

**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. 6

The Arbitral Tribunal

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

Registry

Permanent Court of Arbitration

2 March 2021

WHEREAS on 15 January 2021, the Tribunal issued Procedural Order No. 5 ("**PO 5**") on document production in which it, *inter alia*, partially granted Claimants' Request CDR-32 and ordered the Parties to produce the requested documents by 1 February 2021;

WHEREAS on 4 February 2021, Claimants informed the Tribunal of the Parties' agreement to postpone the deadline for the voluntary and involuntary document production until 18 February 2021;

WHEREAS on 23 February 2021, Respondent wrote to the Tribunal to request "*relief from PO 5 insofar as it concerns Korea's current inability to produce evidence yet to be adduced by the Prosecutors' Office in the pending case against Mr. Lee*";

WHEREAS on 24 February 2021, the Tribunal invited Claimants to comment on Respondent's letter of 23 February 2021;

WHEREAS on 1 March 2021, Claimants provided their comments and requested that the Tribunal (i) deny Respondent's request for relief from its document production obligations under PO 5; and (ii) order Respondent to produce the documents the Tribunal ordered pursuant to PO 5 by no later than 12 March 2021.

THE TRIBUNAL HEREBY ORDERS:

1. In its letter dated 23 February 2021, Respondent submits that the Korean Ministry of Justice sought disclosure from the Prosecutors' Office of documents responsive to CDR-32 and that the Prosecutors' Office declined to disclose such documents, invoking "*relevant laws and regulations such as the [Korean] Criminal Procedure Act*".¹ Respondent argues that the requested documents constitute confidential information the disclosure of which would impede law enforcement under Article 23.4 of the Korea-U.S. Free Trade Agreement ("**FTA**").
2. The Tribunal recalls that in PO 5, paras. 34-38, it addressed Respondent's arguments that documents held by the Korean Prosecutors' Office should not be considered as being in its possession, custody or control and that Respondent is legally impeded from obtaining and producing them. The Tribunal rejected both arguments.
3. In this context, the Tribunal held, *inter alia*, 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*" (PO 5, para. 34) and that "[e]ven 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" (PO 5, para. 35).
4. The Tribunal continues to be of the view that Korean laws and regulations, such as the Korean Criminal Procedure Act, are not decisive for Respondent's disclosure obligations under international law. Therefore, the Tribunal disagrees with Respondent's new argument that any restrictions of Korean domestic law are mirrored in Article 23.4 FTA. In the Tribunal's view, Respondent has not established that disclosure of the requested documents would impede law enforcement. Such conclusion cannot be drawn from the mere fact that Korean law restricts the

¹ Letter from the Seoul Central District Prosecutors' Office to the Ministry of Justice of 17 February 2021 (English translation) attached to Respondent's letter dated 23 February 2021.

access to non-public evidence and other prosecution documents in pending criminal proceedings.

5. Based on the foregoing, the Tribunal **decides** as follows:
- a. Respondent's request for relief from its document production obligations under PO 5 is denied.
 - b. Respondent is ordered to produce the requested documents no later than 12 March 2021.

Place of arbitration (legal seat): Singapore



Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal