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Mason Capital and Elliott Associates Awards: Divergence in Approach But Convergence in Conclusion

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On 11 April 2024, the Permanent Court of Arbitration published the award in *Mason Capital L.P. and Mason Management LLC v. Republic of Korea* (PCA Case No. 2018-55) (“Mason”), reaching the same substantive result as last year’s award in *Elliott Associates L.P. v. Republic of Korea* (PCA Case No. 2018-51) (“Elliott”), while disagreeing on the attribution to the State of Korea’s National Pension Service’s (the “NPS”) conduct.

These two cases were largely based on common facts, and both were brought under the same treaty – the Free Trade Agreement between the Republic of Korea and the United States of America, signed on 30 June 2007 (the “KORUS FTA”). This common thread makes the awards ripe for comparison.

This article first describes the background of the *Mason* and *Elliott* cases, and their tribunals’ shared conclusion that Korea breached its treaty obligations. The article then reviews the analysis of each tribunal in its consideration of whether the relevant conduct was attributable to the State, including the tribunals’ shared framework and differing results on that question – which did not compel inconsistent outcomes on the State’s ultimate responsibility.

Throughout this article, citations to the awards are marked with “M” or “E” for the *Mason* and *Elliott* (majority) awards, respectively, and the paragraph number.

Background

As of 2015, US private equity funds Elliott (E.165) and Mason (M.154) had invested in Samsung C&T Corporation (“SC&T”), forming part of the Samsung Group. In 2015, the NPS, a corporation established under the [National Pension Act](#) and the world’s third-largest public pension fund (M.132), was SC&T’s largest single shareholder, with an 11.21% stake (M.129).

A proposed merger between SC&T and its affiliate Cheil Industries Inc. was announced in May 2015 (M.159). At an SC&T shareholder meeting on 17 July 2015, the NPS’s vote in favor of the merger proved decisive (M.887). Mason and Elliott both alleged the NPS’s vote was part of a corrupt scheme by the State, with personal involvement from Korea’s then-President Park Geun-hye, to support the Samsung founding family’s control over Samsung, at the expense of public shareholder value. President Park was later convicted of receiving bribes to assist in executing a

family succession plan for the Samsung Group (M.272).

Both Mason and Elliott filed investor-State disputes under the KORUS FTA in 2018, alleging that the State interfered with their investments.

Shared Outcome

The *Mason* tribunal and the *Elliott* tribunal each found that Korea had breached its obligation of fair and equitable treatment (“FET”) under Article 11.5 of the KORUS FTA in its handling of the Samsung Group restructuring and was liable to the investors, Mason and Elliott, respectively, for losses in respect of their SC&T shares (M.1147, E.995). However, while the *Elliott* tribunal found the NPS’s conduct to be directly attributable to the State, the *Mason* tribunal rejected the argument that the NPS’s conduct was attributable to the State but found that Korea violated the FET standard through President Park’s interference with the NPS’s voting right in exchange for a bribe.

Differences of Opinion

While the *Elliott* tribunal considered the NPS to be a State organ of Korea, and its conduct therefore attributable to Korea, the *Mason* tribunal disagreed. Both tribunals approached the issue of attribution of NPS actions to the State as a jurisdictional issue examined through the same lens. Each examined Article 11.1.3 of the KORUS FTA, which does not expressly address attribution, but defines the entities which may maintain or adopt measures under the treaty as: (a) “central, regional or local governments and authorities” and (b) “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities” (M.463, E.439).

The *Mason* and *Elliott* tribunals each examined first whether the NPS is a *de jure* State organ, and then whether it is a *de facto* State organ, and the *Mason* tribunal then considered whether the State could be considered to have delegated powers to the NPS.

1. *De Jure* State Entity

Both the *Mason* and *Elliott* tribunals reviewed whether the NPS is a *de jure* State organ under Korean law, and both concluded that it is not.

The *Mason* tribunal concluded the NPS is not a *de jure* State organ, as it does not fall under any of the three categories of State organs recognized under Korean law as identified in the testimony of the expert on Korean administrative law submitted by Korea (M.477-82). The tribunal further found that, even if, as the claimant argued, Korea has no concept of State organs under domestic law, the NPS’s independent legal personality nonetheless would prevent it from qualifying as a *de jure* State organ (M.483-88). According to the *Mason* tribunal, “[w]hen an entity has a separate legal personality, especially when it is established according to the provisions of civil law, this indicates that the entity does not form an integral part of the organization of the State itself in such way that it can be considered a State organ” (M.487).

The *Elliott* tribunal likewise found that the NPS is not a *de jure* State organ, based on the parties' apparent agreement to that effect and on reasoning similar to the *Mason* tribunal (E.444).

2. *De Facto* State Entity

The *Mason* and *Elliott* tribunals each next examined whether the NPS qualifies as a *de facto* State organ under international law principles.

The *Mason* tribunal adopted the “substantial dependency” test from the *Bosnian Genocide* case, which both parties had relied upon (M.493). The majority of the tribunal described this test as “whether the entity is completely dependent on the State,” but an unidentified arbitrator was not convinced that complete dependency is required but considered that “one needs to look at the individual act” (M.494, fn.787). Applying this test, the majority was not satisfied that the NPS qualifies as a *de facto* State organ based on a balanced analysis of several factors (M.496). The tribunal majority considered that:

- “the National Pension Act affords the NPS a considerable level of autonomy from the government,” as a corporation which “can acquire property, sign contracts and be party to litigation in its own name” (M.497);
- this is additionally “reflected in the decision-making processes of the NPS,” notwithstanding “some level of supervision and oversight by the . . . State” (which does not extend to imposing “day-to-day management decisions” on the NPS) (M.498);
- despite the public function of the NPS, its asset management role is not “a core government function,” as it involves commercial transactions which the NPS “carries out like a private fund manager” (M.501); and
- while the NPS exemption from corporate taxation may be “related to its public mission,” this “does not mean that the NPS is completely dependent on the . . . State” (M.502).

In contrast, the *Elliott* tribunal refused to apply the test from the *Bosnian Genocide* case, noting the different context of that case, which involved “attribution of acts of genocide in the circumstances of an armed conflict,” but stated that it would have reached the same conclusion under that test (E.fn.656). The *Elliott* tribunal concluded that the NPS is a *de facto* State organ, due to evidence “linking the NPS to the State both functionally and financially” (E.445). It emphasized different facts than the *Mason* tribunal, considering that:

- the NPS’s function is to “manage and administer the National Pension Fund,” which “belongs to the State” (E.444);
- “when the NPS exercises its voting rights to acquire shares, the entity that acquires” them is the State, not the NPS (E.444);
- contributions to the National Pension Fund managed by the NPS “are not voluntary, as Korean citizens are required by law to contribute” (E.444);
- the NPS’s “operational expenses are funded from the national State budget,” and the NPS’s annual budget is “approved by the [Ministry of Health and Welfare]” (E.444);
- NPS officials “are appointed and supervised by the Minister of Health and Welfare” (E.444); and
- the NPS is “subject to annual audits” by Korea’s National Assembly, and its dispositions are “reviewable as public law acts” (E.444).

3. Delegation of Powers

Article 11.1.3(b) of the KORUS FTA permits State attribution in the case of delegation of powers to an entity which is not a State organ. The *Mason* tribunal found the NPS's exercise of shareholder rights in a listed company was commercial in nature, as it was conferred upon the NPS by virtue of its shareholding in SC&T, in the same way as any private shareholder (M.513). As such, its vote was not an exercise of delegated governmental power attributable to the State (M.518). Since the *Elliott* tribunal found that the NPS was *de facto* a State organ, it did not need to consider whether the NPS's relevant conduct was an exercise of delegated governmental powers (E.445).

Conclusion

In many respects, the *Mason* and *Elliott* awards are consistent with one another, including in relation to Korea's responsibility for the outcome of the merger vote. Nonetheless, the locus of Korea's relevant State conduct differs in each tribunal's analysis, as they disagree on whether the NPS itself is an organ of the State. The tribunals' separate reviews led them to the same question of State attribution, and their analyses were in many respects similar. The key difference in the findings on State attribution was due to the tribunals' differing factual assessments, but this difference did not compel inconsistent results on liability.

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