

**IN THE MATTER OF AN ARBITRATION  
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH  
THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE  
UNITED STATES OF AMERICA, DATED 30 JUNE 2007**

– and –

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW, 1976**

**PCA CASE N° 2018-55**

– between –

- 1. MASON CAPITAL L.P. (U.S.A.)**
  - 2. MASON MANAGEMENT LLC (U.S.A.)**
- (“Claimants”)**

– and –

**REPUBLIC OF KOREA**  
**(“Respondent,” and together with Claimants, the “Parties”)**

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**DECISION ON RESPONDENT’S  
PRELIMINARY OBJECTIONS**

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**The Arbitral Tribunal**

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

**Registry**

Permanent Court of Arbitration

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**GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS**

<b>CAFTA</b>	Central American – Dominican Republic Free Trade Agreement
<b>Cayman Fund</b>	Mason Capital Master Fund L.P.
<b>Cheil</b>	Cheil Industries Incorporated
<b>Claimants</b>	Mason Capital L.P. and Mason Management LLC
<b>Capital Markets Act</b>	Korean Financial Investment Services and Capital Markets Act
<b>Counter-Memorial</b>	Claimants' Counter-Memorial on Preliminary Objections dated 19 April 2019
<b>Domestic Fund</b>	Mason Capital L.P.
<b>FTA</b>	The Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007, entered into force on 15 March 2012
<b>General Partner</b>	Mason Management LLC
<b>Investment Manager</b>	Mason Capital Management LLC
<b>Limited Partner</b>	Mason Capital Ltd.
<b>Mason</b>	The Mason group of companies
<b>Memorial</b>	Respondent's Memorial on Preliminary Objections dated 25 January 2019
<b>Notice of Arbitration and Statement of Claim</b>	Notice of Arbitration and Statement of Claim dated 13 September 2018

<b>Partnership Agreement</b>	Second Amended and Restated Limited Partnership Agreement dated 1 January 2013
<b>Partnership Law</b>	Exempted Limited Partnership Law, 2014 of the Cayman Islands
<b>Private International Law Act</b>	Korean Act on Private International Law
<b>PCA</b>	Permanent Court of Arbitration
<b>Respondent</b>	Republic of Korea
<b>Response</b>	Respondent's Response to Notice of Arbitration and Statement of Claim dated 12 October 2018
<b>Reply</b>	Respondent's Reply on Preliminary Objections dated 28 June 2019
<b>Rejoinder</b>	Claimants' Rejoinder on Preliminary Objections dated 11 September 2019
<b>Samsung</b>	Samsung group of companies
<b>Samsung Shares</b>	Shares of Samsung Electronics Co., Ltd and Samsung C&T Corporation
<b>SC&amp;T</b>	Samsung C&T Corporation
<b>SEC</b>	Samsung Electronics, Inc.
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 1976

## I. INTRODUCTION AND PARTIES

1. The claimants in this arbitration are Mason Capital L.P. and Mason Management LLC (collectively referred to as "**Claimants**"), two companies incorporated under the laws of the State of Delaware, the United States of America, with their registered office at 251 Little Falls Drive, Wilmington, DE 19808, U.S.A.
2. Claimants are represented in these proceedings by Ms. Claudia T. Salomon, Ms. Lilia B. Vazova, Mr. Matthew C. Catalano of Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022, U.S.A., Ms. Sophie J. Lamb QC, Mr. Samuel M. Pape, and Mr. Bryce Williams of Latham & Watkins LLP, 99 Bishopsgate, London EC2M 3XF, United Kingdom, Mr. Wonsuk (Steve) Kang of Latham & Watkins LLP, 29F One IFC, 10 Gukjegeumyung-ro Yeongdeungpo-gu, Seoul 07326, Republic of Korea, and Mr. Eun Nyung (Ian) Lee and Mr. John M. Kim of KL Partners, 7th Floor, Tower 8, 7 Jongro 5 gil, Jongro-gu 7, Seoul 03157, Republic of Korea.
3. The respondent is the Republic of Korea ("**Respondent**" or "**Korea**").
4. Respondent is represented in these proceedings by Mr. Paul Friedland, Mr. Sven Volkmer, Mr. Damien Nyer, Ms. Insue Kim of White & Case LLP, 1221 Avenue of the Americas, New York 10020-1095, U.S.A., Mr. Jun Hee Kim, Ms. Sebyul Chun of White & Case LLP, 31F One IFC, 10 Gukjegeumyung-ro, Yeongdeungpo-gu, Seoul 07326, Republic of Korea, Mr. Moon Sung Lee, Mr. Dong Seong Nam, Mr. Robert Wachter, Mr. Kyung Chun Kim, Mr. Sang Hoon Han, Mr. Hee Woong Lee, Ms. Ayong Lim, and Ms. Elizabeth Shin of Lee & Ko, Hanjin Building, 63 Namdaemun-ro, Jung-gu, Seoul 04532, Republic of Korea.
5. A dispute has arisen between Claimants and Respondent concerning Claimants' investment in Samsung C&T Corporation ("**SC&T**") and Samsung Electronics, Inc. ("**SEC**"), two publicly listed Korean companies that form part of the Samsung group of companies ("**Samsung Group**").<sup>1</sup> According to Claimants, Korean government officials improperly and illegally manipulated the SC&T shareholder vote to approve the merger of SC&T with Cheil Industries, Inc. ("**Cheil**") at an undervalue to SC&T shareholders. These actions, Claimants argue, amount to violations of the minimum standard of treatment and national treatment standard under the

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<sup>1</sup> Notice of Arbitration and Statement of Claim, 13 September 2018 (the "**Notice of Arbitration and Statement of Claim**"), ¶ 2.

FTA and caused damages to Claimants.<sup>2</sup> Respondent denies Claimants' allegations as to the violations of the FTA and damages in their entirety.<sup>3</sup>

6. The merits of such allegations are not the subject for today. This decision addresses certain preliminary matters, namely Respondent's application of 25 January 2019 that the Tribunal dismiss certain of Claimants' claims pursuant to Articles 11.20.6 and 11.20.7 of the FTA on the basis that the Tribunal lacks jurisdiction over them or, alternatively, that, as a matter of law, some of Claimants' claims are not claims for which an award in favour of Claimants may be made under Article 11.26 of the FTA.

## II. PROCEDURAL HISTORY

### A. Commencement of the arbitration and constitution of the Tribunal

7. On 7 June 2018, Claimants served upon the Government of the Republic of Korea a Notice of Intent to bring arbitration proceedings against the Republic of Korea pursuant to Article 11.16.2 of the Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007 and entered into force on 15 March 2012 (the "FTA").
8. On 13 September 2018, Claimants filed the Notice of Arbitration and Statement of Claim pursuant to Article 3(1) of the United Nations Commission for International Trade Law Arbitration Rules, 1976 (the "UNCITRAL Rules") and Article 11.16.3 of the FTA.
9. In the Notice of Arbitration and Statement of Claim, Claimants appointed The Rt. Hon. Dame Elizabeth Gloster, a national of the United Kingdom, as the first arbitrator. Dame Elizabeth's contact details are:

**The Rt. Hon. Dame Elizabeth Gloster**

One Essex Court

Temple

London EC4Y 9AR

United Kingdom

10. In its Response to Notice of Arbitration and Statement of Claim dated 12 October 2018, Respondent agreed to the application of the 1976 UNCITRAL Rules and appointed Professor Pierre Mayer, a French national, as the second arbitrator. Professor Mayer's contact details are:

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<sup>2</sup> Notice of Arbitration and Statement of Claim, ¶¶ 3-6, 64, 74, 81.

<sup>3</sup> Memorial on Preliminary Objections, 25 January 2019 (the "Memorial"), ¶ 3.

**Professor Pierre Mayer**

20 Rue des Pyramides  
Paris 75001  
France

11. On 11 December 2018, the Parties, pursuant to Article 11.19.1 of the FTA, appointed Professor Dr. Klaus Sachs, a German national, as the presiding arbitrator. Professor Sachs' contact details are:

**Professor Dr. Klaus Sachs**

CMS Hasche Sigle  
Nymphenburger Straße 12  
80335 Munich  
Germany

12. On 13 December 2018, the Parties agreed to the administration of the proceedings by the Permanent Court of Arbitration (the "PCA"). The PCA accepted to act as registry on 14 December 2018.
13. On 22 December 2018, the PCA, acting on behalf of the Tribunal, circulated drafts of the Terms of Appointment and the Procedural Order No. 1 for the Parties' review and comments.
14. Following an extension request which was granted by the Tribunal, on 1 and 4 February 2019, respectively, the Parties submitted their joint comments on the draft Terms of Appointment and draft Procedural Order 1. In their joint communication of 1 February 2019, the Parties consented to the appointment of Mr. Marcus Weiler as Assistant to the Tribunal.
15. On 19 February 2019, a first procedural meeting was held via telephone conference in which counsel and representatives for both Parties, all members of the Tribunal, the Assistant to the Tribunal, and the PCA participated.
16. On 25 February 2019, having considered the Parties' comments, the Tribunal issued its Terms of Appointment, signed by the President of the Tribunal, which, *inter alia*, fixed Singapore as the place of arbitration (legal seat) pursuant to the Parties' agreement, set out rules concerning the language of the arbitration and translations. A final version of the Terms of Appointment signed by all Parties and each member of the Tribunal was circulated on 11 March 2019.



17. Also on 25 February 2019, having considered the Parties' comments, the Tribunal issued Procedural Order No. 1, which set out the rules of procedure, including the transparency regime applicable to these proceedings.

**B. Process for determination of Respondent's preliminary objections**

18. On 18 and 19 January 2019, the Parties jointly submitted a proposed intermediate timetable to the Tribunal, pursuant to which Respondent was to file its preliminary objections under Articles 11.20.6 and 11.20.7 of the FTA together with a proposed procedural timetable for the preliminary objections phase by 25 January 2019 and the Parties were to revert to the Tribunal with an agreed timetable for the preliminary objections or, in case of disagreement, with separate proposed timetables by 12 February 2019. On 21 January 2019, the Tribunal confirmed that the proposed intermediate timetable was acceptable.
19. Following an extension request which was granted by the Tribunal, on 13 February 2019, the Parties reverted to the Tribunal separately with their observations on the appropriate process for determining Respondent's preliminary objections and the procedural calendar.
20. Having obtained prior leave, on 15 February 2019, Respondent submitted further observations on Claimants' characterization of certain legal authorities cited in Claimants' submission of 13 February 2019.
21. During the first procedural meeting on 19 February 2019, as recorded in the Tribunal's letter dated 26 February 2019, the Parties and the Tribunal agreed on a tentative schedule for the determination of Respondent's preliminary objections in deviation from the time limits set forth in Article 11.20.7 of the FTA. The tentative schedule was subject to the Parties' subsequent agreement or a decision by the Tribunal to this effect.
22. On 28 February and 4 March 2019, Claimants and Respondent, respectively, confirmed their agreement to the timetable set out in the Tribunal's letter of 26 February 2019 and provided further comments on the admissibility of a further separate jurisdictional phase subsequent to the preliminary objections phase.
23. On 5 March 2019, the Tribunal issued its Procedural Order No. 2, which established the procedural calendar for the determination of Respondent's preliminary objections, as agreed by the Parties at the first procedural meeting and confirmed by the Parties' letters of 28 February and 4 March 2019. The Tribunal also reserved its position as to the admissibility of another

separate jurisdictional phase until such time as a request for another jurisdictional phase were made.

**C. Written pleadings**

24. On 25 January 2019, Respondent submitted its Memorial, with supporting evidence and a proposed procedural calendar for the preliminary objections phase.
25. On 19 April 2019, Claimants filed their Counter-Memorial on Preliminary Objections (the “**Counter-Memorial**”), with supporting evidence.
26. On 28 June 2019, Respondent filed its Reply on Preliminary Objections (the “**Reply**”), with supporting evidence.
27. Further to a joint request from the Parties, on 30 August 2019, the Tribunal issued Procedural Order No. 3 in which it adopted a revised procedural calendar.
28. On 6 September 2019, pursuant to the revised procedural calendar, Claimants submitted witness statements and expert reports in anticipation of Claimants' Rejoinder on Preliminary Objections, excluding accompanying documents. On 11 September 2019, Claimants filed their Rejoinder on Preliminary Objections (the “**Rejoinder**”).
29. On 26 September 2019, Respondent sought leave to introduce three new Korean legal authorities (Exhibits R-23, R-24 and R-25) into the record. Upon the Tribunal's invitation to comment, Claimants objected to Respondent's request by letter dated 27 September 2019. On 28 September 2019, the Tribunal admitted the legal authorities onto the record.

**D. Hearing on preliminary objections**

30. On 16 September 2019, each side submitted a final list of fact and expert witnesses it wished to cross-examine at the hearing.
31. On 24 September 2019, a pre-hearing conference call was held in which counsel and representatives for the Parties, all members of the Tribunal, the Assistant to the Tribunal and the PCA participated.
32. The hearing on Respondent's preliminary objections (the “**Hearing on Preliminary Objections**” or the “**Hearing**”) was held at the New York International Arbitration Center, 150

East 42nd Street, New York, NY 10017, U.S.A., from 2 to 4 October 2019. The following persons attended the hearing:

Tribunal:	Professor Dr. Klaus Sachs	Presiding Arbitrator
	The Rt. Hon. Dame Elizabeth Gloster	Arbitrator
	Professor Pierre Mayer	Arbitrator
	Mr. Marcus Weiler	Assistant to the Tribunal
	Dr. Levent Sabanogullari	PCA
Claimants:	Mr. James McGovern	General Counsel and Chief Compliance Officer, Mason Capital
	Ms. Claudia T. Salomon	Counsel, Latham & Watkins
	Ms. Sophie J. Lamb QC	Counsel, Latham & Watkins
	Mr. Michael A. Watsula	Counsel, Latham & Watkins
	Mr. Bryce Williams	Counsel, Latham & Watkins
	Mr. Dong-Seok (Johan) Oh	Counsel, KL Partners
	Mr. John M. Kim	Counsel, KL Partners
	Ms. Jisun Hwang	Counsel, KL Partners
	Mr. Kenneth Garschina	Co-Founder, Mason Capital (Witness)
	Mr. Derek Satzinger	CFO, Mason Capital (Witness)
	Mr. Rolf Lindsay	Partner, Walkers (Expert)
	Professor Jae Yeol Kwon	Dean, Kyung Hee University School of Law (Expert)
	Ms. Wansoo Suh	Interpreter
	Mr. Jon Walton	Legal Assistant, Latham & Watkins
	Ms. Laura Vazquez	Legal Assistant, Latham & Watkins
Respondent:	Mr. Changwan Han	Ministry of Justice
	Mr. Donghwan Shin	Ministry of Justice
	Ms. Sujin Kim	Ministry of Justice
	Mr. Sangjin Park	Ministry of Health and Welfare
	Mr. Kyungsung Yoo	Ministry of Health and Welfare
	Mr. Paul Friedland	Counsel, White & Case
	Mr. Damien Nyer	Counsel, White & Case
	Mr. Sven Volkmer	Counsel, White & Case
	Mr. Surya Gopalan	Counsel, White & Case
	Mr. Sanghoon Han	Counsel, Lee & Ko
	Ms. Ji Hyun Yoon	Counsel, Lee & Ko
	Mr. Richard Jung Yeun Won	Counsel, Lee & Ko

Ms. Rachael Reynolds	Partner, Ogier (Expert)
Professor Hyeok-Joon Rho	Professor, Seoul National University School of Law (Expert)
Mr. Chi-hyun Ahn	Interpreter

33. At the Hearing, the following fact and expert witnesses gave evidence for Claimants and were cross-examined by Respondent's counsel in accordance with the procedure set out in Procedural Order No. 1 and agreed at the pre-hearing conference call: Mr. Kenneth Garschina and Mr. Derek Satzinger of Mason Capital, Mr. Rolf Lindsay of Walkers and Professor Jae Yeol Kwon of Kyung Hee University School of Law.
34. At the Hearing, the following expert witnesses gave evidence for Respondent and were cross-examined by Claimants' counsel in accordance with the procedure set out in Procedural Order No. 1 and agreed at the pre-hearing conference call: Ms. Rachael Reynolds of Ogier and Professor Hyeok-Joon Rho of Seoul National University School of Law.
35. At the Hearing, as recorded in the Tribunal's letter of 8 August 2019, the Tribunal and the Parties agreed that the Parties would not submit any post-hearing briefs unless the Tribunal seeks further clarifications on specific issues from them. The Tribunal decided that it would not need any further clarifications from the Parties.

### III. STATEMENT OF FACTS

#### A. Corporate structure of Claimants and their affiliates

36. Mason Capital Management LLC, a Delaware limited liability company, is an investment management firm that was founded in or about January 2002 (the "**Investment Manager**").<sup>4</sup> All employees of the Mason group of companies ("**Mason**") are employed by the Investment Manager.<sup>5</sup>

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<sup>4</sup> Witness Statement of Kenneth Garschina, 17 April 2019 ("**First WS Garschina**") [CWS-1], ¶ 2; Certificate of Amendment to Certificate of Formation of Amagansett Capital Management LLC, 9 January 2002 [C-2].

<sup>5</sup> Counter-Memorial, ¶ 13; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 177:22-24 [Cross-examination of Mr. Satzinger].

37. According to Claimants, the Investment Manager “actively manages a portfolio of investments with the objective of achieving capital appreciation over time.”<sup>6</sup> Its investments are made through two funds:
- a. Mason Capital L.P., a limited partnership organized under the laws of the State of Delaware, the United States of America (the “**Domestic Fund**”); and
  - b. Mason Capital Master Fund L.P., an exempted limited partnership governed by the Exempted Limited Partnership Law, 2014 of the Cayman Islands (the “**Cayman Fund**”, “**Fund**” or “**Partnership**”).<sup>7</sup>
38. The general partner of the Domestic Fund and the Cayman Fund is Mason Management LLC (the “**General Partner**”), a limited liability company incorporated under the laws of the State of Delaware, the United States of America. The General Partner was founded in or around July 2000 by Messrs. Michael Martino and Kenneth Garschina, two U.S. nationals.<sup>8</sup> The General Partner became the general partner in the Cayman Fund in or around 2009.<sup>9</sup>
39. In addition to the General Partner, the Cayman Fund has a sole limited partner, Mason Capital Ltd. (the “**Limited Partner**”), an exempted company incorporated under the laws of Cayman Islands.<sup>10</sup>
40. The Cayman Fund became operational at the start of 2010.<sup>11</sup>
41. The following summary chart encapsulates the relevant entities of Mason:<sup>12</sup>

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<sup>6</sup> Notice of Arbitration and Statement of Claim, ¶ 7.

<sup>7</sup> Notice of Arbitration and Statement of Claim, ¶ 7.

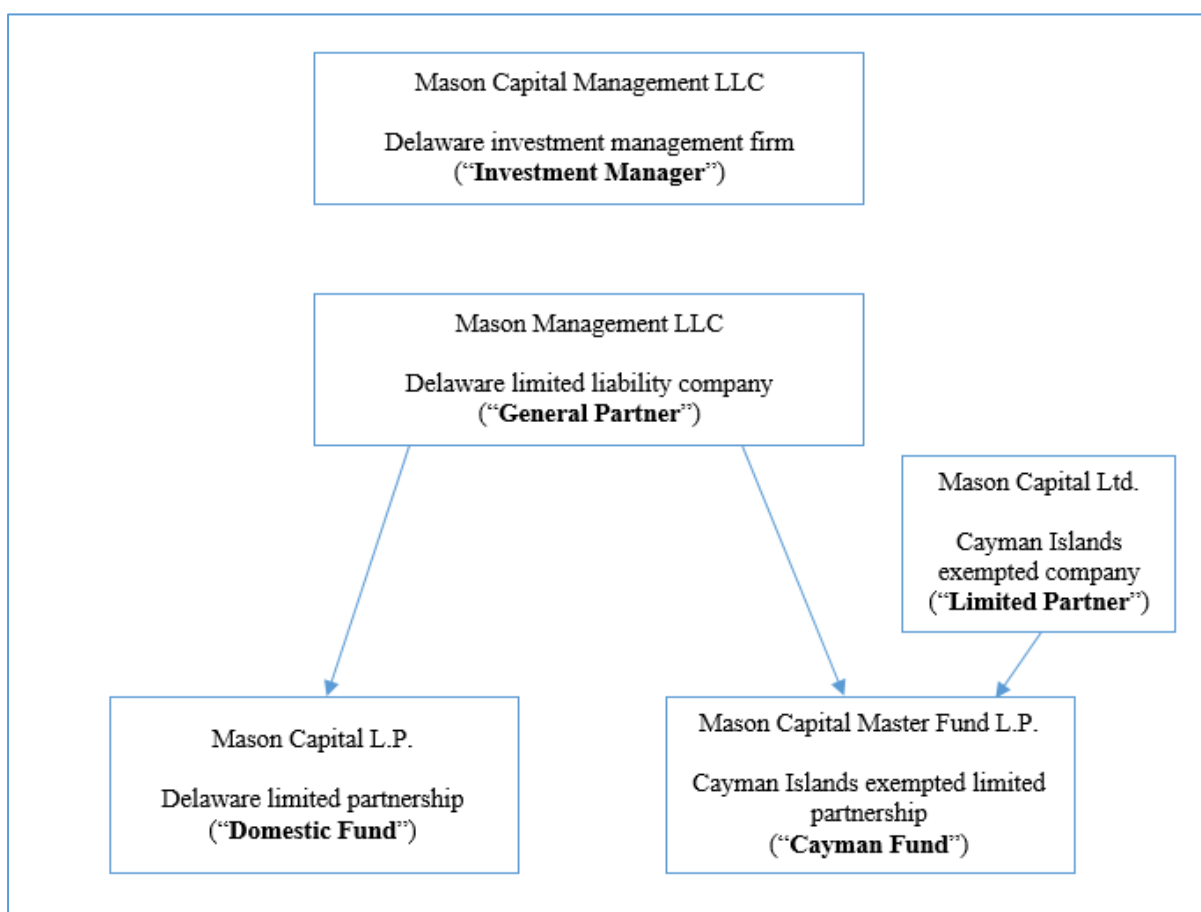
<sup>8</sup> First WS Garschina [CWS-1], ¶ 1; Certificate of Amendment to Certificate of Formation of Reef Management LLC, 26 July 2000 [C-1].

<sup>9</sup> Second Witness Statement of Derek Satzinger, 6 September 2019 (“**Second WS Satzinger**”) [CWS-4], ¶ 12.

<sup>10</sup> First Witness Statement of Derek Satzinger, 18 April 2019 (“**First WS Satzinger**”) [CWS-2], ¶ 10; First WS Garschina [CWS-1], ¶ 7.

<sup>11</sup> Second WS Satzinger [CWS-4], ¶ 12.

<sup>12</sup> Cf. First Expert Report of Rolf Lindsay, 18 April 2019 (“**First ER Lindsay**”) [CER-1], Annex 3.



## B. The Partnership Law and the Partnership Agreement

42. Cayman Islands exempted limited partnerships are governed by the Exempted Limited Partnership Law, 2014 of the Cayman Islands (the "**Partnership Law**").<sup>13</sup> The Parties have made submissions, *inter alia*, on the following provisions of the Partnership Law:

### SECTION 3

#### SAVING OF RULES OF EQUITY AND COMMON LAW

The rules of equity and of common law applicable to partnerships as modified by the Partnership Law but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Law.

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<sup>13</sup> Exempted Limited Partnership Law, 2014 of the Cayman Islands [CLA-22].

**SECTION 4(2)**

**CONSTITUTION**

- (2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in section 20(1) and 34(1), but a general partner, without derogation from his position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.

**SECTION 14**

**MODIFICATION OF GENERAL LAW**

- (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as limited partner.
- (2) All letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership.

**SECTION 16(1), (2)**

**PROPERTY**

- (1) Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.
- (2) Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership.

**SECTION 20(1)**

**LIABILITY OF LIMITED PARTNER**

- (1) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that he participates in the conduct of the business as though he were, for that period, a general partner, but he shall be liable only to a person who transacts business with the exempted limited partnership during the period with actual knowledge of his participation and who then reasonably believed the limited partner to be a general partner.

**SECTION 23**

**DIFFERENCES DECIDED BY GENERAL PARTNER**

Any difference arising as to matters connected with the business of the exempted limited partnership shall be decided by the general partner, and, if more than one, by a majority of the general partners as is provided in the partnership agreement.

**SECTION 33**

**PROCEEDINGS**

- (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
- (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).
- (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.
- (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership.

43. The relationship between the General Partner and the Limited Partner is further governed by the Second Amended and Restated Limited Partnership Agreement dated 1 January 2013 (the "**Partnership Agreement**").<sup>14</sup> The Parties have made submissions, *inter alia*, on the following provisions of the Partnership Agreement:

**ARTICLE 1**

**ORGANIZATION**

- 1.05 Objects and Purposes. The primary purpose of the Partnership shall be to purchase, sell or hold, for investment or speculation, Securities, on margin or otherwise, for the account and risk of the Partnership.

**ARTICLE 2**

**DEFINITION**

- 2.12 "*Partnership Interests*" shall mean a Partner's interest in the Partnership. The Partner's economic interest shall be expressed as a percentage equal to (i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners at any given time. The

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<sup>14</sup> Second Amended and Restated Limited Partnership Agreement, 1 January 2013 [C-30].



General Partner may, in its sole and absolute discretion, offer one or more series or sub-series of Partnership Interests.

### ARTICLE 3

#### THE GENERAL PARTNER

3.01 Management. The management, control and the conduct of the business of the Partnership shall be vested exclusively in the General Partner. The General Partner is the general partner of the Partnership. The Limited Partners shall have no part in the management, control or operation of the Partnership or the conduct of its business and shall have no authority to act on behalf of the Partnership in connection with any matter, except as provided in Sections 10.01 and 12.01.

...

3.02 Authority of General Partner. The General Partner shall have the power by itself on behalf and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership set forth in Section 1.05, and to perform all acts and enter into and perform all contracts and other undertakings which it may deem necessary or advisable or incidental thereto, and to have and possess the same rights and powers as any general partner in a partnership formed under the laws of the Cayman Islands, including, without limitation, to:

...

- (n) commence or defend any litigation or arbitration involving the Partnership or the General Partner in its capacity as General Partner...

3.06 Exculpation. The General Partner (and its members, employees, agents and affiliates) (each, a "Covered Person") shall not be liable to any other Partner or the Partnership for any loss suffered by the Partnership unless such loss is caused by such Covered Person's Gross Negligence, willful misconduct or breach of fiduciary duty. A Covered Person may consult with counsel and accountants in respect of Partnership affairs and, in acting in accordance with the written advice or opinion of such counsel or accountants, such Covered Person shall not be liable for any loss suffered by the Partnership provided that such counsel or accountants shall have been selected with reasonable care and the written advice was not induced by such Covered Person's Gross Negligence or willful misconduct. Covered Persons shall not be liable for errors in judgment or for any acts or omissions that do not constitute Gross Negligence, willful misconduct or breach of fiduciary duty.

3.07 Indemnification.

- (a) A Covered Person shall be indemnified and held harmless by the Partnership from and against any and all losses, liabilities and expenses (collectively, "Losses") arising from claims, demands, investigations, actions, suits or proceedings, whether civil, criminal or administrative (each, a "Proceeding"), in which it (and its members, employees and agents) may be involved, as a party or otherwise, by reason of the management of the affairs of the Partnership, whether or not it continues to be such at the time any such Loss is paid or incurred. A Covered Person shall not be entitled to indemnification hereunder for any conduct arising from its Gross Negligence, willful misconduct, breach of

its fiduciary duty or breach of this Agreement in connection with its management of the Partnership's affairs...

#### ARTICLE 4

##### CAPITAL ACCOUNTS

- 4.01 Capital Contributions. Each Partner shall make an initial Capital Contribution in cash or in kind, with the consent of the General Partner. Limited Partners shall also make an initial Capital Contribution that is attributable to each series or sub-series of shares issued by such Limited Partner for the benefit of the shareholder(s) of such series or sub-series. The initial Capital Contribution by a Limited Partner shall not be less than \$1,000,000 for Partners admitted on or after the effective date of this Amended and Restated Limited Partnership Agreement, except to the extent the General Partner, at its sole discretion, permits an initial Capital Contribution in a lesser amount.
- 4.03 Capital Account. A capital account shall be established for each Partner on the books of the Partnership for the General Partner and for each series or sub-series of shares issued by a Limited Partner (each, a "Capital Account"), and such Capital Account shall be adjusted as provided for herein. ...
- 4.06 Allocation of Net Profits and Net Losses
- (a) Net Profits and Net Losses for a Valuation Period shall be preliminarily allocated among the Capital Accounts in proportion to their respective Opening Capital Balances for such Valuation Period.
  - (b) With respect to each Capital Account of a Limited Partner, as of the end of each Fiscal Year, there shall be allocated to the Capital Account of the General Partner, as its incentive allocation (the "*Incentive Allocation*") 20% of:
    - (i) the Cumulative Net Profits preliminarily allocated to such Capital Account of such Limited Partner pursuant to Section 4.06(a) for such Fiscal Year minus
      - (x) any management fees paid by the Limited Partner on behalf of the shareholders of the series or sub-series corresponding to such Capital Account for such year, and
      - (y) any expenses attributable to such series or sub-series of shares that are incurred by the Limited Partner and are not otherwise reflected in the Capital Account balance,
    - over (ii) the CUNL (as defined below), if any, for such Capital Account as of such Fiscal Year-end.

For the avoidance of doubt, the General Partner will not receive an Incentive Allocation for a Fiscal Year if the calculation in the previous sentence results in a negative number. For the avoidance of further doubt, an Incentive Allocation will be made with respect to a Capital Account for a partial calendar year due to an intra-year contribution, or in the event some or all amounts are voluntarily or mandatorily withdrawn from such Capital Account

as of a date other than the end of a Fiscal Year. The General Partner, in its sole discretion, may reduce, waive or grant rebates with respect to the Incentive Allocations for certain Capital Accounts.

**C. Claimants' alleged investments in SC&T and SEC**

44. In or around February 2014, Claimants began an analysis of whether to invest in the Korean technology sector. According to Claimants, they undertook a thorough analysis of the Samsung Group, spending “hundreds of hours investigating and analyzing” in order to make a decision on an investment.<sup>15</sup> Eventually, they decided to focus on an investment in SEC and (later) SC&T (the “**Samsung Shares**”) which they considered a “promising investment opportunity.”<sup>16</sup>
45. At the end of May 2014, Claimants started purchasing swaps denominated in U.S. dollars.<sup>17</sup>
46. On 23 June 2014, Standard Chartered Bank Korea, acting based on a power of attorney issued by the Cayman Fund,<sup>18</sup> filed an application for investment registration with the Korean Financial Supervisory Service. The application form stated the “Trade Name (of foreign corporation, etc.)” as “MASON CAPITAL MASTER FUND L.P.” (i.e., the Cayman Fund), the applicant's nationality as “Cayman Islands”, the investor category as “Corporation”, the “Acts and relevant provisions providing the grounds for establishment (creation)” as “THE LAW OF CAYMAN ISLANDS” and “[t]he first major shareholder” as “MASON CAPITAL LTD.” (i.e., the Limited Partner) with 100% share of equity.<sup>19</sup>
47. The trading account with Standard Chartered Bank Korea, in which the Samsung Shares belonging to the Cayman Fund were to be held, was opened in the name of the Cayman Fund.<sup>20</sup>

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<sup>15</sup> First WS Garschina [CWS-1], ¶ 14; Second Witness Statement of Kenneth Garschina, 4 September 2019 (“**Second WS Garschina**”) [CWS-3], ¶¶ 11-12, 18.

<sup>16</sup> First WS Garschina [CWS-1], ¶¶ 12, 13.

<sup>17</sup> Mason Trading Records Samsung Electronics, 8 August 2015 [C-31]. The Tribunal notes that Mason's trading records for SEC and SC&T [C-31, C-32] distinguish between trades by Mason Capital LP (i.e., the Domestic Fund) and by Mason Capital Master Fund LP (i.e., the Cayman Fund).

<sup>18</sup> Mason Capital Master Fund L.P. Application for Investment Registration Certificate, 9 June 2014 [C-66], pp. 6-7.

<sup>19</sup> Cayman Fund's Application for Foreign Investment Registration, 23 June 2014 [R-7].

<sup>20</sup> Email from ██████████ to ██████████, 17 July 2014 [C-68]; Goldman Sachs Brokerage Letter, 10 September 2018 [C-29].

48. In early August 2014, Claimants closed out the swaps and began to purchase SEC shares directly.<sup>21</sup> By 16 September 2014, they had acquired 141,650 shares in SEC.<sup>22</sup>
49. On 23 September 2014, Claimants started selling all of their SEC shares so that as of 14 October 2014 they held no shares in SEC.<sup>23</sup>
50. On 30 October 2014, Claimants started buying shares in SEC again, with their position reaching a peak of 247,553 shares on 3 April 2015. On the same day, Claimants began selling some of their shares again and continued doing so until 3 June 2015.<sup>24</sup>
51. In mid-April 2015, Claimants purchased a first instalment of SC&T shares which they sold entirely a few days later.<sup>25</sup>
52. On 26 May 2015, SC&T and Cheil announced plans to merge.<sup>26</sup>
53. In early June 2015, Claimants began to purchase larger quantities of SC&T shares. On 11 June 2015, their stake in SC&T reached a peak of 3,401,878 shares. Thereafter, on 26 June and 13 July 2015, Claimants sold around 10% of their SC&T shares.<sup>27</sup>
54. On 4 June 2015, Claimants increased their holding in SEC by another 58,699 shares. In the following days up until 9 July 2015, Claimants sold 73,479 of their SEC shares.<sup>28</sup>
55. On 17 July 2015, the voting date of the merger, Claimants' total investment in SEC and SC&T consisted of 81,901 SEC shares and 3,046,915 SC&T shares.<sup>29</sup> More specifically, the Domestic Fund held 29,435 SEC shares and 1,094,990 SC&T shares, while Goldman Sachs & Co. LLC's

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<sup>21</sup> Mason trading records Samsung Electronics, 8 August 2015 [C-31].

<sup>22</sup> Mason trading records Samsung Electronics, 8 August 2015 [C-31].

<sup>23</sup> Mason trading records Samsung Electronics, 8 August 2015 [C-31].

<sup>24</sup> Mason trading records Samsung Electronics, 8 August 2015 [C-31].

<sup>25</sup> Mason trading records SC&T, 10 August 2015 [C-32].

<sup>26</sup> *Cheil Industries Announces Merger with Samsung C&T*, Korea Herald, 26 May 2015 [C-5].

<sup>27</sup> Mason Trading Records SC&T, 10 August 2016 [C-32].

<sup>28</sup> Mason Trading Records Samsung Electronics, 8 August 2015 [C-31].

<sup>29</sup> Goldman Sachs Brokerage Letter, 10 September 2018 [C-29]. The Tribunal notes that according to the trading records for SC&T of 10 August 2015 [C-32], Claimants held 3,047,115 shares in SC&T as of 17 July 2015.

statement of holding reflected that the Cayman Fund held 52,466 SEC shares and 1,951,925 SC&T shares.<sup>30</sup>

56. The shareholder registries of SEC and SC&T reflected the Cayman Fund and the Limited Partner as registered shareholders in June 2015.<sup>31</sup>
57. Following the merger vote, Claimants incrementally sold their entire Samsung Shares so that by August 2015 they no longer held any shares in SEC or SC&T.<sup>32</sup> Claimants allegedly incurred losses as a result of this.<sup>33</sup>

**D. Capital contributions and incentive allocation of the General Partner**

58. In accordance with Article 4.03 of the Partnership Agreement, the General Partner established individual capital accounts for both the Limited Partner and for itself that were updated on a monthly basis.<sup>34</sup>
59. Between the beginning of the Cayman Fund's operations in early 2010 and the end of May 2014, the Limited Partner provided net capital contributions of approximately USD 5.56 billion.<sup>35</sup> These capital contributions were credited to the Limited Partner's capital account.<sup>36</sup> The General Partner did not make any cash contributions to its capital account up to May 2014.<sup>37</sup>
60. At the end of May 2014, the Cayman Fund's assets had a value of approximately USD 6.52 billion.<sup>38</sup> The difference of USD 0.96 billion between the amount of the Limited Partner's net capital contributions and the value of the Cayman Fund's assets was, according to Mr. Satzinger,

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<sup>30</sup> Goldman Sachs Brokerage Letter, 10 September 2018 [C-29].

<sup>31</sup> Samsung C&T Corporation Register of Shareholders, 11 June 2015 [R-8]; Samsung Electronics Co., Ltd. Register of Shareholders, 30 June 2015 [R-9].

<sup>32</sup> First WS Garschina [CWS-1], ¶ 20. Again, the Tribunal notes that pursuant to Mason's trading records for SC&T of 10 August 2015 [C-32], Mason retained 200 shares in SC&T on 10 August 2015.

<sup>33</sup> First WS Garschina [CWS-1], ¶ 20.

<sup>34</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 182:8-25 [Cross-examination of Mr. Satzinger].

<sup>35</sup> Second WS Satzinger [CWS-4], ¶ 13.

<sup>36</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 185:16-187:7 [Cross-examination of Mr. Satzinger].

<sup>37</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 192:17-19 [Cross-examination of Mr. Satzinger].

<sup>38</sup> Second WS Satzinger [CWS-4], ¶ 14.

due to the latter's appreciation in value.<sup>39</sup> In Claimants' view, this amount reflects the value of the General Partner's "historic contribution of its investment decision-making, management and expertise".<sup>40</sup>

61. Between the beginning of 2010 and the end of May 2014, the General Partner accumulated incentive allocations of approximately USD 351.86 million in total.<sup>41</sup> The General Partner's incentive allocations, as defined under Article 4.06(b) of the Partnership Law (the "**Incentive Allocation**"), were credited to its capital account,<sup>42</sup> the majority of which the General Partner took out of its capital account every year.<sup>43</sup> Specifically, the General Partner's Incentive Allocation for the year 2013 was substantially withdrawn in January 2014.<sup>44</sup>
62. In 2014, the value of the Cayman Fund's assets depreciated by approximately 12% or USD 720 million.<sup>45</sup> As a result of this, the General Partner did not receive any Incentive Allocation in 2015.<sup>46</sup>
63. In January 2015, the General Partner's capital account contained at most "a couple of hundred thousand dollars".<sup>47</sup>

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<sup>39</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 188:20-189:9 [Cross-examination of Mr. Satzinger].

<sup>40</sup> Rejoinder, ¶ 58, referring to Second WS Satzinger [CWS-4], ¶¶ 13-14; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 190:4-16 [Cross-examination of Mr. Satzinger].

<sup>41</sup> Second WS Satzinger [CWS-4], ¶ 15.

<sup>42</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 192:23-193:4 [Cross-examination of Mr. Satzinger].

<sup>43</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 193:12-194:20 [Cross-examination of Mr. Satzinger].

<sup>44</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 194:1-4 [Cross-examination of Mr. Satzinger].

<sup>45</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 206:19-207:16 [Cross-examination of Mr. Satzinger].

<sup>46</sup> First WS Satzinger [CWS-2], ¶ 15; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 205:4-206:18 [Cross-examination of Mr. Satzinger].

<sup>47</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 210:3-9 [Cross-examination of Mr. Satzinger].

#### IV. SUMMARY OF THE PARTIES' POSITIONS AND REQUESTS FOR RELIEF

##### A. Summary of Respondent's preliminary objections

64. Respondent raises two preliminary objections pursuant to Articles 11.20.6 and 11.20.7 of the FTA,<sup>48</sup> which, according to Respondent, would materially reduce the subsequent phase of the proceedings if they were successful.<sup>49</sup>
65. First, Respondent raises an objection to the Tribunal's competence under Article 11.20.7 of the FTA. It argues that the General Partner's claim fails at the jurisdictional level for two reasons, namely (i) because the General Partner does not qualify as an "investor" since it did not "make" an "investment" within the meaning of Article 11.28 of the FTA and did not own or control the Samsung Shares under Korean law;<sup>50</sup> and (ii) because under the FTA as well as international law, the General Partner lacks standing to bring a claim on behalf of the Cayman Fund and the Limited Partner as third-party beneficiaries.<sup>51</sup>
66. Second, Respondent files an objection under Article 11.20.6 of the FTA submitting that the General Partner's claim is "legally deficient" and, as a matter of law, not a claim for which an award in favour of the General Partner may be made because the General Partner did not incur the alleged damages and cannot claim damages for the benefit of the Cayman Fund.<sup>52</sup>
67. As to Claimants' objection to the appropriateness of the preliminary phase of the proceedings, Respondent submits that the determination of its objections does not require an inquiry into the "full factual record".<sup>53</sup>

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<sup>48</sup> While Respondent's counsel has referred to three preliminary objections in his opening statement at the Hearing on Preliminary Objections (Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 7:7-8), Respondent has only mentioned two preliminary objections in its Memorial, ¶ 2. Depending on whether Respondent's two arguments regarding the Tribunal's jurisdiction to hear the General Partner's claim are counted as separate objections, there are two or three preliminary objections. For the purposes of this Decision, the Tribunal will assume that there is one preliminary objection under Article 11.20.7 of the FTA, consisting of two main arguments, and one preliminary objection under Article 11.20.6 of the FTA.

<sup>49</sup> Memorial, ¶ 2.

<sup>50</sup> Memorial, ¶ 5; Reply, ¶ 54.

<sup>51</sup> Memorial, ¶ 5.

<sup>52</sup> Memorial, ¶¶ 6-7.

<sup>53</sup> Reply, ¶ 120.

**B. Respondent's request for relief**

68. In the Memorial, Respondent 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.<sup>54</sup>

69. In the Reply, Respondent amends its request for relief and now requests that the Tribunal:

- a. Declare that the Tribunal lacks jurisdiction over the GP's claims on the basis that: the GP has not made an investment in accordance with Article 11.28 of the FTA; and/or the GP did not own or control the Samsung Shares, and, accordingly, dismiss all of the claims brought by the GP;
- b. In the alternative:
  - (i) Dismiss the GP's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that: the GP lacks standing to submit claims on behalf of third parties under Article 11.16.1; and/or the GP's claim in respect of such portion is, as a matter of law, not a claim for which an award in favor of the GP may be made under Article 11.20.6; and
  - (ii) Declare that the GP can claim damages only to the extent of its own Partnership Interest in 2015;
- c. Order Claimants to bear in full the costs of this preliminary phase of the arbitration and all of Korea's costs of legal representation and other expenses; and
- d. Order any other relief the Tribunal deems appropriate.<sup>55</sup>

**C. Summary of Claimants' position on Respondent's preliminary objections**

70. Claimants reject Respondent's preliminary objections in their entirety.

71. As to Respondent's first preliminary objection to the Tribunal's jurisdiction, Claimants submit (i) that the General Partner is an "investor" and the Samsung Shares are an "investment" within

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<sup>54</sup> Memorial, ¶ 37.

<sup>55</sup> Reply, ¶ 121.



the meaning of the FTA, and (ii) that there is no standing requirement under the FTA or international law and even if there were, the General Partner would satisfy that requirement.<sup>56</sup>

72. In relation to Respondent's preliminary objection that, as a matter of law, the General Partner's claim is not a claim for which an award in its favour may be made, Claimants submit that Respondent has not come close to discharging its burden of proof that that an award of damages in favour of the General Partner is demonstrably doomed to fail. Claimants contend that Respondent's "legal deficiency" objection is premised on a misunderstanding of the role of the General Partner and its proprietary rights regarding the Samsung Shares.<sup>57</sup>
73. Furthermore, Claimants maintain their objection, raised in their letter of 13 February 2019, that the objections raised by Respondent in its Memorial are not appropriate for preliminary determination and should not have been raised in this process.<sup>58</sup>

#### **D. Claimants' request for relief**

74. In the Counter-Memorial, Claimants request 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.<sup>59</sup>

75. In the Rejoinder, Claimants request 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;

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<sup>56</sup> Counter-Memorial, ¶¶ 9, 61.

<sup>57</sup> Counter-Memorial, ¶¶ 9, 93-94.

<sup>58</sup> Counter-Memorial, ¶¶ 106-107; Rejoinder, ¶¶ 126-127.

<sup>59</sup> Counter-Memorial, ¶ 108.

- 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.<sup>60</sup>

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<sup>60</sup> Rejoinder, ¶ 128.

## V. KEY LEGAL PROVISIONS

76. The Free Trade Agreement between the Republic of Korea and the United States of America was signed on 30 June 2007, entered into force on 15 March 2012.<sup>61</sup>
77. Articles 11.20.6 and 11.20.7 of the FTA deal with preliminary objections by respondents:

### ARTICLE 11.20

#### CONDUCT OF THE ARBITRATION

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a 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 11.26.
- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.
- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 7.
7. In the event that the respondent so requests within 45 days of the date the tribunal is constituted, 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. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on

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<sup>61</sup> The FTA [CLA-23].

a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

78. Article 11.16 of the FTA governs the submission of a claim to arbitration:

**ARTICLE 11.16**

**SUBMISSION OF A CLAIM TO ARBITRATION**

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
    - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
      - (i) that the respondent has breached
        - (A) an obligation under Section A,
        - (B) an investment authorization, or
        - (C) an investment agreement;
      - and
      - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
    - (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
      - (i) that the respondent has breached
        - (A) an obligation under Section A,
        - (B) an investment authorization, or
        - (C) an investment agreement;
      - and
      - (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach
- ...
- (emphasis added).

79. Article 11.28 of the FTA defines the terms “enterprise of a Party”, “investment” and “investor of a Party”:

**ARTICLE 11.28**

**DEFINITIONS**

For the purposes of this Chapter

...

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

...

**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:

(a) ...

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) ...

...

**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; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

...

(emphasis added).

80. Article 1.4 of the FTA defines the terms “enterprise of a Party” and “national”:

#### ARTICLE 1.4

##### DEFINITIONS

For the purposes of this Agreement, unless otherwise specified:

...

**enterprise of a Party** means an enterprise constituted or organized under a Party's law

...

**national** means:

(a) with respect to Korea, a Korean national within the meaning of the *Nationality Act*; and

(b) with respect to the United States, “national of the United States” as defined in the *Immigration and Nationality Act*.

...

## VI. THE TRIBUNAL'S REASONING

81. The Tribunal has carefully reviewed all of the arguments and evidence presented by the Parties during the preliminary phase of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.
82. Before turning to its analysis of Respondent's preliminary objections, the Tribunal points out that, as Respondent's counsel stated in his opening statement at the Hearing,<sup>62</sup> these objections proceed from two core propositions, namely that: (i) under the FTA and international law, a claimant cannot bring a claim to the extent that another entity beneficially owns the assets in question; and (ii) as a matter of fact, the General Partner has failed to establish its beneficial interest in the Samsung Shares.
83. Several of Respondent's arguments under different provisions of the FTA are premised upon these two core propositions. The Tribunal will deal with these propositions in detail in the context of Respondent's argument on legal and beneficial ownership and, where relevant, refer to these propositions in its assessment of Respondent's other arguments.
84. The Tribunal's Decision on Respondent's Preliminary Objections is delivered as part of the expedited procedure for the determination of preliminary objections set out in Articles 11.20.6 and 11.20.7 of the FTA. In this context, it is relevant to note that Claimants contend that it is not appropriate for the Tribunal to determine the Respondent's objections as a preliminary issue and have requested a declaration that the General Partner's claim is admissible and that the Tribunal has jurisdiction over it. The Tribunal will deal with these points as a preliminary issue before turning to the substance of Respondent's objections.
85. The Tribunal's reasoning is therefore structured as follows: it will first deal with Claimants' objection and request for a declaration of jurisdiction and admissibility (**A.**); thereafter, the Tribunal will address Respondent's two preliminary objections, which relate to the Tribunal's jurisdiction over the General Partner's claim (**B.**) and the legal deficiency of that claim (**C.**); finally, the Tribunal will deal with the Parties' respective requests to order the opposing Party to bear the costs of this preliminary phase (**D.**).

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<sup>62</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 7:7-17, 9:11-15 [Respondent's Opening Statement].

**A. Claimants' objection to the expedited procedure and request for a declaration of jurisdiction and admissibility of the General Partner's claim**

86. As a preliminary issue, the Tribunal addresses Claimants' objection<sup>63</sup> to the appropriateness of the preliminary determination of Respondent's objections and Claimants' request<sup>64</sup> for a declaration that the General Partner's claim is admissible and that the Tribunal has jurisdiction over that claim.

**1. Claimants' position**

87. In their letter of 13 February 2019, Claimants argued that Respondent's objections raised in its Memorial are not appropriate for expedited determination and do not fall within the scope contemplated by the expedited procedure under the FTA as they raise complex factual and legal issues necessitating a detailed factual inquiry and the assessment of expert evidence and questions of foreign municipal law. Furthermore, Claimants took issue with Respondent's reservation of its right to bring further objections at a later stage of the proceedings. In their letter, Claimants requested the Tribunal to join Respondent's objections to a full jurisdictional phase.

88. In their Counter-Memorial, Claimants add that "the Tribunal's examination of the question of damages risks prejudging the merits of the General Partner's claim without access to the full factual record, and without giving the General Partner a 'full opportunity' to present its case, as it is entitled under the UNCITRAL Rules."<sup>65</sup> As part of their request for relief, Claimants request the Tribunal to declare that the General Partner's claim is admissible and that the Tribunal has jurisdiction over that claim.<sup>66</sup>

**2. Respondent's position**

89. In its Memorial, Respondent "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 [Respondent] may consider necessary or appropriate to enforce or defend its rights" (emphasis added).<sup>67</sup>

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<sup>63</sup> Counter-Memorial, ¶¶ 106-107, referring to Claimants' letter to the Tribunal, 13 February 2019; Rejoinder, ¶¶ 126-127.

<sup>64</sup> Counter-Memorial, ¶ 108; Rejoinder, ¶ 128.

<sup>65</sup> Counter-Memorial, ¶ 106.

<sup>66</sup> Counter-Memorial, ¶ 108.

<sup>67</sup> Memorial, ¶ 38.

90. In its Reply, Respondent argues that the question of whether and to what extent the General Partner holds a beneficial interest in the alleged investments does not require an inquiry into the “full factual record” but only requires evidence of the amounts allocated in the capital accounts of the General Partner and the Limited Partner at the relevant times.<sup>68</sup>

### **3. Tribunal's analysis**

91. In its Procedural Order No. 2, the Tribunal decided to “rule on the admissibility of another separate jurisdictional phase if and when a request for such phase is made” and explained that “[n]either the FTA nor the UNCITRAL Rules appears to entitle it to declare further jurisdictional phases inadmissible before an actual request for such phase is made.” For that reason, the Tribunal rejected Claimants' request to join Respondent's objections to a full jurisdictional phase.

92. To the extent that Claimants maintain their objection to the appropriateness of the preliminary determination of Respondent's objections,<sup>69</sup> the Tribunal points out that, under Article 11.20.7 of the FTA, it is required to decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the Tribunal's competence. The FTA therefore does not grant the Tribunal any discretionary power whether or not to hear such objections on an expedited basis.

93. In the Tribunal's view, both preliminary objections raised by Respondent fall within the ambit of the expedited procedure under Articles 11.20.6 and 11.20.7 of the FTA. Respondent's first objection relates to the Tribunal's competence over the General Partner's claim in the context of Article 11.20.7 of the FTA. Its second objection that the General Partner's claim is, as a matter of law, not a claim for which an award in favour of the General Partner may be made falls within the scope of Article 11.20.6 of the FTA.

94. The final point in relation to Claimants' objection is that whether the substantive threshold under Articles 11.20.6 and 11.20.7 of the FTA is met is a different question which does not relate to the admissibility of the expedited procedure. The Tribunal might well come to the conclusion that, based on the current evidence before it, it is unable to accept a preliminary objection at this stage of the proceedings. The Tribunal will deal with that question in the context of its analysis of Respondent's two preliminary objections.

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<sup>68</sup> Reply, ¶ 120.

<sup>69</sup> Counter-Memorial, ¶¶ 106-107, referring to Claimants' letter to the Tribunal, 13 February 2019; Rejoinder, ¶¶ 126-127.



95. For these reasons, the Tribunal concludes that Claimants' objection to the appropriateness of the preliminary determination of Respondent's objections is not well-founded.
96. As to Claimants' request for declaratory relief, the Tribunal notes that Article 11.20.6(d) of the FTA expressly provides that the respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise a preliminary objection or make use of the expedited procedure set out in Article 11.20.7 of the FTA.
97. In the Tribunal's view, a declaration made now to the effect that the Tribunal has jurisdiction over the General Partner's claim would be irreconcilable with Article 11.20.6(d) of the FTA as it would curtail Respondent's right under that provision to raise other jurisdictional objections that are not preliminary objections or fall outside the scope of the expedited procedure under Article 11.20.7 of the FTA.
98. Consequently, the Tribunal is not prepared to declare the General Partner's claim admissible and to assume jurisdiction over that claim at this stage of the proceedings.
99. For this reason, the Tribunal rejects Claimants' application for a declaration at this stage of the proceedings that the General Partner's claim is admissible and that the Tribunal has jurisdiction over that claim.

**B. Respondent's preliminary objection to the Tribunal's jurisdiction over the General Partner's claim**

100. Respondent's preliminary objection under Article 11.20.7 of the FTA that the General Partner's claim is not within the Tribunal's competence is based on two arguments, namely: (i) that the General Partner does not qualify as an investor that has made an investment; and (ii) that the General Partner lacks standing to bring a claim on behalf of the Cayman Fund.
101. Respondent has amended its request for relief and presented its requests for a new order in its Reply.<sup>70</sup> Respondent's principal request to dismiss all of the General Partner's claims is premised on Respondent's first argument that the General Partner does not qualify as an investor that has made an investment. Its alternative request to dismiss the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner and to declare that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015 rests upon Respondent's

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<sup>70</sup> Reply, ¶ 121.

second jurisdictional argument that the General Partner lacks standing to bring a claim on behalf of the Cayman Fund.

102. The Tribunal's analysis of Respondent's preliminary objection to the Tribunal's jurisdiction over the General Partner's claims will be structured as follows: the Tribunal will first deal with Respondent's principal request to dismiss all of the General Partner's claims and in this context will address the argument that the General Partner does not qualify as an investor that has made an investment under the FTA (1.); it will then turn to Respondent's alternative request based upon the argument that the General Partner lacks standing under the FTA to bring a claim on behalf of the Cayman Fund (2.).

**1. Whether the General Partner qualifies as an "investor" that has "made" an "investment" under the FTA**

*a) Respondent's position*

103. Respondent submits that Article 11.28 of the FTA defines "investor" as a "Party or state enterprise thereof ... that ... has made an investment in the territory of the other Party." To satisfy this provision and qualify as an "investor", Respondent argues that the General Partner would need to establish – and has failed to establish – the existence of an "investment" and that it "has made" the investment.<sup>71</sup>

104. In relation to the FTA's definition of "investment" in Article 11.28 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", Respondent submits that this list of characteristics is non-exhaustive and merely illustrative and does not deprive the term "investment" of its inherent meaning.<sup>72</sup> It contends that this inherent meaning is to be established with reference to the "considerable body of authorities under international investment law" pursuant to which the minimum features of an "investment" include "a contribution that extends over a certain period of time and that involves some risk".<sup>73</sup>

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<sup>71</sup> Memorial, ¶ 20; Reply, ¶¶ 25-26.

<sup>72</sup> Reply, ¶¶ 26, 29-31.

<sup>73</sup> Memorial, ¶ 21; Reply, ¶ 26, referring to *Romak S.A. (Switzerland) v. the Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 ("**Romak v. Uzbekistan**") [RLA-10], ¶ 207; *Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, 30 April 2014 ("**Nova Scotia Power v. Venezuela**") [RLA-20], ¶ 84; *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No.

105. In contrast, Respondent contends that mere ownership or control of an asset absent the above-mentioned characteristics of an investment are insufficient to qualify for FTA protection.<sup>74</sup> In particular, Respondent rejects Claimants' argument that shareholding *per se* satisfies the definition of investment because shares and stocks are listed among the "[f]orms that an investment may take."<sup>75</sup> Such enumeration, Respondent argues, is merely illustrative and does not override the explicit FTA requirement for an asset to possess, at a minimum, several of the above-mentioned characteristics of an investment.<sup>76</sup>
106. In relation to the first characteristic of an investment listed in Article 11.28 of the FTA, a "commitment of capital or other resources", Respondent asserts that "a 'substantial' or 'meaningful' contribution", using the investor's "own financial means and [conducted] at its own financial risk" is required.<sup>77</sup> In this regard, Respondent relies on the decision in *KT Asia v. Kazakhstan*, in which the tribunal declined jurisdiction because the relevant contribution was not made by the claimant, but by the claimant's beneficial owner.<sup>78</sup> Similarly, Respondent submits that the tribunal in *Quiborax v. Bolivia* found that legal ownership or control of assets is insufficient to establish a contribution to an investment.<sup>79</sup>
107. Respondent contends that the General Partner failed to adduce evidence that would show that it had acquired the Samsung Shares with its own capital as opposed to the capital of the Cayman Fund. Therefore, Respondent concludes that the General Partner did not make a contribution, let alone a substantial one, of its "own financial means and at its own financial risk" that would

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Arb/08/12, Award, 5 June 2012 ("*Caratube v. Kazakhstan*") [RLA-12], ¶ 360; *Republic of Italy v. Republic of Cuba*, Interim Award, Ad Hoc Arbitral Tribunal, 15 March 2005 [RLA-34], ¶ 81; *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 [RLA-28], ¶ 52.

<sup>74</sup> Reply, ¶ 28.

<sup>75</sup> Reply, ¶ 27.

<sup>76</sup> Reply, ¶ 27, referring to Lee M. Kaplan and Jeremy K. Sharpe, *United States*, in: Commentaries on Selected Model Investment Treaties (Chester Brown ed., OUP, 2013) [CLA-48], pp. 767-768; *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, 19 June 2019 [RLA-58], ¶ 15.

<sup>77</sup> Reply, ¶ 33, relying on *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 [RLA-5], ¶ 53; *Alapi Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 ("*Alapi v. Turkey*") [RLA-44], ¶ 360; *Caratube v. Kazakhstan* [RLA-12], ¶ 434.

<sup>78</sup> Memorial, ¶ 22, referring to *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 ("*KT Asia v. Kazakhstan*") [RLA-17], ¶ 170; Reply, ¶ 39.

<sup>79</sup> Reply, ¶ 33, referring to *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("*Quiborax v. Bolivia*") [RLA-45], ¶ 233.

qualify as an investment.<sup>80</sup> To the extent Claimants assert that the General Partner contributed “other resources”, Respondent contends that Claimants’ argument centres on pre-investment activity that cannot satisfy Article 11.28 of the FTA.<sup>81</sup> Respondent further argues that, in any event, Claimants failed to present evidence to show that such pre-investment activity was performed by the General Partner as opposed to another Mason entity,<sup>82</sup> and that it follows from the above that the General Partner did not “make” an investment, as it did not engage in an “active contribution” or “action of investing”, but merely tried to “piggyback on contributions made by others (including the Cayman Fund and the Limited Partner).”<sup>83</sup>

108. Respondent submits that a separate reason for the tribunal in *KT Asia v. Kazakhstan* to decline jurisdiction was that the relevant shareholding did not qualify as an investment as it was intended to have a duration of only 16 months which the tribunal considered insufficient to show the required duration and the intent to establish a long-term presence in the host country.<sup>84</sup> Similarly, Respondent asserts that the General Partner intended to make “a short-term speculative bet” and that it has failed to introduce concrete evidence of its intent to hold the Samsung Shares for a sufficiently long duration.<sup>85</sup>
109. As for the “assumption of risk” criterion under Article 11.28 of the FTA, Respondent argues that Claimants failed to prove that the General Partner has assumed a risk of loss.<sup>86</sup> Respondent asserts that there cannot be an investment risk if no contribution of economic value was made, because “a claimant that makes no contribution incurs no risk of losing such (inexistent)

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<sup>80</sup> Memorial, ¶¶ 22, 26, referring to *Caratube v. Kazakhstan* [RLA-12], ¶ 434; *KT Asia v. Kazakhstan* [RLA-17], ¶¶ 192-206; Reply, ¶¶ 35, 40, referring to *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (“*Blue Bank v. Venezuela*”) [RLA-23], ¶¶ 163, 172 .

<sup>81</sup> Reply, ¶ 36, referring to First WS Garschina [CWS-1], ¶¶ 13-15.

<sup>82</sup> Reply, ¶ 36.

<sup>83</sup> Reply, ¶¶ 37-38, referring to *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019 (“*Clorox v. Venezuela*”) [RLA-57], ¶¶ 799-836; *Alapi v. Turkey* [RLA-44], ¶ 350.

<sup>84</sup> Memorial, ¶ 23, referring to *KT Asia v. Kazakhstan* [RLA-17], ¶¶ 207-216; *Romak v. Uzbekistan* [RLA-10], ¶ 207.

<sup>85</sup> Memorial, ¶ 27, referring to *US Hedge Fund Company Mason, Purchases 2.2% Stake in Samsung C&T*, Seoul Economic Daily, 26 June 2015 [R-1]; Reply, ¶¶ 50-53, referring to First WS Garschina [CWS-1], ¶¶ 10, 15, 19; Dani Burger, *Your Guide to the Many Flavors of Quant*, Bloomberg, 24 October 2017 [R-11]; Hedge Fund Investment Due Diligence Report: Mason Capital, December 2010 [R-3]; *Event Study Tools*, Event-Driven Investment Strategies, available at [www.eventstudytools.com/event-driven-investment-strategies](http://www.eventstudytools.com/event-driven-investment-strategies) [R-19].

<sup>86</sup> Memorial, ¶ 28; Reply, ¶¶ 41-42.

contribution.”<sup>87</sup> According to Respondent, in cases where beneficial and nominal ownership are split, the nominal owner cannot be considered as having incurred any risk.<sup>88</sup> Reiterating that the General Partner cannot be considered to have made a contribution to the Samsung Shares, Respondent argues that the General Partner cannot have incurred any risk of losing such contribution.<sup>89</sup> This conclusion, Respondent submits, is bolstered by the fact that the General Partner was contractually shielded from any risk of financial loss pursuant to the Partnership Agreement and would also not incur a loss pursuant to the Incentives Allocation if the Samsung Shares decreased in value.<sup>90</sup>

110. Respondent further submits that, even if the General Partner “made” an investment with the “characteristics of an investment”, Claimants would also need to show – and have failed to show – that the General Partner “owned or controlled” the investment.<sup>91</sup>
111. To the extent that Claimants assert that Cayman law and the Partnership Agreement provide that the General Partner legally owned or controlled the Samsung Shares, Respondent submits that Cayman law is irrelevant to the question.<sup>92</sup> Instead, Respondent argues that Korean law, as the law of the place of incorporation of SC&T and SEC, governs the question whether the General Partner legally owned or controlled the Samsung Shares.<sup>93</sup> Respondent asserts that, to be recognized as an owner of a Korean company and to exercise shareholder’s rights, a foreign investor in Korea must satisfy two requirements under Korean law: “(i) an investor must acquire shares in the investor’s own name after registering as a foreign investor with the Financial Services Commissions in accordance with the Capital Markets Act; and (ii) the investor must register as a shareholder in the shareholder registry of the Korean company.”<sup>94</sup> According to

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<sup>87</sup> Memorial, ¶ 24, citing *KT Asia v. Kazakhstan* [RLA-17], ¶ 219; Reply, ¶ 43.

<sup>88</sup> Memorial, ¶¶ 14, 24, citing *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador* (“*Occidental v. Ecuador*”), ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (“*Occidental Annulment*”) [RLA-21], ¶ 259; *KT Asia v. Kazakhstan* [RLA-17], ¶ 219.

<sup>89</sup> Memorial, ¶¶ 25, 28, citing *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Award, 6 April 2017 [RLA-23], ¶ 163; Reply, ¶ 43.

<sup>90</sup> Reply, ¶¶ 44-45, referring to Partnership Agreement [C-30], Article 3.06.

<sup>91</sup> Reply, ¶ 54.

<sup>92</sup> Reply, ¶¶ 55-56, citing Partnership Law [CLA-22], § 16(1).

<sup>93</sup> Reply, ¶ 56, relying on Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009) [RLA-39], ¶¶ 102-103; *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Award, 22 March 2019 [RLA-56], ¶¶ 216-235.

<sup>94</sup> Reply, ¶¶ 57-61; referring to Legal Opinion of Hyeok-Joon Rho, 28 June 2019 (“*Rho Opinion*”) [RER-2], § V.

Respondent, the General Partner satisfied neither of these requirements.<sup>95</sup> In fact, it was the Cayman Fund, not the General Partner, which was registered as foreign investor in Korea and as shareholder in the shareholder registries of SC&T and Samsung Electronics.<sup>96</sup> As a consequence, Respondent asserts that the General Partner did not own or control the Samsung Shares as a matter of Korean Law and should be estopped from making an argument to the contrary.<sup>97</sup>

112. Finally, Respondent argues that, even assuming that Cayman law applied to the question of legal ownership, the General Partner “held the Samsung Shares only in trust for the Cayman Fund”, and the shares were in fact part of the Cayman Fund’s estate, which means that any dividend or proceed from a sale of the Samsung Shares would have benefited the Cayman Fund, not the General Partner.<sup>98</sup> In other words, even if the General Partner were the legal owner, the Cayman Fund was still the beneficial owner of the shares.<sup>99</sup>
113. Respondent submits that the General Partner has not established that it had any Partnership Interest in the Samsung Shares.<sup>100</sup> It contends that the Partnership Agreement provides that, at any given time, the General Partner’s and the Limited Partner’s respective beneficial interest is expressed as a percentage equal to “(i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners” (“**Partnership Interest**”).<sup>101</sup> It asserts that Claimants have submitted no evidence showing the existence and extent of the General Partner’s Partnership Interest in the Cayman Fund, and thus the Samsung Shares, in 2015.<sup>102</sup> Respondent further submits that the “indivisible beneficial interest” claimed by Claimants means only that the partners’ respective beneficial interests are not separable until these assets are distributed, and does not mean that the General Partner had a beneficial interest in 100% of the Cayman Fund’s assets.<sup>103</sup>

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<sup>95</sup> Reply, ¶ 58.

<sup>96</sup> Reply, ¶¶ 20-23, 57-58.

<sup>97</sup> Reply, ¶¶ 59-63.

<sup>98</sup> Reply, ¶ 60, fn. 134, referring to Legal Opinion of Rachel Reynolds, 28 June 2019 (“**Reynolds Opinion**”) [RER-1], ¶ 28.

<sup>99</sup> Memorial, ¶¶ 12-13.

<sup>100</sup> Reply, ¶ 100.

<sup>101</sup> Reply, ¶ 14, citing Partnership Agreement [C-30], Article 2.12.

<sup>102</sup> Reply, ¶ 17.

<sup>103</sup> Reply, ¶¶ 18, 99-100, referring to Reynolds Opinion [RER-1], ¶¶ 30, 51.

**b) Claimants' position**

114. Claimants argue that the General Partner qualifies as an “investor” under Article 11.28 of the FTA since, as a company incorporated in the state of Delaware, it is an enterprise of a State party to the FTA, the United States, and it made an investment in the territory of Korea, via the Samsung Shares.<sup>104</sup> Additionally, the General Partner performed almost all of its business activities in the United States.<sup>105</sup>
115. Claimants submit that the Samsung Shares fall square within the “broad definition” of investment in Article 11.28 of the FTA, because they were owned and controlled by the General Partner and they were “shares” and “stock”.<sup>106</sup>
116. Referring to Article 11.28 of the FTA, Claimants argue that the relevant assets, to qualify as an investment, are to be controlled or owned, directly or indirectly, by the investor. In this regard, Claimants submit that the Samsung Shares comply with this requirement because the General Partner (i) had direct control over the Samsung Shares; (ii) had indirect control over the Samsung Shares, through its supervision of the Investment Manager; and (iii) directly owned the Samsung Shares.<sup>107</sup>
117. With respect to direct and indirect control, Claimants contend that the General Partner controlled the Samsung Shares “*de jure*” and “*de facto*” by virtue of its complete and exclusive power over these shares.”<sup>108</sup> Claimants assert that the General Partner’s direct control is further evidenced by the fact that, under Cayman law, the General Partner was the only entity allowed to exercise any rights related to business and the assets and to engage in conduct of the business, including having the ultimate say over the Samsung Shares’ acquisition, exercising the power to vote at shareholder meetings, receiving dividends, and engaging in advocacy as a shareholder.<sup>109</sup> Moreover, Claimants argue that the General Partner supervised the Investment Manager when

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<sup>104</sup> Counter-Memorial, ¶¶ 10-12; Rejoinder, ¶¶ 9, 38-39.

<sup>105</sup> Counter-Memorial, ¶ 13; Rejoinder, ¶¶ 9, 39.

<sup>106</sup> Counter-Memorial, ¶¶ 25-26; Rejoinder, ¶ 50.

<sup>107</sup> Counter-Memorial, ¶¶ 25-28.

<sup>108</sup> Counter-Memorial, ¶¶ 29-30.

<sup>109</sup> Counter-Memorial, ¶¶ 30-31, referring to First ER Lindsay [CER-1], ¶¶ 17-18, 22-26; Partnership Law [CLA-22], §§ 14, 16.

the latter acted with respect to the Samsung Shares.<sup>110</sup> The Limited Partner, in contrast, was legally prohibited from any involvement in the decision-making process.<sup>111</sup>

118. Regarding direct ownership, Claimants argue that the General Partner “exclusively held ownership rights and obligations in the Shares.”<sup>112</sup> In particular, Claimants submit that the General Partner had direct legal ownership of the Samsung Shares as, under Cayman law, the “partnership” is not an entity and cannot own property.<sup>113</sup> According to Claimants, all property is owned by the General Partner.<sup>114</sup>
119. Claimants submit that Korean law plays no role in determining the General Partner’s ownership or control of the Samsung Shares.<sup>115</sup> First, Claimants argue that the FTA protects direct as well as indirect investors. Even if the Tribunal were to assume that the Cayman Fund directly owned the Samsung Shares under Korean law, the General Partner would nevertheless have owned and controlled the Samsung Shares for the purposes of the FTA, because the General Partner owned and controlled the Cayman Fund and, consequently, qualifies as indirect investor.<sup>116</sup> Second, Claimants contend that, under Korean private international law, the legal capacity of a foreign organization is determined by reference to that organization’s personal foreign law, which in this case is the law of the Cayman Islands.<sup>117</sup> Under Cayman law, the Cayman Fund does not exist as an entity separate from the General Partner and the Limited Partner.<sup>118</sup> It, according to Claimants, thus lacks capacity under both Cayman and Korean law.<sup>119</sup>
120. With respect to any alleged registration requirement, Claimants argue that the investment registration does not preclude the General Partner’s claim under the FTA, pointing out that in case of registration of a foreign fund, the investment registration may be made in the name of

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<sup>110</sup> Counter-Memorial, ¶ 31, referring to First WS Satzinger [CWS-2], ¶ 8; First WS Garschina [CWS-1], ¶ 6.

<sup>111</sup> Counter-Memorial, ¶ 33.

<sup>112</sup> Counter-Memorial, ¶ 35.

<sup>113</sup> Counter-Memorial, ¶ 36.

<sup>114</sup> Counter-Memorial, ¶ 36, referring to First ER Lindsay [CER-1], ¶ 23(a); Partnership Law [CLA-22], § 16(1).

<sup>115</sup> Rejoinder, ¶ 92.

<sup>116</sup> Rejoinder, ¶ 93.

<sup>117</sup> Rejoinder, ¶ 95 referring to Legal Opinion of Jae Yeol Kwon, 6 September 2019 (“**Kwon Opinion**”) [CER-3], ¶¶ 20-21.

<sup>118</sup> Rejoinder, ¶ 95, referring to Reynolds Opinion [RER-1], ¶¶ 24-27.

<sup>119</sup> Rejoinder, ¶ 95.



such fund, even if the fund does not have separate legal capacity.<sup>120</sup> Even assuming that there were errors during the registration process, these would have “no effect on ownership of [the Samsung Shares]”<sup>121</sup> as mistakes in the process of making an investment deprive investors of treaty protection only in “rare circumstances”.<sup>122</sup> According to Claimants, Respondent also failed to prove that the purported registration error estops the General Partner from arguing that it is within the FTA’s jurisdiction.<sup>123</sup>

121. Claimants assert that the definition of “investor” does not impose a requirement of “beneficial ownership”: the expression “attempts to make, is making, or has made an investment” in Article 11.28 of the FTA is merely intended to expand, rather than to limit, the temporal scope of the FTA’s protection and does not create a requirement that an investment must be “beneficially owned” by an investor.<sup>124</sup> Claimants argue that it is impermissible for Respondent to add jurisdictional limits beyond the text of the FTA by recourse to an alleged “inherent meaning” of investment, noting that the additional requirements introduced by Respondent, including a contribution of an investor’s own capital, have no basis in the FTA.<sup>125</sup>
122. Claimants reject Respondent’s argument that the General Partner does not have a beneficial interest in the Samsung Shares.<sup>126</sup> Claimants submit that the General Partner had an “indivisible beneficial ownership interest in the Samsung Shares”, which reflected its right to an Incentive Allocation in consideration for the General Partner’s management of the business.<sup>127</sup> According to Claimants, Respondent’s contention that the General Partner’s beneficial interest is determined by the definition of “Partnership Interest” in the Partnership Agreement is incorrect and irrelevant because the term is used only in relation to limited partners.<sup>128</sup> In Claimants’ view, the defined

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<sup>120</sup> Rejoinder, ¶ 117, referring to Kwon Opinion [CER-3], ¶¶ 51-52.

<sup>121</sup> Rejoinder, ¶¶ 118-119, referring to Kwon Opinion [CER-3], ¶ 55.

<sup>122</sup> Rejoinder, ¶ 119, fn. 137, citing *Mytilineos Holdings SA v. The State Union of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 (“*Mytilineos Holdings v. Serbia*”) [CLA-82], ¶¶ 151-152; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (“*Tokios Tokelés v. Ukraine*”) [CLA-44], ¶ 86 and relying on *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 [CLA-83], ¶ 117.

<sup>123</sup> Rejoinder, ¶ 120.

<sup>124</sup> Counter-Memorial, ¶¶ 79-83.

<sup>125</sup> Counter-Memorial, ¶¶ 84-86.

<sup>126</sup> Rejoinder, ¶ 88.

<sup>127</sup> Counter-Memorial, ¶¶ 34-38, referring to First ER Lindsay [CER-1], ¶¶ 23(b), 36-39; Partnership Law [CLA-22], § 16(1); Rejoinder, ¶¶ 86-91; referring to Supplementary Expert Report of Rolf Lindsay, 6 September 2019 (“*Second ER Lindsay*”) [CER-2], ¶¶ 18-19.

<sup>128</sup> Rejoinder, ¶¶ 89-90.

term “Partnership Interest” is used only in relation to the withdrawal or transfer of a limited partner or the admission of a new general partner, and does not determine the right of the partners to share in the bundle of assets.<sup>129</sup> Claimants instead assert that the General Partner's beneficial interest is determined by reference to increase or decrease in value of each relevant asset, accordingly, the General Partner has a beneficial interest associated with each of its investments, including the Samsung Shares.<sup>130</sup>

123. Claimants further submit that the Samsung Shares qualify as an “investment” because they “easily satisfy each of the characteristics of an investment” identified in Article 11.28 of the FTA, even though satisfying one would be sufficient to come within the scope of the definition.<sup>131</sup> Notably, Claimants emphasize that the FTA itself expressly states that shares in an enterprise constitute an investment.<sup>132</sup>
124. Claimants submit that Respondent is wrong to assert that the FTA requires any commitment of capital or other resources to be “substantial” or “meaningful”.<sup>133</sup> Notwithstanding, Claimants contend that the General Partner made a contribution to Samsung's balance sheet in exchange for acquiring ownership and control over the Samsung Shares at the prevailing market price.<sup>134</sup> This, according to Claimants, reflects a substantial and meaningful commitment of capital by the General Partner.<sup>135</sup> Claimants submit that the funds used for that capital commitment were in significant part the “General Partner's historic contribution of its investment decision-making management, and expertise to grow the capital available for investment”, valued at approximately US\$ 0.96 billion, combined with the Limited Partner's cash contributions.<sup>136</sup> Claimants argue further that investment tribunals faced with similar circumstances have concluded that a

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<sup>129</sup> Rejoinder, ¶ 36, referring to Second ER Lindsay [CER-2], ¶ 19.

<sup>130</sup> Rejoinder, ¶ 91, referring to Second ER Lindsay [CER-2], ¶ 22.

<sup>131</sup> Counter-Memorial, ¶ 41 referring to Article 11.28 of the FTA [CLA-23].

<sup>132</sup> Counter-Memorial, ¶ 41, referring to *Saluka Investment B.V. v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (“*Saluka v. Czech Republic*”) [CLA-41], ¶¶ 205, 209; Rejoinder, ¶¶ 84-85.

<sup>133</sup> Rejoinder, ¶ 56.

<sup>134</sup> Counter-Memorial, ¶ 43.

<sup>135</sup> Rejoinder, ¶¶ 56-57.

<sup>136</sup> Rejoinder, ¶ 57-58, referring to Second WS Satzinger [CWS-4], ¶¶ 13-14.

commitment of capital existed.<sup>137</sup> In any event, Claimants consider the origin of funds committed to an investment irrelevant.<sup>138</sup>

125. In addition, Claimants contend that the General Partner also committed other resources, including by investing its “management time and effort into the process and decision to invest in the Samsung Shares, as well as into its investment once made, including hundreds of hours of its analysts’ time in ongoing research, meeting with experts in Korea and conversations with the Samsung Group’s investor relations representatives.”<sup>139</sup> In this regard, Claimants reject Respondent’s argument that pre-investment activity does not constitute a commitment of resources.<sup>140</sup>
126. Claimants further disagree with Respondent’s contention that the FTA only protects investors who make an “active contribution” and engage in “action of investing”, arguing that the majority of investment tribunals have refused to apply the “activity” concept or found that investors satisfied any such “activity” requirement.<sup>141</sup> In contrast, the cases relied upon by Respondent are exceptional and should be disregarded as outliers.<sup>142</sup> In any event, the General Partner satisfies any activity requirement.<sup>143</sup>
127. For Claimants, “it is equally obvious that an investment in the equity of a commercial enterprise”, here the Samsung Shares, involved an expectation of gain or profit.<sup>144</sup>
128. Claimants also assert that the Samsung Shares required an assumption of risk in the form of a “hope of receiving a benefit (including the inherent risk one will not result).”<sup>145</sup> In particular,

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<sup>137</sup> Counter-Memorial, ¶¶ 42-44, citing *Tokios Tokelés v. Ukraine* [CLA-44], ¶ 80 and distinguishing *KT Asia v. Kazakhstan* [RLA-17], ¶ 204; *Caratube v. Kazakhstan* [RLA-12], ¶¶ 437-438.

<sup>138</sup> Counter-Memorial, ¶¶ 87-88, referring to *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (“*Saba Fakes v. Turkey*”) [CLA-40], ¶ 134; Rejoinder, ¶ 109.

<sup>139</sup> Counter-Memorial, ¶ 45, referring to *First WS Garschina* [CWS-1], ¶ 14; Rejoinder, ¶¶ 59-60.

<sup>140</sup> Rejoinder, ¶ 61.

<sup>141</sup> Rejoinder, ¶¶ 41, 44, referring to *Kim et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 [CLA-70], ¶¶ 306, 310-313; *Mytilineos Holdings v. Serbia* [CLA-82], ¶¶ 126-135.

<sup>142</sup> Rejoinder, ¶¶ 44-46, distinguishing *Alapi v. Turkey* [RLA-44], ¶¶ 311, 359, 379-380; *Quiborax v. Bolivia* [RLA-45], ¶¶ 232-233; *Clorox v. Venezuela* [RLA-57], ¶¶ 831-832, 834.

<sup>143</sup> Rejoinder, ¶ 47.

<sup>144</sup> Counter-Memorial, ¶ 46; Rejoinder, ¶¶ 54-55.

<sup>145</sup> Counter-Memorial, ¶¶ 47-49, referring to *KT Asia v. Kazakhstan* [RLA-17], ¶ 218; *Nova Scotia Power v. Venezuela* [RLA-20], ¶¶ 84, 94; Rejoinder, ¶¶ 66-67, referring to *Second ER Lindsay* [CER-2], ¶¶ 5, 30.

“[i]f the Samsung Shares lose value, the General Partner will receive zero return for that investment notwithstanding its ongoing commitment of significant resources”.<sup>146</sup> Other risks, according to Claimants, include “significant and material financial and reputational damage” to the General Partner.<sup>147</sup>

129. Claimants reject Respondent’s argument that additional characteristics of an investment such as duration may be introduced into the FTA. Claimants assert that the duration requirement advanced by Respondent “has no textual foundation” in the FTA and that similar attempts to read an “inherent” meaning into the definition of investment have been rejected by investment tribunals constituted under the UNCITRAL Arbitration Rules.<sup>148</sup> Even if the Tribunal were to find that duration was relevant, Claimants submit that “[s]hort-term projects are not deprived of ‘investment’ status solely by virtue of their limited duration” and that the “intended duration period ... should be considered”.<sup>149</sup> In this regard, the General Partner’s intentions “more than meet any ‘duration’ requirement, even if one were added to the [FTA]” as “the General Partner intended to hold the Samsung Shares for a considerable duration” as a matter of commercial logic.<sup>150</sup>
130. Contrary to Respondent’s submission, Claimants argue that the FTA explicitly permits investment structures like that employed by the General Partner.<sup>151</sup> Claimants assert that, under Article 11.28 of the FTA, the General Partner, being a U.S. investor, may bring claims before the Tribunal regardless of whether it is the ultimate beneficiary of the investment or characterized as a direct or indirect investor in the investment.<sup>152</sup> Claimants also contend that any overlap between the interests of the General Partner and other investors or entities in the investment structure does not limit the existence of the General Partner’s claims.<sup>153</sup> According to Claimants, the source of

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<sup>146</sup> Rejoinder, ¶ 68.

<sup>147</sup> Rejoinder, ¶ 69(b), citing Second ER Lindsay [CER-2], ¶ 31.

<sup>148</sup> Counter-Memorial, ¶¶ 50-53, referring to *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 [CLA-32], ¶ 364 and distinguishing *Romak v. Uzbekistan* [RLA-10], ¶ 184. Rejoinder, ¶¶ 71-73, referring to *Clorox v. Venezuela* [RLA-57], ¶ 819.

<sup>149</sup> Counter-Memorial, ¶ 55, citing *Romak v. Uzbekistan* [RLA-10], ¶ 225; *KT Asia v. Kazakhstan* [RLA-17], ¶ 209; Rejoinder, ¶¶ 75-76.

<sup>150</sup> Counter-Memorial, ¶ 56; Rejoinder, ¶ 79.

<sup>151</sup> Rejoinder, ¶ 15.

<sup>152</sup> Rejoinder, ¶ 17, referring to Lee M. Caplan and Jeremy K. Sharpe, *United States*, in: Commentaries on Selected Model Investment Treaties (Chester Brown ed., OUP 2013) [CLA-48], p. 767.

<sup>153</sup> Rejoinder, ¶ 18, referring to *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 [CLA-76], ¶ 86;

the funds used to make the investment is irrelevant.<sup>154</sup> Claimants assert that Article 11.11 of the FTA contains a denial of benefits clause to limit the structures the investors may use, which Respondent has not invoked, and cannot invoke, since it requires that the investor has no “substantial business activities” in the United States.<sup>155</sup>

131. Indeed, Claimants argue that the investment structure used by the General Partner is “neither exceptionally complex, nor especially unique” and investment tribunals had no difficulties in the past exercising jurisdiction over similar claims.<sup>156</sup>

132. Claimants assert that Respondent's arguments are based on a misunderstanding of Claimants' investment structure. First, the General Partner acted in its own name and capacity when it brought the claim, as the Cayman Fund does not have its own legal personality and no separate existence from the General Partner and the Limited Partner.<sup>157</sup> Second, contrary to Respondent's submission, the Limited Partner is not the investor, as it only provided capital to add to the investment that the General Partner owned and controlled, and otherwise played no role in the investment.<sup>158</sup> Third, the General Partner did not act as a mere trustee because, in an exempted limited partnership, the General Partner controls the actions of the Partnership and the Limited Partner acts only as a source of funds for the General Partner.<sup>159</sup>

**c) *The Tribunal's analysis***

133. The Tribunal's analysis of this first prong of Respondent's preliminary objection to the Tribunal's jurisdiction will be structured as follows: the Tribunal will first address Respondent's argument that the General Partner does not qualify as an investor since it did not own or control the

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*RREEF Infrastructure (G.P.) Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016 (“*RREEF v. Spain*”) [CLA-67], ¶ 86.

<sup>154</sup> Rejoinder, ¶ 19, citing *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017 [CLA-28], ¶¶ 161, 185; *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016 (“*Flemingo v. Poland*”) [CLA-68], ¶ 331.

<sup>155</sup> Rejoinder, ¶ 21.

<sup>156</sup> Rejoinder, ¶ 23-26, referring to *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017 (“*Eiser v. Spain*”) [CLA-78], ¶¶ 213-215, 221-231; *RREEF v. Spain* [CLA-67], ¶¶ 129-134, 139, 141-150, 156-160.

<sup>157</sup> Rejoinder, ¶¶ 28-31 referring to First ER Lindsay, ¶ 15 [CER-1]; Reynolds Opinion [RER-1], ¶ 24; Second ER Lindsay [CER-2], ¶¶ 5, 17-19; *Impreglio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 [CLA-69], ¶ 139.

<sup>158</sup> Rejoinder, ¶ 32, referring to Second WS Satzinger [CWS-4], ¶¶ 12-15; First ER Lindsay [CER-1], ¶ 19.

<sup>159</sup> Rejoinder, ¶¶ 33-34, referring to Second ER Lindsay [CER-2], ¶¶ 24, 31; First ER Lindsay [CER-1], ¶ 34.

Samsung Shares (1), before turning to Respondent's argument that the General Partner has not made an investment under the FTA (2).

(1) Whether the General Partner owned or controlled the Samsung Shares

134. The Tribunal has to decide whether the General Partner owned or controlled the Samsung Shares, directly or indirectly, under Article 11.28 of the FTA. While this is a question arising under international law, the Tribunal cannot decide this question in isolation from the relevant provisions of municipal law.

(i) *Applicable law*

135. With regard to the regulation of corporate relationships, the tribunal in *Perenco v. Ecuador* held that “[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law.”<sup>160</sup> In the Tribunal's view, this principle equally applies to ownership of tangible and intangible property.<sup>161</sup> Neither the FTA nor general international law provide for any specific rules on the ownership of shares in a company.

136. When a tribunal turns to municipal law to ascertain the owner of assets in a cross-border transaction, the exercise will regularly involve a consideration of the conflict-of-law rules under municipal law to determine the substantive law governing the existence and scope of ownership rights. In assessing whether a foreign organization has become the owner of shares under municipal law, two distinct questions of private international law arise: (i) which law governs the existence and scope of ownership rights of shares in a company; and (ii) which law decides the question of whether a foreign organization has the legal capacity to acquire and hold such rights?

137. As regards the first question, Respondent argues that “[t]he appropriate choice of law for determining the existence or scope of property rights is the municipal law of the property or, in

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<sup>160</sup> *Perenco Ecuador Ltd. V. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 (“*Perenco v. Ecuador*”) [CLA-37], ¶ 522, referring to *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, ¶ 38.

<sup>161</sup> See also Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) [CLA-39], ¶¶ 101-102, providing that “[i]nvestment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognisable by the municipal law of the host state. General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights in rem over tangibles and intangibles. Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property” (footnotes omitted).

case of shares in a corporation, the law of the place of incorporation of the corporation.”<sup>162</sup> Claimants do not dispute this.<sup>163</sup> The Tribunal notes that Respondent's position is based on the widely accepted *lex situs* rule “which is universally applied by municipal courts” and “the appropriate choice of law rule for determining the existence or scope of property rights that comprise an investment.”<sup>164</sup> Consequently, the Tribunal concludes that Korean law governs the existence and effects of ownership rights in the Samsung Shares.

138. The Parties' main disagreement relates to the second question, namely the law applicable to determine the legal capacity of the Cayman Fund. Claimants contend that this question is governed by Cayman law as Korea's private international law refers to the personal foreign law of a foreign organization to determine its legal capacity.<sup>165</sup> Respondent, on the other hand, contends that this issue is also governed by the municipal law of the property or, in the case of shares in a corporation, the law of the place of incorporation of that company, i.e. Korean law.<sup>166</sup>
139. Article 16 of the Korean Act on Private International Law (the “**Private International Law Act**”) provides that “[c]orporations and other organizations shall be governed by the applicable law of the establishment thereof: in case corporations or other organizations established in foreign countries have their principal business offices located in the Republic of Korea or transact their principal business in the Republic of Korea, such corporations and other organizations shall be governed by the law of the Republic of Korea.”<sup>167</sup>
140. Professor Rho and Professor Kwon, the two legal experts who gave expert testimony on Korean law, agree on three issues as regards the legal capacity of foreign organizations under Korean law: first, the experts are in agreement that Article 16 of the Private International Law Act sets out a general principle in relation to the legal capacity of a foreign organization that could, in

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<sup>162</sup> Reply, ¶ 56.

<sup>163</sup> See Rejoinder, ¶ 95, which deals exclusively with the legal capacity of a foreign organization under Korean private international law.

<sup>164</sup> Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) [CLA-39], ¶ 87. This also seems to follow from Article 19(1) of the Korean Act on Private International Law which the Parties have only submitted in Korean [CLA-54] but which, according to the English translation available on the website of the Korean Ministry of Government Legislation (<http://www.moleg.go.kr/english/korLawEng?pstSeq=52687>, last updated 4 November 2019), provides: “Real rights, or other rights subject to registration, concerning movables and immovables shall be governed by the *lex situs* of the subject matter.”

<sup>165</sup> Rejoinder, ¶ 95.

<sup>166</sup> Reply, ¶ 56.

<sup>167</sup> Private International Law Act [CLA-54].

theory, be deviated from in special statutes;<sup>168</sup> second, they concur that some Korean statutes apply to foreign organizations even if they otherwise lack legal capacity under Korean law or under the law of the place of their establishment;<sup>169</sup> third, the experts agree that a person or organization that does not have the legal capacity to hold rights, either by way of the general provision or a specific statute of Korean law, cannot own shares under Korean law.<sup>170</sup>

141. The experts' disagreement centres on the question whether in the present case there are any special statutes that derogate from the general principle set out in Article 16 of the Private International Law Act and instead provide that a foreign organization lacking legal capacity under the law of its place of establishment can still acquire ownership of shares under Korean law.
142. In Professor Rho's view, Article 168.1 of the Korean Financial Investment Services and Capital Markets Act (the "**Capital Markets Act**") is one of these special statutes (which he calls "Alien Law statutes") that regulate international issues and derogate from the "General Legal Capacity" set out in Article 16 of the Private International Law Act.<sup>171</sup> Professor Rho concludes that "[e]ven where a foreign entity does not have a General Legal Capacity pursuant to the law of its place of establishment, such entity can be bestowed with legal capacity to the extent that such entity is subject to the Capital Markets Act."<sup>172</sup>
143. In Professor Kwon's opinion, Article 168.1 of the Capital Markets Act does not displace the general principle laid down in Article 16 of the Private International Law Act. In his view, Article 168.1 only serves to place limits on acquisitions of listed securities by foreign corporations but does not permit foreign organizations lacking legal capacity under the law of its place of establishment to acquire listed securities.<sup>173</sup>
144. The Tribunal begins its analysis by looking at the wording of Article 168.1 of the Capital Markets Act. The provision bears the heading "Restrictions on Foreigners' Trading of Securities and

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<sup>168</sup> Kwon Opinion [**CER-3**], ¶¶ 20-23; Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 357:23-358:5 [Cross-examination of Professor Rho].

<sup>169</sup> Kwon Opinion [**CER-3**], ¶ 23; Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 340:22-342:15 [Presentation of Professor Rho].

<sup>170</sup> Rho Opinion [**RER-2**], ¶ 17; Kwon Opinion [**CER-3**], ¶ 17.

<sup>171</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 343:12-15 [Presentation of Professor Rho].

<sup>172</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 345:13-17 [Presentation of Professor Rho].

<sup>173</sup> Kwon Opinion [**CER-3**], ¶¶ 26-29.



Exchange-Traded Derivatives” and stipulates that “[w]ith respect to trading and other transactions involving securities or exchange-traded derivatives by foreigners (referring to individuals with no address or residence for not less than six months in the Republic of Korea; hereafter the same shall apply in this Article), foreign corporations, etc., restrictions may be placed on the limit of acquisition, etc. in accordance with the guidelines and methods prescribed by Presidential Decree” (emphasis added).<sup>174</sup>

145. Article 9.16 of the Capital Markets Act and Article 13.2.1 of the Enforcement Decree to the Capital Markets Act define the term “foreign corporations, etc.” as including, *inter alia*, a “foreign company established pursuant to statutes of a foreign country”<sup>175</sup> and a “fund or an association created and supervised or managed in accordance with the statutes of a foreign country”.<sup>176</sup>
146. The experts are again in agreement that a foreign organization which lacks legal capacity under the law of the place of its establishment falls within the definition of “foreign corporations, etc.” and the ambit of the Capital Markets Act.<sup>177</sup>
147. The Tribunal accepts that there could in theory be statutory provisions under Korean law pursuant to which foreign organizations lacking legal capacity at the place of their establishment are deemed to be legally capable for the purposes of that specific act, thereby overriding the general principle set out in Article 16 of the Private International Law Act. Essentially, this is a question of *lex specialis derogat legi generali*.
148. The Tribunal, however, is not convinced that Article 168.1 of the Capital Markets Act constitutes such a special statute that overrides the general principle. The provision's scope of application is clearly defined by its express terms: it allows *restrictions* to be placed on the limit of acquisition of listed securities by way of presidential decree. Nowhere does it state that it seeks to *expand* the list of buyers entitled to acquire property, including listed securities, under Korean law. By contrast to other statutory provisions (such as Article 57 of the Korean Civil Procedure Act<sup>178</sup>),

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<sup>174</sup> Capital Markets Act [R-14].

<sup>175</sup> Capital Markets Act [R-14], Article 9.16.4.

<sup>176</sup> Enforcement Decree to the Capital Markets Act [R-16], Article 13.2.1.

<sup>177</sup> Rho Opinion [RER-2], ¶ 19; Kwon Opinion [CER-3], ¶ 28.

<sup>178</sup> Korean Civil Procedure Act [R-20], providing that “[w]here a foreigner has a litigation capacity under the laws of the Republic of Korea, he/she shall be deemed to have a litigation capacity, even where he/she does not have such capacity pursuant to the laws of his/her home country.”

there is no express provision in the Capital Markets Act dealing with the issue of legal capacity of foreign organizations.<sup>179</sup> The Tribunal thus concludes that the Capital Markets Act does not regulate the legal capacity of a foreign organization to acquire shares in Korean companies.

149. To the extent that Professor Rho has relied in his testimony on other Korean statutory provisions, e.g. in the Civil Procedure Act<sup>180</sup> or the Corporate Tax Act<sup>181</sup>, neither these provisions nor the respective jurisprudence of the Korean courts permit the acquisition of shares by foreign funds that lack legal personality at the place of their establishment. In the Tribunal's view, these statutes deal with specific, narrowly confined issues different from the present one and do not displace the general principle set out in Article 16 of the Private International Law Act.
150. As a final remark on the applicable law, the Tribunal notes that subjecting the legal capacity of a foreign organization to hold property rights to the *lex situs* of the property would result in a legal nullity becoming the owner of the property. Both at the national and international level, this would be an undesirable result as it would create considerable uncertainty as to who can exercise the ownership rights in these assets.

(ii) *Legal ownership*

151. Having established that Korean law governs the existence and scope of ownership rights in the Samsung Shares whereas Cayman law governs the Cayman Fund's legal capacity to acquire and hold rights, the Tribunal now turns to the application of these substantive laws to the present dispute.
152. Respondent argues that for a foreign investor to be recognized as an owner of shares in a Korean company, the investor must register as a foreign investor, acquire shares in its own name and

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<sup>179</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 387:9-16 [Cross-examination of Professor Rho], pp. 421:17-422:2 [Cross-examination of Professor Kwon].

<sup>180</sup> See fn. 178.

<sup>181</sup> Article 2.3 of the Korean Corporate Tax Act [CLA-56] provides: "The term 'foreign corporation' means an organization that has its headquarters or main office in a foreign country in the form of a corporation that meets the standards prescribed by Presidential Decree (limited to such a corporation that does not have a place for actual management of its business in the Republic of Korea)." Article 13.1 of the Korean Framework Act on National Taxes [CLA-57] provides: "Any incorporate body, foundation or other organization (hereinafter referred to as 'organization other than juristic person') which is not a juristic person (referring to domestic and foreign corporations under subparagraph 1 and 3 of Article 1 of the Corporate Tax Act; hereinafter the same shall apply), which falls under any of the following subparagraphs and does not distribute profits to its members, shall be deemed a juristic person and governed by this Act and other tax-related Acts".

register as a shareholder in the shareholder registry.<sup>182</sup> In support of its argument, Respondent relies on Professor Rho's legal opinion according to which "[t]he [Korean] Supreme Court has regarded the ownership of shares as an issue of determining the party to a share subscription agreement for new shares or share purchase agreement for existing shares."<sup>183</sup>

153. It is undisputed that the Cayman Fund was registered as foreign investor with the Financial Supervisory Service<sup>184</sup> and as shareholder on the shareholder registries of SEC and SC&T.<sup>185</sup>
154. This leads Respondent to conclude that the Cayman Fund became the legal owner of the Samsung Shares under Korean law as only the Cayman Fund established a shareholder relationship with SC&T and SEC, and that any trust arrangement under Cayman law and the Partnership Agreement would be external to that relationship.<sup>186</sup>
155. The Tribunal disagrees with that conclusion. Assuming the Samsung Shares were indeed purchased in the name of the Cayman Fund,<sup>187</sup> the legal consequences of that acquisition in the name of the Cayman Fund are governed by the same law that applies to the Fund's legal capacity to hold rights. Therefore, Cayman law, as the law at the place of the Fund's establishment, determines who becomes the legal owner of shares purchased in the name of the Fund.
156. There is no dispute between the Parties<sup>188</sup> or the legal experts on Cayman law, Mr. Lindsay and Ms. Reynolds,<sup>189</sup> that, under Cayman law, the Cayman Fund lacks legal personality and the capacity to hold property and that the General Partner owns all partnership assets on trust for the Cayman Fund.

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<sup>182</sup> Reply, ¶ 57, referring to Rho Opinion [RER-2], § V.

<sup>183</sup> Rho Opinion [RER-2], ¶ 28, citing Supreme Court Decision Case No. 2016Da265351, 5 December 2017 [R-12].

<sup>184</sup> Cayman Fund's Application for Foreign Investment Registration, 23 June 2014 [R-7].

<sup>185</sup> Samsung C&T Corporation Register of Shareholders, 11 June 2015 [R-8]; Samsung Electronics Co., Ltd. Register of Shareholders, 30 June 2015 [R-9].

<sup>186</sup> Reply, ¶ 60.

<sup>187</sup> The Tribunal notes that while the experts agree that under the Korean Commercial Act, existing shares are transferred by agreement of the seller and purchaser and delivery of the relevant share certificates (Kwon Opinion [CER-3], ¶ 46; Rho Opinion [RER-2], ¶¶ 16; 31-32), no such share purchase agreements that might indicate the identity of the contracting parties have been produced.

<sup>188</sup> Reply, ¶ 60, fn. 134; Counter-Memorial, ¶ 36.

<sup>189</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 231:8-24; 234:7-20 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

157. Under Article 16.1 of the Partnership Law, “[a]ny rights or property of every description of the exempted limited partnership ... shall be held or deemed to be held by the general partner ... upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement” (emphasis added).<sup>190</sup>
158. Mr. Lindsay and Ms. Reynolds concur that by using the words “deemed to be held”, the Partnership Law clarifies that the general partner will be the legal owner of the partnership’s assets regardless of whether the partnership is named as the owner.<sup>191</sup> As Ms. Reynolds has explained, “the reason for that [provision] is because sometimes in parts of the world or in other context, the Partnership will be named as the owner”.<sup>192</sup> The present case falls squarely within that scope of application.
159. The Tribunal thus concludes that, even if the Samsung Shares were acquired in the name of the Cayman Fund, they were legally owned by the General Partner. This follows from the reference of Korea’s private international law to Cayman law as the law governing the Fund’s legal capacity, and Cayman law accepting this reference.<sup>193</sup>
160. This result is not contradicted by statutory provisions of Korean law, such as Article 311.1 of the Capital Markets Act<sup>194</sup> or the Real Name Act<sup>195</sup>.

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<sup>190</sup> Partnership Law [CLA-22], § 16(1).

<sup>191</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 329:16-330:10 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>192</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 329:18-20 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>193</sup> The Tribunal is mindful of Ms. Reynold’s caveat that “Cayman Law would defer to the Law of Incorporation to determine who owns shares. So, if we’re talking about Korean shares, then we would refer to the law of Korea as to who owns them.” (Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 232:13-16; see also p. 330:11-14). In the Tribunal’s view, it is irrelevant whether Cayman law defers to the *lex situs* for general ownership of the assets. Rather, the question at issue is whether Cayman law accepts the reference of foreign conflict-of-law rules to determine the legal capacity of an exempted limited partnership. The Tribunal agrees with Mr. Lindsay that “if the analysis [under foreign law] is that the Shares are owned by the Partnership, then the legal title to those Shares is determined as a matter of Cayman Islands law” (Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 233:11-14). On that basis, the Tribunal concludes that Cayman law accepts the reference of Korea’s private international law.

<sup>194</sup> Article 311.1 of the Capital Markets Act [R-14] provides that “[a]ny person who is stated in an investor’s account book and the depositor’s account book shall be deemed to hold the respective securities.”

<sup>195</sup> The Tribunal notes that the Real Name Act itself is not part of the record but that the Act has been interpreted in the Concurring Opinion of the Korean Supreme Court, Decision Case No. 2015-Da-248342, 23 March 2017 [R-10], pp. 6-7 as establishing a presumption that “only the title holders entered in the shareholder registry must be deemed shareholders.”

161. First, the Tribunal is not convinced that these provisions deal with ownership. In the Korean original, the verb “to hold” in Article 311.1 of the Capital Markets Act is not identical with the verb “to own”.<sup>196</sup> As regards the registration as foreign investor and on the companies' shareholder registries, the Korean law experts essentially agree that neither registration has any direct bearing on ownership rights under Korean law.<sup>197</sup>
162. Second, there is no need to resort to any of the legal presumptions in the above-mentioned provisions. In the present case, there is only one legal entity, namely the General Partner, that is capable of holding rights on trust for the Cayman Fund. As explained above, when the Cayman Fund is recorded as the titleholder, this refers to a legal nullity and is understood as referring to the General Partner under the applicable law. There is thus no discrepancy between the holder of the trading account, the investment registration and the shareholder registration and the General Partner. The present case is different from the scenario described by Professor Rho in which a purchaser acquires shares in the name of a third person who is designated as titleholder.<sup>198</sup> In the present instance, the entity that was designated as titleholder does not exist as a legal person.
163. Consequently, the Tribunal concludes that under the applicable municipal laws, the General Partner became the legal owner of the Samsung Shares.

(iii) *Beneficial ownership*

164. As an alternative argument, Respondent submits that, even if Cayman law applied to the question of legal ownership under Article 11.28 of the FTA, the General Partner held the Samsung Shares only in trust for the Cayman Fund, relying on the finding in *Blue Bank v. Venezuela* that “[a]s trustee, Blue Bank does not own the assets, but simply manages and administers them ... to the benefit of a third party.”<sup>199</sup> Respondent submits that the Samsung Shares were part of the Cayman Fund's estate and that any dividends or proceeds from a sale of the Samsung Shares would only benefit the Cayman Fund but not the General Partner in its capacity as trustee.<sup>200</sup> In essence, Respondent argues that the General Partner was not the beneficial owner of the Samsung Shares.

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<sup>196</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 391:10-17 [Cross-examination of Professor Rho].

<sup>197</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 364:14-365:4, 366:8-376:25 [Cross-examination of Professor Rho]; Kwon Opinion [CER-3], ¶¶ 49, 55.

<sup>198</sup> Rho Opinion [RER-2], ¶ 31.

<sup>199</sup> Reply, ¶ 60, fn. 134, citing *Blue Bank v. Venezuela* [RLA-23], ¶ 163.

<sup>200</sup> Reply, ¶ 60, fn. 134.

165. As pointed out above, Claimants contend that Article 11.28 of the FTA does not impose a requirement of beneficial ownership. In any event, Claimants submit that “[t]he 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.”<sup>201</sup>
166. As is clear from the legal authorities cited support of the Parties' submissions, there are two major schools of thought on the implications of a split between legal and beneficial ownership in international investment case law and scholarly writings.
167. The first school considers that there is a general principle of international investment law that a claimant only qualifies as an investor to the extent that it can prove a beneficial interest in the investment. According to this view, legal title alone is insufficient to establish ownership. Representative of this school of thought is Professor Stern's dissenting opinion in *Occidental v. Ecuador* which states:

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.<sup>202</sup>

168. This was affirmed by the annulment committee in the same matter in the following terms:

In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee.<sup>203</sup>

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<sup>201</sup> Rejoinder, ¶ 123.

<sup>202</sup> *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Stern, 20 September 2012 (“*Occidental Dissent*”) [RLA-15], ¶ 148.

<sup>203</sup> *Occidental Annulment* [RLA-21], ¶ 259. The annulment committee added the following observations on Professor Stern's analysis: “The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument. This subjective limitation of ICSID jurisdiction is a natural consequence of international investment law. Arbitral tribunals are not courts of justice holding unfettered jurisdiction. ... Specifically, protected 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*

169. The second school of thought does not accept that, under general international investment law, only the beneficial owner fulfils the characteristics of an investor. For example, the tribunal in *Saba Fakes v. Turkey* made the following observations on the division of legal title and beneficial ownership:

[T]he division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a *fiducie* or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.<sup>204</sup>

170. Along the same lines, the tribunal in *Von Pezold v. Zimbabwe* considered *prima facie* evidence of legal ownership sufficient to establish jurisdiction:

The next ground of challenge is that the von Pezold Claimants have not proved beneficial ownership. The Tribunal can find no requirement that beneficial ownership be proven in either the Swiss or German BITs, and sees no basis on which such a requirement should be read into the BITs. In the present case, the Tribunal finds that the Claimants have provided *prima facie* evidence of legal ownership which has not been rebutted and this is sufficient to establish jurisdiction.<sup>205</sup>

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personae, beyond the limits agreed by the States when executing the treaty.” (*Occidental Annulment* [RLA-21], ¶¶ 262-264). On this basis, the annulment committee reached the following conclusion: “By compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers. ... In the present case, the excess of powers is manifest ...” (*Occidental Annulment* [RLA-21], ¶¶ 266, 268).

<sup>204</sup> *Saba v. Turkey* [CLA-40], ¶ 134.

<sup>205</sup> *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (“*Von Pezold v. Zimbabwe*”) [CLA-27], ¶ 314. In similar vein, the tribunal in *Flemingo v. Poland* [CLA-68], ¶ 331 stated: “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 ... However, the Tribunal notes again that the Treaty did not expressly provide for the limitation

171. The Tribunal considers that at this stage of the proceedings it can leave open which school of thought should be applied to the present case. Even assuming, without deciding, that the FTA and/or applicable rules of international law require an investor beneficially to own the investment, the Tribunal is convinced that the General Partner fulfils that requirement. As the Tribunal will explain below, Claimants have sufficiently established that the General Partner has a beneficial interest in the Samsung Shares.
172. At the outset, the Tribunal notes that the facts underlying the question whether the General Partner has a beneficial interest in the Samsung Shares are largely undisputed.
173. Notably, there is no dispute between the Parties that the General Partner did not make any cash capital contributions to the Cayman Fund. It is also undisputed that every year the General Partner took out most of the Incentive Allocations credited to its capital account and that it withdrew most of its Incentive Allocation for 2013 in January 2014. Finally, there is no dispute that as a result of the Cayman Fund's losses in 2014, the General Partner did not receive any Incentive Allocation in 2015 and that in January 2015, the General Partner's capital account contained at most "a couple of hundred thousand dollars".<sup>206</sup>
174. There are also several points of agreement between the two experts on Cayman law, Mr. Lindsay and Ms. Reynolds. First, they concur that Cayman law distinguishes between legal title and beneficial interest.<sup>207</sup> Second, the experts are in agreement that the General Partner's beneficial interest in the Cayman Fund, including the Samsung Shares, is determined by the terms of the Partnership Agreement.<sup>208</sup> Third, they agree that any beneficial interest that a partner may have in the partnership assets is indivisible in the sense that a partner is not entitled to particular assets.<sup>209</sup> Fourth, they concur that the concept of indivisibility does not determine the amount of a partner's beneficial interest in the partnership.<sup>210</sup> Fifth, they agree that under Cayman law any

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of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it."

<sup>206</sup> See above at ¶¶ 61-63.

<sup>207</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 235:6-11 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>208</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 239:11-16 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>209</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 239:17-241:1 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>210</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 321:7-322:6 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].



legal proceedings by or against an exempted limited partnership may be instituted by or against the general partner only.<sup>211</sup>

175. The Parties, however, disagree on whether the General Partner's beneficial interest is determined based on the balance of its capital account or by reference to its entitlement to an Incentive Allocation. While Respondent argues that the General Partner's beneficial interest in July 2015 amounted to zero as the General Partner had virtually nothing in its capital account in 2015 and could not earn an Incentive Allocation regardless of the performance of the Samsung Shares,<sup>212</sup> Claimants argue that the General Partner's beneficial interest is determined by reference to the increase or decrease in value of the partnership assets.<sup>213</sup>
176. In accordance with the expert testimony of Mr. Lindsay and Ms. Reynolds, the Tribunal will begin its analysis of the General Partner's beneficial interest by looking at the wording of Partnership Agreement.
177. Article 2.12 of the Partnership Agreement defines the term "Partnership Interests" as "a Partner's interest in the Partnership. The Partner's economic interest shall be expressed as a percentage equal to (i) the balance in the Capital Account of such Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners at any given time."<sup>214</sup>
178. While at first glance the concept of "Partnership Interest" does not appear to be limited to the Limited Partners' economic interest in the Partnership, a systematic review of the provisions in the Partnership Agreement referring to this concept shows that the term is tailored to Limited Partners. The Tribunal agrees with Mr. Lindsay's assessment that the Partnership Agreement uses the term only in respect of "the withdrawal or transfer by any Limited Partner of its interest in the Partnership; and ... obtaining the necessary consent of Limited Partners to the admission of an additional General Partner",<sup>215</sup> the withdrawal of the General Partner, which the Limited Partners holding Partnership Interests of a certain threshold must consent to,<sup>216</sup> and the winding-up of the Partnership following the withdrawal of the General Partner in which case the Limited

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<sup>211</sup> First ER Lindsay [**CER-1**], ¶ 25; Reynolds Opinion [**RER-1**], ¶ 33.

<sup>212</sup> Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, pp. 462:21-463:5, 464:19-465:4 [Respondent's Closing Statement].

<sup>213</sup> Rejoinder, ¶ 36, citing Second ER Lindsay [**CER-2**], ¶ 22.

<sup>214</sup> Partnership Agreement [**C-30**], Article 2.12.

<sup>215</sup> Second ER Lindsay [**CER-2**], ¶ 18, referring to Partnership Agreement [**C-30**], Articles 5.04(b), 6.02, 7.01., 7.07, 8.01, 8.02, 11.02].

<sup>216</sup> Partnership Agreement [**C-30**], Article 7.05.

Partners holding Partnership Interests of a certain threshold may appoint a successor.<sup>217</sup> Consequently, the definition of "Partnership Interest" in Article 2.12 of the Partnership Agreement is insufficient to establish the General Partner's beneficial interest in the partnership assets.

179. Article 4.06(b) of the Partnership Agreement provides, in relevant part, that "[w]ith respect to each Capital Account of a Limited Partner, as of the end of each Fiscal Year, there shall be allocated to the Capital Account of the General Partner, as its incentive allocation ... 20% of ... the Cumulative Net Profits preliminarily allocated to such Capital Account of such Limited Partner" minus any management fees and expenses paid by the Limited Partner and to the extent that the "Cumulative Net Profits" exceed the "Cumulative Unrecovered Net Losses" of previous years.<sup>218</sup>
180. In the Tribunal's view, this general entitlement to an Incentive Allocation represents a beneficial interest of the General Partner in the Partnership's assets. It is undeniable that the Incentive Allocation entitles the General Partner to share in the benefits of ownership of the Partnership's assets. Whenever the Partnership's assets gain in value and generate net profits above a certain watermark, the General Partner gets its share of these profits.
181. While under the Partnership Agreement the General Partner's beneficial interest in the partnership assets could in theory not only be determined by its entitlement to an Incentive Allocation but also by its capital contributions, this question does not arise in the present case as the General Partner has not to date made any cash contributions. Consequently, the entitlement to an Incentive Allocation reflects a beneficial interest of the General Partner, in its own right, in the Partnership's assets including the Samsung Shares.
182. Whether or not this entitlement to an Incentive Allocation results in a payment in any given year is a different question that is of no relevance to the determination of the General Partner's beneficial interest in the Partnership's assets. Even if this entitlement does not materialize in a specific year, this does not deprive the General Partner of its entitlement to share in any future profits the same assets might generate. If this were not the case, the General Partner's beneficial interest in any given year could only be determined retroactively. Consequently, the Tribunal

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<sup>217</sup> Partnership Agreement [C-30], Articles 10.01(a), 10.04.

<sup>218</sup> Partnership Agreement [C-30], Article 4.06(b).

does not consider the balance of the General Partner's capital account in 2015 to be dispositive of its beneficial interest in the Samsung Shares at the time of the alleged breaches of the FTA.

183. Having concluded that the General Partner's entitlement to an Incentive Allocation represents a beneficial interest in the Samsung Shares, the Tribunal need not at present decide whether the General Partner has a beneficial interest in the Samsung Shares beyond its Incentive Allocation, for example an interest based on its entitlement to apply the assets of the Partnership in discharge of the Partnership's debts for which it, the General Partner, is solely responsible.<sup>219</sup>
184. In this context, the Tribunal notes, however, that Claimants' argument<sup>220</sup> that the concept of indivisibility determines the extent of its beneficial interest in the Partnership's assets has not been confirmed by the Parties' experts. They have stated at the Hearing:

Q. Then, on a last topic, I'm coming back to the discussion of indivisibility. Does the notion of 'indivisibility' determine the amount of a Partner's beneficial interest in the Partnership?

A. (Ms. Reynolds) Do you mean quantum?

Q. Yes.

A. (Ms. Reynolds) I would say no.

A. (Mr. Lindsay) No, it doesn't. That's the whole – that is the point of indivisibility. So, to the extent that two or three assets perform especially well and the General Partner feels buoyed by the idea that it will share in the upside of those assets, it has, until the point that you conduct the calculation of the Net Profit at the end of the year, it has notionally an indivisible interest in the upside of those assets. If one asset, then, performs particularly badly, then the General Partner loses the benefit of the stellar performance of the other assets.

Q. Right.

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<sup>219</sup> See below at ¶ 224.

<sup>220</sup> Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, pp. 500:6-501:5 [Claimants' Closing Statement]; pp. 538:25-539:15 [Claimants' Counsel].

So, does the notion of indivisibility help us to determine if a Partner has, for example, 1 percent beneficial interest or a 99 percent beneficial interest?

A. (Mr. Lindsay) No.

A. (Ms. Reynolds) No. (emphasis added)<sup>221</sup>

185. The Tribunal agrees with that mutual view of the experts. Furthermore, the Tribunal does not deem it necessary to further differentiate between the beneficial and the economic interest of the General Partner in the Partnership's assets, as suggested by Claimants in their closing statement.<sup>222</sup> In the Tribunal's view, both terms can be used interchangeably and relate to the General Partner's right to share in the benefits of ownership of the Partnership's assets.
186. As a last point on this issue, the Tribunal observes that it is this entitlement to share in the Partnership's profits that distinguishes the General Partner from the claimant in *Blue Bank v. Venezuela* who "as a trustee holding the assets of the Qatar Trust for the ultimate benefit of third party interests, does not own the assets of the Qatar Trust, did not invest these assets for its own account and cannot, therefore, ground jurisdiction on any investment made by it".<sup>223</sup> Contrary to a bare trustee, the General Partner is not disinterested in the Partnership's property but holds, in its own right, a beneficial interest in these assets which makes him a beneficial co-owner.
187. Based on this finding and without ruling on any requirement of beneficial ownership under the FTA or international law, the Tribunal rejects Respondent's argument that the General Partner was not a beneficial owner of the Samsung Shares.

(iv) *Estoppel*

188. As a final point on ownership, the Tribunal addresses Respondent's argument that the General Partner is estopped from relying on its ownership of the Samsung Shares due to the registration of the Cayman Fund as foreign investor without disclosure of the General Partner's purported interest.<sup>224</sup>

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<sup>221</sup> Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, p. 321:7-322:6 [Expert conferencing of Mr. Lindsay and Ms. Reynolds]; Second ER Lindsay [CER-2], ¶ 10.

<sup>222</sup> Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, pp. 500:6-501:5 [Claimants' Closing Statement].

<sup>223</sup> *Blue Bank v. Venezuela* [RLA-23], ¶ 172.

<sup>224</sup> Reply, ¶ 59.

189. Without ruling on the applicability or the prerequisites of the estoppel doctrine, the Tribunal considers that the requirements advanced by Respondent are not met. As the Tribunal has determined above,<sup>225</sup> the registration of the Cayman Fund as the titleholder has to be understood as referring to the General Partner under the applicable municipal laws. Consequently, there is no mismatch between the recorded and the actual investor.
190. Furthermore, Respondent has not established that it actually relied on the representations as there is no indication that the application would not have been granted if it had been submitted in the General Partner's name. Finally, Respondent has not shown that it suffered a loss, or that Claimants derived a benefit, from the representations made on the foreign investment registration application.
191. For these reasons, the Tribunal rejects Respondent's estoppel argument and concludes that the General Partner owned the Samsung Shares in the sense of Article 11.28 of the FTA.

(v) *Control*

192. The Tribunal now turns to Respondent's argument that the General Partner did not, directly or indirectly, control the Samsung Shares.
193. Respondent's argument is twofold: first, Respondent asserts that because the General Partner was not registered as an owner on the shareholder registries of SEC and SC&T, it did not have the legal capacity to exercise any shareholding rights under Korean law;<sup>226</sup> second, Respondent submits that whatever control the General Partner exercised over the Samsung Shares was only in the name of the legal owner, the Cayman Fund, and that this is similar to a situation where a director exercises shareholder rights on behalf of a corporation.<sup>227</sup>
194. In relation to the first point, the Tribunal refers to its earlier findings that the Cayman Fund lacks legal personality and that, although the Cayman Fund was nominally registered on the shareholder registries of SEC and SC&T, it could exercise its shareholding rights only through the General Partner.<sup>228</sup> Under Cayman law, to which Korean private international law refers in

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<sup>225</sup> See above at ¶¶ 151-163.

<sup>226</sup> Reply, ¶ 61.

<sup>227</sup> Reply, ¶ 62.

<sup>228</sup> See above at ¶ 162.

this context, the General Partner is the only entity that is entitled to exercise any rights associated with the ownership of the Partnership's assets.

195. The present case is therefore different from the situation described in the second part of Respondent's argument. The General Partner did not exercise any shareholder rights on behalf of a corporation but in its own name.
196. The Tribunal thus concludes that the General Partner controlled the Samsung Shares, *de jure* and *de facto*.

(2) Whether the General Partner has failed to make an investment under the FTA

197. The Tribunal now turns to Respondent's second argument that the General Partner does not qualify as an investor as it has failed to make an investment under the FTA.
198. As a preliminary issue, the Tribunal will address the question whether the FTA only affords protection to investors who themselves have made the covered investment.
199. Respondent argues that the investor itself must have made an investment that fulfils the characteristics of an investment under the FTA.<sup>229</sup> In Claimants' submission, Respondent attempts to construct two additional, extra-textual hurdles for investors: (i) a requirement that, to meet the definition of an investor under the FTA, a claimant must also demonstrate certain characteristics found in the definition of investment; and (ii) by claiming that the FTA only affords protection to investors who make an active contribution.<sup>230</sup>
200. The Tribunal notes that while Article 11.28 of the FTA defines an "investor of a Party" 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 ...", the definition of "investment" under the same provision describes the relationship between an investor and an investment in the following terms: "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" (emphasis added).

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<sup>229</sup> Reply, ¶ 26.

<sup>230</sup> Rejoinder, ¶¶ 40-41.

201. The Tribunal thus has to decide whether the relationship between protected assets and qualifying nationals is exclusively governed by the concepts of (direct or indirect) ownership or control or whether the use of the verb “making” in the definition of an investor imposes additional requirements on the investor.
202. This question is inextricably linked to Respondent's core legal proposition that an investor must beneficially own the investment. Respondent's argument that an investor needs to make an own contribution, expect own gain or profit and assume own risk presupposes that an investor enjoys the benefits of legal ownership.<sup>231</sup>
203. The Tribunal need not decide this question. Nor does it need to rule on the issue whether the specific characteristics listed in the definition of investment are merely stated by way of example or need to be fulfilled cumulatively. In light of the Tribunal's prior finding in relation to the General Partner's beneficial interest, and as will be set out in more detail below, the General Partner fulfils all additional requirements that Respondent invokes. In particular, the General Partner has made its own contribution (*i*), expected its own gain or profit (*ii*) and assumed its own risk (*iii*). In addition, and again without ruling on the existence of such jurisdictional requirement, the General Partner has held the Samsung Shares for a sufficient duration (*iv*).

*(i) Commitment of capital or other resources*

204. Respondent's argument on the absence of a meaningful contribution centres on Claimants' alleged failure to establish that the General Partner had acquired the Samsung Shares with its own capital as opposed to the capital of the Cayman Fund. This leads Respondent to conclude that the General Partner did not make a contribution, let alone a meaningful one, of its own financial means and at its own financial risk that would qualify as an investment.<sup>232</sup> According to Respondent, the General Partner's alleged contribution of knowledge and management merely constitutes pre-investment activity that is not protected under the FTA, did not transfer value and contribute to Samsung's business and therefore does not qualify as the contribution of “other resources”.<sup>233</sup> According to Respondent, Claimants have also not established that any pre-

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<sup>231</sup> This connection between the making of an investment and the requirement of beneficial ownership has also been noted by Hanno Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected under International Investment Agreements*, 34(6) J. Int'l Arb. (2017) [RLA-22], p. 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.”).

<sup>232</sup> Memorial, ¶¶ 25-26, referring to *KT Asia v. Kazakhstan* [RLA-17], ¶¶ 192-206; *Blue Bank v. Venezuela* [RLA-23], ¶¶ 163, 172; Reply, ¶¶ 35, 40.

<sup>233</sup> Reply, ¶¶ 35-36.

investment analysis was in fact performed by the General Partner and not by the Investment Manager.<sup>234</sup>

205. Claimants argue that the General Partner made a contribution by committing the capital under its exclusive control to the acquisition of the Shares (totalling approximately USD 5.56 billion) and contributed its investment decision-making, management and expertise (totalling approximately USD 0.96 billion).<sup>235</sup> According to Claimants, this qualifies as the contribution of “other resources” in the sense of Article 11.28 of the FTA. In relation to the temporal scope, Claimants point to the fact that the definition of “investor” in Article 11.28 of the FTA comprises “attempts to make ... an investment” and thus also extends to the pre-investment phase.<sup>236</sup> Furthermore, Claimants assert that the General Partner engaged as a significant minority shareholder in an ongoing dialogue with the Samsung Group even after acquisition of the shares.<sup>237</sup>
206. The Tribunal bears in mind the fact that the General Partner did not make any cash contributions to the Partnership and that the funds used to acquire the Samsung Shares originate from the Limited Partner's cash contributions.<sup>238</sup>
207. However, again, the Tribunal does not deem it necessary to decide whether the origin of the capital used to acquire the shares plays a role in determining whether the General Partner has made an own contribution. In the Tribunal's view, Claimants have sufficiently established that the General Partner's investment decision-making, management and expertise constitutes a commitment of “other resources” in the sense of Article 11.28 of the FTA.
208. Mr. Garschina has described these activities in his written testimony in the following way:

The team under my supervision spent hundreds of hours investigating and analyzing Samsung Electronics and the Samsung Group. The internal team regularly met and discussed the company's performance, including reviewing analyst reports from local and international brokers, and preparing and compiling models for the companies. The team travelled to Korea, and worked with other market participants (including other foreign investors in Samsung, and investment

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<sup>234</sup> Reply, ¶ 36.

<sup>235</sup> Rejoinder, ¶ 58.

<sup>236</sup> Rejoinder, ¶¶ 39, 61.

<sup>237</sup> Rejoinder, ¶ 62, citing Second WS Garschina [CWS-3], ¶¶ 10-12.

<sup>238</sup> See above at ¶ 59.



banks), with experts on Korean companies and the Korean market, and with the Samsung Group's investor relations group ...

While Mason was a minority foreign investor, and its ability to control the ultimate direction of the company was limited, it was clear that Samsung was at least outwardly interested in the views of foreign investors on Samsung's approach to corporate governance. The team's regular meetings with Samsung's investor relations group were not only an opportunity to learn more about the drivers of the Samsung business, but also to express our views and suggestions on Samsung's corporate strategy, provide feedback on the expectations of the market, and contribute to the pressure on Samsung to reform its internal governance.<sup>239</sup>

209. There is no dispute between the Parties that the FTA generally allows contributions in kind.<sup>240</sup> Instead, Respondent's arguments centre on the temporal aspect and the involvement of the Investment Manager.
210. In respect of Respondent's argument that these activities predate the investment in the Samsung Shares, the Tribunal considers that pre-investment activities are included in the ambit of the FTA. This follows from the definition of investor whose explicit language ("attempts to make, is making, or has made an investment") extends the FTA's temporal scope of application to the pre-investment phase. The ordinary meaning of these terms, which the Tribunal shall have regard to under Article 11.22.1 of the FTA in conjunction with Article 31.1 of the Vienna Convention on the Law of Treaties, is that an investor is already protected by the FTA if it is still in the process of making an investment.
211. Regarding the involvement of the Investment Manager, the Tribunal is aware of Mr. Satzinger's testimony that all staff was employed by the Investment Manager.<sup>241</sup> Yet both Mr. Satzinger and Mr. Garschina also state in their witness statements that the decision-making authority in Mason and its related entities rested in the General Partner at all times, and that the General Partner has

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<sup>239</sup> Second WS Garschina [CER-3], ¶¶ 18-19.

<sup>240</sup> See Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, p. 474:6-8 [Respondent's Closing Statement].

<sup>241</sup> First WS Satzinger [CWS-2], ¶ 8; Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 177:22-24 [Cross-examination of Mr. Satzinger].

merely delegated the exercise of some of its authority under the Partnership Agreement to the Investment Manager which remained under the supervision of the General Partner.<sup>242</sup>

212. The General Partner's decision-making authority is confirmed by Article 3.01 of the Partnership Agreement which provides that "[t]he management, control and the conduct of the business of the Partnership shall be vested exclusively in the General Partner."<sup>243</sup> The Partnership Agreement also explicitly provides for the possibility that the General Partner employs agents in the performance of its services.<sup>244</sup> Finally, only the General Partner but not the Investment Manager was entitled to share in the benefits of the Partnership's assets and thereby assumed risk, as the Tribunal will explain in more detail below.<sup>245</sup>
213. The Tribunal therefore concludes that any work by the Investment Manager was performed on behalf and in the exercise of the General Partner's rights and obligations under the Partnership Agreement.
214. As a final point on the issue of contribution, the Tribunal has taken note of Mr. Lindsay's and Ms. Reynold's initial disagreement on whether investment expertise qualifies as a contribution in kind under Cayman law.<sup>246</sup> In the Tribunal's view, whether investment expertise constitutes a contribution in kind under Cayman law is not relevant to the question at issue whether the General Partner's investment decision-making, management and expertise qualifies as the commitment of "other resources" in the sense of Article 11.28 of the FTA.
215. At the Hearing, it became clear that the experts were essentially in agreement that, while the value of the General Partner's investment expertise was not initially reflected in its capital account, this did not mean that the Partnership Agreement did not ascribe to it any value at all.

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<sup>242</sup> First WS Garschina [CWS-1], ¶ 6; First WS Satzinger [CWS-2], ¶¶ 7-8.

<sup>243</sup> Partnership Agreement [C-30], Article 3.01.

<sup>244</sup> Article 3.02 of the Partnership Agreement [C-30] provides in relevant terms: "The General Partner shall have the power by itself on behalf and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership set forth in Section 1.05, and to perform all acts and enter into and perform all contracts and other undertakings which it may deem necessary or advisable or incidental thereto, and to have and possess the same rights and powers as any general partner in a partnership formed under the laws of the Cayman Islands, including, without limitation, to: ... (1) employ such agents, brokers, consultants, advisors, attorneys and accountants, as it deems reasonably appropriate and necessary for the conduct of the business of the Partnership ... (emphasis added)."

<sup>245</sup> See below at ¶¶ 219-225.

<sup>246</sup> Reynolds Opinion [RER-1], ¶ 42; Second ER Lindsay [CER-2], ¶ 17.

Rather, the Incentive Allocation reflects the value that the Partnership Agreement assigns to the General Partner's investment expertise.<sup>247</sup>

216. The Tribunal agrees with that assessment. The Partnership Agreement is structured in such way that the General Partner contributes its investment decision-making, management and expertise to the benefit of the Partnership and receives an Incentive Allocation in return for these services. In the Tribunal's view, the provision of these services constitutes a contribution of "other resources" in the sense of the FTA.

217. Consequently, the Tribunal concludes that the General Partner has made a contribution within the meaning of Article 11.28 of the FTA.

*(ii) Expectation of gain or profit*

218. It is undisputed between the Parties that the General Partner, through its entitlement to an Incentive Allocation, had an expectation of gain or profit.<sup>248</sup>

*(iii) Assumption of risk*

219. Turning to the question whether the General Partner assumed any risk in respect of the Samsung Shares, the Tribunal will first address Respondent's argument that a claimant does not bear any risk associated with the acquisition of equity where it has not made any capital contribution to that acquisition.<sup>249</sup>

220. The Tribunal refers to its prior finding that the General Partner's investment decision-making, management and expertise constitutes a commitment of other resources.<sup>250</sup> While the General Partner has not made any cash contributions, the Partnership Agreement assigns a value to the services rendered by the General Partner. Given that this value is dependent on the performance of the Partnership's assets, the Tribunal agrees with Claimants' submission that the General Partner assumed the risk that, despite its commitment of other resources, the Partnership's assets,

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<sup>247</sup> See Transcript of Hearing on Preliminary Objections, Day 2, 3 October 2019, pp. 273:6-279:16 [Expert conferencing of Mr. Lindsay and Ms. Reynolds].

<sup>248</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 35:18-22 [Respondent's Opening Statement].

<sup>249</sup> Reply, ¶ 43.

<sup>250</sup> See above at ¶¶ 204-217.

including the Samsung Shares, would not appreciate in value and that it would not receive any Incentive Allocation.<sup>251</sup>

221. The Tribunal need not go any further and look at any spill-over effects in respect of other assets of the Partnership.<sup>252</sup> Any depreciation in the value of the Samsung Shares can negatively affect the General Partner's Incentive Allocation and thereby curtail its ability to recover the costs and expenses associated with its services.
222. For this reason, the Tribunal disagrees with Respondent's characterization of the Incentive Allocation as a "one-sided arrangement that allowed the [General Partner] to share in the upside of market operations (such as the acquisition of the Samsung Shares) without any liability to share in their downside".<sup>253</sup> The General Partner shares in the downside by having rendered its services in vain and without receiving any consideration.
223. Furthermore, the fact that the Partnership Agreement<sup>254</sup> limits the General Partner's liability towards the Limited Partner or the Partnership does not absorb the above-mentioned risk that the General Partner is unable to make good for its contribution of other resources.
224. The Tribunal may also have to determine whether the General Partner's undisputed liability to discharge the debts of the Partnership could have some relevance for the assessment of its alleged own loss.<sup>255</sup>
225. The Tribunal therefore concludes that the General Partner assumed the investment risk that it would not receive an Incentive Allocation in exchange for the resources contributed by it.

*(iv) Duration*

226. The Tribunal refers to the Parties' disagreement as to whether there is an additional implicit requirement under the FTA and/or general international investment law that the investment needs

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<sup>251</sup> Rejoinder, ¶¶ 67-68.

<sup>252</sup> Rejoinder, ¶ 69, referring to Second ER Lindsay [CER-2], ¶ 30(b).

<sup>253</sup> Reply, ¶ 45.

<sup>254</sup> Article 3.06 of the Partnership Agreement [C-30] provides: "The General Partner (and its members, employees, agents and affiliates) (each, a 'Covered Person') shall not be liable to any other Partner or the Partnership for any loss suffered by the Partnership unless such loss is caused by such Covered Person's Gross Negligence, willful misconduct or breach of fiduciary duty...".

<sup>255</sup> See Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, pp. 519:13-527:12.

to be held for a sufficient duration.<sup>256</sup> The Tribunal is aware that the non-exhaustive list of characteristics of an investment in Article 11.28 of the FTA does not include any requirement as to the duration of an investment. Yet the Tribunal need not rule on this legal issue as the General Partner fulfils any implicit requirement suggested by Respondent.

227. The Parties agree that if a duration requirement is to be applied, the Tribunal needs to look to the intended duration of the investment.<sup>257</sup>

228. In the absence of an explicit requirement of duration in the FTA, there are no clear indications which duration is to be deemed sufficient. Assuming (but not deciding) that an implicit duration requirement exists, the Tribunal agrees with the flexible approach adopted by other tribunals, as formulated by the *Romak v. Uzbekistan* tribunal:

The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of 'investment' status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor's overall commitment.<sup>258</sup>

229. The Tribunal concludes that the General Partner satisfies this standard and held the Samsung Shares for a sufficient duration.

230. In his written testimony, Mr. Garschina has described Mason's investment strategy as follows:

What prompted us to invest at that time was the prospect that the transition to the next generation of leadership would require a significant restructuring of the Samsung Group. The restructuring would be a catalyst to unlock value in the

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<sup>256</sup> Reply, ¶¶ 47-49; Rejoinder, ¶¶ 71-76.

<sup>257</sup> Reply, ¶¶ 50-51; Counter-Memorial, ¶ 55, citing *KT Asia v. Kazakhstan* [RLA-17], ¶ 209 ("When assessing the duration in light of the circumstances, the question arises about the weight to be given to the investor's intentions or expectations in terms of duration. Like the tribunals in *Deutsche Bank* and in *L.E.S.I.*, this one is of the opinion that 'it is the intended duration period that should be considered to determine whether the criterion is satisfied'". See also *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 ("*Deutsche Bank v. Sri Lanka*") [CLA-30], ¶ 304 ("[I]t is the intended duration period that should be considered to determine whether the criterion is satisfied.").

<sup>258</sup> *Romak v. Uzbekistan* [RLA-10], ¶ 225. This standard has been confirmed in *Deutsche Bank v. Sri Lanka* [CLA-30], ¶ 303 ("With respect to duration, the Tribunal once again agrees with Schreuer that '[duration] is a very flexible term. It could be anything from a couple of months to many years'. Further, the Tribunal concurs with the statement made by the Tribunal in *Romak v. Republic of Uzbekistan*, holding that 'short-term projects are not deprived of 'investment' status solely by virtue of their limited duration. Duration is to be analysed in light of all the circumstances, and of the investor's overall commitment'.").

business for shareholders. The Samsung heir apparent was under a lot of pressure from shareholders (particularly foreign shareholders) to improve governance and increase returns ...

Consistent with our view, Samsung was interested in foreign investors' preferences for returns and a desire to be in line with global peers within 2-3 years. Samsung's view was that restructuring was likely to take the form of a holding/operating company structure, but this was 'unlikely to be a near-term event' given tax, money and other logistics involved.<sup>259</sup>

231. At the Hearing on Preliminary Objections, Mr. Garschina added that

[a]lso a part of it was the corporate environment in Korea and the fact that laws had been passed that would require certain structures to be unwound. Those structures, commonly referred to as the 'chaebol' system, are a group of circularity- driven – I mean, if you looked at the Mason capital structure, and I'm confused by it, if you looked at the Samsung structure, your brain would explode, so the Government of Korea said this is not hospitable to investment capital.<sup>260</sup>

232. Also at the Hearing, Mr. Garschina commented on the time horizon of Mason's investment in Samsung as follows:

Q. And do I understand your testimony to be that the time horizon on your Samsung holdings was longer than three to nine months?

A. It was impossible to tell because of the complexity of it. ...

...

Q. It was impossible to tell, I think that's good enough.

A. You know, some investments you make, there's a merger agreement, and you're going to get paid a certain amount of money, and it's feasible to bracket a time period where you're going to receive your money. Other investments – and – and having a shorter time, your money invested for a shorter period of time is not a bad

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<sup>259</sup> Second WS Garschina [CWS-3], ¶¶ 8-9.

<sup>260</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 123:16-25 [Cross-examination of Mr. Garschina].

thing, it's a good thing, because your Internal Rate of Return will be higher and your investor's capital will be at risk for a shorter period of time and for less market risk, a lot of other factors that we were not interested in imposing on our investors unnecessarily.

But this investment is more of an open-ended, long-term investment because the gestation period for change in Korea was going to be long. I would compare it to like a long bankruptcy investment where you have the process moves along quite slowly as evidenced by the fact that we're still sitting here in 2019, and they're still restructuring. (emphasis added)<sup>261</sup>

233. Mr. Garschina further stated that under normal circumstances Mason intended to hold the Samsung Shares until after the restructuring:

Q. I'm asking you whether that is your testimony, that you intended to hold the Shares until after the restructuring?

A. I think – I think we were going to hold the Shares until not only in the restructuring happened but at a price – inherent in investing is being happy where the price is. You can't just – it's not untrue –

Q. Right.

A. – but there are many reasons.

Q. Right. So, you were intending to hold the Shares until you could make money selling them in the market; right?

A. Or until there was a reason that we had to get out, which happened in this case.<sup>262</sup>

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<sup>261</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 136:8-137:11 [Cross-examination of Mr. Garschina].

<sup>262</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 144:5-18 [Cross-examination of Mr. Garschina].

234. The Tribunal gathers from Mr. Garschina's written and oral testimony that when Mason started investing the duration of the investment was difficult to assess but that Mason expected this to be "more of an open ended, long term investment".<sup>263</sup>
235. Mr. Garschina's testimony is confirmed by the estimates on the investment's duration provided in contemporaneous email correspondence between Mason employees (and third parties) that has been exhibited together with Mr. Garschina's second witness statement.
236. On 22 May 2014, [REDACTED], a Mason employee and member of the core team for the Samsung investment,<sup>264</sup> sent an email to other Mason employees as well as Mason's co-founder, Mr. Martino, summarizing the takeaways from a meeting with Samsung's investor relations a few days earlier. In this email, [REDACTED] provided the following assessment of the time horizon of possible overhauls of Samsung's corporate governance:

Re: chairman's health and potential corporate governance, they think the company will eventually have some sort of holdco/opco structure. But this could take easily 5+ years to come to fruition as the amount of tax, money and other logistics involved will make it unlikely to be a near-term event. (emphasis added)<sup>265</sup>

237. In an email of 27 May 2014, Mason employees circulated a detailed note prepared by the financial services company [REDACTED]. In this note, the author commented on the possible timeframe of any changes in Samsung's corporate governance structure as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>263</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 137:5-6 [Cross-examination of Mr. Garschina].

<sup>264</sup> Second WS Garschina [CWS-3], ¶ 4.

<sup>265</sup> Email from [REDACTED] to [REDACTED] et al., 22 May 2014 [C-42].



[REDACTED]  
[REDACTED] (emphasis added)<sup>266</sup>

238. In an email of [REDACTED] to a contact at [REDACTED] of 15 July 2014 in preparation of a trip to Seoul, [REDACTED] describes Mason's investment strategy *inter alia* in the following terms:

We are primarily value-driven, with a longer-term time horizon. We generally take a bottoms up, fundamental view on most positions. We invest globally across all asset classes, but mostly in equities and credit. We have taken large positions within Asia, that we have held for several years. (emphasis added)<sup>267</sup>

239. On that basis, the Tribunal concludes that the General Partner was prepared to hold the Samsung Shares for a longer term.

240. Contrary to Respondent's assertion, the Tribunal does not see any indications that the General Partner intended "to exploit short-term fluctuations in share prices associated with the Merger, rather than to make a long-term commitment."<sup>268</sup> Respondent bases this assertion on the General Partner's allegedly event-driven investment strategy and the timing of the acquisition of the SC&T shares following the announcement of the merger.

241. As to Respondent's first point, the Tribunal notes that even if the General Partner's investment had been "event-driven" in the sense that the General Partner considered possible changes of Samsung's corporate governance as an opportunity to invest, this is not indicative of any short-term investment in and by itself. The Tribunal is aware of the due diligence report published by the Rhode Island Office of the General Treasurer describing Mason's investment horizon as being "shorter than most event driven and distressed managers, with an average holding period of 3 to 9 months."<sup>269</sup> Independent of whether this statement is a correct and fair description of Mason's investment horizon,<sup>270</sup> the Tribunal does not consider that this average holding period was meant to apply to the General Partner's investment in Samsung. As the Tribunal has explained, there are clear indications in Mason's contemporaneous email correspondence that the General Partner

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<sup>266</sup> Email from [REDACTED] to [REDACTED] et al., attaching [REDACTED], 27 May 2014 [C-43], p. 2

<sup>267</sup> Email from [REDACTED] to [REDACTED], 15 July 2014 [C-34].

<sup>268</sup> Reply, ¶ 53.

<sup>269</sup> Hedge Fund Investment Due Diligence Report, Mason Capital, 31 December 2010 [R-3], p. 6.

<sup>270</sup> The Tribunal has noted Mr. Garschina's reservations about the report; see Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, p. 120:8-122:10 [Cross-examination of Mr. Garschina].

intended to hold the Samsung Shares for a longer term. The same due diligence report also acknowledges that “the fund may be invested in situations that play out over extended periods of time and thus is exposed to market risk”.<sup>271</sup>

242. In relation to Mason's trading pattern between May 2014 and July 2015 and, in particular, the timing of its acquisition of the SC&T shares, the Tribunal has studied Mason's trading records for SEC<sup>272</sup> and SC&T<sup>273</sup> as well as the explanations provided by Mr. Garschina at the Hearing.
243. While the Tribunal is aware that Mason sold its entire position in SEC in August 2014 and again in October 2014, the Tribunal does not consider this to be indicative of a short-term investment. At the Hearing, Mr. Garschina described these trades as part of the execution process and independent of Mason's investment strategy:

Q. And isn't it true that you sold your entire holding of Samsung Electronics – by the 10th of October, you had sold your entire holding of Samsung Electronics?

A. That's what it says. What I would say to you is that part of the execution process often is – it's like when you're going into an ocean, you don't jump in right away, at least I don't, sometimes you put a leg in, sometimes you put an arm in, and you splash water on yourself, and if you don't like it you may go out, but you ultimately go in, and that's part of the execution process for investing. And I think that's what you're seeing here. It's maximizing, getting the lowest price for our investors for which – who we're fiduciaries.

Q. I understand the reasons. But what I'm asking you is that by the 10th of October 2014, isn't it true that Mason had liquidated its entire holding in Samsung Electronics?

A. It looks like that, but again, I would say that that's not the end of the investment. That's part of the execution process. (emphasis added)<sup>274</sup>

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<sup>271</sup> Hedge Fund Investment Due Diligence Report, Mason Capital, 31 December 2010 [R-3], p. 6.

<sup>272</sup> Mason trading records Samsung Electronics, 8 August 2015 [C-31].

<sup>273</sup> Mason trading records SC&T, 10 August 2015 [C-32]. See also above at ¶¶ 44-57 as well as the demonstrative exhibits [RDE-1] and [RDE-2].

<sup>274</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 147:13-148:7 [Cross-examination of Mr. Garschina].

Q. You don't say anywhere in your Witness Statements, in your two Witness Statements, Mr. Garschina, that after the period from May 2014 to June 2015 Mason had been trading in and out of Samsung Electronics. You don't say that in your Witness Statements?

A. To me, it's not relevant. Optimizing our price is something completely different from my investment thesis and my investment research and the ideas I have in my mind. (emphasis added)<sup>275</sup>

244. The Tribunal finds this explanation convincing. The Tribunal considers that a holistic approach is warranted when looking at the individual buy and sell executions. In the Tribunal's view, Claimants have satisfactorily explained that such buy and sell executions merely constituted price optimizations that are part of Mason's overall investment strategy and do not contradict its intention to hold the Samsung Shares for a longer period of time.

245. Mr. Garschina has explained the timing and the duration of Mason's position in SC&T as follows:

Q. So, Mason held the Shares in SC&T for about two months; right? Correct?

A. Well, we started in April and we ended in August – August? Yeah, August.

Q. Sorry, Mason – you started in April, you bought 334,000, you sold them in April, and then you bought in May, in June, early June, and you held them until August. That's about two months.

A. That's the trading record, although I would emphasize that C&T was a proxy for Samsung Electronics. It essentially is a company – maybe still today; I haven't followed it – its primary asset was shares in Samsung Electronics. They had some other peripheral assets. But the reason to buy C&T – there were several reasons, but one of the main reasons to buy it was that it was a cheaper proxy of Samsung Electronics.

So I don't – you haven't pointed me to how much Samsung Electronics we owned at this point.

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<sup>275</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 150:19-151:2 [Cross-examination of Mr. Garschina].

Q. Right.

A. But what I would say is that it's a – my recollection is that we swapped, not in a financial funding instrument, but we sold some Samsung or just bought Samsung C&T as a cheaper way to buy Samsung Electronics.

So, when I look at our investment at Samsung, it's in – for restructuring of Samsung, it says as a whole. It's not C&T or Samsung.

And importantly, I think that C&T effectively, its main asset was Samsung Electronics in the cross holdings. So, if you added up the Shares in Samsung Electronics and then added up the other, I believe there was some real estate and a few other operating businesses – I believe there was a blood – some sort of generic biotech business – if you added that up, you are 'creating,' my word, Samsung Electronics at a cheaper price.

So, when you say we entered C&T and we exited at – and during a short period of time, I would say two things: One, our investment, as I said before, begins the day we start research. Executing in the market is a switch that we turn on when we want to have economic exposure to that investment process.

And two, Samsung and Samsung C&T were not completely disconnected investments since they were overlapping in the sense that they were both inherently exposed to Samsung Electronics and that Samsung C&T was also undergoing a merger vote that we anticipated would have to be – the exchange ratio would have to be increased if the vote was turned out. (emphasis added)<sup>276</sup>

246. In the Tribunal's view, Mr. Garschina provided a conclusive explanation as to why Mason decided to increase its position in SC&T while at the same time selling some of its shares in SEC. Mason considered SC&T to be a proxy for SEC which it thereby could acquire at a cheaper price. The Tribunal is persuaded that Mason's holdings in SEC and SC&T are based on the same investment strategy and constitute a coherent investment.

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<sup>276</sup> Transcript of Hearing on Preliminary Objections, Day 1, 2 October 2019, pp. 154:1-155:24 [Cross-examination of Mr. Garschina].

247. Even if the acquisition of the SC&T was (partially) inspired by the merger announcement, this would not be indicative of an insufficient duration. Rather, as the Tribunal has explained, Mason considered the overhaul of Samsung's corporate governance structure to be an ongoing process.
248. Consequently, the Tribunal finds that the General Partner intended to hold the Samsung Shares for a sufficient duration.

*d) Conclusion*

249. For the above reasons, the Tribunal concludes that the General Partner owned and controlled the Samsung Shares and made an investment in the sense of Article 11.28 of the FTA. Consequently, the Tribunal rejects Respondent's request for a declaration that the Tribunal lacks jurisdiction over the General Partner's claim on the basis that: the General Partner has not made an investment in accordance with Article 11.28 of the FTA; and/or the General Partner did not own or control the Samsung Shares; and rejects Respondent's request to dismiss all of the claims brought by the General Partner for that reason.

**2. Whether the General Partner has standing to bring a claim**

*a) Respondent's position*

250. Respondent submits that the General Partner lacks standing under the FTA and international law, as it has no "beneficial ownership" in the alleged investment and brings claims for damages allegedly suffered by the Cayman Fund as a third party.<sup>277</sup>
251. In relation to the FTA, Respondent argues that, pursuant to Article 11.16.1 of the FTA, the General Partner may submit to arbitration claims only "on its own behalf" and on behalf of its Korean subsidiaries, but not on behalf of third Parties such as the Cayman Fund.<sup>278</sup> Contrary to Claimants' submission, Respondent asserts that the expression "on its own behalf" does not merely serve to distinguish regular claims from derivative claims on behalf of an enterprise of Respondent.<sup>279</sup> Respondent also contends that legal ownership and control do not suffice to claim compensation for an alleged breach of the FTA.<sup>280</sup>

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<sup>277</sup> Reply, ¶ 64.

<sup>278</sup> Reply, ¶¶ 65-66.

<sup>279</sup> Reply, ¶ 67.

<sup>280</sup> Reply, ¶ 67.

252. Respondent asserts that Article 11.16.1 of the FTA is comprehensive and does not cover the situation where a claimant brings claims on behalf of a third party that is not a host-State enterprise.<sup>281</sup> Additionally, absent a beneficial interest, the General Partner cannot have “incurred loss or damage” as required by Article 11.16.1(a) of the FTA.<sup>282</sup> Moreover, the distinction between Articles 11.16.1(a) and (b) would be rendered meaningless if Claimants’ interpretation prevailed since, in either scenario, the entire loss would then be that of Claimants.<sup>283</sup>
253. To support its reading of Article 11.16.1 of the FTA, Respondent refers to investment tribunal decisions on the analogous Articles 1116 and 1117 of the North American Free Trade Agreement.<sup>284</sup>
254. According to Respondent, the restriction on standing contained in the FTA is confirmed by a “general principle of international investment law”, namely that “claimants are only permitted to submit their own claims, held for their own behalf not those held (be it as nominees, agents or otherwise) on behalf of third parties.”<sup>285</sup> Relying on the dissent as well as the decision of the Annulment Committee in *Occidental v. Ecuador*, Respondent argues that, in cases where beneficial and legal ownership are not in the same hands, international law grants standing only to the beneficial owner, as the owner of the economic interest, but not to the nominal owner.<sup>286</sup>
255. Respondent rejects Claimants’ contention that these authorities are inapposite because their reasoning is based on the law of diplomatic protection. In this regard, Respondent asserts that a large number of investment tribunals have adopted the above-mentioned principle as a principle of international investment law to dismiss claims brought by nominal owners on behalf of beneficial owners regardless of the principle’s position in the law of diplomatic protection.<sup>287</sup> In

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<sup>281</sup> Reply, ¶ 68.

<sup>282</sup> Reply, ¶ 69.

<sup>283</sup> Reply, ¶ 70.

<sup>284</sup> Reply, ¶¶ 71-74, citing *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002 [RLA-30], ¶ 80; *Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 [RLA-31], ¶ 82; *William Richard Clayton et al. v. The Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019 [RLA-55], ¶ 388; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, 18 September 2001 [CLA-39], ¶ 6.

<sup>285</sup> Memorial, ¶ 11 citing *Occidental Annulment* [RLA-21], ¶ 262; Reply, ¶¶ 64-66.

<sup>286</sup> Memorial, ¶¶ 14-16; Reply, ¶¶ 77-78, relying on *Occidental Annulment* [RLA-21], ¶¶ 259, 262, 265-266; *Occidental Dissent* [RLA-15], ¶¶ 148-149, 151.

<sup>287</sup> Memorial, ¶¶ 14, 17; Reply, ¶¶ 79-86, referring to *Occidental Annulment* [RLA-21], ¶ 259; *Occidental Dissent*, [RLA-15], ¶¶ 139-144; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (“*Impregilo v. Pakistan*”) [RLA-6], ¶¶ 144-153; *Blue*

contrast, Respondent submits that the investment tribunal decisions put forward by Claimants are not persuasive since on a closer reading they do not support Claimants' position.<sup>288</sup>

256. Finally, Respondent rejects Claimants' argument that a *lex specialis* regime established by the FTA prevails over general principles of international law, including the principles related to standing and beneficial ownership.<sup>289</sup> First, "applicable rules of international law" are part of the applicable law in this dispute pursuant to Article 11.22.1 of the FTA.<sup>290</sup> Second, "a treaty provision is *lex specialis* vis-à-vis rules of international law only if the provision expressly regulates the same subject matter with more specificity."<sup>291</sup> While the "express provisions"<sup>292</sup> would serve as evidence of the treaty parties' intent to derogate from general international law, none of the FTA's provisions "derogates from the beneficial ownership requirement under international investment law".<sup>293</sup> To the extent that Claimants argue otherwise, the authorities adduced in Claimants' favour do not support their position.<sup>294</sup>
257. Turning to the facts of the case, Respondent submits that the General Partner "stands before this Tribunal not to claim compensation for its own losses, but for losses purportedly suffered by the Cayman Fund (and by its Limited Partner). The GP claims the entirety of the alleged loss in value

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*Bank v. Venezuela* [RLA-23], ¶ 163; *Zhinvali Development Ltd. V. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 [RLA-4], ¶¶ 396-405; *PSEG Global, Inc., and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 [RLA-7], ¶ 325; *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 ("*Mihaly v. Sri Lanka*") [RLA-3], ¶¶ 24-26; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015 [RLA-50], ¶ 388.

<sup>288</sup> Reply, ¶¶ 87-89, addressing Claimants' arguments with respect to *Saluka v. Czech Republic* [CLA-41], ¶ 244; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 ("*CSOB v. Slovak Republic*") [RLA-26], ¶ 31; *Saba Fakes v. Turkey* [CLA-40], ¶ 140.

<sup>289</sup> Reply, ¶ 91.

<sup>290</sup> Reply, ¶ 92.

<sup>291</sup> Reply, ¶ 92, referring to Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (2006) [RLA-38], ¶ 56.

<sup>292</sup> Reply, ¶ 93, citing *Loewen Group v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 [RLA-32], ¶ 162.

<sup>293</sup> Reply, ¶ 93.

<sup>294</sup> Reply, ¶¶ 94-97, citing *KT Asia v. Kazakhstan* [RLA-17], ¶ 128; *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 ("*Waste Management v. Mexico*") [CLA-19], ¶¶ 84-85; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, 12 September 2010 ("*RosinvestCo v. Russia*") [CLA-38], ¶¶ 388, 672; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226, Interim Award on Jurisdiction and Admissibility, 30 November 2009 ("*Hulley v. Russia*") [CLA-33], ¶¶ 420-421; *Von Pezold v. Zimbabwe* [CLA-27], ¶¶ 838-839.

of the Samsung Shares that it held on trust for the benefit of the Cayman Fund, irrespective of the existence and extent of the GP's own loss (which depends on the GP's Partnership Interest in the Samsung Shares, if any)."<sup>295</sup>

258. According to Respondent, the General Partner has not shown that it had any Partnership Interest in the Samsung Shares.<sup>296</sup> Furthermore, whether the General Partner is "exclusively responsible for the conduct of the [Cayman Fund's] investment business", makes all relevant decisions, and is "the only entity with capacity to engage in legal proceedings with respect to the Cayman Fund's] assets" is irrelevant to the General Partner's standing under the FTA.<sup>297</sup>

**b) Claimants' position**

259. Claimants reject Respondent's attempt to introduce "standing" or "beneficial ownership" requirements into the FTA, arguing that these are contrary to the express terms of the FTA.<sup>298</sup> Indeed, according to Claimants, the General Partner has a standing as it owned and controlled the Samsung Shares.<sup>299</sup>

260. Claimants submit that Respondent's position rests upon a "tortured reading" of Article 11.16 of the FTA which, by its plain terms, does not require a potential claimant to demonstrate "standing" premised on beneficial ownership.<sup>300</sup> Contrary to Respondent's submission, the term "on its own behalf" in Article 11.16.1(a) of the FTA does not introduce such a requirement and is simply used to distinguish regular and derivative claims that can be filed "on behalf of an enterprise of the respondent" under Article 11.16.1(b) of the FTA.<sup>301</sup>

261. Claimants further argue that a "freestanding general principle" that denies standing to a party without beneficial ownership does not exist in the regime of international investment law, which is distinct from the customary international law regime of diplomatic protection.<sup>302</sup> According to

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<sup>295</sup> Reply, ¶ 99.

<sup>296</sup> Reply, ¶ 100.

<sup>297</sup> Reply, ¶ 102.

<sup>298</sup> Counter-Memorial, ¶ 61; Rejoinder, ¶ 100.

<sup>299</sup> Counter-Memorial, ¶ 60; Rejoinder, ¶ 113.

<sup>300</sup> Counter-Memorial, ¶¶ 62-64; Rejoinder, ¶ 101.

<sup>301</sup> Counter-Memorial, ¶ 65; Rejoinder, ¶ 102.

<sup>302</sup> Counter-Memorial, ¶ 66, referring to *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 24 May 2007 [CLA-26], ¶¶ 88-90; Rejoinder, ¶¶ 105-109.



Claimants, the existence of such a principle is not supported by the decisions cited by Respondent and has been rejected by other authorities.<sup>303</sup>

262. Even if such a “general principle” were to exist, Claimants contend that it could not override the *lex specialis* regime created by the FTA.<sup>304</sup> According to Claimants, Respondent misapplies the *lex specialis* doctrine when it states that the “treaty provision is *lex specialis* vis-à-vis international law only if the provision expressly regulates the same subject matter with more specificity.”<sup>305</sup> Instead, according to Claimants, the *lex specialis* doctrine operates at a general, subject-matter level.<sup>306</sup>
263. Notwithstanding, Claimants submit that the General Partner satisfies Respondent's additional standing requirement, noting that “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.”<sup>307</sup>

*c) The Tribunal's analysis*

264. In its Reply, Respondent has introduced an alternative request for relief that the Tribunal dismiss the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner lacks standing to submit claims on behalf of third parties, and that the Tribunal declare that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015.<sup>308</sup>
265. Respondent submits that the General Partner lacks standing to submit claims on behalf of the Cayman Fund and the Limited Partner under Article 11.61.1 of the FTA as well as under general international investment law.

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<sup>303</sup> Counter-Memorial, ¶¶ 66-71, referring to *Occidental Annulment* [RLA-21], ¶ 261, fn. 192; *Impregilo v. Pakistan*, [RLA-6]; *Blue Bank v. Venezuela* [RLA-23]; *Perenco v. Ecuador* [CLA-37], ¶ 523, fn. 828; Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) [CLA-49], ¶ 559, which in turn refers to *CSOB v. Slovak Republic* [RLA-26]; Rejoinder, ¶¶ 105-108.

<sup>304</sup> Counter-Memorial, ¶¶ 72-75, citing *Waste Management v. Mexico* [CLA-19], ¶ 85; *KT Asia v. Kazakhstan* [RLA-17], ¶¶ 129, 140, 143; *RosInvestCo v. Russia* [CLA-38], ¶ 323; *Hulley v. Russia* [CLA-33], ¶ 429; *Von Pezold v. Zimbabwe* [CLA-27], ¶ 314.

<sup>305</sup> Rejoinder, ¶ 112.

<sup>306</sup> Rejoinder, ¶ 112.

<sup>307</sup> Rejoinder, ¶ 113.

<sup>308</sup> Reply, ¶ 121.

266. As stated above, Article 11.16.1(a) of the FTA provides, in relevant parts, that a “claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached ... and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach” (emphasis added).
267. Pursuant to Article 11.16.1(b) of the FTA, a “claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached ... and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach” (emphasis added).
268. Claimants argue that the General Partner brings the claim against Respondent in its own name and in its capacity as general partner of the Partnership and therefore easily satisfies Respondent's purported standing requirement.<sup>309</sup>
269. By contrast, Respondent argues that the General Partner does not bring a claim for its own loss or damage. Respondent's legal standing argument, as its counsel has made clear in his closing statement at the Hearing on Preliminary Objections,<sup>310</sup> is premised on the theory that a claimant only acts on its own behalf if it has a beneficial interest in the investment. Under that logic, the General Partner's claim would qualify as its own to the extent it can establish its beneficial interest in the Samsung Shares.
270. In the Tribunal's view, Respondent's alternative request for relief, as formulated in its Reply, has a more limited scope than Respondent's original request for relief as set out in its Memorial.<sup>311</sup> Under the amended request for relief, the Tribunal is only requested to dismiss such claims of the General Partner that are for losses incurred by the Cayman Fund and the Limited Partner. Respondent no longer seeks dismissal of all the General Partner's claims for lack of standing. In other words, Respondent's amended request does not appear to extend to any claims for own loss or damage that the General Partner may have suffered. In fact, Respondent acknowledges that

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<sup>309</sup> Rejoinder, ¶¶ 28-31, 113, referring to Second ER Lindsay [CER-2], ¶¶ 5, 7.

<sup>310</sup> Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, p. 518:20-22 [Respondent's Closing Statement] (“[B]eneficial interest' is the international label that it's given, it has to be on its own behalf or its own loss or damage.”).

<sup>311</sup> Memorial, ¶ 37.

the General Partner might be able to seek recovery of its own loss or damage to the extent of its beneficial interest.<sup>312</sup>

271. The Tribunal considers it neither possible nor appropriate to grant Respondent's alternative request for relief at the current stage of the proceedings. This is for several reasons.
272. First, Claimants do not pretend to claim for losses incurred by the Limited Partner and/or the Cayman Fund as asserted by Respondent. Rather, they have repeatedly confirmed that the General Partner is seeking to recover its own loss or damage.<sup>313</sup> On Claimants' own case, the General Partner's claim is solely brought in its own right under Article 11.16.1(a) of the FTA.
273. The Tribunal emphasizes that through the entitlement to an Incentive Allocation, the General Partner, in its own right, enjoys a beneficial interest in the Samsung Shares.<sup>314</sup> It is thus conceivable that the General Partner has suffered own loss or damage in the sense of Article 11.16.1(a) of the FTA.
274. Whether that applies to the General Partner's entire claim or whether the General Partner is in fact seeking recovery of some losses that it did not incur itself is not a question for today.
275. It is important to remember that the purpose of this preliminary phase of the proceedings is to deal with such objections that can be swiftly and fairly resolved based on the limited record available to the Tribunal.<sup>315</sup> This means, as a corollary, that a tribunal may also decide to defer

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<sup>312</sup> Reply, ¶ 99 (“The GP claims the entirety of the alleged loss in value of the Samsung Shares that it held on trust for the benefit of the Cayman Fund, irrespective of the existence and extent of the GP's own loss (which depends on the GP's Partnership Interest in the Samsung Shares, if any).” (emphasis added)).

<sup>313</sup> Rejoinder, ¶¶ 28-31, 113, referring to Second ER Lindsay [CER-2], ¶¶ 5, 7; Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, p. 537:15-19 [Claimants' Counsel] (“The only way in which the General Partner can pursue the claim is in its own role. The General Partner pursuing its claim in its role as General Partner of the Partnership. It's not pursuing a claim in the name of the Partnership.”) and p. 538:20-22 [Claimants' Counsel] (“[The General Partner] is not bringing a claim on behalf of a third party. It's bringing the claim with regard to its own interests.”).

<sup>314</sup> See above at ¶¶ 172-187.

<sup>315</sup> See the findings on similarly worded provisions in the Central American – Dominican Republic Free Trade Agreement (CAFTA) in *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010 (“*Pac Rim v. El Salvador*”) [CLA-36], ¶ 116 (“The Tribunal concludes that the object and purpose of these two provisions is to create, under CAFTA, an effective and flexible procedure for the swift and fair resolution of disputes between claimant investors and respondent host states, to be exercised reasonably by a tribunal according to all the circumstances of the particular case.”). See also below at ¶¶ 299-300.

its decision on a particular issue until such time that it has a full factual and legal record before it.

276. The Tribunal emphasizes that Claimants have not yet made any submissions on which type of losses the General Partner will eventually seek to recover.<sup>316</sup> Given the early stage of these proceedings, this is by no means unusual.
277. Consequently, absent a full factual and legal record before it, the Tribunal has no choice but to accept, for the time being, Claimants' assertion that the General Partner is bringing a claim for its own loss or damage. The Tribunal will deal with the General Partner's claim for damages if and when it is put to the Tribunal.
278. Second, the Tribunal wishes to underline that granting Respondent's alternative request now would not expedite the proceedings or serve procedural efficiency. Respondent's assertion that its preliminary objections "would materially reduce the subsequent phase of the proceedings"<sup>317</sup> does not apply to its alternative request for relief premised on the General Partner's alleged lack of standing.
279. The Tribunal is presently not faced with a situation in which there are several distinct investments and where the Tribunal is called upon to differentiate between those investments within its jurisdiction and those which fall outside its competence. Rather, in the present case, there is only one possible investment, the Samsung Shares.
280. Given that the General Partner's beneficial interest is indivisible in the sense that it extends to all Samsung Shares (without any determination of the extent of its beneficial interest), it is impossible to distinguish between that part of the shares in which the General Partner has a beneficial interest and that part in which it is not interested and which would therefore fall outside

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<sup>316</sup> See Transcript of Hearing on Preliminary Objections, Day 3, 4 October 2019, p. 507:10-25 [Claimants' Closing Statement] ("We have a loss that is capable of legal protection. We have an interest in the performance of the Fund, and that interest is enshrined in a contract. The quantification of its value will depend in the event on the ultimate theory of damage, or theories, which we might choose to deploy. Could be lost profits, could be direct loss, loss of opportunity, an 'alternative transaction' model, could be loss of clients, reputational damage and so on. All of those are categories of loss known to the law. That analysis might take into account past performance, peer performance, market performance, any number of potential future scenarios ... [A]ll of that is for a quantum stage, the quantification stage. It does not, by any stretch, negate the legal sufficiency of the pleaded claim.").

<sup>317</sup> Memorial, ¶ 2.

the Tribunal's jurisdiction. Respondent thus effectively requests the Tribunal to exercise its jurisdiction *pro rata* in respect of the Samsung Shares.

281. As a corollary, even if the Tribunal were ultimately to find that the General Partner may, in its own right, only claim for the loss of its Incentive Allocation, the Tribunal would have to deal with issues of liability and quantum for the entirety of the Samsung Shares. Granting Respondent's relief now would not dispose of any of these issues.
282. Consequently, the Tribunal rejects Respondent's application to dismiss, at this stage of the proceedings, the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner lacks standing to submit claims on behalf of third parties under Article 11.16.1 of the FTA. The Tribunal reserves its decision as to whether the General Partner's claim is for its own loss or is tantamount to a claim on behalf of the Limited Partner to a later stage of the proceedings.
283. The Tribunal now turns to Respondent's request for a declaration that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015, which Respondent has introduced in its Reply.
284. The Tribunal refers to its prior finding that the General Partner's beneficial interest is not tantamount to the "Partnership Interest" as defined in Article 2.12 of the Partnership Agreement.<sup>318</sup> The Tribunal has already decided that the General Partner's entitlement to an Incentive Allocation represents a beneficial interest in the Partnership's assets and is independent of the balance of its capital account in 2015.
285. Consequently, the Tribunal rejects Respondent's request to declare that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015.

**C. Respondent's preliminary objection that the General Partner's claim is legally deficient**

286. This section addresses Respondent's second preliminary objection that as a matter of law, the General Partner's claim is not a claim for which an award in favour of the General Partner may be made under Article 11.26 of the FTA.<sup>319</sup>

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<sup>318</sup> See above at ¶ 182.

<sup>319</sup> In its Reply, Respondent has requested the Tribunal to "dismiss the GP's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that ... the GP's claim in respect of such portion is, as a matter of law, not a claim for which an award in favor of the GP may be made under Article 11.20.6"

## 1. Respondent's position

287. Respondent contends that Article 11.16.1 of the FTA requires Claimants to have “incurred loss or damage by reason of, arising out of, [a] breach [of the FTA].”<sup>320</sup> It follows, so argues Respondent, that the FTA does not allow Claimants to bring claims for losses allegedly suffered by third parties.<sup>321</sup> According to Respondent, such requirement is consistent with international law.<sup>322</sup>
288. Repeating its argument that the General Partner lacks beneficial ownership of the Samsung Shares, Respondent submits that the General Partner had no right to enjoy the economic benefits in the first place and, therefore, cannot have suffered any alleged damage.<sup>323</sup> Respondent argues that any alleged loss incurred as a result of Respondent's conduct would have been the loss of the Cayman Fund as the beneficial owner of the Samsung Shares, just like any increase in the value of the shares would have accrued to the Cayman Fund only.<sup>324</sup> Consequently, any award of damages in favour of the General Partner would result in an unjust enrichment of the latter.<sup>325</sup>
289. Respondent rejects Claimants' argument that a claim for which an award in favour of the claimant may not be made is limited to “legally impossible” claims, as such qualifying words are “significantly absent” in the text of the provision.<sup>326</sup> Likewise, Respondent submits that, contrary to Claimants' arguments, it does not need to prove that the alleged FTA breaches “had no consequences on the General Partner” and that “the General Partner's situation remained unaffected by [these alleged breaches].”<sup>327</sup> Rather, Respondent asserts that the General Partner, absent a beneficial interest in the Samsung Shares, cannot have suffered an economic loss, cannot

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(Reply, ¶ 121; emphasis added). The Tribunal understands this to refer to the wording of Article 11.20.6 of the FTA, according to which “a 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 11.26.” (emphasis added).

<sup>320</sup> Memorial, ¶ 31.

<sup>321</sup> Memorial, ¶ 31.

<sup>322</sup> Reply, ¶ 109.

<sup>323</sup> Memorial, ¶¶ 32-35, relying on *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (“*Siag v. Egypt*”) [RLA-8], ¶¶ 582, 584; *Occidental Dissent* [RLA-15], ¶ 161; Hanno Wehland, *Blue Bank International v. Venezuela: When Are Trust Assets Protected under International Investment Agreements* 34(6) J. Int'l Arb. (2017) [RLA-22], p. 958, fn. 64.

<sup>324</sup> Memorial, ¶ 35.

<sup>325</sup> Memorial, ¶ 35, referring to *Occidental Dissent* [RLA-15], ¶ 162.

<sup>326</sup> Reply, ¶ 107, referring to *Pac Rim v. El Salvador* [CLA-36], ¶ 108.

<sup>327</sup> Reply, ¶ 108.

claim damages on its own behalf, and that an award in favour of the General Partner for such claim may not be made.<sup>328</sup>

290. Respondent criticizes Claimants' characterization of the standard of compensation established in the *Case Concerning the Factory at Chorzów (Germany v. Poland)*, noting that Claimants "ignore[] the Permanent Court of Justice's statement in *Chorzów* that one must 'exclud[e] from the damage to be estimated [any] injury resulting for third parties'".<sup>329</sup>
291. Respondent further rejects Claimants' argument that the General Partner may claim damages suffered by the Limited Partner given that any recovered amounts "would be re-invested on the Cayman Fund's behalf, and thus potentially generate future benefits for the [General Partner]."<sup>330</sup> Respondent considers this argument to be flawed because it blurs the distinction between separate beneficial interests of the General Partner and the Limited Partner, which results in different economic losses.<sup>331</sup> Additionally, the prospect of profiting from a third party's recovery of damages is not enough to circumvent the restriction that a claimant may recover damages only for its own losses.<sup>332</sup>
292. Respondent also disagrees with Claimants' argument that the General Partner would not be unjustly enriched if it was awarded damages, because the award for damages "would be held on the Cayman Fund's behalf in accordance with Cayman law and the Partnership Agreement."<sup>333</sup> According to Respondent, any such arrangement under domestic law cannot circumvent the restrictions contained in Article 11.16.1(a) of the FTA and international law.<sup>334</sup> Moreover, even if the General Partner were to hold an award on damages on trust for the Cayman Fund, that would only serve to show that the claim is brought on the Cayman Fund's, and not on the General Partner's, behalf.<sup>335</sup>

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<sup>328</sup> Reply, ¶ 108.

<sup>329</sup> Reply, ¶ 111, citing *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ, Series A No. 17, Decision on the Merits, 13 September 1928 ("*Chorzów*") [CLA-1], p. 31; *Occidental Annulment [RLA-21]*, ¶ 291; *Siag v. Egypt [RLA-8]*, ¶ 582.

<sup>330</sup> Reply, ¶ 114.

<sup>331</sup> Reply, ¶ 114

<sup>332</sup> Reply, ¶ 114.

<sup>333</sup> Reply, ¶ 115.

<sup>334</sup> Reply, ¶¶ 115-116, citing *Impregilo v. Pakistan [RLA-6]*, ¶¶ 151-152.

<sup>335</sup> Reply, ¶ 117.

293. Finally, Respondent submits that the fact that the alleged breach of the FTA had “other consequences” for the General Partner, including for its right to participate in the meetings of the companies, is irrelevant to the General Partner's economic interest in the Samsung Shares and any alleged ensuing damages.<sup>336</sup>

## 2. Claimants' position

294. Claimants argue that the General Partner is entitled to compensation for Respondent's treaty violations in accordance with the *Chorzów* standard pursuant to which all consequences of an internationally wrongful act must be wiped out.<sup>337</sup> Claimants also assert that Respondent's objections under Article 11.20.6 of the FTA are based on “limitations that have no place in the [FTA].”<sup>338</sup>

295. According to Claimants, given the early stage of the proceedings, Respondent must meet an extremely high standard of proof, namely that the General Partners claims are “demonstrably doomed to failure”, and “legally hopeless” and that Respondent's “wrongful acts had no consequences for the General Partner (to be wiped out), and the General Partner's situation remained unaffected by those acts (with no need for that situation to be reestablished)” even assuming the facts alleged by the General Partner to be true.<sup>339</sup> Claimants assert that Respondent has failed to discharge this burden.

296. Claimants submit that Respondent's argument that the General Partner has no beneficial interest in the Samsung Shares is incorrect and recalls that the General Partner did have an indivisible beneficial interest over the assets of the partnership, including the Samsung Shares.<sup>340</sup> According to Claimants, Respondent's wrongful acts “affected the value of the Samsung Shares, and thus the General Partner's partnership interest, including the General Partner's entitlement to an incentive allocation.”<sup>341</sup>

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<sup>336</sup> Reply, ¶ 118.

<sup>337</sup> Counter-Memorial, ¶ 100, citing *Chorzów* [CLA-1], p. 47.

<sup>338</sup> Counter-Memorial, ¶ 93.

<sup>339</sup> Counter-Memorial, ¶¶ 94, 96-97, 101, referring to *Bridgestone v. Panama* [CLA-28], ¶ 97; *The Renco Group. Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014 (“*Renco Group v. Peru*”) [CLA-43], ¶ 206; *Pac Rim v. El Salvador* [CLA-36], ¶ 110; Rejoinder, ¶ 122.

<sup>340</sup> Counter-Memorial, ¶ 102.

<sup>341</sup> Counter-Memorial, ¶ 103, referring to First WS Garschina [CWS-1], ¶ 11; First WS Satzinger [CWS-2], ¶¶ 12-13; Rejoinder, ¶ 124.



297. Even if Respondent were successful in proving that the General Partner had no beneficial interest in the Samsung Shares, Claimants argue that Respondent has not proven (i) that “damage to the value of the [Samsung] Shares nevertheless had no other consequences for the General Partner, including as the party bearing ultimate liability for the business in the event of insolvency”; and (ii) that “the damage to the General Partner’s investment in the Samsung Shares had no consequences for the General Partner’s legal and controlling interests in the [Samsung] Shares.”<sup>342</sup> Moreover, Claimants allege that the loss in value of the Samsung Shares resulted in potentially “significant and material financial and reputational damage.”<sup>343</sup>
298. In addition, Claimants argue that Respondent failed to substantiate its assertion that an award on damages in favour of the General Partner would unjustly enrich the latter. Indeed, an award on damages to the General Partner would be held in the same way that the Samsung Shares originally were held and would therefore restore the position that existed but for Respondent’s wrongful conduct.<sup>344</sup>

### 3. The Tribunal’s analysis

299. At the outset of its analysis of Respondent’s preliminary objection under Article 11.20.6 of the FTA, the Tribunal refers to the fact that other tribunals have been called upon ruling on preliminary objections under similarly worded investment treaties such as the Central American – Dominican Republic Free Trade Agreement (“CAFTA”) and the United States – Peru Trade Promotion Agreement.<sup>345</sup>
300. The Tribunal agrees with the remarks made by the *Pac Rim v. El Salvador* tribunal on the standard of review as well as the Tribunal’s discretion in ruling on such objections:

The Tribunal does not consider that the standard of review under Article 10.20.4 is limited to “frivolous” claims or “legally impossible” claims, contrary to the submissions of the Claimant ...

The Tribunal does consider that the word “may” in Article 10.20.4 (line 4) confers an important arbitral power in whether to grant or refuse a preliminary objection,

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<sup>342</sup> Counter-Memorial, ¶ 104, referring to First ER Lindsay [CER-1], ¶¶ 16, 26, 32(c).

<sup>343</sup> Rejoinder, ¶ 124.

<sup>344</sup> Counter-Memorial, ¶ 105.

<sup>345</sup> *Pac Rim v. El Salvador* [CLA-36]; *Renco Group v. Peru* [CLA-43].

to be exercised reasonably in all the circumstances of the particular case. The word “may” is not “must” or otherwise mandatory ...

In other words, returning to the negative language of Article 10.20.4, to grant a preliminary objection, a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection. (emphasis added)<sup>346</sup>

301. The Tribunal refers to its prior conclusion that it would be neither possible nor appropriate for it to decline jurisdiction over the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner at the present stage of the proceedings given that this would involve making findings on issues of quantum that have not been fully pleaded.
302. The same considerations apply in the context of Respondent's legal deficiency objection under Article 11.20.6 of the FTA. To use the words of the *Pac Rim v. El Salvador* tribunal, the Tribunal has not reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner at the very outset of the arbitration.
303. For these reasons, the Tribunal rejects Respondent's request to dismiss the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner's claim in respect of such portion is, as a matter of law, not a claim for which an award in favour of the General Partner may be made under Article 11.26 of the FTA.

#### **D. Costs of the preliminary phase**

304. As a final matter, the Tribunal turns to consider the issue of costs of this preliminary phase of the proceedings.

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<sup>346</sup> *Pac Rim v. El Salvador* [CLA-36], ¶¶ 108-110.

305. Both Parties have requested the Tribunal to order the other Party to bear the full costs of this preliminary phase.<sup>347</sup>

306. The Tribunal has discretion to award costs under Article 11.20.8 of the FTA, which provides:

When it decides a respondent's objection under paragraph 6 or 7, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

307. In the present circumstances, the Tribunal does not consider it appropriate to award costs to any Party at this stage of the proceedings.

308. The Tribunal cannot award costs in favour of Respondent as it has not succeeded in its preliminary objections.

309. On the other hand, the Tribunal does not consider it appropriate to award costs in favour of Claimants. That is for two reasons: first, Respondent's preliminary objections have not been frivolous; the fact that the Tribunal has postponed its decision on some of the issues shows that the preliminary objections have addressed crucial issues arising in the case; second, the Tribunal is of the view that many of the issues addressed in this preliminary phase will retain their relevance for the liability and quantum phase; the efforts and costs associated with this preliminary phase of the proceedings have therefore not been wasted.

310. Consequently, the Tribunal reserves its decision on costs for the final award.

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<sup>347</sup> Reply, ¶ 121; Counter-Memorial, ¶ 108.

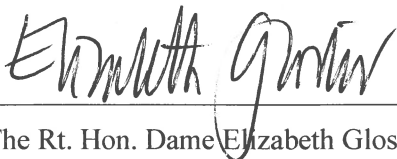
## VII. OPERATIVE PART

311. For the reasons set out above, the Tribunal:

- (a) **declares** that the General Partner owned and controlled the Samsung Shares and made an investment in accordance with Article 11.28 of the FTA; accordingly **rejects** Respondent's request for a declaration that the Tribunal lacks jurisdiction over the General Partner's claim on the basis that: (i) the General Partner has not made an investment in accordance with Article 11.28 of the FTA and/or (ii) the General Partner did not own or control the Samsung Shares; and **rejects** Respondent's request to dismiss all of the claims brought by the General Partner for that reason;
- (b) **rejects** Respondent's application to dismiss, at this stage of the proceedings, the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner lacks standing to submit claims on behalf of third parties under Article 11.16.1 of the FTA;
- (c) **rejects** Respondent's request to dismiss the General Partner's claim for losses incurred by the Cayman Fund and the Limited Partner on the basis that the General Partner's claim in respect of such portion is, as a matter of law, not a claim for which an award in favour of the General Partner may be made under Article 11.26 of the FTA;
- (d) **rejects** Respondent's request for a declaration that the General Partner can claim damages only to the extent of its own Partnership Interest in 2015;
- (e) **rejects** Claimants' application for a declaration at this stage of the proceedings that the General Partner's claim is admissible and that the Tribunal has jurisdiction over that claim;
- (f) **reserves** its decision on the costs of this preliminary phase of the arbitration for the final award.

Place of arbitration (legal seat): Singapore

Signed, this 22 day of December 2019,



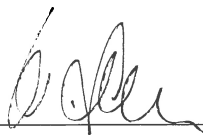
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The Rt. Hon. Dame Elizabeth Gloster  
Arbitrator



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Professor Pierre Mayer  
Arbitrator



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Professor Dr. Klaus Sachs  
Presiding Arbitrator