

**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. 3

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

27 May 2019

I. PROCEDURAL HISTORY

1. On 22 March 2019, a First Procedural Meeting was held between the members of the Tribunal, counsel and representatives for both Parties and the PCA, at which *inter alia* the sequence of the Parties' written submissions was discussed.
2. By letter dated 27 March 2019, the Tribunal directed that, "[a]s a next procedural step, the Claimant may file an amended Statement of Claim, together with supporting evidence, including documentary evidence, witness statements and expert reports."
3. On 4 April 2019, the Claimant submitted its Amended Statement of Claim (the "**ASoC**"), accompanied by four witness statements and three expert reports.
4. By letter to the Claimant dated 18 April 2019, the Respondent requested that the Claimant produce the following documents which it had allegedly failed to produce with its ASoC:
 - (a) The Settlement Agreement between the Claimant and Samsung C&T Corporation ("**SC&T**") dated March 2016 (the "**Settlement Agreement**"); and
 - (b) Documentary evidence sufficient to identify the nature, exact timing, and extent of the Claimant's investment in SC&T, including the swap agreements through which it claims to have initially made an investment (the "**Investment Documents**").
5. By letter to the Respondent dated 24 April 2019, the Claimant rejected the Respondent's request.
6. By letter to the Tribunal dated 30 April 2019, the Respondent requested "that the Tribunal order the Claimant to submit [certain] documents [...] on which it expressly relies in its ASoC, but which it failed to submit with the ASoC as it was required to do" (the "**Request**").
7. By letter dated 6 May 2019, the Claimant provided its response to the Respondent's Request (the "**Response**"), objecting to the Request.

II. POSITIONS OF THE PARTIES

1. The Respondent's Position

8. The Respondent acknowledges that it is up to a claimant to determine for itself on what evidence it wishes to rely. In the present case, however, the Respondent argues that the Claimant has

chosen to rely in its ASoC on the Settlement Agreement and the Investment Documents and accompanying documents without producing those documents.¹

9. The Respondent considers that the Claimant's omission, if not corrected by the Tribunal, would undermine "its right to present its full defence" in the Statement of Defence and "result in basic procedural unfairness" towards the Respondent.² It therefore requests that the Tribunal order the Claimant to produce the requested documents as soon as possible, and in any event within two business days from the Tribunal's order for production.³

Settlement Agreement

10. Specifically, the Respondent notes that the ASoC as well as the accompanying witness statement of James Smith and expert report of Richard Boulton QC make reference to the Settlement Agreement, without citing it as an exhibit.⁴
11. In the Respondent's view, the Settlement Agreement "provide[s] the very foundation for the Claimant's right" to bring treaty claims, for the calculation of any alleged damages, and for a potential future adjustment to the latter.⁵ In particular, the Respondent considers that the Settlement Agreement may have already compensated the Claimant fully for any alleged loss, in which case, according to the Respondent, the institution of arbitration proceedings would constitute an abuse of process, which would give rise to an admissibility objection.⁶ Without access to the Settlement Agreement, however, the Respondent is prevented from "develop[ing] and present[ing] this potential objection at the time it must, in its Statement of Defence."⁷

Investment Documents

12. The Respondent also characterizes the Claimant's case as being built around an alleged purchase of shares in SC&T, including the timing of such alleged purchase, and on an alleged investment in "total return swaps" that, according to the Claimant, were terminated to purchase SC&T shares. In this regard, the Respondent claims that the Claimant has not introduced into the record the Investment Documents that would shed light on the details of these transactions, including in

¹ Request, pp. 5-6, relying on paragraph 6.2 of Procedural Order No. 1 dated 1 April 2019.

² Request, pp. 1, 2, 5, 6.

³ Request, p. 6.

⁴ Request, pp. 2-3, referring to ASoC, ¶ 259; Witness Statement of James Smith dated 4 April 2019 (CWS-1), ¶¶ 64, 65; Expert Report of Richter Boulton QC dated 4 April 2019 (CER-3), ¶¶ 6.2.8, 6.2.14.

⁵ Request, p. 3.

⁶ Request, p. 3.

⁷ Request, p. 3.

relation to the Claimant's status as a protected investor with a protected investment.⁸ Absent the Investment Documents, the Respondent submits, it is unable to verify if the Claimant's shares in SC&T or the total return swaps constitute protected investments under the Treaty.⁹

13. More specifically, the Respondent highlights that the ASoC distinguishes between the Elliott group, defined as "Elliott", which had initially acquired shares in SC&T, and the Claimant, Elliott Associates, L.P., abbreviated in the ASoC as EALP, which owned common voting shares of SC&T at the relevant time.¹⁰ The Respondent considers that the undisclosed exact timing and terms on which the Claimant, as opposed to the Elliott group, came to hold shares are essential elements of a potential jurisdictional objection, and are relied upon expressly in various parts of the Claimant's submission.¹¹

2. The Claimant's Position

14. The Claimant considers that the Request is premature, given that the agreed procedural schedule foresees only one round of document production following the submission of the Statement of Defence.¹² The Request should therefore be denied.¹³
15. More generally, the Claimant contests the Respondent's characterization of the requested documents as pertaining to jurisdiction and admissibility and submits that the documents could not have any effect on the Tribunal's jurisdiction or the admissibility of the Claimant's claims.¹⁴

Settlement Agreement

16. The Claimant argues that the Settlement Agreement is irrelevant to its status as a protected investor with a protected investment under the Treaty. In this regard, the Claimant points out that the Settlement Agreement was entered into on 1 March 2016. Hence it is subsequent to the merger to which the Claimant's claims pertain, which was approved on 17 July 2015 and executed on 1 September 2015. The Settlement Agreement therefore cannot constitute the "foundation" of the Claimant's right to bring treaty claims, as contended by the Respondent.¹⁵

⁸ Request, p. 3.

⁹ Request, p. 5.

¹⁰ Request, pp. 3-4.

¹¹ Request, p. 4, referring to ASoC, ¶ 153; Witness Statement of James Smith dated 4 April 2019 (CWS-1), ¶ 12; Expert Report of Richter Boulton QC dated 4 April 2019 (CER-3), ¶ 3.4.2

¹² Response, p. 1.

¹³ Response, p. 3.

¹⁴ Response, p. 1.

¹⁵ Response, p. 2.

17. While the Claimant accepts that the Settlement Agreement is relevant to the quantification of its claims, it asserts that it has no bearing on jurisdiction or admissibility. According to the Claimant, any document production request can therefore be accommodated in the ordinary production process agreed by the Parties, *i.e.* following the submission of the Statement of Defence.¹⁶
18. Moreover, the Claimant emphasizes that it is subject to a confidentiality obligation not to disclose the Settlement Agreement to third parties in the absence of “an order of a competent court”. It follows, the Claimant argues, that it would only be in a position to disclose the Settlement Agreement following an order from the Tribunal and in accordance with the provisions governing “protected information” in the Treaty and Procedural Order No. 1.¹⁷

Investment Documents

19. The Claimant posits that, contrary to the Respondent’s allegations, evidence of the Claimant’s shareholding in SC&T at the time of the Merger is a matter of public record and was submitted into the record of the present proceeding by both the Claimant and the Respondent.¹⁸ In this regard, the Claimant refers the Tribunal to Section V of the ASoC, which addresses questions of jurisdiction and admissibility, and the documentary evidence referenced therein.¹⁹
20. Against this background, the Claimant characterizes the Respondent’s Request with respect to the Investment Documents as “an early fishing expedition for additional documentation”.²⁰

III. ANALYSIS OF THE TRIBUNAL

21. There is no dispute between the Parties that the Respondent’s Request is a request for an order for production of documents that the Claimant has refused voluntarily to produce at this stage of the proceedings.
22. The Tribunal notes that pursuant to paragraph 5.1 of Procedural Order No. 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. The procedural calendar was subsequently fixed in Procedural Order No. 2, according to which the document production phase

¹⁶ Response, p. 2.

¹⁷ Response, p. 3.

¹⁸ Response, p. 2.

¹⁹ Response, p. 2, referring to ASoC, ¶ 153, which in turn cites to BAML, *Elliot Associates LP Stocks and Cash Position*, 17 July 2015 (**Exh. C-243**) and SC&T DART Filing, 4 June 2015 (**Exh. R-3**).

²⁰ Response, p. 2.

takes place after the first round of written submissions (Track A1), or after the Tribunal's determination of its jurisdiction, if applicable (Tracks B1 and B2), or after the first round of written submissions and exchange of written submissions on bifurcation (Track B3). The issue that arises is therefore whether the Respondent has presented sufficient reasons to justify its request for an order for production of documents to be issued at this early stage of the proceedings, out of the agreed procedural sequence.

23. The Respondent argues that the Investment Documents and the Settlement Agreement are necessary for the Respondent to be able to raise its objections to jurisdiction and admissibility. According to the Respondent, the Investment Documents are necessary for its potential objection to jurisdiction based on failure to prove a covered investment, and the Settlement Agreement is relevant as the Claimant may have committed an abuse of process by submitting a claim even if it has already been fully compensated.
24. The Tribunal notes, at the outset, that the Respondent's Request is specific and narrow and seeks the production of a limited category of documents. The requested documents also relate, in the Respondent's submission, to preliminary issues of jurisdiction and admissibility which the Respondent is required to address in its next written submission, due to be filed on 30 August 2019, should it choose to raise such objections. The Tribunal further notes that pursuant to paragraph 6.2 of Procedural Order No. 1, "[t]he Parties shall submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, documents and all other evidence in whatever form." It would have better promoted procedural efficiency and the orderly consideration of all aspects of the claims had the Claimant indeed produced all the supporting documentation already at this stage of the proceedings, in accordance with paragraph 6.2 of Procedural Order No. 1, including the Investment Documents and the Settlement Agreement.
25. The Tribunal is nonetheless not persuaded that the documents requested by the Respondent are necessary for the Respondent to be able to raise the preliminary objections it may wish to raise in its next written submission.
26. First, it is the Claimant that bears the burden of proving that its claims meet the jurisdictional requirements under the Treaty, including the existence of a covered investment. If the Claimant fails to produce sufficient evidence in support of jurisdiction, the Respondent remains free to point this out and to request that the claims be dismissed for lack of jurisdiction.

27. Similarly, while the Tribunal need not decide at this stage whether it is in the first place for the Claimant to establish the admissibility of its claims, or for the Respondent to object and establish that the Claimants' claims are inadmissible, the Tribunal notes that nothing prevents the Respondent from raising an argument in its next written submission to effect that, in view of the existence of the Settlement Agreement, it is incumbent upon the Claimant to establish that it has not already been compensated for the alleged loss, in full or in part, and that it has failed to do so. The Respondent need not have access to the Settlement Agreement in order to be able to raise such an argument. The Claimant will then have to answer to the Respondent's argument in its Reply (if the proceedings are not bifurcated) or in its Statement of Defence on Jurisdiction (if the proceedings are bifurcated). In any event, and more importantly, the issue of whether the Claimant has already been compensated for the alleged loss and, if so, whether the claim constitutes an abuse of process in the circumstances, or for some other reason should lead to the rejection of the claim, presently appears to be so closely intertwined with the merits of the case, including quantum, that the Tribunal notes (without deciding the issue) that there does not appear to be any true benefit in having the Settlement Agreement produced at this early stage of the proceedings. Finally, the Tribunal notes that the Settlement Agreement appears to be subject to confidentiality obligations and thus may raise issues of modalities of protection of confidential information that are more appropriately addressed in the document production phase of these proceedings.
28. In view of the above, the Respondent's Request cannot be upheld at this stage of the proceedings.

IV. THE TRIBUNAL'S DECISION

29. For the reasons set out above the Tribunal decides as follows:
- (a) **The Respondent's Request is dismissed; and**
 - (b) **Costs are reserved.**

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal