

**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, 2013**

PCA CASE NO. 2018-51

-between-

**ELLIOTT ASSOCIATES, L.P. (U.S.A.)
(the “Claimant”)**

-and-

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

SEPARATE OPINION OF J. CHRISTOPHER THOMAS KC

Registry

Permanent Court of Arbitration

20 June 2023

Introduction

1. I concur generally with the Award, but on the key jurisdictional question of whether the Respondent adopted or maintained measures “*relating to*” the Claimant’s covered investment, I found this to be a difficult question that did not yield an easy answer and I have reservations about the approach taken in the Award. In the end, I arrived at the same result, but for different reasons. I also wish to comment on the Minimum Standard of Treatment. Accordingly, I append this separate opinion.
2. It would be remiss of me not to record at the outset that my colleagues have been unfailingly courteous and willing to engage in extensive discussion of the issues raised in this important case. I wish to express my gratitude to the President for his admirably clear drafting and his management of the arbitration and the deliberations, as well as my regard for Mr. Garibaldi’s constructive efforts in bringing this case to a conclusion.
3. Article 1101 of the Treaty is entitled “Scope and Coverage.” It specifies that measures “adopted and maintained” by a Party “relating to” certain subjects, are governed by the substantive obligations set forth in the Chapter’s Section A, “Investment,” and can give rise to an investor-State claim under the Chapter’s Section B, “Investor-State Dispute Settlement.”
4. This type of provision was first employed by the North American Free Trade Agreement (“NAFTA”) and it has been replicated in many subsequent treaties. NAFTA tribunals have described it as the “gateway” through which a claimant must pass in order to seize a tribunal with jurisdiction to hear a claimed breach of the protections specified in the investment chapter.¹ The meaning of the phrase “relating to” is thus central to a tribunal’s determination of its jurisdiction.
5. The Treaty contains eight Scope and Coverage provisions, worded in different ways. A review of those provisions reveals that the intention of the Treaty’s drafters was to specify different forms of connection between measures and the subjects addressed in the various chapters. Reference to the Scope and Coverage clauses used in other chapters thus assists in ascertaining the meaning of the clause used in Chapter Eleven.
6. It is important to the proper operation of Chapter Eleven that its Scope and Coverage provision not be interpreted in a way that relaxes the “relating to” requirement, because that would result in an unjustified broadening of the jurisdictional gateway. This is not the Tribunal’s intention, but I think it right to comment on this issue.

The gravamen of the case

7. The National Pension Service (“NPS”) was established to administer the assets of the Republic of Korea’s National Pension Fund (“NPF”). Procedures were prescribed by law to protect the independence of NPS decision-making from outside interference and to further certain specified goals

¹ *Methanex Corporation v. United States of America*, Partial Award, 7 August 2022, para. 106(i) (**RLA-22**): “This is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met” Cited with approval by *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, para. 76 (**RLA-33**).

intended to protect the NPF's interests and the interests of Korean pension subscribers and pensioners.²

8. The present claim arose out of (i) acts taken by State organs external to the NPS; and (ii) acts of the NPS itself in deciding how to cast a vote on the proposed Merger between SC&T and Cheil Industries. The Korean courts found that there was an unlawful interference in procedures erected to ensure the independence of NPS decision-making as well as breaches of the relevant officials' duties of loyalty and of care as fiduciaries of the assets of the NPF.³
9. This interference did not stem from errors of judgement. As a result of the then-President's direction that the Merger should be approved, undue pressure was mounted on the Minister of Health and Welfare by the President's Executive Office, and in turn upon the Chief Investment Officer of the NPS. They in turn pressed other officials to build a justification for the Merger or, in the case of the Investment Committee, to approve it. The Korean courts also found that shortly after the Merger was approved, at a one-on-one meeting, the then-President drew Mr. JY Lee's attention to the role that her Administration had played in supporting his succession plan through the NPS's vote in favour of the Merger and intimated that some pecuniary recognition of that assistance was in order. Mr. Lee took the hint and payment was made. Both individuals were subsequently convicted for the offence of bribery and terms of imprisonment were imposed.⁴
10. At the time of the hearing in this case, a second prosecution of Mr. Lee is afoot; in that proceeding, the prosecutor alleged that an unlawful *quid pro quo* preceded the NPS's vote on the Merger. The courts evidently have not yet decided the point.

The key jurisdictional objection

11. The question for this Tribunal was whether the acts found to be unlawful at municipal law also sounded a claim for breach of either or both of the substantive obligations invoked by the Claimant.
12. The Tribunal found that the claim based on an alleged breach of Article 11.3, National Treatment, was barred by the Respondent's Equity Interests Reservation taken under Annex 2. This left one claim, the alleged breach of the Minimum Standard of Treatment, to be considered. For the Tribunal to be able to consider the merits of that claim, it was necessary that the Claimant first satisfy the Treaty's jurisdictional requirements.
13. Among other defences, the Respondent asserted that the Tribunal lacked the requisite jurisdiction to hear the claim because the Claimant could not show that the Republic of Korea "*adopted or maintained measures relating to*" (in the case of an alleged breach of Article 11.5(1)) the Claimant's

² As the Award notes, in reference to the Voting Guidelines applicable to the NPS when administering the NPF's assets: "The Voting Guidelines further require that the voting rights of the Fund be 'exercised in good faith for the benefit of the subscribers, former subscribers and public pension holders.'" Award, para. 156.

³ As the Award notes, at para. 160: "According to the Fund Operational Regulations, the employees must act, *inter alia*, in accordance with fiduciary duties as prudent fiduciaries of the Fund, and always perform their duties with honesty and fairness." And at para. 161: "The Enforcement Rules of the Fund Operational Regulations establish that NPSIM officers and employees are to manage and operate the Fund 'in accordance with the management and operation principles of the Fund,' through, *inter alia*, 'secur[ing] the transparency of the Fund and the efficiency of investments in order to earn the confidence of the public.'"

⁴ The President was also convicted of abuse of power and coercion.

“covered investment.”⁵ Various arguments were advanced as to the meaning and application of this phrase, all of which were rejected.

14. I agree with the Tribunal’s interpretations of the terms “measures” and “adopted or maintained.” In my view, the only significant jurisdictional question presented by the claim was whether the Respondent adopted or maintained measures “relating to” the Claimant’s covered investment. The Respondent’s arguments on this point went to the heart of the Tribunal’s jurisdiction to hear the case and, as shall be seen, there was a serious question whether the measures did relate to the Claimant’s covered investment in the sense of Article 11.1(1).
15. An unusual feature of this dispute was that it centred on the exercise of voting rights attached to shares. Shares are a species of property, and it is an inherent feature of the right of ownership that a person can dispose of its shares in a company as it sees fit. In so doing, it generally owes no duty to any other owner of shares in the company.
16. Putting to one side the statutory requirements applicable to the NPS in the present case, in general it is open to a shareholder to vote its shares in favour of a merger even if, objectively speaking, it is economically unreasonable to do so. It is also not uncommon for shareholders of a company to disagree as to whether a proposed transaction is in the best interests of the company and its shareholders. This is why proxy battles arise in the first place. Thus, in the ordinary course there would be no basis for one investor in a company to complain about how another investor exercised its vote.⁶ This was not an ordinary case, but the general point remains valid.
17. Insofar as the specific issue of treaty interpretation is concerned, the important fact was that the voting rights attached to shares owned by the NPF. Under Korean law, the decision on whether to vote for or against the Merger was vested in the NPS, which is charged with administering the NPF’s assets.
18. To foreshadow my analysis, applying the framework of Chapter Eleven of the Treaty and the Treaty more generally, it is clear that:
 - (a) The NPF was an investor of the Republic of Korea.⁷
 - (b) The measures complained of *related to* the exercise of voting rights attached to the NPF’s 11.21% shareholding in SC&T.
 - (c) The *effect* of the measures was the approval of a merger that was disadvantageous to SC&T shareholders (and, by virtue of the Merger Ratio, advantageous to Cheil shareholders).⁸

⁵ Statement of Defence, para. 228-36; Rejoinder, paras. 32-34; Respondent’s PHB, paras. 17-21; Respondent’s Reply PHB, paras. 10-11.

⁶ The Claimant accepted this. It accepted that in launching the proxy battle, it was prepared to lose it if conducted fairly. “Knowing that Samsung might propose an economically irrational merger for its own purposes is one thing—while not expecting this, the Claimant was prepared for any fair proxy contest that ensued. Knowing that, under President Park’s corrupt direction, the Blue House, Ministry and NPS would engage in illegal acts to make that merger a reality—notwithstanding the costs to the NPS and Korea’s state pension holders—is another thing entirely.” Reply, para. 451.

⁷ In fact, the NPF is owned by the Republic. Award, para. 444: “The function of the NPS is to manage and administer the National Pension Fund, which under Korean law belongs to the State, and not to the NPS.”

⁸ Award, para. 816, *referring to* the Seoul District Court’s findings in the Moon/Hong proceedings.

(d) That *effect* was experienced by the Korean investor itself, and by every other person, including the Claimant, that held shares in SC&T.

19. It was, therefore, beyond any serious dispute that the impugned measures “related to” a Korean investor’s investment.

20. In contrast to those measures, there were, on the facts of the present case, instances where the Republic of Korea did adopt or maintain measures plainly relating to the Claimant’s covered investment.

21. The following does not purport to be an exhaustive list of those measures, but it suffices to make the point:

- The Financial Investment Services and Capital Markets Act was such a measure. Among other things it prescribed the rules governing a merger, including the means for determining the merger ratio, and the share appraisal mechanism available to a dissenting shareholder after a merger has been approved.

This law is a “measure” as understood by Article 1.4 of the Treaty and it related to the Claimant’s covered investment.⁹ It is an example of a law of general application enacted well before the events in question arose, and thus without any knowledge on the part of the State that at some future date a U.S. investor in the form of the Claimant would oppose a merger governed by the law.¹⁰

If claimed to violate one or more of Chapter Eleven’s substantive obligations, the law would be a measure allegedly in breach, and in respect of which the Claimant could assert that it had incurred loss or damage by reason of, or arising out of, that breach.

- On 9 June 2015, the Claimant applied to the Korean courts to enjoin the holding of the Extraordinary General Meeting of SC&T or alternatively, if the EGM were to be held, to prevent it from passing resolutions regarding the proposed Merger.¹¹

The Seoul Central District Court rejected the application. The Claimant appealed to the Seoul High Court and from there to the Supreme Court. The appeal to the latter was ultimately withdrawn on 23 March 2016.¹² The courts’ consideration and disposition of the Claimant’s application were measures relating to its covered investment.

- On 11 June 2015, the Claimant applied to the Seoul Central District Court to block the intended sale of treasury shares on the basis that the sale had been strategically timed and was intended

⁹ Financial Investment Services and Capital Markets Act, 1 July 2015, Art. 165-5(3) (C-213).

¹⁰ I make this point because this issue is a matter of some importance to the Tribunal (*see* Award, para. 359). The Financial Investment Services and Capital Markets Act assists in making my point that the approach which I take is not a “backdoor” introduction of what the majority considers to be an unwarranted “*immediacy*” requirement. I believe that there *is* such a requirement, but my interpretation of “relating to” fully encompasses measures taken by States that could relate to an investor or its investment sometime in the future. It is therefore not necessary to introduce an effects test into Article 11.1(1).

¹¹ Elliott Application for Preliminary Injunction for Prohibition on Notifying of and Passing Resolutions, etc. at the Extraordinary General Meeting of the Shareholders, 9 June 2015, pp. 33-35 (C-195); Seoul Central District Court Case No. 2015KaHap80582, 1 July 2015, p. 9 (R-9).

¹² Statement of Defence, Annex A: Table of Korean Court Proceedings.

to cause “severe distortion of voting right[s] at the EGM.”¹³ On 7 July 2015, the Seoul Central District Court rejected the application (and on 10 July 2018 that finding was upheld on appeal).¹⁴

The Seoul Central District Court’s treatment of the Claimant’s application can be said to have related to the Claimant’s covered investment.¹⁵

- After the Merger was approved, on 27 August 2015, the Claimant initiated court proceedings to invoke the share appraisal remedy for the buy-back of shares purchased before the Merger’s announcement.¹⁶

The Seoul Central District Court refused to re-appraise the price. According to the Claimant, the court found “itself constrained by the statutory formula set out in the Financial Investment Services and Capital Markets Act”¹⁷

An appeal was taken to the Seoul High Court (although the Claimant withdrew its appeal on 23 March 2016 after concluding its Settlement Agreement with SC&T).¹⁸ On 30 May 2016, the High Court reversed the Seoul Central District Court’s decision and determined that the buy-back price should be recalculated to KRW 66,602 per share. The parties (other than the Claimant) appealed further to the Supreme Court. The Supreme Court upheld the decision on 14 April 2022.¹⁹

The statutory formula applicable for determining the appraisal price was a measure relating to the Claimant’s covered investment, as was the decision of the Seoul Central District Court applying that formula.

22. Had the Korean courts acted inconsistently with Article 11.5 of the Treaty by, for example, denying a fair hearing in any of the proceedings listed above such as to amount to a denial of justice, such measures plainly would have related to the Claimant’s covered investment and hence have fallen within the Tribunal’s jurisdiction to consider an alleged breach of Article 11.5.
23. But the Claimant did not seek to impugn the conduct of the Korean courts in any of the proceedings to which it was a party, nor did it challenge any law or regulation adopted or maintained by the Republic of Korea. Instead, as already noted, the measures complained of all related to an investment of a Korean investor and it was the *effect* of such measures that was said to have caused loss or damage to the Claimant’s covered investment.²⁰

¹³ Amended Statement of Claim, para. 55.

¹⁴ *Id.*

¹⁵ Elliott Application for Preliminary Injunction for Prohibition on the Sale of Treasury Shares, 11 June 2015, p. 7 (C-198); First Smith Statement, para. 39(iv) (CWS-1).

¹⁶ Seoul Central District Court Case No. 2015BiHap91 (Consolidated), 27 January 2016 (C-259).

¹⁷ Amended Statement of Claim, para. 258.

¹⁸ Statement of Defence, Annex A: Table of Korean Court Proceedings.

¹⁹ Supreme Court Case No. 2016Ma5394 (Consolidated), 14 April 2022, pp. 1, 11 (C-782).

²⁰ At various places in its pleadings, the Claimant noted that the measures complained of produced an effect on its covered investment. For example, in its Reply, at para. 294, the Claimant asserted: “... in this case, both the Claimant and its investment in SC&T could be expected to be affected by the ROK’s ensuring that the NPS would vote ‘yes’ on the Merger.” And in its PHB, at para. 58, the Claimant acknowledged that it was true that “the ROK’s measures affected other SC&T shareholders” (emphasis added), but went on to assert that the

24. The question therefore was whether and how measures adopted or maintained relating to the National Pension Fund's investment could also, or in addition, or through that medium, be found to "relate to" the Claimant's covered investment. An affirmative answer to this question was a prerequisite to the Tribunal being able to exercise jurisdiction over the claim.

The Governing Law

25. Article 11.22 of the Treaty, Governing Law, provides that a tribunal is to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Thus, although the Tribunal's subject-matter jurisdiction is restricted to determining a breach of any of the substantive provisions listed in Section A of Chapter Eleven, it must have regard to the Agreement as a whole when deciding a dispute.
26. As a result, it is both necessary and appropriate to consider how the Treaty describes the forms of connection between "measures" and the subject-matters of various chapters.

The Scope and Coverage issue

27. Paragraph (1) of Article 11.1 of the Treaty states as follows:

Article 11.1: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party.

The meaning of "relating to"

28. Before setting out my approach, it is helpful to quote from the Award's analysis of Article 11.1(1) and to add my comments to the quoted passages as a means of identifying the interpretative differences between us:

- Proximate Context: The term "measures" has a broad meaning, and therefore the phrase "relating to" should be given a "sufficiently broad" meaning. That is, the Tribunal says:

... the proximate context of this expression includes the term "measure," which is to be interpreted broadly, as determined above. The context therefore indicates that the terms "relating to" must denote a relationship that is sufficiently broad to accommodate the broad meaning of the term "measure."²¹

In my view, the broad meaning given to the term "measure" (with which I agree) does not bear on the meaning to be given to "relating to." A Treaty-wide illustrative definition of "measure" cannot change the meaning of the chapter-specific expressions of connection. They are two separate matters.

measures were conceived with the Claimant in mind. (I will discuss the latter assertion later in this opinion because it is an important one.)

²¹ Award, para. 357.

Since the term “measure” is used throughout the Treaty, it is in “proximate context” with other forms of connection, such as the term “*may, directly or indirectly affect,*” the term employed in another chapter. Thus, the breadth of the term “measure” says nothing about the breadth or narrowness of “affecting,” “relating to,” or any other verb used in the Treaty’s Scope and Coverage clauses.

I would add that focusing on the “proximate context” of “measure” and “relating to” only in Chapter Eleven unduly narrows the interpretative analysis. In my view, it is appropriate to consider not only the context of the terms in close proximity in Chapter Eleven, but also across the Treaty as a whole.²²

- Object and purpose: I agree with the Tribunal that the term “relating to” must be interpreted “in light of” the object and purpose of the Treaty. The Tribunal asserts:

In contrast with investment contracts, investment treaties – including the Treaty – are generally meant to apply to a class of anonymous or undetermined investors – any investment that falls within the scope of application of an investment treaty *ratione temporis, ratione personae, and ratione materiae* is generally protected under the treaty. There is therefore no requirement of “privity” or “immediacy” between the host State and the protected investor, and accordingly it is not necessary for the host State even to be aware of a foreign investor having invested in the territory of the host State, or of its investment, for such investment to be protected under the treaty in question. Indeed, foreign investment is often based exclusively on transactions between private parties and hence may not directly involve the host State at all. This does not mean, however, that such investments are not protected under the applicable investment treaty.²³

I agree with the general thrust of the foregoing quotation, but in my view it goes too far. It is true that at the time of the entry into force of an investment protection treaty, the States party to the treaty cannot know what disputes will arise. No one can predict the future and certainly no one can predict who will step forward to submit a claim to arbitration. Thus, in principle, any investment that falls within the scope of application of an investment treaty *ratione temporis, ratione personae, and ratione materiae* is generally protected under the treaty.

However, I do not agree with the implication that “[t]here is no requirement of ‘privity’ or ‘immediacy’ between the host State and the protected investor” *at the point that a dispute arises under Chapter Eleven*.

In fact, all experience shows that when a dispute arises under an investment treaty, even if in many cases there is no “privity,”²⁴ there is an “immediacy” between the host State’s measure(s) and the investor that claims rights under the treaty.

The State may be alleged to have enacted a law that dispossesses the investor or its investment

²² I observe that both Parties to the dispute made reference to other chapters in support of their interpretations of various terms. See Award, paras. 315 and 337, for examples of the Parties doing so. The Tribunal itself does so too when analyzing the meaning of the term “measure.” Award, para. 351.

²³ Award, para. 358.

²⁴ In fact, there *must* be privity for some disputes arising under Chapter Eleven of the Treaty. One of the bases for claim under Section B of Chapter Eleven is an alleged breach of an “investment agreement” as defined in Article 11.28, Definitions. See Article 11.16: Submission of a Claim to Arbitration, paragraph (1)(a)(i)(C) (“the claimant, on its own behalf, may submit to arbitration under this Section a claim ... that the respondent has breached ... an investment agreement.”). See also subparagraph (b)(i)(C). Privity is thus required in such cases.

of trademark rights, it may be alleged to have wrongly denied a permit needed to exploit a natural resource or to carry on a regulated business, it may be alleged to have wrongly withdrawn previously granted subsidies, its courts might be alleged to have denied justice in a particular litigation, and so on.

In all of these instances, there *is* a close connection between the State’s measures and the claimant, an “immediacy,” to use the Award’s phrasing. The “relating to” gateway to Chapter Eleven jurisdiction is precisely the means of determining such immediacy.

This has been recognized by several NAFTA tribunals applying the same language as that found in Article 11.1. I will discuss the *Methanex* case in some detail later in this opinion, but I note for present purposes the following sample of tribunal holdings.

In *Cargill Inc. v. United Mexican States*,²⁵ while the tribunal questioned without deciding whether the *Methanex* test of a “legally significant connection” might be too strict, it held that a restrictive import permit requirement on high fructose corn syrup imposed in retaliation against restrictive U.S. sugar trade policies had “an immediate and direct effect on the business of the Cargill de Mexico [the U.S. claimant’s subsidiary] but also constituted a legal impediment to the carrying on the business of Cargill de Mexico” with the result that the threshold gateway in NAFTA Article 1101(1) was there met by the claimant investor.²⁶ (Emphasis added.)

In *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, the tribunal held that: “[t]he immediate effect of the Import Alert made it impossible for Apotex-US legally to receive contracted products from Apotex Inc.’s two facilities at Etobicoke and Signet; and, as a direct result, Apotex-US was prevented from carrying on that major part of its business of sourcing those products from Apotex Inc.’s two facilities for re-sale in the USA.”²⁷ (Emphasis added.)

In the *Bilcon* case, the tribunal held: “... Bilcon had a significant legal connection with the proposed 3.9 [hectare] quarry—and with the larger quarry and terminal project—as a result of its partnership agreement with Nova Stone. At this point Bilcon qualified as an investor for the purposes of Chapter Eleven of NAFTA. Bilcon had standing to raise challenges under Chapter Eleven in respect to government measures addressing matters such as industrial permits sought by Nova Stone, transfers of such permits to the partnership, approvals sought by Nova Stone, and applications by Nova Stone or the partnership for environmental licenses.”²⁸ (Emphasis added.)

All of these measures plainly related to the partnership in which the claimant held an interest in the sense that without the permits and approvals, the project could not proceed.

It need hardly be added that in cases where, for example, it is claimed that the claimant has

²⁵ In the interests of full disclosure, I wish to disclose that I was a member of Mexico’s team of counsel in *Cargill, Incorporated v. United Mexican States*.

²⁶ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 175 (CLA-2).

²⁷ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 6.23 (CLA-1).

²⁸ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, para. 241 (CLA-3).

suffered a denial of justice, there is by definition an immediacy between the courts' conduct of a litigation and the claimant and/or its investment.

- Ordinary meaning: The Tribunal states:

In the present case, the Treaty makes clear that its scope of application, insofar as it relates to "Investment," is limited to "measures adopted or maintained by a Party *relating to*:
(a) investors of the other Party; [and] (b) covered investments.²⁹

This statement is correct so far as it goes, but the interpretation of Article 11.1(1) should encompass the whole of the paragraph. If examined fully, the interpreter can derive additional guidance as to the meaning of "relating to." Similarly, the formulations of other Scope and Coverage provisions in the Treaty also inform the interpretation. I discuss this further below.

- The Tribunal then returns to the "privity" and "immediacy" point once again:

... the terms "relating to" in the Treaty must have a meaning that, on the one hand, is broad enough to denote a relationship between a measure and a class of anonymous or undetermined investors or covered investments but, on the other hand, is narrower than denoting a relationship based merely on an *ex post* determination of an adverse effect on an investor or a covered investment. At the same time, the search for such a narrower or "legally significant" meaning cannot be used as a backdoor to create a requirement of "privity" or "immediacy" between the investor and the host State.³⁰

I already noted that the "relating to" test is the means of determining such immediacy in the event of a dispute and will elaborate further upon this below. For present purposes, I note that the *Methanex* case, to which the Tribunal then refers ("Such a relation between a measure and an investor or a covered investment can also be said to be 'legally significant,' as argued by the Parties by reference to the *Methanex* award"³¹) confirms the point that I am seeking to make.

- In the end, the Tribunal decides that:

... a measure "relates to" an investor or an investment under the Treaty if it is reasonably foreseeable at the time the measure in question was adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be.³²

As shall be seen, I believe that the "may adversely affect" test is barely different than the "affects" and "may, directly or indirectly, affect" tests employed in other Scope and Coverage provisions.

29. Having noted the Tribunal's approach and my reactions to it, I now turn to my approach to interpreting the phrase "relating to."

²⁹ Award, para. 359.

³⁰ *Id.*

³¹ *Id.*

³² Award, paras. 359, 361.

30. Although the Treaty does not define the phrase “relating to,” it does provide guidance as to its meaning.³³ The Tribunal has correctly specified the proper approach to interpreting the Treaty in accordance with Article 31 of the Vienna Convention on the Law of Treaties. When determining the meaning of Article 11.1(1), I believe it is appropriate to examine all of the relevant provisions of Chapter Eleven which collectively form the context of the chapter of which Article 11.1 forms a part, and to consider the formulation of the Chapter’s Scope and Coverage provision, having regard to the context of the Treaty as a whole.

31. Applying Article 31 of the Vienna Convention, there are three sources of guidance to the interpreter, both literal and contextual: (i) Article 11.1 itself; (ii) the substantive obligations of Chapter Eleven; and (iii) the Scope and Coverage provisions of other chapters of the Treaty. I will discuss each in turn.

A. Article 11.1

32. Starting with Article 11.1, as noted above, paragraph (1) of the Article states that Chapter Eleven applies to “measures adopted or maintained relating to” three classes of subjects:³⁴

(i) “investors of the other Party”;

(ii) “covered investments” (which, according to Article 1.4 of the Treaty, are investments in the territory of a Party “of an investor of the other Party”);³⁵ and

(iii) “... all investments in the territory of the Party.”

33. The Tribunal has focused on the first two of the classes of subjects, but the third class is also relevant to a full understanding of Chapter Eleven’s scope and application.³⁶

34. Article 11.1(1) makes clear that the Parties to the Treaty differentiated between “investors of the other Party” and their “covered investments,” and between three classes of investments: (i) “covered investments” of investors of the other Party (in this case, the United States); (ii) investments of investors of the respondent Party (in this case, the Republic of Korea); and (iii) investments of investors of third States not party to the Treaty.³⁷ The distinguishing characteristic of the three types of investments is whether they are owned or controlled by an investor which is connected to one or the other Party, or to a State that is not a party to the Treaty.

³³ Award, paras. 357-59.

³⁴ As discussed below, the class(es) of subjects will vary, depending upon which substantive obligations are alleged to have been breached.

³⁵ Treaty, Article 1.4 (C-1): “**covered investment** means, with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other Party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.” (Bolding in original.)

³⁶ Treaty, Article 11.1(1)(a)-(c) (C-1). The Tribunal confines its analysis to subparagraphs (i) and (ii) of Article 11.1(1). Award, para. 359: “In the present case, the Treaty makes clear that its scope of application, insofar as it relates to ‘Investment,’ is limited to ‘measures adopted or maintained by a Party *relating to*: (a) investors of the other Party; [and] (b) covered investments.’” In my view, subparagraph (iii) also provides important context.

³⁷ I employ this example simply because the Tribunal is concerned with a claim against the ROK by a U.S. investor; the hypothetical could of course be reversed as between the Parties to the Treaty.

35. The reason for this differentiation between “investor” and “investment” and between “investments” is that Chapter Eleven’s substantive provisions are variously worded in terms of how and when they apply to the different subjects listed in Article 11.1(1).³⁸
36. This leads to the second source of interpretative guidance.

B. The substantive obligations listed in Section A

37. Section A of Chapter Eleven sets out the obligations which can form the basis for an investor-State claim under the Treaty.³⁹ Some of the obligations listed in Section A apply to a covered investment, but not to an investor of the other Party, some apply to both, and two obligations apply to all investments in the territory of a Party.⁴⁰
38. To illustrate the point, Article 11.3, National Treatment, applies to “investors of the other Party” (in paragraph 1) and to “covered investments” of investors of the other Party (in paragraph 2).⁴¹
39. By contrast, the relevant provisions of Article 11.5, Minimum Standard of Treatment, those at issue in the instant case, paragraphs (1) to (3), do *not* apply to “investors of the other Party.” Rather, they apply only to measures relating to “covered investments” of investors of the other Party. Paragraphs (4) to (6) of Article 11.5, on the other hand, apply to both investors of the other Party and their covered investments or to investors of the other Party only.⁴²
40. And in the case of an alleged breach of the “Performance Requirements” obligation, a U.S. claimant could complain of measures relating to “an investment in its [*i.e.* Korea’s] territory of an investor of a Party or of a non-Party” (that is, (i) a U.S. claimant’s own investment; (ii) an investment of a Korean investor; or even (iii) an investment of an investor of a third State not a party to the Treaty).
41. The different formulations of the substantive articles assume importance because they show that the drafters of the Treaty broadened or narrowed, as they saw fit, *the range of contestable measures as well as the subjects to which measures apply.*
42. This is most clearly illustrated by contrasting Articles 11.5(1) and 11.8. In accordance with Article 11.1(1), a breach of Article 11.8 could be alleged by a U.S. claimant in respect of measures adopted or maintained relating to an investment of a Korean investor that were alleged to have caused loss or damage to the claimant.
43. But this formulation of the range of contestable measures was not employed in Article 11.5(1). That paragraph of the article restricts a claimant to complaining about measures relating to its own covered

³⁸ The Tribunal accepts this differentiation at footnote 472.

³⁹ See Treaty, Article 11.16, Submission of a Claim to Arbitration (C-1).

⁴⁰ Treaty, Articles 11.8 and 11.10 (C-1).

⁴¹ Article 11.4, Most-Favored-Nation Treatment, does the same in its paragraphs (1) and (2).

⁴² Paragraph (4) applies to both: “Notwithstanding Article 11.12.5(b), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.” Paragraph (5) applies only to “investors of the other Party” for the “requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or for the destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation”

investment that are alleged to have caused loss or damage by reason of a breach.

44. The fact that Article 11.8 expressly allows a U.S. claimant to make a claim in respect of measures adopted or maintained relating to an investment of a Korean investor that were alleged to have caused loss or damage to the claimant, but Article 11.5 does not expressly do so, raises a serious question of interpretation: by virtue of the different wording of the clauses and the Chapter's differentiation between investors and investments, and between investments, is it possible for the Claimant in this case to assert that measures relating to the exercise of voting rights attached to shares owned by a Korean investor relate to it?

C. The Treaty's Scope and Coverage provisions

45. The third source of interpretative guidance as to the meaning of Article 11.1(1) comes from the way in which the States party to the Treaty framed the Treaty's various Scope and Coverage provisions.⁴³
46. As noted above, there are eight Scope and Coverage provisions in the Treaty. Some are identical (allowing for differences of wording stemming from the chapters' subject-matters) and others are quite different in terms of describing the type of connection between "measures" and the subject(s) to which they apply.
47. For example, Article 9.2, the Scope and Coverage provision for Chapter Nine, Technical Barriers to Trade, applies to standards and other like measures "that *may, directly or indirectly, affect* trade in goods between the Parties" This gives the chapter a very wide scope and coverage for technical barriers.
48. A somewhat less expansive, but still broad Scope and Coverage provision is found in Chapter Twelve, Cross-Border Trade in Services. It applies to measures "*affecting* cross-border trade in services"⁴⁴
49. By contrast, the relevant subsection of Article 11.1(1) speaks of "measures adopted or maintained by a Party *relating to* ... covered investments."⁴⁵
50. We are agreed that "relating to" connotes a narrower form of connection than "affecting."⁴⁶ "Relating to" implies a closer type of connection between the measures and the subject than measures "affecting" the subject, and a much closer type of connection than measures "that may, directly or indirectly, affect" the subject. The latter phrasing is very broad indeed because it is worded in the conditional ("*may*") and it reaches not only measures that may directly affect the subject, but also measures that may indirectly affect it.

⁴³ Award, para. 359: "The ordinary meaning of the terms 'relating to,' in this context, is narrower than that of other similar terms; for instance, the Treaty does not say in Chapter Eleven, as it does in some other chapters, that it applies to any investor or investment 'affected' by the measures adopted or maintained by a Party."

⁴⁴ So too does the equivalent provision in Chapter Fourteen, Telecommunications, in the context of trade in telecommunications services.

⁴⁵ This form of connection is also found in the Agriculture chapter, and in the Financial Services chapter.

⁴⁶ Award, para. 359: "The ordinary meaning of the terms 'relating to,' in this context, is narrower than that of other similar terms; for instance, the Treaty does not say ... that it applies to any investor or investment 'affected' by the measures adopted or maintained by a Party. The 'relating to' clause therefore cannot be interpreted so broadly as to cover any adverse impact on an investor or an investment, even if such impact was not reasonably foreseeable by the host State at the time when it adopted or maintained the measure."

51. In sum, according to the framework employed by the Treaty’ drafters, *affecting* something is not the same as *relating to* something. In my opinion, the overall structure and phrasing employed in Chapter Eleven, and in the Treaty more generally, points to the conclusion that measures relating to one shareholder’s investment do not simultaneously relate to another shareholder’s investment by reason of their effects on that investment.
52. The Tribunal recognizes that the “relating to” requirement cannot be satisfied by the mere effect of a measure taken in relation to one investor’s investment on another person’s investment. It adds that a measure will relate to a subject (an investor or a covered investment, as the case may be) “if it is reasonably foreseeable at the time the measure in question was adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be.”⁴⁷ (Emphasis added.)
53. In my opinion, this is barely different from the formulations employed in other Scope and Coverage provisions (“*affects*” and “*may, directly or indirectly, affect*”) but not in Article 11.1(1), and for that reason and the others previously discussed, I have reservations about that approach.
54. Taken collectively (i) the wording and context of Article 11.1, combined with (ii) Chapter Eleven’s differentiation of subjects and its express contemplation in Article 11.8 that a claimant can complain of measures relating to another investment that cause damage to the claimant’s investment – but that formulation is not used in Article 11.5(1); and (iii) Chapter Eleven’s non-use of terms such as measures “*affecting*” or “*may, directly or indirectly, affect*” when describing the requisite connection between measures and a subject, the “relating to” requirement requires a closer form of connection between the measures sought to be impugned and a claimant than the “*may adversely affect*” test contemplates.⁴⁸

The basis for passing though the jurisdictional gateway in the present case

55. On reflection, I have concluded that there is one way in which the measures that were adopted or maintained by the Republic of Korea relating to the NPF’s investment in SC&T shares could be said to relate to the Claimant’s covered investment.
56. I previously adverted to the bribery convictions of the then-President and Mr. Lee. This was no ordinary case. The evidence is that prior to the Merger’s announcement, when there was market speculation of a possible merger between SC&T and Cheil, the Claimant’s Mr. Smith and a colleague attended a meeting with the NPS. Mr. Smith testified, and his testimony was not rebutted by any witness testimony on the point, that the NPS representatives agreed with him that a merger on the basis of the two companies’ then-current share prices would be detrimental to SC&T shareholders.⁴⁹
57. The proposed Merger was announced by the boards of the two companies on 26 May 2015. There is no record evidence of any intention on the part of the Respondent to intervene in the NPS’s decision-making until the Claimant announced on 4 June 2015 that it had amassed a 7.12% stake in SC&T and that it intended to oppose the Merger. The evidence is that it was only after that public announcement

⁴⁷ Award, para. 359.

⁴⁸ Based on the foregoing analysis, I do not accept the Claimant’s contention that the phrase “relating to” in Article 11.1 of the Treaty is merely designed to ensure that some factual nexus exists between the measures taken by the State and the impairment of the investor’s rights. Reply, para. 288; Claimant’s PHB, para. 54.

⁴⁹ First Smith Statement, para. 28 (CWS-1).

that the President mobilized to support Mr. Lee's succession plan by instigating the interference in the NPS's consideration of the Merger vote.⁵⁰ This was the finding of the Seoul High Court:

The meeting was held immediately after the Merger which was considered as one of the most crucial succession processes when issues such as stricter separation of industrial and financial capital and promotion of economic democratization policies were increasingly brought up for discussion with the status of [Geon-hui Lee]. In order to accelerate the succession to consolidate his control of the group under the succession-friendly [Park] Administration that assisted the Merger, it was necessary for [JY Lee] to show his gratitude to the Defendant with regard to the Merger and ask for continued assistance in connection with the succession.

Around the one-to-one talks on 25 July 2015, the Defendant thought that she could give assistance to [JY Lee's] succession, and her thought was shared by the presidential staff in the Blue House. [The Samsung Group] faced a situation where the success of the Merger hinged on a showdown vote at the general shareholders' meeting with the unexpected emergence of the [Claimant] in the course of the Merger and went all out to seal the Merger in a group-wide effort. By having the Ministry of Health and Welfare unduly intervene in the process of the NPS' exercise of its voting rights, the Defendant and her presidential staff in the Blue House had caused the NPS to vote in favor of the Merger at the general shareholders meeting of [SC&T], which had a decisive influence on sealing the Merger.

Under the circumstances, the office of [BH] prepared a talking points memo dated July 25, 2015 to provide the Defendant with reference materials to the Defendant for her one-on-one meeting with [JY Lee]. ... [T]he talking points memo contained the following in connection with the succession: "The corporate governance of the [Samsung Group] is vulnerable to threats from foreign hedge funds, etc. A crisis of [the Samsung Group] is the crisis of the Republic of Korea, so I hope [the Samsung Group's] corporate governance becomes quickly stabilized so that the group can be committed to future affairs in the face of fierce international competition."

...

There was decisive assistance from the [Park] Administration to the Merger immediately prior to the meeting, and such friendly stance of [the Park] Administration was sustained afterwards.⁵¹

58. It was thus the "unexpected emergence" of the Claimant's publicly stated opposition to the Merger that galvanized the Administration into providing "decisive assistance" to the Merger (in aid of Mr. Lee's succession plan).
59. As already noted, the Korean courts, including the Supreme Court, held that the unlawful interference in the NPS vote was tainted by corruption. It may or may not be the case that a *quid pro quo* was agreed before the NPS voted in favour of the Merger. The point, though interesting, is not decisive because there was a judicial finding that the bribe was solicited within days of the Merger's consummation:⁵²

⁵⁰ The Claimant alleged that on or around 29 June 2015, President Park instructed Blue House officials to "take good care of the NPS voting rights issue regarding the [Cheil] and [SC&T] merger," which those attending the meeting understood to mean ensuring that the Merger was approved. Reply, para. 432(a), *referring to* Second Suspect Examination Report of Jin-su Kim to the Special Prosecutor, 9 January 2017, pp. 5-6 (C-488); Fourth Suspect Examination Report of Hyeong-pyo Moon to the Special Prosecutor, 5 January 2017, p. 9 (C-482).

⁵¹ Seoul High Court No. 2018No1087, 24 August 2018, pp. 101-03 (C-286/R-169).

⁵² The Merger was approved on 17 July 2015 and became effective on 14 September 2015.

During the one-on-one talks of July 25, 2015, the Defendant demanded sponsorship for a certain organization while asking to “provide monetary support to an organization founded by medalists from the winter Olympics.”

...

Sponsorship for the AA Center was provided between October of 2015 and March of 2016 when the individual issues that form part of the succession plan were proceeding, including the winding of circular-shareholding, the strengthening of defense of management right against foreign capital, and the conversion of [AV] into a financial holding company pursuant to the merger in the present case.

...

With respect to the sponsorship for the [AA] center, the presence of unjust solicitation that requested for assistance in [JY Lee’s] succession plan is found.⁵³

60. In this regard, the present case bears some important parallels to *Methanex Corporation v. United States of America*.⁵⁴ In that case, the claimant, a producer of methanol, contended that two measures taken by the state of California to ban the use of a gasoline additive (“MTBE”), of which the claimant’s product was the principal ingredient, related to it *even though neither measure was expressly directed at or mentioned methanol, methanol producers or the claimant itself*.
61. The United States objected to the tribunal’s jurisdiction to hear the case. Among the arguments advanced, the U.S. asserted that the measure complained of did not “relate to” the claimant or to its investment. This is precisely the same issue as is presented in the instant case.
62. It was common ground that there were “measures” (a California Executive Order and certain California Regulations) and that the claimant was an “investor of another Party” for the purposes of NAFTA’s Scope and Coverage provision. The issue was whether measures relating to other persons or products somehow related to Methanex.
63. After it held a jurisdictional hearing, the tribunal stated that it was inclined to hold that the measures complained of did *not* relate to the claimant:

154. On the sole basis of these assumed facts and inferences, it is doubtful that the essential requirement of Article 1101(1) is met. It could be said with force that the intent behind the measures would be, at its highest, to harm foreign MTBE producers with no specific intent to harm suppliers of goods and services to such MTBE producers. If so, the measures would not relate to methanol suppliers such as Methanex; and accordingly, even with such intent as alleged by Methanex, we would have no jurisdiction to decide Methanex’s amended claim.⁵⁵ (Emphasis added.)

64. However, the claimant had amended its statement of claim and the essence of the new allegation was described by the tribunal as follows: “In short, it is contended, as regards Governor Davis, that his constituency was the State of California; a ‘foreign’ product was a product foreign to California, which to him, as influenced by ADM [Archer Daniels Midland Company, a major ethanol producer

⁵³ Seoul High Court No. 2018No1087, 24 August 2018, pp. 105, 107, 130 (C-286/R-169).

⁵⁴ Methanex Corporation advanced claims of breach of National Treatment, the Minimum Standard of Treatment and Expropriation.

⁵⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 154 (RLA-22).

whose product competed with the claimant's methanol⁵⁶], signified methanol produced by Methanex, a 'foreign' product produced by 'foreigners'; and his intent was to harm Methanex."⁵⁷

65. The United States accepted with regard to Article 1101 (the NAFTA equivalent to Article 11.1(1) of the Treaty) that: "If the purpose of the measure is an intent to harm foreign-owned investors or investments on the basis of nationality, then the measure relates to the foreign-owned investor or investment."⁵⁸
66. The tribunal found that it was unable to decide the contention on the evidence then before it and permitted the claimant to file a fresh pleading.⁵⁹ In the end, after a further evidentiary hearing, the tribunal found that the claimant could not sustain its claim that the governor adopted or maintained the measures with the intention to harm it and therefore the measures complained of did not "relate to" Methanex.⁶⁰
67. In a passage that contrasts sharply with the facts of the present case, the tribunal found that the claimant had been unable to make out its case that at a "secret meeting" between the governor and ADM an exchange of favours had been agreed:

⁵⁶ The claimant alleged that ADM had a secret meeting with Governor Davis during his election campaign; this meeting concerned ethanol; ADM made substantial campaign contributions to Governor Davis, and after he was elected he paid back the favour by banning MTBE. *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 153 (**RLA-22**).

⁵⁷ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 157 (**RLA-22**).

⁵⁸ *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, para. 152 (**RLA-22**).

⁵⁹ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part II, Chapter E, para. 6 (**RLA-28**): "In the Partial Award, the Tribunal decided that the case presented by Methanex was not sufficiently clear to enable the Tribunal to determine whether or not Methanex's allegations based on 'intent' were credible, and therefore whether or not one of the US measures could 'relate to' Methanex or its investments for the jurisdictional purposes of Article 1101(1) NAFTA. Accordingly the Tribunal invited Methanex to re-plead its case in a fresh pleading and postponed its decision on the USA's jurisdictional objection with respect to Article 1101(1) NAFTA."

⁶⁰ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part IV, Chapter E, para. 22 (**RLA-28**): "Having concluded on the evidential record that no illicit pretext underlay California's conduct and that Methanex has failed to establish that the US measures were intended to harm foreign methanol producers (including Methanex) or benefit domestic ethanol producers (including ADM), it follows on the facts of this case that there is no legally significant connection between the US measures, Methanex and its investments. As such, the US measures do not 'relate to' Methanex or its investments as required by Article 1101(1). Accordingly, the USA succeeds on its jurisdictional challenge under Article 1101, as regards Methanex's claim pleaded in its Second Amended Statement of Claim; and the Tribunal concludes that it lacks jurisdiction to determine Methanex's substantive claims alleged under NAFTA Articles 1102, 1105 and 1110."

37. The Disputing Parties agreed, as did Mr Vind, that if the encounter [at the alleged “secret meeting” between the governor and ADM] became one of a promise to do something in return for a contribution - a “quid pro quo” - it would be unlawful. Moreover, the Tribunal concludes that if there were proof that the banning of MTBE in California reformulated gasoline, its replacement by ethanol and the impact of all of this on Methanex were extensively discussed at the dinner, then (ignoring the narrow restrictions on the Governor imposed by California Senate Bill 521), the timing of the dinner and the contribution of campaign funds could suggest a deal, or a quid pro quo, which would be unlawful and, also, satisfy in this case the intent requirement for Article 1101, as well as for Articles 1102, 1105 and 1110 NAFTA.
38. However, the Tribunal again notes that Methanex concedes that it cannot offer such proof: “[W]e cannot prove ... anything criminal. We can’t prove any quid pro quo. We can’t prove any handshake deal”. Thus, the question the Tribunal turns to is whether the evidence adduced can even support, by way of inference, Methanex’s view of the dinner - that is, whether there is sufficient circumstantial evidence to justify inferring that the exchange at the dinner was unlawful.⁶¹ (Emphasis added.)
68. In the end, the tribunal concluded that the evidence adduced by the claimant did not support the finding of an unlawful *quid pro quo* and the claim was dismissed on the ground that the measures complained of did not relate to the claimant or its investment.⁶²
69. On this key issue, the facts of the present case are entirely different. There was a meeting shortly after the Merger was consummated, the then-President adverted to the support that her Administration had given to Mr. Lee’s succession plan (thus explicitly drawing a connection between her Administration’s interference in the NPS’s operating procedures and the benefit conferred on Mr. Lee), and then intimated the appropriateness of his providing some pecuniary compensation for the favour bestowed.
70. In other words, unlike the evidence before the *Methanex* tribunal which led that tribunal to find that the measures relating to MTBE did not relate to Methanex because (i) the measures at issue were not expressly directed at methanol, methanol producers or the claimant itself; and (ii) that claimant could not adduce evidence of malign intent, in the case before this Tribunal, the Claimant has, through the proof of the convictions of the former President and Mr. Lee, been able to demonstrate that the Korean courts found that after the Merger, the then-President’s support for the Merger was rewarded by undue benefits.⁶³
71. Accordingly, measures that related to the voting of the NPF’s shares in favour of the Merger, which would otherwise not satisfy the “relating to” requirement set forth in Article 11.1, can be said to have related to the Claimant. The weight of the evidence shows that had it not been for the unexpected

⁶¹ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part III, Chapter B, paras. 37-38 (**RLA-28**). (Footnotes references omitted.)

⁶² *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, Part III, Chapter B, para. 60 (**RLA-28**): “In summary, the Tribunal’s finds that (i) the Governor of California, Mr Gray Davis, according to the terms of the 1997 California Senate Bill 521 and exercising his statutorily limited discretion thereunder (which Methanex does not impugn as a US measure), made California Executive Order D-5-99 without any intent to harm methanol or Methanex and without any intent to favour ethanol or ADM, contrary to Methanex’s allegations; and (ii) there is no credible evidence that Mr Davis as the Governor of California or California intended thereafter to favour the United States ethanol industry (or particular companies within it, including ADM) or to harm US or foreign methanol producers (including Methanex), contrary to Methanex’s allegations.”

⁶³ Award, para. 620.

emergence of the Claimant's highly publicized proxy campaign, the measures relating to the voting of the NPF's shares would likely not have been adopted or maintained in the first place. The measures, intended by the President to assist the succession plan by means of a vote in favour of the Merger, necessarily were intended to defeat the Claimant's proxy battle, in respect of which it had acquired its 7.12% shareholding in SC&T. Whether the President intended to harm the Claimant's covered investment is not clear. But what is clear is that upon the giving of her directive, unbeknownst to the Claimant, it was engaging in a waste of time and money in launching a proxy battle that was destined to fail, and at least to that extent it was harmed. That interference, tainted by corruption, suffices to allow the Claimant to pass through the jurisdictional gateway of Article 11.1.

72. No two cases are ever the same, but the key point to be derived from *Methanex* was that measures adopted or maintained relating to some other subject could be found to relate to a claimant and/or its investment if there was a corrupt intent to advance the interests of a party through the measures ultimately adopted. That is what would have created the "legally significant connection" had *Methanex* been able to make out its jurisdictional case. In the present case, the Claimant has been able to make that case.
73. On the highly unusual facts of this case, I therefore concur in the result reached by the Tribunal, albeit for different reasons.

The Minimum Standard of Treatment

74. Finally, I wish to comment on the Minimum Standard of Treatment ("MST"). I agree with the Tribunal's description of the approach required by the Treaty when it comes to establishing a rule of customary international law. I note that the disputing parties agreed that the *Waste Management II* award authoritatively described the MST.⁶⁴ It should be noted however that being a NAFTA tribunal, the *Waste Management II* tribunal was not expressly bound to apply the kind of mandatory methodology set forth in Annex 11-A of the Treaty and was in fact seeking to express an "emerging" general "standard of review" based upon its review of certain prior NAFTA cases.⁶⁵ Prior judicial and arbitral decisions can assist in discerning the existence of a customary international law rule, but caution should be exercised to ensure that the court or tribunal, as the case may be, sought to ascertain State practice and *opinio juris* prior to declaring itself on the existence of an alleged rule.
75. I note in addition that the United States asserted in its Submission before this Tribunal that currently "customary international law has crystallized to establish a minimum standard of treatment in only a few areas."⁶⁶ (Emphasis added.) Examples of such rules are then set out at paragraph 19 of the U.S.

⁶⁴ In the interests of full disclosure, I wish to disclose that I was a member of Mexico's team of counsel in *Waste Management II*.

⁶⁵ See *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (CLA-16).

⁶⁶ U.S. Submission, para. 18. "One such area, expressly addressed in Article 11.5.2(a), concerns the obligation to provide 'fair and equitable treatment,' which includes 'the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.'" To this the United States adds a handful of other crystallized customary international rules in para. 19: "To the extent that the customary international law minimum standard of treatment incorporated in Article 11.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings, access to judicial remedies or treatment by the courts, or the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife." (Footnote references omitted.)

Submission.

76. The implication of this statement is that the customary international law rules comprising the MST are context-specific. As I understand the United States' position, it is that there is no general across-the-board minimum standard of treatment that can be invoked for any given set of facts; it is instead dependent either upon either (i) identifying an existing rule said to be applicable to the facts of the particular case (such as the obligation not to deny justice in adjudicative proceedings); or (ii) proving the existence of some other rule claimed to have been breached. To the best of my knowledge, this is the approach that the United States has consistently taken both as a respondent and in many cases as a non-disputing party. In my view, therefore, careful consideration must be given to how paragraph 98 of the *Waste Management II* Award comports with the requirements of a post-NAFTA treaty such as the Treaty applicable in the present case. Paragraph 98, even with its use of adjectival modifiers, could be wrongly taken to imply that there is no need to confirm the existence of an alleged rule of customary international law by applying the two requirements stipulated in Annex 11-A.

Date: 20 June 2023



J. Christopher Thomas KC