

**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. 14

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

24 June 2020

I. PROCEEDINGS

1. On 13 January 2020, the Tribunal issued Procedural Order No. 8, setting out the Tribunal's decisions regarding the Parties' outstanding document production requests.
2. On 27 February 2020, the Tribunal issued Procedural Order No. 12, providing clarifications regarding the scope of the Parties' document production obligations.
3. On 30 May 2020, the Respondent wrote to the Tribunal, requesting that the Tribunal issue further orders on the alleged shortcomings in the Claimant's document production pursuant to Procedural Order No. 8 (the "**Respondent's Application**").
4. On 1 June 2020, the Claimant wrote to the Tribunal, seeking further orders regarding the alleged shortcomings in the Respondent's document production (the "**Claimant's Application**"). The Claimant enclosed with its Application an appendix setting out its specific requests and further observations on the Respondent's comments on its allegedly deficient document production, two annexes, and exhibits C-319 to C-329.
5. On 2 June 2020, in view of the upcoming time limit on 19 June 2020 for the Claimant to file its Statement of Reply in this arbitration, and the Claimant's request that the Tribunal prioritize the Claimant's Application, the Tribunal suspended the time limit for the Claimant's comments on the Respondent's Application and invited the Respondent to comment on the Claimant's Application by 10 June 2020. The Tribunal also invited the Parties to confer with a view to agreeing on an appropriate postponement of the time limits for the Claimant's Statement of Reply and the Respondent's Statement of Rejoinder, to allow the Tribunal to determine the issues raised by the Parties' Applications of 30 May 2020 and 1 June 2020, and the Parties to take appropriate action as may be required by the Tribunal's determinations, in an orderly fashion prior to the filing of the Statement of Reply.
6. On 10 June 2020, the Tribunal issued Procedural Order No. 13, approving a revised procedural timetable as agreed between the Parties. Procedural Order No. 13 set out, *inter alia*, the procedure and the time limits for further submissions regarding the Parties' Applications.
7. On 10 June 2020, the Respondent submitted its comments on the Claimant's Application (the "**Response to the Claimant's Application**"), enclosing an annotated appendix, exhibits R-221 to R-234, and legal authorities RLA-101 to RLA-109.
8. On 12 June 2020, the Respondent submitted a letter from the National Pension Service ("**NPS**") dated 11 June 2020, as exhibit R-235, in response to a search request made by the Respondent

following the Claimant's Application. The Respondent further produced to the Claimant additional documents that the Respondent had received from the NPS on 11 June 2020.

9. On the same date, 12 June 2020, the Claimant wrote to the Respondent, stating that in light of the recent media coverage of the Respondent's Public Prosecutor's Office ("**PPO**") seeking a further arrest warrant for the Vice-Chairman of the Samsung Group Jae-young Lee ("**JY Lee**") for accounting fraud and breach of fiduciary duty, the Claimant had become aware of seven additional documents that were in the Respondent's possession, custody or control, and which were responsive to the Tribunal's document production orders, but had not yet been produced (the "**Claimant's Further Requests**"). The Claimant requested that the Respondent produce these seven documents as in the Claimant's view they were "readily available to the Respondent" by 19 June 2020, or object to their disclosure by 15 June 2020. In view of the urgency of its requests, the Claimant copied the letter to the Tribunal.
10. Also on the same date, the Claimant wrote to the Tribunal, requesting an extension of the time limit to file its comments on the Respondent's Response to the Claimant's Application until 17 June 2020, to enable it to review the "additional 40 Korean documents (approximately 250 pages) obtained by its representatives from the NPS" that the Respondent had produced the same day. The Tribunal indicated that it was minded to grant the request, "absent any justifiable objections by the Respondent by Monday, 15 June 2020."
11. On 15 June 2020, the Respondent informed the Tribunal that the supplementary production of 40 documents referred in the Claimant's correspondence of 12 June 2020 was in response to the Claimant's Application regarding production of further documents from the NPS. The Respondent further noted that, while it did not object to the Claimant's request for an extension of time, it requested that, "to the extent the Claimant seeks to add new requests to [the Claimant's Application], those new requests be disallowed."
12. On the same date, the Tribunal confirmed its preliminary ruling of 12 June 2020, extending the time limit for the Claimant to file its comments on the Respondent's Response to the Claimant's Application until 17 June 2020. Accordingly, the time limit for the Tribunal to render its decision on the Claimant's Application was similarly extended to 24 June 2020.
13. Further on the same date, the Respondent wrote to the Claimant, stating that although it was "under no obligation to respond to the [Claimant's Further Requests] by the time unilaterally decided by the Claimant (15 June 2020)," it would submit its comments by 16 June 2020 to enable the Tribunal to reach a joint decision on the Claimant's Application and the Claimant's Further Requests. This letter was copied to the Tribunal.

14. On 17 June 2020, the Respondent wrote to the Claimant in response to the Claimant's Further Requests, enclosing exhibits R-236 to R-240 and legal authorities RLA-110 to RLA-114. The letter was copied to the Tribunal.
15. On the same date, the Claimant submitted its comments on the Respondent's Response to the Claimant's Application, enclosing an updated annotated appendix, exhibits C-331 to C-333, and legal authorities CLA-74 to CLA-76.
16. On 18 June 2020, the Respondent requested the Tribunal's leave to submit "a very brief" response to correct "serious misstatements, including of Korean law" in the Claimant's comments on the Respondent's Response to the Claimant's Application by 19 June 2020.
17. On the same date, the Tribunal granted the Respondent's request to file comments on the Claimant's letter dated 17 June 2020 and invited the Claimant to make any comments it might wish to make on the Respondent's response by 22 June 2020. The Tribunal further indicated that it did not envisage granting any further requests for comment on the Claimant's Application.
18. On 19 June 2020, the Respondent submitted its comments on the Claimant's letter dated 17 June 2020.
19. On 22 June 2020, the Claimant submitted its comments on the Respondent's letter dated 19 June 2020, enclosing legal authority CLA-77. The Claimant also wrote to the Tribunal in response to the Respondent's letter dated 17 June 2020 regarding the Claimant's Further Requests, reiterating its request that the Tribunal order the Respondent to produce seven additional documents.
20. On 23 June 2020, the Respondent requested that the Tribunal not entertain the Claimant's Further Requests as addressed in the Claimant's second letter of 22 June 2020, or in the alternative grant the Respondent the opportunity to respond to these comments "at a time convenient to the Tribunal." The Respondent further requested that the Tribunal "close correspondence" on the Claimant's Application.
21. On the same date, the Claimant wrote to the Tribunal, rejecting the Respondent's characterization of its 22 June 2020 letter as "unsolicited" and its Further Requests as "belated." The Claimant expressed the view that the Tribunal would not be assisted by yet further briefing on this issue.
22. This Procedural Order contains the Tribunal's decisions on the Claimant's Application and the Claimant's Further Requests.

II. THE CLAIMANT'S APPLICATION

23. In its Application, as amended in its letter dated 17 June 2020, the Claimant requests that the Tribunal:

1. Order the Respondent's representatives, including counsel, to make a declaration to the Tribunal no later than 10 July 2020, providing a comprehensive record of their communications with the NPS and its personnel, including via telephone, in-person meetings or other means, between 12 July 2018 (the date of the Notice of Arbitration) and 10 July 2020, and relating to the Respondent's preparation of its Statement of Defence and its compliance with its document production obligations (including the Respondent's representatives' communications with the NPS and its personnel following any further orders issued by this Tribunal as a result of this Application);
2. Order the Respondent's representatives to make further efforts to obtain responsive Documents from the NPS under Claimant's Requests 6, 7, 11, 12, 13, 22(a), 24(a), 25(d), 32(g), 33(f), 37(b), 37(c), 38(b), 41(a), 41(b), 41(d), 41(e), 45(a), 45(b), 51(a), 51(b), 53(b), 53(b)(i), 53(b)(ii), 53(b)(iii), 54(a). Such efforts shall include a demand from the Minister of Health and Welfare to the NPS in exercise of his statutory powers, as follows:
 - (a) compelling production of all responsive Documents in its possession, custody or control;
 - (b) to the extent that the NPS does not provide such Documents, the Minister shall request the NPS explicitly to justify its non-disclosures, explaining the reasons why it has withheld all responsive Documents;
 - (c) to the extent that the NPS invokes the Official Information Disclosure Act, the Minister shall request a full explanation of why the NPS considers that disclosure of these Documents would "remarkably obstruct[] the fair performance of duties or research and development";
 - (d) furthermore, to the extent the NPS relies on other Korean law grounds to justify disclosure, the Minister shall request that it provide a full and reasoned explanation as to why such grounds apply.
3. Order the Respondent's representatives to disclose these efforts under order (2) (including replies to any responses from the NPS) in compliance with its continuing production obligations under Request No. 47, and to disclose all responsive Documents obtained as a result of such further efforts;
4. Order the Respondent to produce the last version of any Documents in its possession, custody or control responsive to the Claimant's Requests and to undertake that it has not withheld any other Documents on the flawed basis that they were "drafts" and thus exempt from the scope of the Respondent's disclosure obligations;
5. Grant the Orders sought in the attached Appendix, Part I – Missing Documents;
6. Grant the Orders sought in the attached Appendix, Part II – Incomplete Production;
7. Order the Respondent to provide legible copies of the Documents set out in the attached Appendix, Part III – Blank and/or Illegible Documents;
8. Order the Respondent to provide missing information concerning the date, author and/or source of the Document in relation to those Documents identified in the attached Appendix, Part IV – Missing Information.

24. The Respondent requests that the Tribunal dismiss the Claimant's Application.

A. WHETHER THE RESPONDENT HAS MADE BEST EFFORTS TO OBTAIN ALL RESPONSIVE DOCUMENTS IN THE POSSESSION, CUSTODY OR CONTROL OF THE NPS

1. The Claimant's Position

25. The Claimant submits that the Respondent's obligation to make best efforts to obtain the requested documents from the NPS extends to exercising all of the powers available to it. The Claimant contends that the Minister of Health and Welfare has failed to take any steps pursuant to his statutory powers to request document production from the NPS or to require explanations for its non-disclosure. In particular, the Claimant argues that documents that are known to be within the NPS's possession, custody, or control and which the Respondent has failed to take sufficient steps to ensure production include *inter alia* (i) correspondence between the NPS and the Ministry of Health and Welfare, and the Blue House; (ii) documents recording NPS's request to the Korea Corporate Governance Service and related correspondence; and (iii) documents relating to NPS's internal audit of the exercise of the NPS's voting rights.
26. According to the Claimant, the supervisory powers of the Minister of Health and Welfare to "inspect the status of [the NPS's] services or property" and take any other "necessary measures regarding supervision" under the National Pension Act encompass the right to compel documents held by the NPS and take copies thereof. In view of these statutory powers, requiring the Minister of Health and Welfare to demand production from the NPS in the exercise of his supervisory powers would not require the Tribunal to prejudge the issue of attribution.
27. The Claimant submits that the Respondent has also failed to exercise best efforts to obtain documents from the NPS when it merely requested the NPS's "voluntary cooperation" in document production. In the Claimant's view, the scarcity and nature of the Respondent's communications with the NPS not only shows the Respondent's readiness to accept the NPS's non-disclosure of documents, but also confirms the existence of undisclosed communications. The Claimant argues that the Respondent cannot legitimately object to the Claimant's request for a comprehensive description of the Respondent's interactions with the NPS.
28. The Claimant further argues, in response to the Respondent's assertion that under Korea's Official Information Disclosure Act it cannot force the NPS to produce internal audit documents, that the Respondent's belated reliance on the Act contravenes the Tribunal's direction to prepare a privilege log for documents subject to legal impediment or privilege. The Claimant further points out that the NPS has failed to explain why the Act would justify withholding responsive documents. The Claimant contends that the Act provides only limited exceptions to the general rule that government entities must disclose information when requested by members of the Korean public, and that the NPS therefore cannot invoke any governmental privilege in refusing

to disclose documents to government representatives who are under an international obligation to comply with the Tribunal's orders.

29. Finally, the Claimant argues that Article 9(5) of the Official Information Disclosure Act does not justify the withholding of information relating to NPS's audit as the information disclosure regime under the Act ceases to apply when the relevant "duties" are "already completed." In any event, according to the Claimant, investment treaty tribunals have denied respondent states the ability to rely on domestic laws to invoke deliberative process privileges when the claims require an evaluation of a government's internal processes. Given that the NPS's internal deliberative process is the subject matter of this dispute, the Respondent cannot rely on governmental privilege to withhold NPS documents.

2. The Respondent's Position

30. The Respondent submits that it has discharged its obligation to make best efforts to obtain documents from the NPS by "urging" the NPS to conduct multiple searches and provide the responsive documents. Relying on United States law, English law, and the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "**IBA Rules**"), the Respondent argues that an obligation to use best efforts requires the use of all "reasonable" steps available to a party and that there are no other reasonable steps that it could take to obtain additional documents from the NPS.
31. The Respondent rejects the notion that the Minister of Health and Welfare has statutory powers to compel production of documents from the NPS. According to the Respondent, the Minister's statutory powers reflect an "oversight authority and responsibility over the operation and management of the NPS [...] for the purpose of satisfying the Minister's duties in relation to the NPS." Consequently, the Respondent contends that the Minister's oversight authority does not extend to the power to execute a search and seizure raid over the NPS. The Respondent further argues that whether the Minister of Health and Welfare can exercise "far-reaching" powers to conduct search and seizure to obtain documents requires determinations that would be premature at this stage of the proceedings, including whether the Respondent controls the NPS, which the Tribunal in Procedural Order No. 8 recognized as forming part of the merits.
32. The Respondent contends that while requesting the NPS's "voluntary cooperation" is "all [the Respondent] can do" to discharge its obligations to make best efforts in obtaining the documents, it repeatedly contacted the NPS before and after the Tribunal's document production orders and "earnestly" asked the NPS for its cooperation, stressing that the provision of as many of the requested documents as possible would be "significant" and "crucial" to the Respondent's

defense. In light of the NPS's cooperation with these requests, requiring the Minister of Health and Welfare to "merely repeat" these steps undertaken by the Ministry of Justice unnecessarily imposes additional burden on the Respondent without any corresponding benefit.

33. In the Respondent's view, exhibiting a document obtained from the NPS in its Statement of Defence cannot count as evidence of undisclosed channels of communication or "nefarious" collaboration, as alleged by the Claimant. The Respondent notes that it "chased" the NPS numerous times to search for more documents and rejects the contention that it "readily accepted" the NPS's failure to disclose certain documents. The NPS has confirmed that it has conducted its search thoroughly and provided the documents it was able to find, subject to exceptions that have been identified in the Respondent's privilege log or otherwise shared with the Claimant. Consequently, there is no basis for the Respondent to be required to provide the record of its communications with the NPS.
34. In response to the Claimant's suggestion that there are "missing documents" that are "known to be within the NPS's possession, custody or control," the Respondent submits that it has produced all documents relating to correspondence between the NPS and other relevant Korean entities in the NPS's possession, custody or control after undertaking appropriate searches. The Respondent further explains that it has collected NPS documents from other sources, including the Ministry of Health and Welfare, the Presidential Archives, and the Korean courts. Consequently, any additional requests for written communications between the NPS and KCGS are unwarranted.
35. As to documents relating to the NPS's internal audit of the exercise of the NPS's voting rights, the Respondent submits that the NPS declined to provide such documents based on a prohibition on disclosure under the Official Information Disclosure Act. According to the Respondent, the Official Information Disclosure Act does not create governmental privilege for public institutions, such as the NPS, but confers discretion on the NPS to decline document production if it would obstruct the "fair performance of its duties or research and development." As the NPS has made the determination pursuant to Article 9(5) of the Act that legitimate concerns exist as to disclosing documents containing "information at the stage of decision-making processes or internal-review processes" to the public, the Respondent argues that neither the Respondent nor the Tribunal can force the NPS to provide these documents where the NPS considers itself legally constrained from doing so.
36. As to the Claimant's argument that the NPS's invocation of the Act should have been reflected in the privilege log, the Respondent argues that the documents were never within the Respondent's possession, custody or control and thus were never withheld by the Respondent. Accordingly,

the Respondent has complied with its obligation to produce the requested documents “insofar as it [was] able to obtain them” from the NPS.

B. WHETHER THE RESPONDENT’S PRODUCTION OF DOCUMENTS IS PARTIAL AND INADEQUATE

1. The Claimant’s Position

37. The Claimant submits that, in addition to the documents mentioned in paragraph 25 above that are in the NPS’s possession, custody or control, the Respondent has failed to produce (i) all responsive documents in relation to 65 of the Claimant’s requests notwithstanding the Respondent’s supplementary production on 21 May 2020; (ii) certain responsive documents notwithstanding evidence of the existence of such documents; (iii) legible copies of certain documents included in its production; and (iv) information regarding the date, author and/or source of 252 documents that are in the Respondent’s possession, custody or control.
38. According to the Claimant, the Respondent’s insufficient production is evident from the November 2018 letter from the Respondent’s counsel to the Ministry of Health and Welfare, emphasizing that the Ministry was under no legal obligation to provide the relevant documents and counsel was seeking only “voluntary cooperation.” Consequently, to the extent that the same language was used by the Respondent in seeking responsive documents from the NPS and the Ministry, the Respondent should be ordered to disclose all relevant correspondence to government departments seeking documents following the Tribunal’s document production orders of 13 January 2020.
39. While the Claimant accepts the Respondent’s representation that it has produced the final versions of all responsive documents, the Claimant points out that the Respondent adopts contradictory positions regarding the production of drafts. While the Respondent first justified its refusal to produce a particular report on the basis that it was merely a draft, it subsequently claimed that it was “not aware” of such report. The Claimant further highlights that the Respondent in its 10 June 2020 letter complained that the Claimant was requesting the production of drafts even though the Tribunal expressly excluded them from its production order, whereas in its 19 June 2020 letter it alleged that it had produced final version of all responsive documents.
40. The Claimant further argues that the Respondent’s production of court documents pursuant to the Tribunal’s order is inadequate. Given that the Tribunal upheld Request No. 45 in full “insofar as it related to decisions of courts and tribunals that have upheld or denied the Respondent’s claim of sovereign immunity in relation to the NPS,” the Claimant avers that pleadings related to such decisions in which sovereign immunity may have been asserted are responsive documents.

41. The Claimant disapproves of what it views as the Respondent's attempt to evade its document production obligations by recharacterizing certain documents that it has already produced as responsive to other requests. Similarly, the Claimant considers that the Respondent's use of the word "probable" in response to the Claimant's requests is an inappropriate attempt to avoid any direct representation to the Tribunal as to whether the requested documents are in its possession, custody or control. The Claimant requests that the Tribunal order the Respondent to provide a definitive position on the existence of the requested documents, rather than allowing the Respondent to rely on "non-committal speculations."
42. The Claimant notes that the NPS failed to provide reasons for its belated document production on 12 June 2020. Accordingly, the Claimant requests that the Respondent be directed to require the NPS to provide an explanation as to its reasons for the belated disclosure, a description of the degree of thoroughness of the search that was different compared to the previous searches, and an undertaking that it has now disclosed all responsive documents.

2. The Respondent's Position

43. The Respondent maintains that it has undertaken the necessary steps to locate, collect and identify all responsive documents, and that documents that are not produced are either not within the Respondent's possession, custody or control, or relate to requests that were not granted by the Tribunal.
44. First, the Respondent submits that its correspondence with the Ministry of Health and Welfare shows its efforts to ensure that the Ministry provide any responsive documents. According to the Respondent, the Claimant relies on an inaccurate translation of the letter from the Respondent's counsel to the Ministry of Health and Welfare dated November 2018 to allege that the Respondent has indicated to the Ministry that it was under no legal obligation to provide relevant documents. The Respondent points out, referring to a certified translation, that the phrase "voluntary cooperation" was not present in the letter to the Ministry, unlike in its letters to the NPS. This demonstrates that the Respondent applied a different standard when communicating its document requests to the Ministry of Health and Welfare.
45. Second, the Respondent denies that it has "recharacterized" documents by listing them as responsive to additional document production requests that it had not identified in its initial production. According to the Respondent, the fact that some documents produced in the initial document production were also responsive to additional document production requests reflects the Respondent's "ongoing satisfaction of its document production obligations and its cooperation

with the Claimant.” In the Respondent’s view, the only relevant question is whether the documents are responsive and not when they were identified as such.

46. Third, the Respondent asserts that the Claimant’s requests for production of drafts have been expressly excluded by the Tribunal’s orders. Nonetheless, the Respondent notes that it has produced the final versions of all responsive documents that are in its possession, custody or control regardless of whether they were labelled as “drafts.”
47. Fourth, the Respondent submits that the court documents that are in its possession, custody or control, including court testimonies and evidentiary documents, have been produced. The Respondent notes that it is under no obligation to produce pleadings in legal proceedings in circumstances where the Tribunal ordered only the production of court decisions. The Respondent further argues that the mere fact that some communications are mentioned in court transcripts does not prove that a written record of those communications exists or is in the Respondent’s possession, custody or control. The Respondent notes that in such cases it has indicated the “probable” nature of the existence of documents as it “cannot confirm or deny” their existence.
48. Finally, as to allegedly missing information, the Respondent submits that it has produced the responsive documents in their entirety “as collected, without alteration” and that it cannot provide information, such as the date, author, or source of a document where the documents do not contain such information. In any event, the Respondent undertakes to provide the requested information if and when discovered.

C. THE TRIBUNAL’S ANALYSIS

49. The Tribunal’s decisions on the Parties’ document production requests were made in Procedural Order No. 8 and the enclosed Annexes I and II, which contained the Parties’ Redfern schedules. As to the Claimant’s document production requests, the Tribunal decided, more specifically, as follows:

14. [...] 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.

[...]

16. Accordingly, the Tribunal directs that the Respondent produce the relevant responsive documents to the Claimant, as recorded in the Claimant’s Redfern schedule [...]. This ruling is subject to any legal impediment (other than separation of powers) or privilege that may apply [...].

[...]

21. [...] [T]he 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.

[...]

28. [...]

c) 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[.]

50. The Tribunal notes that neither the Free Trade Agreement between the Republic of Korea and the United States of America (the "**Treaty**") nor Procedural Order No. 1 envisage that the Tribunal may issue a fresh order in the event a party fails to comply with the Tribunal's document production orders. Instead, Procedural Order No. 1, paragraph 5.3.7, envisages that, "[s]hould 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." Article 9(5) of the IBA Rules, to which the Tribunal under paragraph 5.3.6 of Procedural Order No. 1 may refer when deciding on the Parties' document production requests, similarly provides that "[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

51. Accordingly the proper way for the Claimant to address its grievances regarding the Respondent's alleged failure to comply with its obligations under Procedural Order No. 8 is to request that the Tribunal draw the inference that the document or documents that the Respondent has allegedly failed to produce would be adverse to the interests of the Respondent. The Claimant may make such a request at an appropriate stage of the proceedings and in any event prior to the closing of the evidence.

52. However, as both Parties have made wide-ranging allegations of failure of the other Party to comply with its document production obligations under Procedural Order No. 8, the Tribunal considers it appropriate to make further observations and clarifications regarding the scope of the Parties' document production obligations.

53. First, as to its determination in Annex I to Procedural Order No. 8 regarding the Claimant's document production Request No. 5, the Tribunal clarifies that its order for production applies not only to final versions of the documents that were subsequently issued, but also to any other final versions, including drafts, of documents that were never formally finalized and issued. In this connection, the Tribunal notes that, while the Respondent in its letter of 19 June 2020 states that it "has not withheld final versions – whether or not they are labeled as 'drafts' – of any documents that are in its possession, custody or control," its response to the Claimant's request in the Appendix attached to the Claimant's letter of 1 June 2020 (set out in the form of a Redfern schedule) is less clear. In its response, the Respondent submits that the Tribunal in Procedural Order No. 8 granted the Claimant's document production request "*only* insofar as it concerns final versions of the requested documents (and not drafts)," and that accordingly "[t]he Claimant is requesting documents beyond the scope of the Tribunal's document production order that the ROK is not obliged to produce."
54. The Tribunal clarifies that under Procedural Order No. 8, Annex I, the Respondent is required to produce the final versions of the documents it was ordered to produce, including final drafts where the documents in question were never formally finalized and issued.
55. The Tribunal further observes that the Parties disagree on whether the Respondent has failed to comply with its obligation under Procedural Order No. 8 to make its best efforts to obtain any responsive documents from the National Pension Service ("NPS") and to produce them to the Claimant insofar as it is able to obtain them. In making this determination, the Tribunal noted that 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."¹ In the circumstances, the Tribunal could not require more than that the Respondent make its best efforts to obtain any responsive documents from the NPS. Having reviewed the correspondence between the Respondent's counsel and the NPS that is currently on record, the Tribunal finds that there is *prima facie* no basis to conclude that the Respondent has manifestly failed to comply with its best efforts obligation.² The NPS's refusal to produce its internal audit documents pursuant to Article 9 of the Official Information Disclosure Act similarly appears to be justified on the assumption that the NPS is not a State organ, or that its conduct is not otherwise attributable to the State. The Tribunal further notes that, insofar as the Claimant's request is based on the argument that the Ministry of Health and

¹ Procedural Order No. 8, para. 17 (citing the Respondent's General Observations, p. 1).

² See, e.g., exhibits C-320, C-321, C-322, C-323, C-324, C-325, R-174, R-222, R-225, R-226, R-229, R-230, R-232, and R-235. The Tribunal notes that some of the requests were made prior to the Tribunal's document production orders.

Welfare could have used its supervisory powers to require the NPS to produce the requested documents, the Tribunal is not currently in a position to determine whether under Korean law the Ministry of Health and Welfare could have used its supervisory powers for such purposes. Moreover, and in any event, the NPS's alleged failure to comply with the Tribunal's order is also bound up with the issue, noted above, as to whether the NPS's conduct is attributable to the State, in whole or in part, which remains a matter for the merits. The Tribunal therefore reiterates its determination (in paragraph 51 above) that should the Claimant consider that the Respondent has failed to comply with its document production obligations under Procedural Order No. 8, the proper approach is to request that the Tribunal draw adverse inference in due course of these proceedings.

56. The Claimant has also made a number of further document production requests, based on the argument that many of the documents are blank or otherwise illegible, and that some of the documents are missing key information such as their author and date. The Tribunal's determinations on these requests are recorded in the **Appendix**.

III. THE CLAIMANT'S FURTHER REQUESTS

57. In addition to its letter of 1 June 2020, the Claimant subsequently made further document production requests on the basis of recent media reports about the PPO's criminal investigations regarding allegations of accounting fraud and breach of fiduciary duty by JY Lee. More specifically, in its letter of 22 June 2020, the Claimant requests that the Respondent be ordered to produce:

1. **The PPO's Request for Arrest Warrant** [영장청구서]: a 150-page request from the PPO to the Seoul Central District Court to issue a new arrest warrant for JY Lee for crimes relating to the SC&T and Cheil Merger and alleging manipulation of the share trading prices of SC&T and Cheil. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 1, 2, 4, 6, 30 and 31.
2. **Samsung Future Strategy Office, "Merger Plan for Company M** [M 사 합병추진안]: April 2015 report detailing Samsung's strategy for the SC&T-Cheil Merger. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 1, 2 and 4.
3. **Samsung, "Plan to Announce the Listing of Samsung Bioepis** [바이오 상장계획 공표방안]: June 2015 report relating to Samsung's strategies for manipulating the SC&T-Cheil Merger. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request No. 4.
4. **PPO Statement Report of the Head of Finance of Samsung Bioepis**: PPO's statement detailing Samsung's malfeasance in relation to Samsung Bioepis. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 30 and 31.

5. **Samsung Biologics' Finance Team Report to Samsung Future Strategy Office "Appraisal Issue Regarding Bio/Biogen's Call Option** [바이오, 바이오젠사 콜옵션 평가이슈]: November 2015 report relating to Samsung's strategies for manipulating the SC&T-Cheil Merger. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 30 and 31.
 6. **Samsung Biologics, "Accounting Issue Regarding Appraisal of Bio/Biogen's Call Option** [바이오, 바이오젠사 콜옵션 평가 관련 회계 이슈]: November 2015 report relating to Samsung's strategies for manipulating the SC&T-Cheil Merger. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 30 and 31.
 7. **PPO's Statement of Reasons of for Appeal** [재항고이유서]: an approximately 95-page statement of reasons which details the role of the SC&T Merger in the Samsung Group's succession plan submitted in an appeal to the Korean Supreme Court to challenge the impartiality of Judge Joon-young Chung, the presiding judge of JY Lee's remanded criminal proceedings in the Seoul High Court. According to the Claimant, this document is responsive to the Tribunal's document production orders in respect of Request Nos. 1, 2, 4, 6, 30 and 31.
58. The Respondent denies that the seven documents referred to by the Claimant are responsive to the Tribunal's document production orders. Moreover, the Respondent submits that, even if they were considered responsive, it would be constrained by legal impediment under both Korean and international law to withhold the documents. The Respondent further argues that the Claimant's requests are "belated" and requests an opportunity to respond to the Claimant's "unsolicited letter" of 22 June 2020, in which the Claimant addressed its Further Requests to the Tribunal.

A. THE PARTIES' POSITIONS

1. The Claimant's Position

59. The Claimant submits that the seven undisclosed documents of which the PPO came into possession during its investigation into allegations of accounting fraud and breach of fiduciary duty by JY Lee fall within the Tribunal's existing document production order. Accordingly, the Claimant contends that the Respondent should produce these documents in accordance with its continuing disclosure obligations.
60. The Claimant alleges that the seven documents are relevant and material to the key issues in this arbitration. In particular, the Claimant argues that the documents are "plainly relevant" to its claim that the Merger was "corruptly motivated by JY Lee's and/or the Samsung Group's succession plan," a position shared with the PPO, and that the Respondent actively intervened to approve the Merger. In the Claimant's view, the media reports anticipating the potential impact of any new prosecution against JY Lee on this arbitration in relation to the Respondent's conduct in the Merger further confirm that the documents are relevant and material.

61. The Claimant submits that the seven documents are also relevant to the quantification of the loss suffered by the Claimant, as evidence of the manipulation of share prices. According to the Claimant, the documents directly relate to the inflation of the Cheil share price and the suppression of the SC&T share price and reveal the efforts of “orchestrating” the approval of the Merger on the basis of these manipulated share prices. The Claimant adds that the documents would be relevant to counter the Respondent’s damages calculation, which relies exclusively on the observable market price for SC&T shares.
62. In response to the Respondent’s invocation of Korean law to withhold documents, the Claimant argues that none of the provisions cited by the Respondent is relevant to its document production obligations. According to the Claimant, Article 126 of the Korean Criminal Act would not criminalize the production of documents requested in this arbitration as it would not involve “publication” of the documents within the meaning of the Act. Similarly, neither Article 3(1) of the Management Protocol on the Inspection and Copying of Case Record nor Article 266-3(1) of the Korean Criminal Procedural Act are applicable, as document production in this arbitration does not involve inspection or copying of documents by a person involved in a criminal case, his or her counsel, or a witness. The Claimant further notes that the Respondent has failed to file an updated privilege log that identifies the legal impediment alleged to apply in relation to each of the requested documents.
63. The Claimant rejects the Respondent’s argument that the Claimant’s request amounts to a “fishing expedition,” particularly when the documents are known to exist and are within the Respondent’s possession. In the Claimant’s view, there is no basis for the Respondent to claim that the documents are improperly sought to aid the Claimant’s ongoing commercial dealings.
64. The Claimant submits that the production of the requested documents within the current procedural timetable would cause no prejudice to the Respondent. On the other hand, the Claimant argues that it would be prejudiced if it did not have full access to these documents before the filing of the Statement of Reply on 17 July 2020. According to the Claimant, given that some information drawn from the documents has already been released in the news, further relevant information is expected to be disclosed after the Reply is filed, at which point it would be too late for the Claimant. Consequently, the Claimant requests that the Tribunal order the Respondent to produce the seven documents, should the Tribunal consider the documents to fall outside the scope of the Tribunal’s existing orders.

2. The Respondent's Position

65. The Respondent submits that it is under no obligation to produce the seven documents as they are not responsive to the Tribunal's orders on the Respondent's document production obligations. According to the Respondent, the Claimant's "empty assertions" that the documents are "plainly relevant" to the Claimant's claims, without stating why the documents requested are relevant to the case and material to its outcome, do not justify its document requests under Article 3.3 of the IBA Rules. The media reports speculating on the impact of the investigations on this arbitration also fall short of demonstrating the relevance of JY Lee's alleged accounting fraud to any issues to be determined in this arbitration.
66. The Respondent considers that the Claimant's belated document requests constitute a "fishing expedition" to gain access to documents that might otherwise be of interest to its other commercial dealings unrelated to this arbitration. Noting that it was JY Lee's previous conviction on the alleged bribery to President Park's administration that formed the basis of the Tribunal's orders on document production, the Respondent contends that the documents relating to the ongoing investigations on JY Lee's alleged accounting fraud are irrelevant to the Claimant's allegations in this arbitration, that is, whether the Respondent manipulated the NPS into voting in favor of the Merger.
67. The Respondent contends that, while the requested documents appear to relate to allegations of JY Lee manipulating the share prices of SC&T and Cheil, the Claimant has not suggested that the Respondent or the NPS intervened to participate in this manipulation or that the documents have any relevance and materiality to the Respondent's conduct in respect of the Merger. As regards the Claimant's argument that the share prices of SC&T and Cheil are relevant to the question of the Claimant's loss, the Respondent asserts that it has identified "multiple failings in the Claimant's damages claim, including its wholly speculative and unsupported 'intrinsic value' concept that itself bears no relation to the Samsung C&T share prices even absent any alleged manipulation."
68. According to the Respondent, even assuming *arguendo* that any of the seven documents were responsive to the Tribunal's orders, the legal impediment under Korean law excludes them from production. The Respondent contends that Korean law is relevant within the meaning of Article 9(3) of the IBA Rules since "the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen" are "formed by the approach to privilege prevailing in the home jurisdiction of such persons."

69. The Respondent further contends that under Article 27(4) of the Constitution of Korea, the Respondent is strictly prohibited from producing the requested documents that are currently held by the PPO. According to the Respondent, Article 3 of the Management Protocol on the Inspection and Copying of Case Record provides a similar limitation in that only JY Lee or a witness in the case may apply for access to the documents held by the PPO prior to indictment. The Respondent submits that, even if an indictment is issued, it would still be barred from producing the documents as only JY Lee and/or his counsel may have access to the court files during the court proceedings pursuant to Article 266-3(1) of the Korean Criminal Procedure Act.
70. Finally, the Respondent argues that the Claimant's requests should be rejected in their entirety under the principle of secrecy of criminal proceedings. According to the Respondent, investment treaty tribunals have recognized the state's sovereign right to pursue investigation of serious crime without external interference, and the importance of maintaining the secrecy of such investigations until they are made public as a result of an indictment or the commencement of court proceedings. Given that the PPO's ongoing criminal investigations into JY Lee's alleged accounting fraud and breach of fiduciary duties are serious crimes, any documents related to these investigations must be kept secret. Accordingly, in the Respondent's view, it is constrained by legal impediment under both Korean law and international law from producing the documents to any external party for the purpose of protecting the integrity of the investigations.

B. THE TRIBUNAL'S ANALYSIS

71. The Tribunal notes that, while the Claimant submits that its Further Requests are not new requests but relate to documents that it had previously requested in the context of document production, it is evident that the Claimant did not make its earlier requests in such specific terms.³ However, in view of the reasons put forward by the Claimant, including that the existence of the requested documents was only recently reported in the media, as well as the fact that the Respondent has had an adequate opportunity to comment on the Claimant's requests, the Tribunal finds that the Claimant's requests are appropriately before it and must be determined.
72. Having carefully considered the Claimant's Further Requests, the Tribunal finds that, although the requested documents appear to be relevant to the case and material to its outcome, there is no basis to order the Respondent to produce the documents. First, it is undisputed between the Parties that the requested documents pertain to ongoing criminal investigations that have not yet been

³ The Claimant does allege that the requested documents are responsive to the Claimant's Requests Nos. 1, 2, 4, 6, 30 and 31 of its document production requests set out in Annex I to Procedural Order No. 8.

completed and have not yet resulted in an indictment or commencement of court proceedings. They thus appear to be covered by the principle of secrecy of criminal investigations, as recognized by other investment treaty tribunals.⁴ Second, the Tribunal recalls that under Article 9(2)(b) of the IBA Rules, an arbitral tribunal “shall, at the request of a Party or on its own motion, exclude from evidence or production any Document” if there is a “legal impediment or privilege under the legal or ethical rules determined by the arbitral Tribunal to be applicable.” Although the question of whether any “legal impediment,” such as the principle of secrecy of criminal investigations, applies in this particular case is ultimately a matter of Korean law, the Tribunal notes, without making a conclusive determination, that the disclosure of the requested documents does appear to be prohibited under Korean law, including under Article 126 of the Korean Criminal Act, which criminalizes disclosure (or making public), before a request for public trial, of facts relating to a suspected crime.⁵ While the Claimant challenges the Respondent’s interpretation of Article 126, it appears, *prima facie*, that the documents covered by the Claimant’s Further Requests are still subject to the principle of secrecy of criminal investigations under Korean law.

73. The Tribunal’s above determination is made for purposes of disposing of the Claimant’s Further Requests and is therefore necessarily provisional as it is made on the basis of the Parties’ limited submissions on Korean law. In particular, it is without prejudice to the Claimant’s right to seek to demonstrate, in due course, that Korean law does not in fact justify the Respondent’s refusal to produce the requested documents, and to request that the Tribunal draw adverse inference as a result of the Respondent’s refusal. If the Claimant chooses to make such a request in the course of the proceedings, the Respondent will necessarily be given an opportunity to respond and develop its defense, including its argument that any claims arising out of the documents have already been settled in accordance with the Settlement Agreement entered into between the Claimant and SC&T in March 2016.⁶

⁴ See, e.g., *BSG Resources Limited et al v. Republic of Guinea*, Procedural Order No. 7, Annex A, RLA-7 and *Libananco v. Republic of Turkey*, Decision on Preliminary Issues, para. 79, RLA-110.

⁵ Article 126 of the Korean Criminal Act provides that “[a] person who, in the performance or supervision of, or in the assistance in, functions involving prosecution, police, or other activities concerning investigation of crimes, makes public, before request for public trial, the facts of a suspected crime which have come to his/her knowledge during the performance of his/her duties, shall be punished by imprisonment for not more than three years, or suspension of qualifications for not more than five years.” Exhibit RLA-114. The Respondent also refers, in support of its position, to Article 4 of the Management Protocol on the Inspection and Copying of Case Record and Article 266-3(i) of the Korean Criminal Procedure Act.

⁶ See Respondent’s letter of 17 June 2020, p. 2.

74. Finally, as the Tribunal has provisionally accepted the Respondent's refusal to produce the requested documents, the Respondent is directed to produce an updated privilege log identifying each responsive document that is being withheld from production on grounds of a legal impediment.

IV. THE TRIBUNAL'S DECISION

75. In light of the above, the Tribunal determines as follows:
- a) The Claimant's request that the Tribunal order the Respondent's representatives, including counsel, to make a declaration to the Tribunal, providing a comprehensive record of their communications with the NPS and its personnel, is denied;
 - b) The Claimant's request that the Tribunal order the Respondent's representatives, including the Ministry of Health and Welfare, to make further efforts to obtain responsive documents from the NPS is denied;
 - c) The Claimant's request that the Tribunal order the Respondent's representatives to disclose their efforts to obtain responsive documents from the NPS, and to disclose all responsive documents obtained as a result of such efforts, is denied;
 - d) The Claimant's request that the Tribunal order the Respondent to produce the last version of any responsive documents in its possession, custody or control is granted. If the Respondent has already produced such documents, it is requested to confirm the same;
 - e) The Tribunal's remaining decisions on the Claimant's requests for production of documents set out in its letter of 1 June 2020 are recorded in the Appendix, which is appended hereto and forms part of this Procedural Order;
 - f) The Claimant's requests for production of further documents set out in its letters of 12 and 22 June 2020 are denied; and
 - g) The Tribunal's determinations in this Procedural Order are without prejudice to the Claimant's right to seek to establish in due course that the Respondent has failed to produce a specific document or documents that were in its possession, custody or control, and to request that the Tribunal draw appropriate inference from any such failure.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal