3**), ¶¶ 24-26 (holding that a US corporation could claim only its own rights and not that of a Canadian partner under the US-Sri Lanka BIT).

<sup>25</sup> FTA (**CLA-23**), Art. 11.28 (emphasis added).

<sup>26</sup> See, e.g., *Blue Bank v. Venezuela (RLA-23)*, ¶ 164.

<sup>27</sup> FTA (**CLA-23**), Art. 11.28 (emphasis added).

by arbitral tribunals.<sup>28</sup> As observed by the UNCITRAL Tribunal in *Romak v. Uzbekistan*, for example, the term “investment” has an “inherent meaning” which includes “a contribution that extends over a certain period of time and that involves some risk.”<sup>29</sup> Mere ownership of an investment is insufficient to prove that a claimant has “made” an investment.<sup>30</sup>

22. In order to establish a “commitment of capital or other resources” under the FTA,<sup>31</sup> the GP must have made a “contribution of money or assets (that is, a commitment of resources).”<sup>32</sup> The “underlying concept of investment” implies an operation “initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.”<sup>33</sup> In *KT Asia v. Kazakhstan*, the Tribunal declined jurisdiction because it was the claimant’s ultimate beneficial owner, not the claimant itself, who had made the relevant contribution to the investment.<sup>34</sup>

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<sup>28</sup> See, e.g., *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 Aug. 2004 (**RLA-5**), ¶ 53 (“Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development.”); *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award dated 26 Nov. 2009 (“**Romak v. Uzbekistan**”) (**RLA-10**), ¶ 207.

<sup>29</sup> *Romak v. Uzbekistan* (**RLA-10**), ¶ 207 (“The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals (see, supra, ¶¶ 198 -204) which consistently incorporates contribution, duration and risk as hallmarks of an ‘investment.’”) (emphasis in original).

<sup>30</sup> See *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award dated 17 Oct. 2013 (“**KT Asia v. Kazakhstan**”) (**RLA-17**), ¶¶ 188-206 (ruling that ownership of shares is insufficient to establish the existence of an investment); *Caratube International Oil Co. LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated 5 June 2012 (“**Caratube v. Kazakhstan**”) (**RLA-12**), ¶ 455 (“[E]ven if Devincci Hourani acquired formal ownership and nominal control over CIOC, no plausible economic motive was given to explain the negligible purchase price he paid for the shares and any other kind of interest and to explain his investment in CIOC. No evidence was presented of a contribution of any kind or any risk undertaken by Devincci Hourani.”).

<sup>31</sup> FTA (**CLA-23**), Art. 11.28.

<sup>32</sup> *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 170.

<sup>33</sup> *Caratube v. Kazakhstan* (**RLA-12**), ¶ 434 (citing *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction dated 11 Sept. 2009) (emphasis added).

<sup>34</sup> *KT Asia v. Kazakhstan* (**RLA-17**), ¶¶ 192-206. See also *Occidental Dissent* (**RLA-15**), ¶ 138 (“An investment, as is well know[n], requires a contribution: it is uncontested that OEPC [one of the claimants] has contributed only for 60% of the value of the investment, 40% of that value, including both initial capital

23. A contribution that “extends over a certain period of time”<sup>35</sup> requires that an investment be held for a sufficient duration with the intent to establish a long-term presence in the ROK.<sup>36</sup> The Tribunal in *KT Asia v. Kazakhstan*, for example, observed that “16 months . . . is a very short time” for the duration of the claimant’s shareholding and “ha[d] no hesitation to conclude that the Claimant’s alleged investment did not involve the kind of duration envisaged within the meaning of an ‘investment.’”<sup>37</sup>

24. The “assumption of risk” criterion under the FTA<sup>38</sup> requires that the GP incur the risk of loss.<sup>39</sup> The relevant risk is “that which is specific to the investment which did take place, not the lost opportunity to make a different investment or commercial decision.”<sup>40</sup> Contribution and risk are closely related, as “in the absence of any contribution of some economic value it is difficult to identify an investment risk.”<sup>41</sup> This is because a claimant that “ma[kes] no contribution . . . incur[s] no risk of losing such (inexistent) contribution.”<sup>42</sup>

25. Absent a beneficial interest in an investment, “an ‘investment’ will typically not have been made.”<sup>43</sup> As noted by the Tribunal in *Blue Bank v. Venezuela*, where a claimant “acts in its own name” but “in furtherance of certain third party interests,” it “cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss

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expenditures and operational expenditures during the life of the project, having been paid by AEC/Andes [a third party not protected under the applicable treaty]. How would it be possible to grant damages pertaining to rights that no longer belong to OEPC, without disregarding the basic rules that confer jurisdiction on ICSID tribunals?”).

<sup>35</sup> *Romak v. Uzbekistan* (RLA-10), ¶ 207 (emphasis omitted).

<sup>36</sup> See *KT Asia v. Kazakhstan* (RLA-17), ¶¶ 207-216.

<sup>37</sup> *KT Asia v. Kazakhstan* (RLA-17), ¶¶ 214-216. See also *id.*, ¶ 208 (“Cases have held that projects with a minimum duration between two and five years satisfied the duration element.”).

<sup>38</sup> FTA (CLA-23), Art. 11.28.

<sup>39</sup> See, e.g., *KT Asia v. Kazakhstan* (RLA-17), ¶ 219.

<sup>40</sup> *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award dated 30 April 2014 (RLA-20), ¶ 105.

<sup>41</sup> *KT Asia v. Kazakhstan* (RLA-17), ¶ 219.

<sup>42</sup> *KT Asia v. Kazakhstan* (RLA-17), ¶ 219.

<sup>43</sup> H. Wehland, *Blue Bank International v. Venezuela: When are Trust Assets Protected Under International Investment Agreements?*, J. INT’L ARB. (2017) (RLA-22), at 956 (“[B]eneficial ownership may indeed be a requirement for obtaining treaty protection, simply because in the absence of any beneficial interest, an ‘investment’ will typically not have been made.”).

or profit resulting from the investment.”<sup>44</sup> The *Blue Bank* Tribunal found that it lacked *ratione personae* jurisdiction because the claimant had made no contribution to the investment, bore no risk with respect to the investment, and therefore had not “made” the investment.<sup>45</sup>

26. The GP has failed to establish that it “made an investment” within the meaning of the FTA. First, there is no evidence that the GP acquired the Samsung Shares using “its own financial means,”<sup>46</sup> or that the GP made “a contribution of money or assets” to the Samsung Shares.<sup>47</sup> On the contrary, that the GP held the Samsung Shares “on statutory trust for the benefit of” the Cayman Fund – a Cayman entity that is not protected under the FTA – suggests that the Samsung Shares were acquired with the Cayman Fund’s capital. No contribution can exist where the GP “made no injection of fresh capital” but instead “benefit[ed] from a contribution made by . . . [the] ultimate beneficial owner” of the Samsung Shares, *i.e.*, the Cayman Fund.<sup>48</sup>

27. Second, there is no evidence that the GP made a contribution that “extends over a certain period of time.”<sup>49</sup> Contemporaneous press reports indicate that the GP completed the acquisition of the Samsung Shares in late June 2015, shortly after SC&T and Cheil announced their plan to merge, and less than a month before the shareholders of both companies voted to

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<sup>44</sup> *Blue Bank v. Venezuela* (RLA-23), ¶ 163.

<sup>45</sup> *Blue Bank v. Venezuela* (RLA-23), ¶ 172.

<sup>46</sup> *Caratube v. Kazakhstan* (RLA-12), ¶ 434 (citing *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction dated 11 Sept. 2009).

<sup>47</sup> *KT Asia v. Kazakhstan* (RLA-17), ¶ 170. See also FTA (CLA-23), Art. 11.28 (definition of “investment”).

<sup>48</sup> *KT Asia v. Kazakhstan* (RLA-17), ¶¶ 192-206.

<sup>49</sup> *Romak v. Uzbekistan* (RLA-10), ¶ 207 (emphasis omitted); *KT Asia v. Kazakhstan* (RLA-17), ¶ 207, et seq. (“An allocation of resources cannot be deemed an investment unless it is made for a certain duration. The element of duration is inherent in the meaning of an investment.”).

For the avoidance of doubt, Respondent’s position is that the duration issue applies to both Claimants, including Claimant Mason Capital L.P. Respondent reserves the right to raise additional jurisdictional objections based on Mason Capital L.P.’s lack of an “investment” with the requisite characteristics.

approve the merger.<sup>50</sup> The GP “sold practically all of its” Samsung Shares “in the weeks that followed” the merger vote, meaning it held the Samsung Shares for only a few weeks in total.<sup>51</sup>

28. Third, there is no indication that the GP acquired the Samsung Shares at “its own financial risk” or assumed a risk of loss.<sup>52</sup> Given that it apparently made no contribution to the Samsung Shares, the GP could not have incurred any “risk of losing such (inexistent) contribution.”<sup>53</sup> The GP appears to have acted “in furtherance of . . . third party interests,” for the benefit of the Cayman Fund, and accordingly did not assume any risk in the acquisition of the Samsung Shares.<sup>54</sup>

29. In light of the above, the GP has failed to discharge its burden of proving that it “made an investment” that “has the characteristics of an investment” under Article 11.28 of the FTA, including “the commitment of capital or other resources” for a certain duration and “the assumption of risk.”<sup>55</sup> The GP thus does not qualify as an “investor” under Article 11.28 of the FTA, and its claims must be dismissed for lack of *ratione personae* jurisdiction.<sup>56</sup>

### III. THE GP’S DAMAGES CLAIM IS LEGALLY DEFICIENT

30. Even assuming *arguendo* that the Tribunal had jurisdiction *ratione personae* over the GP, the GP’s claim for damages is nevertheless legally deficient and should be dismissed.

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

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<sup>50</sup> See Seoul Economic Daily, *US hedge fund company Mason, purchases 2.2% stake in Samsung C&T* (26 June 2015) (**Exh. R-1**) (noting that SC&T’s shareholder registry list shows that Mason has recently acquired 2.2% stake in the company); NOA, ¶¶ 25-26.

<sup>51</sup> NOA, ¶ 46.

<sup>52</sup> *Caratube v. Kazakhstan* (**RLA-12**), ¶ 434 (citing *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction dated 11 Sept. 2009).

<sup>53</sup> *KT Asia v. Kazakhstan* (**RLA-17**), ¶ 219.

<sup>54</sup> *Blue Bank v. Venezuela* (**RLA-23**), ¶ 163; NOA, n.77.

<sup>55</sup> FTA (**CLA-23**), Art. 11.28.

<sup>56</sup> See *Blue Bank v. Venezuela* (**RLA-23**), ¶ 164. See also *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award dated 17 Sept. 2009 (**RLA-9**), ¶¶ 149, 179 (dismissing the claims in their entirety in part because “the Claimant has not produced any persuasive evidence that . . . it was an investor within the meaning of the [relevant treaty]”).

is not a claim for which an award in favor of the claimant may be made under Article 11.26.”<sup>57</sup> Article 11.16.1 of the FTA provides that a claimant may submit to arbitration a claim “on its own behalf . . . that the claimant has incurred loss or damage by reason of, or arising out of, [a] breach [of the FTA].”<sup>58</sup> The FTA thus requires that the claimant itself incur the alleged loss. The FTA does not allow an investor to bring claims for losses allegedly suffered by third parties, which is consistent with the position under international law, set out in Section II.A above.

32. Damages in international law aim to compensate “the flow of benefits that the Claimants would have been reasonably expected to earn . . . in the state of the world in which the [wrongful act] hypothetically did not occur.”<sup>59</sup> In the absence of a beneficial interest in an investment, there is no damage to be compensated.<sup>60</sup> This is because, as observed by Professor Stern in *Occidental v. Petroleum*, a claimant lacking beneficial ownership “ha[s] no right to the economic benefits [of the investment] . . . in the first place,” and thus cannot have been damaged with respect to that investment.<sup>61</sup>

33. The Tribunal in *Siag v. Egypt* applied this rule to reduce the amount of damages awarded to the claimants, two investors in an Egyptian company, Siag Touristic.<sup>62</sup> The dispute concerned the expropriation of a parcel of land that Siag Touristic had acquired from the Egyptian Ministry of Tourism.<sup>63</sup> The sales contract provided that, in the event of a subsequent transfer of the land, Egypt would be entitled to “50% of the value of land sale in accordance with

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<sup>57</sup> FTA (CLA-23), Art. 11.20.6(c). In deciding an objection under Article 11.20.6, a tribunal shall “assume to be true claimant’s factual allegations” and “may also consider any relevant facts not in dispute.”

<sup>58</sup> FTA (CLA-23), Art. 11.16.1 (emphasis added). Pursuant to Article 11.26, where a tribunal makes a final award against a respondent, the tribunal may award only “(a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”

<sup>59</sup> *Occidental Dissent* (RLA-15), ¶ 162.

<sup>60</sup> See H. Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected Under International Investment Agreements*, 34(6) J. INT’L ARB. (2017) (RLA-22), n.64 (“[I]n the absence of any beneficial interest in an investment, there would be no damage to be compensated. . . . As a consequence, it would appear that, even if the [*Blue Bank*] tribunal had accepted the claimant’s contention that it had made an investment, its claims should still have failed for lack of any damage affecting the claimant.”).

<sup>61</sup> *Occidental Dissent* (RLA-15), ¶ 161.

<sup>62</sup> *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 (“*Siag v. Egypt*”) (RLA-8), ¶¶ 14-19.

<sup>63</sup> *Siag v. Egypt* (RLA-8), ¶ 18.

the prices prevailing in the area at the time of sale.”<sup>64</sup> The *Siag* Tribunal found that the claimants’ beneficial interest in the land was only 50%<sup>65</sup> and, accordingly, reduced the amount of damages claimed by the claimants by half.<sup>66</sup>

34. In this case, the GP claims damages for the alleged loss in value of the Samsung Shares, equal to “at a minimum” the difference between the price at which the GP sold the Samsung Shares and the price reflecting the “intrinsic value” at which the GP “would have sold” the Samsung Shares but for the ROK’s alleged interference.<sup>67</sup> The ROK rejects these allegations (which are made by both Claimants) and will rebut them at the appropriate stage of these proceedings. Even assuming that the Samsung Shares had lost value as a result of the ROK’s conduct, the GP’s damages claim is legally deficient within the meaning of Article 11.20.6 of the FTA, *i.e.*, “as a matter of law, [it is] not a claim for which an award in favor of the claimant may be made.”<sup>68</sup>

35. As explained above, the GP was not the beneficial owner of the Samsung Shares and thus had no right to their economic benefits.<sup>69</sup> Even if the GP “would have sold [the Samsung Shares] at a price reflecting their intrinsic value” but for the ROK’s conduct,<sup>70</sup> any resulting benefit of such a sale would have accrued to the Cayman Fund, not to the GP. Conversely, even were it shown that the GP “sold its shares of both companies at a significantly lower price” due to the ROK’s actions,<sup>71</sup> any resulting loss would have been that of the Cayman Fund, not that of the GP that held the Samsung Shares for the Cayman Fund’s benefit. The benefits that the GP could have reasonably expected to earn “but for” the alleged FTA breaches cannot be the profits from selling the Samsung Shares in which the GP lacked any beneficial

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<sup>64</sup> *Siag v. Egypt (RLA-8)*, ¶ 577.

<sup>65</sup> *Siag v. Egypt (RLA-8)*, ¶ 582 (finding that “in the event of a sale of the Property, the Claimants would have received 50% of the sale value” and that “this [is an] objective measure of the Claimants’ beneficial interest in the Property”).

<sup>66</sup> *Siag v. Egypt (RLA-8)*, ¶ 584.

<sup>67</sup> NOA, ¶¶ 81-82.

<sup>68</sup> FTA (CLA-23), Art. 11.20.6.

<sup>69</sup> NOA, n.77.

<sup>70</sup> NOA, ¶ 81.

<sup>71</sup> NOA, ¶ 81.

interest. An award of damages to the GP for a beneficial interest that it did not possess would unjustly enrich the GP.<sup>72</sup>

36. In brief, given that the GP was not the beneficial owner of the Samsung Shares, the GP's claim for damages is legally deficient and must be dismissed under Article 11.20.6 of the FTA.

#### **IV. REQUEST FOR RELIEF**

37. For all the reasons set forth above, Respondent respectfully requests that the Tribunal:

- a. Declare that the Tribunal lacks jurisdiction over the claims brought by the GP and dismiss all the claims brought by the GP on the basis that:
  - (i) the GP cannot bring claims on behalf of the Cayman Fund under the FTA; and/or
  - (ii) the GP does not qualify as an investor under Article 11.28 of the FTA.
- b. In the alternative, declare that the GP's claim is, as a matter of law, not a claim for which an award in favor of the GP may be made, and dismiss the GP's claims accordingly; and
- c. Order any other relief the Tribunal deems appropriate.

#### **V. RESERVATION OF RIGHTS**

38. The ROK reserves its rights to amend and supplement this Memorial, including to request other relief and raise additional jurisdictional objections to either or both Claimants' claims, as the ROK may consider necessary or appropriate to enforce or defend its rights.

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<sup>72</sup> See, e.g., *Occidental Dissent (RLA-15)*, ¶ 162.



Respectfully submitted on 25 January 2019



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**ANNEX A**

**Proposed Procedural Timetable for Preliminary Objections Phase**

In accordance with Article 11.20.7 of the FTA, Respondent requests that its preliminary objections be decided on an expedited basis and that a hearing be held after the submission of written pleadings. Respondent proposes to extend by 33 days the 180-day time period for a decision on the objections under Article 11.20.7.

<b>Description</b>	<b>By</b>	<b>Days</b>	<b>Dates</b>
Memorial on Preliminary Objections	Respondent		25 January 2019
Counter-Memorial on Preliminary Objections	Claimants	63 days from Memorial on Preliminary Objections	29 March 2019
Reply on Preliminary Objections	Respondent	56 days from Counter-Memorial on Preliminary Objections	24 May 2019
Hearing on Preliminary Objections (2-3 days, subject to Tribunal availability)	All	59 days from Reply on Preliminary Objections	Week of 22 July 2019
Decision on Preliminary Objections	Tribunal	Approximately 33 days from Hearing on Preliminary Objections	26 August 2019