

**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.)**
(the “Claimants”)

- and -

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

PROCEDURAL ORDER NO. 5

The Arbitral Tribunal

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

Registry

Permanent Court of Arbitration

15 January 2021

WHEREAS in a joint email dated 14 December 2020, the Parties informed the Tribunal of their agreement to postpone the deadline for the submission of the completed Redfern Schedules until 18 December 2020;

WHEREAS Claimants submitted their Redfern Schedule, comprising 41 document production requests (one of which has been withdrawn) on 18 December 2020;

WHEREAS Respondent submitted its Redfern Schedule, comprising 26 document production requests on 18 December 2020,

THE TRIBUNAL HEREBY ORDERS:

A. Applicable rules and principles governing document production

1. Section 4 of Procedural Order No. 1 provides:

4.1. Each Party may request the production of documents from the other Party in accordance with the Procedural Calendar to be determined by the Tribunal. Requests for the production of documents shall be in writing and set forth reasons for the request in respect of each document or class of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable time limit.

4.2. Any documents produced in response to the opposing Party's request or Tribunal's order shall be "Bates numbered" and transmitted to the requesting Party in electronic/text-searchable PDF form (except Excel spreadsheets which shall be produced in native form pursuant to paragraph 4.5), accompanied by an index that indicates which documents have been produced in response to which requests.

4.3. If the requested Party objects to production, the following procedure shall apply:

4.3.1. The requested Party shall submit a response stating which documents or class of documents it objects to producing. The response shall state the reasons for each objection and shall indicate the documents, if any, that the Party would be prepared to produce instead of those requested.

4.3.2. The requesting Party shall respond to the other Party's objection, indicating, with reasons, whether it disputes the objection.

4.3.3. The Parties shall seek agreement on production requests to the greatest extent possible.

4.3.4. To the extent that agreement cannot be reached between the requesting and the requested Party, the Parties shall jointly submit all outstanding requests to the Tribunal for decision.

4.3.5. *Document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as Annex 1 (a modified Redfern schedule). The Parties shall use the model format throughout their exchange of requests, objections, and responses.*

4.3.6. *The Tribunal shall rule on any such application, and may for this purpose refer to the IBA Rules on the Taking of Evidence in International Arbitration 2010. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the Procedural Calendar, unless the Tribunal in its production order fixes a different time period.*

4.3.7. *Should a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate, taking into consideration all relevant circumstances.*

4.4. *Further requests for the production of documents sought by either Party, if any, shall be permitted only with leave of the Tribunal. The request must be substantiated.*

4.5. *Excel spreadsheets shall be produced in their native electronic format (i.e., in Excel format). A Party may submit a reasoned request to the other Party for the production of specified documents in their native electronic format if originally produced in another format. If no agreement is reached, the Tribunal shall take a decision on the request.*

4.6. *The Tribunal may also request the production of documents on its own motion.*

4.7. *The Parties shall not copy the Tribunal or the PCA on their correspondence up until point 4.3.4 above or exchanges of documents in the course of the document production phase.*

4.8. *Documents produced according to the above schedule shall not be considered on the record unless and until a Party subsequently submits them as exhibits to its written submissions or with the leave of the Tribunal after the exchange of submissions.*

2. According to the IBA Rules, the Tribunal has considerable discretion when ruling on requests for the production of documents. It is left to the Tribunal to decide, on a case-by-case basis, how much, if any, disclosure should be allowed.
3. The IBA Rules establish the following standards for the Tribunal's guidance in its decision on document production requests:
 - a. the specific document or narrow and specific category of documents must be described in sufficient detail;
 - b. the relevance and materiality to the outcome of the case must be established with respect to each document or category of documents;
 - c. any document or category of documents requested must be within the opposing party's possession, custody or control and must not be in the requesting party's possession, custody or control;
 - d. the Tribunal must take into account legal impediments or privilege under the

- legal or ethical rules applicable;
- e. the production of the requested evidence may not cause unreasonable burden to the party under the production obligation;
 - f. the Tribunal must consider grounds of commercial or technical confidentiality that it determines to be compelling;
 - g. grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Tribunal determines to be compelling are to be observed; and
 - h. considerations of fairness or equality of the Parties that the Tribunal determines to be compelling may be applied.

B. The Tribunal's considerations

4. The Tribunal has reviewed the reasons advanced by the Parties for their respective requests for production of documents as well as their respective objections to the other Party's requests.
5. Considering the principles outlined above, the Tribunal has decided on the Parties' document production requests in the manner set out in the attached Redfern Schedules.
6. The Tribunal notes that, in deciding on the requests for document production, it has considered the *prima facie* relevance of the documents sought, having regard to the factual allegations made by the Parties so far. At this stage of the proceedings, the Tribunal is not in a position to make any final determination regarding the ultimate relevance or materiality of the documents in question to the adjudication of the Parties' claims and defenses in this arbitration, and its determinations are thus without prejudice.
7. The Tribunal reserves the right to review its decision on the production of documents if later in the proceedings it comes to the view that certain documents, the production of which has been denied, could indeed be relevant and material to a claim.
8. The Tribunal further notes that the Parties have raised certain general objections to the respective other Party's document production requests, which the Tribunal will address in general terms in this Procedural Order. The Tribunal's decisions on the individual document production requests can be found in the attached Redfern Schedules.

I. Legal impediment and political sensitivity

9. The Parties disagree on whether Respondent is entitled to withhold production of documents that could be classified under Korean law or be considered politically sensitive.
 1. The Parties' positions
10. Respondent submits that Korean law, which the Tribunal should have regard to under Articles 9.2(b), 9.3(c) IBA Rules, precludes it from complying with several of Claimants' document production requests.
11. Respondent argues that Korean law prohibits the production of documents in an arbitral

proceeding which are designated as

- a. *Class I Secret, Class II Secret or Class III Secret* under the Presidential Decree on Security Operational Rule (**Exhibit R-363**);
 - b. “*not to be disclosed*” pursuant to the Public Records Management Act (**Exhibit R-361**);
 - c. “*Presidentially Designated Records*” of the Park Geun-hye Administration pursuant to the Act on the Management of Presidential Archives (**Exhibit R-348**).
12. Respondent objects to several of Claimants’ document production requests because the requested documents might fall within one of these categories and therefore be classified.
 13. In the alternative, Respondent submits that documents designated as *Class I Secret, Class II Secret or Class III Secret* should be excluded from production on the separate ground of political sensitivity under Article 9.2(f) IBA Rules.
 14. Claimants submit that Respondent has not demonstrated that any of the alleged restrictions under Korean law has any relevance to the documents requested. Claimants argue that Respondent’s general objection is impermissibly made on an *en bloc* basis without specifying the documents which are to be exempted from production. Claimants contend that in any event, Respondent would have to produce detailed legal impediment logs.
 15. Claimants further submit Respondent cannot rely on its domestic law to evade its procedural and substantive obligations under international law.

2. The Tribunal’s considerations

16. Article 9.2 IBA Rules provides in relevant part:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

[...]

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

[...]

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling [...]

17. In the Tribunal’s view, a party seeking to invoke any of these exemptions needs to specify which of the requested documents ought to be exempted from production and which specific legal impediment or privilege or ground of special political or

institutional sensitivity it invokes in respect of each particular document.

18. The mere assertion that a category of documents could potentially be classified under domestic law (without specifying whether this is actually the case) is not sufficient under Article 9.2(b) IBA Rules.
19. In its objections to Claimants' document production requests, Respondent acknowledges that it "*has no knowledge of whether any of the responsive documents are classified as Secret Documents*" and that it "*has no knowledge of whether any of the responsive documents fall within the ambit of [Presidentially] Designated Records.*"¹ Respondent further argues that it possesses no statutory right to identify any documents classified as "*Not to be disclosed*" for the purposes of this document production.
20. On that basis, the Tribunal is currently not able to rule on any of these exemptions invoked by Respondent.
21. To the extent that Respondent intends to have classified or politically sensitive documents excluded from production, it will have to identify such documents and provide sufficient detail for Claimants and the Tribunal to assess whether the exemption is justified. The Tribunal agrees with Claimants' argument that the reliance on Article 9.2(b) IBA Rules does not shield the party invoking the legal impediment or privilege from searching and identifying the responsive documents and their status.
22. Therefore, the Tribunal directs Respondent to prepare an exemption log, in the format set out in Annex I and sorted by individual document production requests, for any documents it wishes to exclude from document production and provide it to Claimants for comments.
23. The Parties shall seek to reach agreement on the documents that are to be exempt from document production. The Tribunal shall only be seized in respect of documents where the Parties are unable to reach agreement. The Parties shall consult with each other and advise the Tribunal of the timetable for the exchange of the exemption log and the determination of any unresolved issues by the Tribunal.

II. Possession, custody and control of documents

24. Furthermore, the Parties disagree on whether documents which are held by certain entities related to them should be considered as being in their possession, custody or control for the purposes of document production.
 1. Documents held by other Mason entities
 - a) The Parties' positions
25. Claimants argue that Respondent has impermissibly sought to define "Mason" in its document production requests to include various related entities which are not parties to this arbitration.
26. Respondent submits that limiting the document production request obligation to the two

¹ See Respondent's objections to CDR-1.

entities which are parties to this arbitration would be artificial, as it is established that Mason operates as a single business concern through entities beyond the two claimants in the arbitration.

b) The Tribunal's considerations

27. The Tribunal notes that despite their disagreement with Respondent's definition of "Mason", Claimants have offered to *"take appropriate steps to obtain responsive Documents from these entities to the extent such documents exist and can be located upon a reasonable search, and will produce them to the extent not duplicative with responsive Documents in the possession of the Claimants."*²
28. It light of this, no decision is currently required from the Tribunal.

2. Documents held by the Korean judiciary and prosecutors

a) The Parties' positions

29. Respondent submits that documents held by the Korean judiciary or by Korean prosecutors should not be considered as being in its possession, custody or control.
30. Respondent argues that Korea's constitution provides for the separation of powers and the independence of the judiciary and the prosecutors. Respondent submits that Korean law does not permit it (or its Ministry of Justice) to obtain the trial records of ongoing court proceedings or the investigative files held by the Prosecutor's Office. Respondent further contends that its ability to obtain documents held by the office of the Special Prosecutor is even more limited.
31. Furthermore, Respondent asserts that its ability to obtain trial records or investigative files from concluded court proceedings is that of a third-party which requires a specific purpose. In Respondent's submission, the obligation to produce documents in an arbitration does not constitute such specific purpose under Korean law. This leads Respondent to conclude that it does not have possession, custody or control of the trial record of ongoing and concluded proceedings and investigative files of prosecutors and that it is also under a legal impediment in the sense of Article 9.2(b) IBA Rules to produce these documents.
32. Claimants submit that the Republic of Korea is a single entity under international law and its judiciary and prosecutors are State organs which are indistinguishable from the Republic of Korea on an international level and which are under a direct obligation to comply with the Tribunal's orders. Claimants argue that irrespective of the State organ representing the Republic of Korea in these proceedings, Respondent must be considered in possession, custody or control of documents of its judiciary and its prosecutors.
33. Claimants further argue that Korean law does not prohibit the disclosure of the requested documents in this arbitration and Respondent is therefore not under a legal impediment to produce any documents held by the Korean courts or prosecutors.

² Introductory Note to Claimants' Reasoned Objections to Respondent's Requests for the Production of Documents, para. 4.

b) The Tribunal's considerations

34. The Tribunal notes that while Respondent may be represented in this arbitration by the Ministry of Justice, party to the FTA and accordingly respondent in these proceedings is not the Ministry of Justice but the Republic of Korea as a single subject of international law. The Tribunal agrees with Claimants that the Korean courts and prosecutors, as (undisputed) State organs, form an inextricable part of the Republic of Korea for the purposes of this document production. Respondent itself acknowledges in the context of the discussion of whether documents held by the National Pension Service (“NPS”) that documents of a State organ can be considered within the possession, custody and control of the Republic of Korea.³
35. Even if the Ministry of Justice were unable to obtain documents held by the Korean courts or prosecutors under Korean law (a question that the Tribunal does not consider decisive for this issue and will therefore not further elaborate on), it would not release other Korean State organs, including the Korean courts and prosecutors, from its obligations under international law – as has also been confirmed by the *Elliott v. Korea* tribunal.⁴
36. Consequently, the Tribunal considers documents held by the Korean courts, the Prosecutor's Office or the office of the Special Prosecutors, to be in Respondent's possession, custody and control.
37. As regards Respondent's legal impediment argument, the Tribunal disagrees with Respondent that any alleged inability under domestic law for the Ministry of Justice or other parts of the executive branch to request documents from the Korean judiciary or prosecutors would amount to a legal impediment for the Republic of Korea in the sense of Article 9.2(b) IBA Rules. As stated before, it does not make any difference from the perspective of international law whether it is the Ministry of Justice, the Korean courts, prosecutors or any other State organ producing the requested documents. The mere fact that the main point of contact for this arbitration within the Republic of Korea is the Ministry of Justice does not imply that the Ministry's internal rights and powers under domestic law are determinative for the scope of Respondent's international legal obligations.
38. The Tribunal therefore rejects Respondent's argument that its alleged inability to obtain documents from the Korean courts, the Prosecutor's Office or the office of the Special Prosecutors constitutes a legal impediment in the sense of Article 9.2(b) IBA Rules.

³ Respondent's General Observations on Claimants' Document Production Requests, para. 108.

⁴ *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 8, **Annex EE to Claimants' Request for Production of Documents**, para. 14.

3. Documents held by the National Pension Service

a) The Parties' positions

39. Respondent submits that it does not have possession, custody or control of documents held by the NPS. Respondent argues that determining the question of whether it should be considered in possession, custody or control of documents held by the NPS would inevitably require the Tribunal to prematurely decide the central issue of whether the NPS is a State organ and should therefore not be part of the decision on document production. Nevertheless, Respondent offers to use its "best efforts" to obtain relevant responsive documents from the NPS if so ordered by the Tribunal.
40. Claimants submits that the Tribunal need not rule on the issue of whether the NPS qualifies as a State organ to decide the narrow question of Respondent's control over documents held by the NPS. Claimants argue that under Korean law, the Minister of Health and Welfare (who is undisputedly a State organ) has certain supervisory powers vis-à-vis the national pension services empowering him to request documents from them. Furthermore, Claimants contend that Respondent cannot be permitted to benefit from its contradictory behavior in relation to its access to documents held by the NPS given that Respondent placed on the record a number of internal NPS documents which it asserts supports its case. Regarding Respondent's offer to use its "best efforts" to obtain documents from the NPS (if so ordered by the Tribunal), Claimants propose a set of actions for Respondent to discharge that obligation.

b) The Tribunal's considerations

41. The Parties agree that the precise relationship between Respondent and the NPS and the question of whether the NPS is a State organ are matters for the merits.
42. The Tribunal shares Claimants' view that these pending issues do not prevent the Tribunal from ruling on the question whether documents held by the NPS should be considered to be in Respondent's possession, custody or control for the (sole) purpose of this document production phase.
43. Without the benefit of a full pleading and without prejudice to any further decisions on the issue, notably any questions of State attribution, the Tribunal agrees with Claimants that Korean law appears to provide the Minister of Health and Welfare (and thus the Korean State) with at least some elements of control vis-à-vis the NPS.
44. In such circumstances, the respondent State is – as confirmed by the *Elliott v. Korea* tribunal – "*under an obligation to use its best efforts to obtain the relevant responsive documents from the State entity in question if the requesting party provides reasons why it assumes that the requested documents are in the possession, custody or control of the State entity in question, as required by Article 3(3)(c) of the IBA Rules.*"⁵
45. Accordingly, the Tribunal directs Respondent to (i) undertake best efforts to identify and obtain from the NPS any requested documents that are in its possession, custody or control (and not otherwise in Respondent's possession, custody or control) and (ii)

⁵ *Elliott Associates, L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Procedural Order No. 8, **Annex EE to Claimants' Request for Production of Documents**, para. 20.

produce them to Claimants insofar as it is able to obtain them.

46. To discharge that obligation, the Tribunal expects Respondent to exercise its supervisory and discretionary powers vis-à-vis the NPS to the necessary extent, with the objective of ensuring full compliance with this decision on document production and with reference to its disclosure obligations under international law. Respondent is further directed to copy Claimants' legal representatives on any correspondence with the NPS and provide it with copies of any responsive correspondence.

C. Order

47. Based on the foregoing, the Tribunal decides as follows:

- a. The Parties are ordered to produce the documents and/or confirmations as directed in the attached Redfern Schedules by **1 February 2021**, as determined in the updated Procedural Calendar in Procedural Order No. 4.
- b. To the extent that any Party seeks to exclude responsive documents from production pursuant to Article 9.2 IBA Rules and is granted leave to do so in the attached Redfern Schedules, it shall provide the opposing Party with a log of the documents withheld in the format set out in Annex I by **1 February 2021**.
- c. To the extent that the requested documents are in the possession, custody or control of the NPS (and not otherwise in Respondent's possession, custody or control), Respondent is ordered to (i) undertake best efforts to identify and obtain the requested documents from the NPS, in accordance with the procedure set out in para. 46 above, and (ii) produce them to Claimants, insofar as it is able to obtain them, by **1 February 2021**.
- d. With respect to documents for which production has been ordered or for which the Party has indicated its willingness to produce them, each Party shall provide an index of the documents produced, with an indication of the requests to which they respond. Each Party shall state whether it has produced all responsive documents in its possession, custody or control.
- e. All other document production requests are denied, but without prejudice to the Tribunal's power to review its decision on the production of documents in accordance with paragraphs 6 and 7 above.

Place of arbitration (legal seat): Singapore



Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal

