

**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”)**

PROCEDURAL ORDER NO. 8

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

13 January 2020

I. PROCEDURAL HISTORY

1. On 1 April 2019, the Tribunal issued Procedural Order No. 1, providing, *inter alia*, rules and time limits for production of documents by the Parties. Procedural Order No. 1 provides, in relevant part:
 - 5.1 Each Party may request the production of documents from the other Party in accordance with the procedural calendar to be fixed in a subsequent Procedural Order. 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.

[...]
 - 5.3 If the requested Party objects to production, the following procedure shall apply:
 - 5.3.1 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.
 - 5.3.2 The requesting Party shall respond to the other Party's objection, indicating, with reasons, whether it disputes the objection.
 - 5.3.3 The Parties shall seek agreement on production requests to the greatest extent possible.
 - 5.3.4 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.
 - 5.3.5 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.
 - 5.3.6 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.
2. On 26 August 2019, the Tribunal issued Procedural Order No. 5, approving a revised procedural timetable agreed by the Parties, which amended, *inter alia*, the time limits for document production.
3. On 11 October 2018, the Tribunal issued Procedural Order No. 6, amending the procedural timetable as agreed by the Parties, extending the time limit for the voluntary production of documents.

4. In accordance with the revised procedural timetable, between 1 November and 22 November 2019, the Parties exchanged requests for the production of documents, responded to the requesting Party's requests, and commented on objections to production by the other Party.
5. On 13 December 2019, the Parties submitted to the Tribunal for its decision their outstanding requests for production to which the other Party continued to object (the "**Requests**"). The present Procedural Order No. 8 sets out the Tribunal's decisions on the Requests.

II. REASONS FOR THE DECISIONS

A. Applicable rules and standards

6. The Tribunal notes that many of the Parties' Requests raise broader questions, including in particular (i) whether documents held by the Korean judiciary, the Public Prosecutor, or the Special Prosecutor should be considered as being in the Respondent's "possession, custody or control;" (ii) whether documents held by the National Pension Service ("NPS") should be considered as being in the Respondent's "possession, custody or control;" and (iii) whether certain documents requested by the Claimant are subject to "legal impediment" or "special political sensitivity" and therefore excluded from document production.
7. The Parties have addressed the above issues in separate introductory submissions, with the exception of the third issue, which the Respondent has only raised in the Claimant's Redfern schedule.
8. The Tribunal will address these broader issues in this Procedural Order; its decisions on each of the Parties' disputed requests is set out in the Parties' respective Redfern Schedules, which are appended to this Procedural Order as **Annexes I and II**. Pursuant to paragraph 5 of Procedural Order No. 1, when making its determinations, the Tribunal has taken into account, as relevant, the IBA Rules on the Taking of Evidence in International Arbitration of 2010 ("**IBA Rules**"). In those cases in which the request is granted and production of the requested documents is ordered, it should be understood that the Tribunal considers the requirements for a meritorious request under the IBA Rules to have been met. In those cases in which the request is denied or partially denied, it should be understood that the Tribunal considers that one or more of those requirements are not met. The Tribunal has endeavoured to state the grounds for any such denial, consistently with the summary nature of each ruling.

B. Whether documents held by the Korean judiciary and prosecutors are in the Respondent's possession, custody or control

9. According to Article 3(3)(c)(ii) of the IBA Rules, a request for production of documents shall contain, *inter alia*, “a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.”
10. The Parties disagree as to whether certain documents requested by the Claimant are in the possession, custody or control of the Respondent within the meaning of Article 3(3)(c)(ii) of the IBA Rules. More specifically, the Parties disagree as to whether certain documents held by the Korean Public Prosecutor’s Office, the Special Prosecutor and the Korean judiciary (the latter insofar as they concern documents from the trial record of ongoing court proceedings) should be considered as being in the Respondent’s “possession, custody or control.”
11. According to the Respondent, under the Korean Constitution, it does not have possession, custody or control over such documents, due to the separation of powers under the Constitution which establishes and protects the independence from the Government of the judiciary, the Prosecutor’s Office and the Special Prosecutor. The Respondent argues that the constitutional arrangements constitute a “legal impediment” as contemplated in Article 9(2)(b) of the IBA Rules.
12. Notwithstanding its position in principle, the Respondent states that it “is willing, pursuant to an order from the Tribunal, to make its best efforts to obtain relevant responsive documents” from these entities and “to produce those relevant responsive documents to the Claimant should it succeed in obtaining them.”¹
13. The Claimant contends, in response, that “it is [the Republic of Korea] as a whole that is a party to the Treaty pursuant to which this arbitration is brought.”² According to the Claimant, the Respondent does not contest, and cannot contest, that the Korean judiciary and the Prosecutor’s Office are part of the Korean State under international law. The Claimant also denies that Article 9(2)(b) of the IBA Rules provides an excuse for the Respondent to refuse to produce the relevant documents; in the Claimant’s view, the provisions of Korean law cited by the Respondent in support of its position are not applicable in the circumstances.

¹ Respondent’s General Observations, p. 1.

² Claimant’s Responses to the Respondent’s Objections to Claimant’s Requests for Production of Documents, para. 6.

14. The Tribunal notes that the State organ of the Republic of Korea responsible for directing and administering the present arbitration is the Ministry of Justice (see Section 1 of the Terms of Appointment). The Tribunal notes that under Korean law, consistent with the principle of separation of powers and the relevant provisions of Korean law,³ the Ministry of Justice, as an executive organ, does not appear to have a general power to access documents held by the judiciary in pending proceedings, or to order the judiciary to produce such documents. The same principle appears to apply to documents held by prosecutors, including the Public Prosecutor and the Special Prosecutor, which are independent from the Executive in their investigative activities. However, as noted by the Claimant, the Respondent in this proceeding is not the Ministry of Justice but the Republic of Korea. Accordingly, while the Ministry of Justice may not be able, under Korean law, to require the Korean judiciary or the prosecutors to communicate the relevant responsive documents to the Ministry of Justice, this does not provide an excuse, or a legal impediment, for the Korean judiciary or the prosecutors to produce the documents to the Claimant. The Tribunal therefore finds that the requested documents, to the extent that they are held by the Korean judiciary, the Public Prosecutor or the Special Prosecutor, must be considered to be in the possession, custody or control of the Respondent. It is for the Respondent to determine whether the relevant responsive documents are to be produced to the Claimant directly by the State organ which is in the possession, custody or control of the documents in question, or whether they should be first communicated to the Ministry of Justice, as the State organ responsible for directing and administering the arbitration on behalf of the Republic of Korea, for further production to the Claimant.
15. The Tribunal's finding applies also to any documents seized as a result of "dawn raids" of which no copies are held by the State organ which originally prepared or received the documents in question, and which are currently in the possession, custody or control of the judiciary, the Public Prosecutor or the Special Prosecutor.⁴
16. Accordingly, the Tribunal directs that the Respondent produce the relevant responsive documents to the Claimant, as recorded in the Claimant's Redfern schedule (Annex I). This ruling is subject to any legal impediment (other than separation of powers) or privilege that may apply; see Section II.D below.

³ As set out by the Respondent in its Response to the Claimant's Request No. 1.

⁴ Claimant's Responses to the Respondent's Objections to Claimant's Requests for Production of Documents, paras. 16-17.

C. Whether documents held by the National Pension Service are in the Respondent's possession, custody or control

17. The Parties also disagree on whether documents held by the NPS are in the Respondent's possession, custody or control. According to the Respondent, the NPS is not a State organ, and indeed the issue of whether the NPS is a State organ "is a core disputed issue in this arbitration" and as such a matter for the merits.⁵ The Respondent submits that the Tribunal therefore cannot be asked to make a determination on this issue at this stage of the proceedings; in the Respondent's view, the Claimant's request for documents held by NPS is "improper for relying on a presumption that it is correct with respect to the core dispute in this arbitration."⁶
18. However, despite its position in principle, the Respondent confirms that it "is willing, pursuant to an order from the Tribunal, to make its best efforts to obtain relevant responsive documents" from these entities and "to produce those relevant responsive documents to the Claimant should it succeed in obtaining them."⁷
19. While the Claimant agrees that the issue of whether or not the NPS is a State organ is a core issue in this arbitration, it argues that the Tribunal is not required to make any determinations on the legal issue of attribution, in order to resolve the Claimant's document production request; the sole issue that it is required to determine is the factual issue of possession, custody or control of the requested documents, "having regard to the undeniable relationship between the [Republic of Korea] and the NPS."⁸ In support of its position, the Claimant refers to the tribunal's decision on document production in *Almås v. Poland*.⁹ The Claimant submits that there is "abundant authority for the proposition that, at a minimum, State parties are required to make best efforts to obtain the requested documents from entities or persons with which they have a relationship that is relevant to the arbitration, even if they have a distinct legal personality."¹⁰

⁵ Respondent's General Observations, p. 1.

⁶ Respondent's General Observations, p. 1.

⁷ Respondent's General Observations, p. 1.

⁸ Claimant's Responses to the Respondent's Objections to Claimant's Requests for Production of Documents, para. 18.

⁹ Claimant's Responses to the Respondent's Objections to Claimant's Requests for Production of Documents, para. 19 (citing *Kristian Almås and Geir Almås v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, **RLA-80**, ¶ 23).

¹⁰ Claimant's Responses to the Respondent's Objections to Claimant's Requests for Production of Documents, para. 21 (citing *Vito G. Gallo v. The Government of Canada*, PCA Case No. 55798, Procedural Order No. 2, 10 February 2009, **CLA-73**, ¶¶ 7-8; *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Procedural Order No. 8, 25 November 2009, **CLA-62**, ¶ 1(h)).

20. The Tribunal agrees that documents held by a State entity that has a separate legal personality are not necessarily in the “possession, custody or control” of the State. Whether or not this is the case depends on the circumstances, and the Parties agree that the question of the precise relationship between the NPS and the Korean State is a matter for the merits. However, since an entity such as the NPS, *qua* State entity, must be considered to be, as a general matter, under the control of the State (the type and extent of control depending on the applicable law), the respondent State must be considered to be 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. The Tribunal notes that, in the present case, the Claimant has provided such reasons, and the Respondent has agreed to make its best efforts.
21. Accordingly, the Tribunal directs that, to the extent that the relevant documents are in the possession, custody, or control of the NPS and not in those of other agencies, instrumentalities, or entities of the Republic of Korea, the Respondent make its best efforts to obtain such responsive documents from the NPS and produces them to the Claimant insofar as it is able to obtain them, as recorded in the Claimant’s Redfern schedule ([Annex I](#)).
22. The Tribunal’s decision is limited to the issue of production of documents and is without prejudice to the issue of attribution, which forms part of the merits of the case.

D. Whether any of the requested responsive documents are “politically sensitive” and as such excluded from document production

23. The Respondent in several of its responses states that it agrees to produce responsive documents that “are not subject to [...] special political sensitivity.”¹¹ In support of its position, the Respondent refers to Article 9(2)(f) of the IBA Rules, which provides that “[t]he Arbitral Tribunal shall, at the request of a Party or on its motion, exclude from evidence or production any Document [...] [on] grounds of special political or institutional sensitivity [...] that the Arbitral Tribunal considers compelling.”

¹¹ See Respondent’s Responses to the Claimant’s Objections to Respondent’s Requests for Production of Documents, Requests No. 1-13, 20, 26-26, 43 and 47.

24. The Claimant submits, in response, that the Respondent has not identified any grounds for its claim and therefore has not even attempted to comply with Article 9(2)(f).
25. The Tribunal agrees that it is not sufficient for the Respondent to merely assert that its agreement to produce responsive documents is subject to its determination that the documents in question are not politically or institutionally sensitive. Pursuant to Article 9(2)(f) of the IBA Rules, the determination of whether a particular responsive document is excluded from document production on grounds of special political or institutional sensitivity is to be made, in the event the Parties disagree on the issue, by the Tribunal, which must find that the grounds invoked by the party opposing production are “compelling.”
26. Accordingly, the Respondent is directed to prepare a privilege log which identifies each responsive document that is being withheld from production on grounds of political or institutional sensitivity, or any other form legal impediment or privilege, that the Respondent may raise in response to the Claimant’s requests. The privilege log must contain sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Claimant (and if necessary, the Tribunal) to determine whether withholding the document from production is justified.
27. Should the Claimant consider that any of the responsive documents requested by the Respondent should, in the Claimant’s view, be withheld from production on grounds of legal impediment or privilege, it should similarly prepare a privilege log that contains sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Respondent (and if necessary, the Tribunal) to determine whether withholding the document from production is justified.

III. ORDER

28. In light of the above, the Tribunal orders as follows:
 - a) The Tribunal’s decisions on the Claimant’s requests for production of documents are recorded in the Claimant’s Redfern schedule, which is appended hereto as Annex 1 and forms part of this Procedural Order; the Respondent shall produce the requested documents as directed by the Tribunal in the Claimant’s Redfern schedule by 7 February 2020;
 - b) The Tribunal’s decisions on the Respondent’s requests for production of documents are recorded in the Respondent’s Redfern schedule, which is appended hereto as Annex II

and forms part of this Procedural Order; the Claimant shall produce the requested documents as directed by the Tribunal in the Respondent's Redfern schedule by 7 February 2020;

- c) The Claimant is directed to prepare a privilege log which identifies each responsive document that is being withheld from production on grounds of legal impediment or privilege. The privilege log must contain sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Respondent and, if necessary, the Tribunal to determine whether withholding the document is justified;
- d) The Respondent is directed to prepare a privilege log which identifies each responsive document that is being withheld from production on grounds of political or institutional sensitivity, or legal impediment or privilege. The privilege log must contain sufficient information (but without disclosing the politically or institutionally sensitive or otherwise privileged information) to allow the Claimant and, if necessary, the Tribunal to determine whether withholding the document is justified; and
- e) The Parties are directed to prepare a list of the documents produced, identifying which document responds to which request of the other Party.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal