

**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. 12

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

27 February 2020

I. PROCEEDINGS

1. On 13 January 2020, the Tribunal issued Procedural Order No. 8, which set out the Tribunal's decisions on the Parties' requests for production of documents.
2. By letter dated 13 February 2020, the Respondent requested clarification and further directions from the Tribunal concerning the scope of the document production required from the Claimant.
3. By letter dated 19 February 2020, the Claimant responded to the Respondent's letter of 13 February 2020.
4. By letter dated 24 February 2020, the Respondent submitted comments on the Claimant's letter of 19 February 2020.
5. By letter dated 25 February 2020, the Claimant responded to the Respondent's letter of 24 February 2020.

II. THE TRIBUNAL'S DECISION

6. The Tribunal notes that the Parties disagree in respect of four issues, two of which relate to the scope of the Claimant's document production as set out in the Respondent's Redfern schedule, and two concern communications involving the Ministry of Justice (the "MOJ"), the Financial Supervisory Service (the "FSS"), and the Public Prosecutor's Office of the Republic of Korea.

A. THE RESPONDENT'S REQUEST RELATING TO REQUEST NO. 1 (SETTLEMENT AGREEMENT)

7. The Respondent requests that the Tribunal confirm that the Claimant is ordered to write to SC&T, seeking its consent to disclose the Settlement Agreement to the Republic of Korea, and subsequently to produce to the Respondent the entirety of its correspondence with SC&T on the subject.
8. In its response, the Claimant confirms that it has in fact written to SC&T, so that an order from the Tribunal would be "superfluous in the absence of any basis for supposing that the Claimant's undertaking would not be performed." The Claimant indicates that it "plans to produce the Settlement Agreement."
9. The Tribunal recalls that, in Procedural Order No. 8, in view of the Claimant's express undertaking to write to SC&T, the Tribunal did not order the Claimant to write to SC&T, but merely took note of the Claimant's intention to do so.

10. The Tribunal takes note of the Claimant's further confirmation that it has already written to SC&T and intends to produce the Settlement Agreement. In the circumstances, the Tribunal does not consider that any further directions are necessary.

B. THE RESPONDENT'S REQUEST RELATING TO REQUEST NO. 7 (SWAP CONTRACTS)

11. The Respondent requests that the Tribunal confirm, for the avoidance of doubt, that the Claimant is required to produce documents responsive to Request No. 7 that it did not previously produce to the FSS. According to the Respondent, "there could be further documents responsive to Request No. 7 that were not produced to the FSS by the Claimant." The Respondent rejects the Claimant's contention that the Tribunal, in its decision on Request No. 7, did not grant any part of the Request. The Respondent notes that the Tribunal only denied Request No. 7 "insofar as" the requested documents are already in the possession, custody or control of the Respondent.
12. The Claimant argues that the Respondent's request is in truth a request to reverse the Tribunal's decision on Request No. 7 and should therefore be denied. According to the Claimant, the Respondent's request is also untimely. The Claimant contends that the Tribunal, in its decision on Request No. 7, did not grant any part of the Request and expressly rejected the Respondent's request for the Claimant to produce documents postdating June 2015 and considered that the requested documents held by the FSS or the Korean prosecutors are already in the possession, custody or control of the Respondent. The Claimant thus considers that the Respondent is "seek[ing] to add mandatory language that the Tribunal chose not to employ" by "seizing upon the Tribunal's use of the words 'insofar as.'"
13. The Tribunal notes that there was no indication in the Respondent's Request No. 7 as set out in the Respondent's Redfern Schedule, or indeed in the Claimant's response to that Request, that there were any further documents in the Claimant's possession that the Claimant had not already produced to the FSS, or indeed that any such documents had been requested. Accordingly, the Tribunal's decision did not expressly address the production of such documents. The Tribunal therefore rejects the Respondent's request in respect of Request No. 7.
14. In this connection, the Tribunal takes note of the Claimant's undertaking to produce a spreadsheet evidencing the total return swaps held by the Claimant or any other investment fund in the Elliott Group in respect of SC&T between 1 November 2014 and 4 June 2015. This will allow the Respondent to verify whether it is in possession of all the relevant documents.

C. THE RESPONDENT'S REQUEST RELATING TO COMMUNICATIONS INVOLVING THE MOJ, THE FSS AND THE PUBLIC PROSECUTOR'S OFFICE

15. The Respondent contends that, in order to be able to produce documents the Claimant asserts it has provided to the FSS, it is necessary for the MOJ to request them from the FSS. The Respondent notes that the Claimant's parent company has previously alleged that there has been "improper coordination" between the MOJ and the FSS and the Public Prosecutor's Office. The Respondent accordingly requests that the Tribunal either (a) order the Claimant to produce to the MOJ directly what it already produced to the FSS, so as to avoid any appearance of impropriety; or (b) require the Claimant to provide a written permission for the MOJ to obtain any documents the Elliott Group has provided to the FFS.
16. In response, the Claimant provides the requested written permission for the MOJ to obtain any documents that the Elliott Group has provided to the FSS. The Claimant further reserves its right to rely on measures of the Respondent "to target the Claimant with untimely information requests, leaks of those requests, and other harassment" as breaches of the Respondent's obligations pursuant to the Treaty or otherwise to seek protective orders from the Tribunal.
17. The Tribunal takes note of the Claimant's written permission for the MOJ to obtain any documents that the Elliott Group has previously provided to the FSS. In the circumstances, the Tribunal considers that the Respondent's request is moot and that no further directions are required at this time.

D. THE CLAIMANT'S REQUEST RELATING TO COMMUNICATIONS INVOLVING THE MOJ, THE FSS AND THE PUBLIC PROSECUTOR'S OFFICE

18. The Claimant notes that the Respondent has sought "assurances that communications between the MOJ and the FSS or the prosecutors for the purpose of seeking any documents relevant to this arbitration shall not be used as grounds for future accusations." The Claimant considers that it "is not in a position to give those assurances without visibility of those communications." Accordingly, in parallel to the Respondent's request that the Claimant disclose its correspondence with SC&T, the Claimant requests that the Tribunal order the Respondent to "disclose all communications made for the purpose of seeking any documents relevant to this arbitration between, on the one hand, the MOJ or any other part of the ROK with responsibility for or oversight of this arbitration and, on the other hand, the FSS and prosecutors." The Claimant contends that disclosure of such communications is necessary "in order for the Tribunal and the Claimant to assess whether [the Respondent] has complied with its obligation to use 'best efforts' to obtain" the relevant documents.

19. The Respondent asserts that there is no basis for the Respondent to disclose its internal correspondence made for the purpose of seeking the Claimant's documents from the FSS. The Respondent denies that it has an obligation to prove that it has made "best efforts" to obtain documents relevant to this arbitration when the Claimant has refused to produce them.
20. The Tribunal notes that the Claimant has raised its request "in parallel" to the Respondent's request concerning communications involving the MOJ, the FSS, and the Public Prosecutor's Office. The Tribunal has found (see paragraph 17 above) that the Respondent's request is now moot. In the circumstances, the Tribunal does not consider it necessary to decide at this stage whether any further directions are required in relation to the Claimant's parallel request. In any event, the Claimant's request is premature insofar as there is no evidence before the Tribunal that the Respondent has failed to comply with its best-efforts obligation.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal