

**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. 18

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

20 September 2021

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 24 June 2020, the Tribunal issued Procedural Order No. 14 concerning the Claimant's application of 1 June 2020 for further orders relating to the Respondent's document production. The Tribunal decided, *inter alia*:

[I]ts determinations 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 possession, custody or control, and to request that the Tribunal draw appropriate inferences from any such failure.
4. On 7 August 2020, the Tribunal issued Procedural Order No. 16 concerning the Respondent's application of 30 May 2020 for further orders relating to the Claimant's document production.
5. On 4 September 2020, the Tribunal issued Procedural Order No. 17, rejecting the Respondent's request of 14 August 2020 that the Tribunal reconsider certain of its decisions in Procedural Order No. 16.
6. On 10 November 2020, the Claimant wrote to the Respondent, requesting that the Respondent produce certain documents referred to in or underlying the indictment of the Vice-Chairman of the Samsung Group, ██████████ ("████████"), by the Respondent's Public Prosecutor's Office ("PPO") ("the **PPO Indictment**"), which the Claimant considered were "responsive to the Claimant's document production requests as granted by the Tribunal on 13 January 2020 and/or that are centrally relevant and material to the outcome of this arbitration."
7. On 4 December 2020, the Respondent rejected the allegation that there were any shortcomings in its production of responsive documents and maintained that the production of documents arising from the ongoing criminal investigations was, in any event, barred by "legal impediment under Korean law and international law."
8. On 22 March 2021, the Respondent voluntarily produced six further documents in relation to the PPO Indictment.

9. On 14 July 2021, in light of the Respondent's voluntary document production of 22 March 2021 and the ongoing proceedings related to the PPO Indictment, the Claimant requested that the Tribunal (i) draw appropriate inferences from the Respondent's alleged failure to comply with the Tribunal's document production orders; and (ii) issue orders for the production of newly identified documents (the "**Application**"). The Claimant enclosed with its Application, *inter alia*, the six documents voluntarily produced by the Respondent.
10. On 16 July 2021, the Tribunal invited the Respondent to comment on the Claimant's Application by 28 July 2021.
11. On 17 July 2021, the Respondent requested that the Tribunal extend its deadline to submit its comments on the Claimant's Application until 12 August 2021, noting that "two weeks is insufficient to respond to the Claimant's lengthy and belated Application."
12. On the same date, the Tribunal informed the Parties that it was minded to grant the Respondent's request absent any compelling objections by the Claimant by 20 July 2021.
13. On 20 July 2021, the Claimant confirmed that it did not object to the Respondent's extension request.
14. On 29 July 2021, the Claimant filed, *inter alia*, a short table of *errata* relating to its Application.
15. On 12 August 2021, the Respondent submitted its Response to the Claimant's Application.
16. On 19 August 2021, the Claimant requested leave to submit a short reply to the Respondent's Response to the Claimant's Application by 27 August 2021.
17. On the same day, the Tribunal granted the Claimant's request for leave to comment on the Respondent's Response by 27 August 2021 and provided the Respondent with an opportunity to comment on the Claimant's submission by 3 September 2021.
18. On 27 August 2021, the Claimant submitted comments on the Respondent's Response of 12 August 2021.
19. On 3 September 2021, the Respondent submitted comments on the Claimant's Reply of 27 August 2021.
20. On 10 September 2021, the Claimant indicated that it did not intend to respond to the Respondent's submission of 3 September 2021.

21. This Procedural Order sets out the Tribunal's decision on the Claimant's Application of 29 July 2021.

II. THE CLAIMANT'S APPLICATION

22. In its Application, the Claimant seeks the following relief:

- (i) Where it has already ordered document production, and in light of the ROK's now-confirmed deficient disclosure of responsive Documents to date, the Claimant requests that the Tribunal draw the following adverse inferences against the ROK:
 - (a) [...] that President █████ agreed to wield her significant influence and control over the Blue House, Ministry of Health and Welfare, and the NPS, to cause the NPS to vote in favor of the Merger, in exchange for bribes paid by the Samsung Group;
 - (b) [...] that to fulfil her side of the corrupt bargain with Samsung, President █████ triggered a chain of instructions reaching from the Blue House, through the Ministry of Health and Welfare, to the NPS, and that the NPS's CIO █████ was ultimately pressured by and acted under the instructions of the Blue House and Ministry officials to have the NPS Investment Committee vote in favor of the Merger;
 - (c) [...] that, to achieve the NPS's vote in favor of the Merger, government officials, including CIO █████, coordinated with Samsung officials, first to try to induce the NPS's EVC vote in favor of the Merger, and, once it became clear that the EVC would not support the Merger on the terms proposed, conspired instead to have the Investment Committee decide in favor of the Merger; and
- (ii) Where the ROK's PPO Indictment has revealed for the first time that the ROK is in possession, custody or control of Documents that are relevant and material to the issues in dispute between the Parties in this arbitration, the Claimant requests that the Tribunal issue new Document production orders in the following categories of Documents:
 - (a) [...] Documents that establish that the NPS held the casting vote on the Merger, and that both the ROK and Samsung considered that the NPS's vote would determine the success or failure of the Merger;
 - (b) [...] Documents that establish that the NPS's vote in favor of the Merger cannot be rationalized or justified by reference to the fact that some other shareholders also voted in favor of the Merger because Samsung planned to and ultimately did in fact manipulate and interfere with those votes; and
 - (c) [...] Documents that establish that market price is not a reliable basis for calculating the Claimant's loss because the market price of SC&T and Cheil were manipulated and controlled by Samsung prior to and following the Merger, further to a sophisticated Merger plan, prepared by Samsung over a year prior to the Merger vote.

23. The Claimant also requests the Tribunal's leave to add to the record the exhibits accompanying its Application.

24. The Respondent requests that the Tribunal dismiss the Claimant's Application in its entirety and order the Claimant to pay the Respondent's costs of addressing the Application.

III. POSITIONS OF THE PARTIES

1. The Claimant's Position

25. The Claimant states that the Respondent has recently voluntarily disclosed six documents—five of which had been the subject of the Claimant's application of 1 June 2020 (*see* paragraph 3 above)—that are responsive to the Claimant's document production requests in this arbitration and that the Respondent had failed to produce. According to the Claimant, both the voluntary yet selective production of these documents and the ongoing proceedings concerning the indictment of ██████ and other members of the Samsung Group reveal the existence of further documents.
26. The Claimant requests that the Tribunal (i) draw adverse inferences as a result of the Respondent's failure to comply with its production obligations to the extent that the documents are covered by one of the Claimant's document production requests but have not been produced by the Respondent; and (ii) order production of newly identified documents to the extent that the Claimant was not aware, and could not have been aware, of the existence of the documents at the time of its original document production requests in 2019.

A. There is no legal impediment to the production of the requested documents

27. The Claimant submits that there is no legal impediment to the production of the documents it seeks. The Claimant argues that the Respondent cannot rely on the separation of powers in Korea as a legal impediment justifying non-compliance with the Tribunal's document production orders. According to the Claimant, any distinction between the Korean Ministry of Justice and its PPO as a matter of Korean law cannot justify a breach of the Respondent's international law obligations. The Claimant refers to Procedural Order No. 8 in which the Tribunal held that, "while the Ministry of Justice may not be able, under Korean law, to require the Korean judiciary or the prosecutors to communicate the relevant responsive documents to the Ministry of Justice, this does not provide an excuse, or a legal impediment, for the Korean judiciary or the prosecutors to produce the documents to the Claimant." The Claimant also argues that a virtually identical objection to document production was rejected by the tribunal in *Mason v. Korea*.
28. The Claimant contends that the secrecy of criminal investigation is not applicable as the criminal investigations have already been completed and have resulted in the commencement of court proceedings, with hearings open to the public. Conversely, the authorities cited by the Respondent do not support the contention that the current court proceedings against ██████ are different from the kind of "court proceedings" which the Tribunal had decided in Procedural Order No. 14 are not subject to any legal impediment.

29. The Claimant asserts that, in any event, none of the grounds in Korean law limiting access to documents in the criminal investigative file, such as “national security” and “likelihood of destruction of evidence,” are at issue in the proceedings against [REDACTED]. The Claimant rejects the Respondent’s claim that compliance with the Tribunal’s document production orders would have “severe ramifications” for the ongoing court proceedings. According to the Claimant, the Respondent has already produced in this arbitration documents underlying the PPO Indictment, which shows that the Respondent itself does not regard Korean law as a serious impediment.
30. The Claimant notes that, while the Respondent suggests that certain new documents “became available” after three of the Documents “were essentially made public by the media,” two of the media reports cited by the Respondent significantly pre-date Procedural Order No. 14. As for the Respondent’s argument that the documents became available because they relate to proceedings that had reached an advanced appellate stage, the Claimant points out that the Respondent had previously produced documents from the [REDACTED] criminal proceedings even though they remain pending before the Supreme Court.
31. The Claimant submits that, as confirmed by the Tribunal, due process requires that the Respondent sufficiently particularize its objections based on legal impediment so as to allow the Claimant and the Tribunal to determine whether non-production is justified. Since the Respondent has failed to comply with this obligation to date, its objections should be rejected on this additional basis.
32. Finally, even if there were a valid legal impediment to the production of documents, the Claimant submits, relying on *Apotex Holdings v. U.S.*, that the Respondent cannot argue, on the one hand, that the Claimant lacks sufficient evidence to support its factual claims and, on the other hand, withhold such evidence from production.

B. The Tribunal should draw adverse inferences

33. The Claimant recalls that the Tribunal directed that the sanction for failure to comply with a document production order is the drawing of adverse inferences against the party withholding relevant documents without justification. The Claimant submits that the Respondent has failed to produce documents that are in its possession, contrary to the Tribunal’s order to do so. Accordingly, the Claimant seeks adverse inferences that (i) certain statements of fact in the PPO Indictment reflect the Respondent’s genuine belief as to the facts at issue; (ii) those statements are supported by evidence that the Respondent has itself gathered and presented to the Korean courts to meet a criminal standard of proof beyond reasonable doubt; and (iii) the Respondent

withheld such evidence in this arbitration “because it undermines and contradicts the ROK’s contrived defense to the Claimant’s claims.”

34. First, the Claimant requests that the Tribunal draw the adverse inference that there was a “corrupt bargain between President [REDACTED] and [REDACTED] for the payment of bribes in exchange for Government support for the Merger.” The Claimant notes that the PPO Indictment refers to a series of factual allegations in respect of which the Respondent has failed to produce any documents to the Claimant. The Claimant submits that such documents would confirm, and that corresponding adverse inferences should therefore be drawn, “that: (a) [REDACTED] and President [REDACTED] conspired to ensure that the Merger vote was approved by the NPS; and (b) President [REDACTED] agreed to wield her significant influence over the Blue House, Ministry of Health and Welfare, and the NPS, to cause the NPS to vote in favor of the Merger, in exchange for bribes paid by the Samsung Group.”
35. Second, the Claimant requests that the Tribunal draw the adverse inference that “CIO [REDACTED] acted under the instructions of Blue House and Ministry Officials to have the NPS Investment Committee vote in favor of the Merger.” In support its request, the Claimant submits that the PPO Indictment reveals the existence of documents that the Respondent has failed to produce to the Claimant and establish “the chain of command running from the President to the NPS, via the MHW, and which was leveraged to ensure the Investment Committee voted in favor of the Merger.”
36. Third, the Claimant seeks the adverse inference that “CIO [REDACTED] and other government officials coordinated with Samsung officials to try to induce votes from the EVC, and tried later instead to have the Investment Committee decide in favor of the Merger.” The Claimant submits that the PPO Indictment reveals the existence of documents that the Respondent has failed to produce to the Claimant and that are directly relevant to this allegation. According to the Claimant, such documents would confirm that “CIO [REDACTED] and other government officials, including senior officials in the Blue House, coordinated with Samsung officials to try to induce votes from the EVC, and later sought instead to have the Investment Committee in favor of the Merger once it became clear that the EVC would reject the Merger on the terms proposed.”
37. In response to the Respondent’s argument that PPO’s assertions cannot be taken to represent the ROK’s belief as to the facts at issue in this case, the Claimant maintains that, as a matter of international law, the State has a “single voice” and that tribunals have consistently rejected domestic law separation of powers arguments as a basis for disregarding the conduct of particular State organs. Moreover, with reference to *Chevron v. Ecuador*, the Claimant advances that the

principle of good faith prevents the Respondent from “disavowing” the statements made by its own PPO in domestic proceedings in order to avoid international liability.

38. The Claimant notes that its request for adverse inferences is supported by findings made by Korean courts in various proceedings. For example, the Claimant refers to a Supreme Court decision that upheld the lower court findings that ██████ bribed President ██████ in order to gain benefits related to her duties.
39. In addition, according to the Claimant, the fact that the Korean courts did not make affirmative findings on certain factual points or ruled out certain evidence only means that the PPO failed to prove those particular points beyond reasonable doubt. As such, the Claimant takes the view that it is not barred from making the same argument and seeking documents to support the same points even if the Korean courts have found otherwise.
40. As regards the timing of its Application, the Claimant argues that the Tribunal should draw the appropriate adverse inferences now to avoid continued factual debate and assist the Parties in their preparation for the hearing.

C. The Claimant is entitled to make new requests for production of documents

41. The Claimant submits that the PPO Indictment reveals that the Respondent is in possession of numerous documents that are relevant and material to the arbitration and of which the Claimant was not aware, and indeed could not have been aware, at the time it made its original document production requests in 2019. The Claimant argues that it is entitled to make new document production requests regarding the following categories of documents that are relevant and material to this arbitration:
 - (i) Documents showing various parties’ contemporaneous understanding that the NPS held the casting vote on the Merger. These documents are relevant and material because the Respondent asserts that the Claimant has not met its evidentiary burden in establishing that the NPS vote caused the Merger;
 - (ii) Documents showing that the votes of other shareholders in favor of the Merger were bought or manipulated by Samsung. The documents are relevant and material because they show that the NPS’s vote in favor of the Merger can be considered arbitrary and the result of the Respondent’s treaty breaches; and
 - (iii) Documents showing that the market price of SC&T shares was manipulated before and after the Merger announcement. The documents are relevant and material because the

Parties are in dispute as to whether the market prices of SC&T and Cheil shares were reliable indicators of share value at the time of the Merger.

42. The Claimant rejects the Respondent's assertion that documents prepared by the Samsung Group should have been directly sought from the Samsung Group prior to March 2016. The Claimant states that it was not aware of their existence until very recently. The Claimant further notes that the Respondent's voluntary production in March 2021 predominately consisted of internal Samsung documents in the possession of the PPO.
43. The Claimant maintains that its requests for production of additional documents are not untimely, given that the PPO expressly identified or inferred the existence of these new documents a year after the scheduled document production had ended. The Claimant points out that the Tribunal in Procedural Order No. 14 acknowledged that the Claimant could make new document production requests in a situation where the "existence of the requested documents was only recently reported in the media" and where the ROK "had adequate opportunity to comment on the Claimant's requests." In light of the *inter partes* correspondence since November 2020, there is nothing that bars the Claimant from requesting that the Tribunal make orders in respect of the requests to which the Respondent is unwilling to respond.

2. The Respondent's Position

44. The Respondent objects to the Claimant's Application and requests that the Tribunal dismiss it in its entirety. According to the Respondent, granting the orders sought by the Claimant would constitute a "serious infringement of the ROK's sovereign right to pursue domestic prosecutions without international interference," "infringe upon the ROK's sovereign right to safeguard its constitutional separation of powers among its executive, legislative, and judicial branches," and "impinge on the independence of its Public Prosecutor and potentially interfere with an ongoing criminal prosecution." The Respondent also challenges the timing of the Claimant's Application.

A. There is a legal impediment to the production of the requested documents

45. The Respondent asserts that there is no legal basis for the disclosure of the documents sought by the Claimant. The documents in question are subject to strict Korean laws, which act as a legal impediment to production and limit the access to documents in an investigative file relating to an indictment or those in court files to protect the sanctity of the judicial process. According to the Respondent, the relevant Korean laws are complemented by the principle of secrecy of criminal prosecutions which, contrary to the Claimant's assertion, does not cease to apply after the issuance of an indictment or the commencement of court proceedings. According to the Respondent, the

principle continues to apply during ongoing criminal trials, because the rationale for the principle is the State's sovereign right to pursue the commission of serious crime without external interference.

46. In the Respondent's view, requiring the PPO to disclose its evidence to the Claimant, including evidence not yet presented to the court, amounts to requesting the PPO to share its prosecutorial strategy with the Claimant, which could seriously undermine ██████'s right to a fair trial. In addition, as the PPO is entitled to amend the contents of the Indictment during the trial, the Respondent contends that the principle of secrecy of criminal investigations must be respected also during the trial.
47. The Respondent states that the six documents that it produced to the Claimant in March 2021 were produced under exceptional circumstances, where the legal impediment fell away because the documents had been made public by the media or were superseded by the final outcomes in the courts. The Respondent stresses that it promptly produced the documents to the Claimant as soon as they were in the possession of the Korean Ministry of Justice and after they had been released by the PPO.
48. The Respondent also stresses that it has produced volumes of evidence from earlier criminal court proceedings against ██████ and the members of the former administration after those proceedings had reached an advanced appellate stage. Thus, for instance, the two Special Prosecutor documents challenging the impartiality of the judge sitting on the earlier ██████ proceedings were produced only after the proceedings were completed because the disclosure of such documents, unlike those relating to the ██████ proceedings, raised specific risks of infringing upon ██████'s right to a fair trial and, as a result, was prohibited by Korean law.
49. Finally, the Respondent denies that its voluntary production implies acceptance of the relevance and materiality of the six documents it produced or any other documents that may be mentioned in the PPO Indictment. Instead, the recent production reflects the Respondent's efforts—constrained by necessary and constitutionally-mandated restrictions—to continue to comply with its document production obligations in this arbitration.

B. The Claimant's request to draw adverse inferences must fail

50. The Respondent submits that the request for the drawing of adverse inferences must fail because the Claimant has failed to prove that the relevant legal requirements have been met. In particular, the Claimant has failed to show that (i) the Respondent has failed without justification to fulfil an

obligation to produce the documents which indeed existed; and (ii) there is *prima facie* evidence corroborating the inference sought.

51. First, the Respondent argues that there is no basis to attribute the belief expressed by one State organ in advocacy to the hypothetical state of mind of the State as a whole. The Respondent argues that different State organs may legitimately express disparate views, and the statements made by the PPO in an indictment to prosecute domestic criminal proceedings cannot be equated to the State's belief in international arbitration proceedings. According to the Respondent, the legal authorities cited by the Claimant are inapposite as they involved State responsibility for conduct attributed to it, whereas the present issue concerns an inference that the "genuine belief" of a State is reflected in pre-trial statements made by its prosecutors.
52. Second, the Respondent argues that the Claimant has failed to establish that the documents sought exist in the first place. In particular, the Claimant did not set out a basis for the assumption that the evidence relied on in the PPO Indictment is new or different from the evidence used in earlier Korean court proceedings. Therefore, according to the Respondent, the Claimant has failed to show that the documents were indeed withheld by the Respondent.
53. Third, the Respondent submits that certain of the inferences sought are inconsistent with the evidence on the record and the findings of the Korean courts in earlier proceedings. In particular, the Respondent points out that while the Korean courts found a *quid pro quo* relationship in respect of the equestrian support provided by ██████ in respect of President ██████'s official duties and authority in general, they specifically declined to find any *quid pro quo* relationship in respect of the Merger.
54. Fourth, the Respondent argues that certain of the inferences sought are based on misrepresentations of the contents of the PPO Indictment. For example, the Respondent points out that, contrary to what the Claimant states, the PPO Indictment does not establish that ██████ communicated with President ██████ about difficulties with the Merger, nor does it establish that the NPS would not have voted in favour of the Merger but for the influence by President ██████. According to the Respondent, the Korean courts determined that (i) there was no government support for the Merger in return for bribes from ██████; (ii) there was no *quid pro quo* relationship between President ██████ and ██████ until after the shareholders had voted on the Merger; and (iii) the instructions from Minister ██████ to refer the voting decision on the Merger to the Investment Committee did not originate from President ██████. As a result, the Claimant's proposed inferences are "peppered with inaccuracies" and based on "partial and unreliable 'evidence'."

55. While the Respondent recognizes that the Claimant is entitled to make the same arguments as those made by the PPO, which were rejected by the Korean courts, such submissions should be made on the merits, and not in an application for adverse inferences. Such an application should only turn on whether the inferences sought are consistent with evidence on the record.
56. Finally, the Respondent takes issue with the timing of the Claimant's request for adverse inferences. The appropriate time and place to make such requests is the second round of submissions or at the hearing as the Tribunal will then have the benefit of the full factual record before it. Accordingly, the Respondent has set out its requests for adverse inferences arising from the Claimant's incomplete production in its Rejoinder memorial.

C. The request for further production of documents is unjustified

57. The Respondent submits that there is no justification for the Claimant to make new and belated requests for production of documents at this stage of the proceedings. According to the Respondent, the documents sought by the Claimant could have been covered by the Claimant's original document production requests in 2019. The Respondent also recalls that the Tribunal has already conclusively determined that the only possible avenue for the Claimant to address its grievances regarding the Respondent's alleged failure to comply with its document production obligations is to seek adverse inferences against the Respondent.
58. The Respondent considers that, in any event, the additional documents requested by the Claimant are not relevant to the case or material to its outcome, as they all relate to actions taken by the Samsung Group, not the Respondent. Moreover, documents that are in the Respondent's view "at best peripheral to the issues in dispute" should not be ordered for production.
59. As to the first category of the newly requested documents, the Respondent argues that perceptions about the significance of the NPS's vote are not relevant to the issues in dispute because the Claimant's case requires a showing that, but for the NPS's vote, the Samsung Group could not have pushed through the Merger.
60. Similarly, the Respondent argues that the second category of requested documents is based on "unsubstantiated assumptions" that the efforts by the Samsung Group were determinative of the position of SC&T shareholders who voted in favour of the Merger. While the Respondent acknowledges that the Samsung Group may have provided faulty information to these shareholders, it maintains that this fact alone cannot justify an assumption that the shareholders were indeed "misled into voting for a Merger that they otherwise would have opposed."

61. As to the third category of requested documents, the Respondent argues that it is not responsible for the actions of the Samsung Group and that the Claimant could have sought these documents directly from the Samsung Group in their bilateral discussions in connection with the litigation they eventually settled.

IV. THE TRIBUNAL'S ANALYSIS

1. The Claimant's Request for New Document Production Orders

62. The Tribunal notes at the outset that the Parties disagree as to whether the Parties are allowed to make further requests for production of documents at this late stage of the proceedings. The Respondent, referring to paragraph 5.1 of Procedural Order No. 1 and the procedural calendar set out in Procedural Order No. 2, argues that this is not the case. According to the Respondent, these two Orders establish that the Parties were to make their requests for production of documents after the first round of written submissions, and that further requests are not allowed. The Claimant disagrees, stating that a party must be permitted to request production of documents "if new information comes to light about the existence of documents that are relevant and responsive to issues in disputes between two parties."¹
63. The Tribunal considers, as it already held in Procedural Order No. 14, that a party cannot be precluded from making a fresh request for production of documents if it had no reason to believe, at the time it made its initial document production request, that the newly requested documents were in the other party's possession, custody or control. This is consistent with Article 27(3) of the UNCITRAL Arbitration Rules, which provides that an arbitral tribunal may require the parties to produce documents and other evidence "[a]t any time during the arbitral proceedings." While the provision envisages the scenario where the request for production of documents is made by the arbitral tribunal at its own initiative rather than a party, it must also apply in circumstances where the initiative for the production of documents is made by one of the parties, so long as the tribunal agrees that the requested documents are relevant to the case and material to its outcome, and could not have reasonably been requested earlier, and so long as the tribunal provides the other party with an opportunity to respond to the request.
64. The Claimant submits that the PPO Indictment revealed "for the first time" that the Respondent was in possession of the additional documents referred to in paragraphs 37, 41, 43 and 44 of the

¹ Claimant's Reply, para. 36.

Claimant's Application.² According to the Claimant, since many of these documents originated from Samsung and not from the Respondent, it was not aware that they were in the Respondent's possession, custody or control, and therefore could not have been requested earlier. The Respondent argues, in turn, that the Claimant's requests are untimely, as the Indictment was exhibited already with the Respondent's Statement of Rejoinder and Reply to Preliminary Objections filed in November 2020, and the Claimant requested for the same documents in correspondence between the Parties already at the time, in November 2020.

65. Having considered the Parties' positions, the Tribunal finds that, while the Claimant's request is indeed somewhat late in this proceeding, it would not be appropriate to deny the request on this basis alone.
66. The Respondent also argues that the Claimant's request should be denied because the Claimant has not proven that the requested documents in fact exist. The Tribunal considers that the criterion presupposed by the Respondent's objection is too exacting. It must be sufficient if the party making the request reasonably believes that the requested documents exist; it cannot be required to prove that they actually exist. In this particular case, the Claimant may reasonably believe that the documents exist because the PPO has made certain allegations in the Indictment and it may be presumed that those allegations are supported by underlying evidence, even if such evidence might not have been specifically identified or referred to in the Indictment. Indeed, under Article 3.9(c)(ii) of the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "**IBA Rules**"), to which the Tribunal may refer when ruling on document production requests (paragraph 5.3.6 of Procedural Order No. 1), the requesting party may make a request for documents that contains "a statement of the reasons why the requesting Party **assumes** the Documents requested are in the possession, custody or control of another Party." (Emphasis added.) The requesting party need not prove that the requested documents exist; and indeed, this might be impossible.
67. The Respondent also contends that the requested documents are not relevant to the case or material to its outcome. The Respondent's contention appears to be largely based on its position regarding the disputed issues. This is not a proper basis to assess the relevance and materiality of the requested documents; relevance and materiality must be assessed on the basis of what is disputed, not on the basis of an assumption as to which party will eventually prevail on the disputed issues.

² Claimant's Application, para. 36.

68. Insofar as the Respondent seeks to rely on the constitutional separation of powers as a basis for refusing to produce the requested documents, the Tribunal recalls that it has already rejected this argument in Procedural Order No. 14.
69. The Respondent further contends that the Claimant's request should be denied because the requested documents are subject to the secrecy of criminal investigations under Korean law. According to the Respondent, there is therefore a "legal impediment" for their production within the meaning of Article 9.2(b) of the IBA Rules."³ The question of whether ongoing criminal investigations constitute a "legal impediment" under the IBA Rules has been previously addressed by the Tribunal in Procedural Order No. 14. In addressing this issue, the Tribunal held that documents that pertain to ongoing criminal investigations that have not yet been completed and have not yet resulted in an indictment or a court proceeding are *prima facie* subject to the principle of secrecy of criminal investigations under Article 126 of the Korean Criminal Act and thus excluded from document production. The Tribunal stressed that its ruling was "provisional" as it was "made on the basis of the Parties' limited submissions on Korean law."⁴ The Tribunal further noted that its ruling was "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."⁵
70. The Respondent now argues that even if the criminal investigations have resulted in an indictment and the court proceedings are underway, which is the case with the PPO Indictment, the requested documents continue to be subject to secrecy of criminal investigations under Article 266-3(1) of the Korean Criminal Procedure Act. According to the Respondent, while the trial is afoot, the PPO may have documents from the investigations that have not yet been adduced in court and, so long as such documents have not been adduced, they remain secret under Korean law. Article 266-3 provides, in relevant part:

**Article 266-3 (Inspection and Copying of Documents and Articles in Custody
of Prosecutor Subsequent to Indictment)**

³ Article 9.2(b) of the IBA Rules provides, in relevant part, that "[t]he Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document ... for any of the following reasons: ... (b) legal impediment ... under the legal or ethical rules determined by the Arbitral Tribunal to be applicable."

⁴ Procedural Order No. 14, para. 73.

⁵ Procedural Order No. 14, para. 73.

(1) A criminal defendant or his/her defense counsel may file an application with the prosecutor for the inspection, copying, or delivery in writing, of a list of documents or objects (hereinafter referred to as ‘documents’) relating to the case indicted and the following documents that are likely to have influence over admission of the facts charged or sentencing: Provided, that if the criminal defendant retains a defense counsel, the criminal defendant is only permitted to apply for inspection of the documents:

1. Documents that the prosecutor would produce as admissible evidence;
2. A paper that describes the names of persons whom the prosecutor plans to produce as witnesses and their involvement in the case or documents that contain statements made prior to trial;
3. Documents relating to the probative value of the paper or documents under subparagraph 1 or 2;
4. Documents relating to arguments made by the criminal defendant or his/her defense counsel on legal or factual matters (including the records of related criminal trial for which adjudication is finally closed and the records of cases for which non-prosecution has been disposed of).

(2) If it is deemed that there is a reasonable ground to disallow the inspection, copying, or delivery in writing, of documents, such as the national security, necessity to protect witnesses, likelihood of destruction of evidence, and specific grounds under which it is anticipated that it is likely to hinder the investigation into related cases, the prosecutor may refuse to allow the inspection, copying, or delivery in writing, of such documents or may place a limitation thereon.

71. Based on the wording of Article 266-3(1), it appears that only a criminal defendant or his or her defense counsel may have access to documents that are “in custody” of the prosecutor and not yet adduced in court.⁶ Moreover, it appears that such right of access is not unconditional since under Article 266-3(2) the prosecutor may deny the request made by criminal defendant or his or her defense counsel in certain circumstances.
72. The Claimant argues, in response, that Article 266-3(1) of the Korean Criminal Procedure Act “does not govern production of Documents for the purposes of meeting the ROK’s obligations under international law, and it therefore creates no legal impediment to the ROK disclosing Documents pursuant to the Tribunal’s orders in this arbitration.”
73. Contrary to the scenario in Procedural Order No. 14, the issue before the Tribunal is whether the secrecy of criminal investigations extends to documents that form part of or support the indictment. The Tribunal did not address this issue in Procedural Order No. 14, as the criminal investigations at issue were still pending and had not yet resulted in an indictment. According to

⁶ The Respondent submits that documents held by the court are governed by Article 25 of the Criminal Procedure Act. *See* Respondent’s Response, para. 32(c).

the Respondent, however, the fact that the investigations have now resulted in an indictment which in turn has led to pending criminal proceedings before the Korean courts does not mean that the documents underlying or supporting the indictment are not governed by the secrecy of criminal investigations, as this depends on whether the documents have been disclosed in open court. The Tribunal notes, in this connection, that it is unclear from the Respondent's submissions whether any of the documents requested by the Claimant in the Application have in fact been disclosed in open court or otherwise made public by the media; to the extent that this is in fact the case, the Respondent appears to agree that such documents cannot be considered to be subject to the secrecy of criminal investigations.

74. The Claimant does not appear to dispute the Respondent's reading of Article 266-3(1) of the Korean Criminal Procedure Act as a matter of Korean law, but argues that the provision "does not govern production of Documents for purposes of meeting the ROK's obligations under international law,"⁷ and that Korean domestic law does not allow the Respondent "to refuse to respect its international obligations to produce responsive documents when ordered to do so."⁸ The Tribunal agrees with the Claimant's position in the general terms it is stated, but the question before it is, precisely, whether international law requires the Respondent to produce the documents at issue. While international law indeed takes primacy before international courts and tribunals over domestic law, this is the case only to the extent that there is a conflict between the relevant rules of law; an international court or tribunal may apply domestic law in various circumstances, including where the applicable rules of international law refer to such law or otherwise require or authorize such application. In this case, there is no such conflict; on the contrary, the applicable rule in Article 9.2(b) of the IBA Rules, which is not a rule of law but to which the Tribunal may rely on as guidance under Procedural Order No. 1, refers to "the legal or ethical rules determined by the Arbitral Tribunal to be applicable." The legal rules in question can only be the rules of the applicable domestic law, which in this case is Korean law, because international law does not contain any generally applicable rules governing the secrecy of criminal investigations conducted by local authorities or any other relevant "legal impediments."⁹ While international arbitral tribunals have taken decisions recognizing, and giving effect to, the secrecy

⁷ Claimant's Application, para. 12.

⁸ Claimant's Reply, para. 8.

⁹ The rules governing the confidentiality of investigations before the International Criminal Court are applicable only in investigations conducted for purposes of proceedings before the Court and do not govern investigations conducted by local authorities for purposes of proceedings before domestic courts. *See* the Statute of the International Criminal Court and the Rules of Procedure of the International Criminal Court, at <http://www.icc-cpi.int>.

of criminal investigations conducted by local authorities, those decisions are based on the applicable domestic law, not international law.¹⁰

75. The Claimant also suggests that the Tribunal has already decided in Procedural Order No. 14 that the secrecy of criminal investigations cannot apply in the present case “because charges have been laid.”¹¹ As noted above, in Procedural Order No. 14 the Tribunal did not decide the issue of secrecy of criminal investigations applicable in post-indictment court proceedings as this was not the scenario before it.
76. In light of the above, and having carefully considered the Parties’ positions, the Tribunal finds, on the present state of the record, that under Article 266-3(1) of the Korean Criminal Procedure Act, the secrecy of criminal investigations does appear to extend to documents that support or underlie an indictment submitted to the court, insofar as the documents in question have not yet been produced in open court. This is implicit in the tense of the verb “would” in the terms “would produce as admissible evidence” in Article 266-1(1) of the Korean Criminal Procedure Act. Thus, the answer to the question of whether the documents requested by the Claimant are subject to the secrecy of criminal investigations under Korean law depends on whether the documents in question have been disclosed in open court or their content, insofar as it is responsive to the request, has been reported on or made public by the media. To the extent they have been so disclosed, they can no longer be considered to be governed by the secrecy of criminal investigations; to the extent they have not been so disclosed, it appears, *prima facie*, that under Article 266-3(1) of the Korean Criminal Procedure Act, they continue to be governed by the secrecy of criminal investigations.
77. The Tribunal’s above ruling is subject to the caveat it made in Procedural Order No. 14. Consequently, the Tribunal’s determination regarding the scope of the secrecy of criminal investigations is made for the sole purpose of disposing of the Claimant’s Application and is therefore necessarily provisional as it is based on the Parties’ limited submissions on the meaning and scope of application of Korean law, including Article 266-3 of the Korean Criminal Procedure Act. It is therefore without prejudice to the Claimant’s right to seek to demonstrate that Korean law does not in fact justify the Respondent’s refusal to produce the requested documents. The Claimant remains free to make an application to that effect, including a request for adverse

¹⁰ This is the case with respect to the two decisions cited by the Parties in this case – *Libananco v. Turkey* and *BSG v. Guinea*.

¹¹ Claimant’s Reply, para. 11.

inference, prior to the hearing, or at the hearing, subject to the Respondent being given an opportunity to respond.

2. The Claimant's Request for Adverse Inferences

78. The Tribunal recalls its rulings in paragraph 75(g) of Procedural Order No. 14 and in paragraph 72(h) of Procedural Order No. 16, to the effect that its determinations in the two Procedural Orders were without prejudice to the Parties' right to seek to establish in due course that the other Party had failed to produce a specific document or documents that were in its possession, custody or control, and to request that the Tribunal draw appropriate inferences from such failure.
79. As summarized above, the Claimant has now made such a request in the Application, and the Respondent has similarly made a request for adverse inferences in its Statement of Rejoinder and Reply to Preliminary Objections, requesting that the Tribunal make its determinations on the Respondent's requests in the Award.¹² The Tribunal agrees with the Respondent that the appropriate time to take a decision on the Parties' requests for adverse inference is indeed the time of the Award. This will allow the Tribunal to consider the Parties' requests in connection with the entirety of the evidence, including the evidence that will unfold at the hearing, and to clarify as appropriate the basis and scope of the Parties' requests at the hearing. This will also allow the Parties to make oral argument in support of their requests at an appropriate time at the hearing, if they so wish.
80. Accordingly, the Tribunal defers its decision on the Claimant's request for adverse inferences to a later, more appropriate stage of the proceedings.

V. CLAIMANT'S REQUEST FOR LEAVE

81. As summarized above, the Claimant requests leave from the Tribunal to add to the record the exhibits accompanying its Application. As the exhibits in questions were voluntarily produced by the Respondent, and in the absence of any objections by the Respondent, the Claimant's request is granted in the terms presented.

VI. THE TRIBUNAL'S DECISION

82. In view of the above, the Tribunal orders as follows:

¹² Statement of Rejoinder and Reply to Preliminary Objections, 13 November 2020, pp. 276-86.

- (a) The Claimant's request that the Tribunal issue new document production orders is granted for the categories of documents referred to in paragraphs 46(ii)(a), (b) and (c) and paragraphs 37, 41, 43 and 44 of the Claimant's Application, insofar as the requested documents have been disclosed in court or the content thereof, insofar as it is responsive to the request, has been reported on or made public by the media;
- (b) The Claimant's request that the Tribunal draw against the Respondent the adverse inferences set out in paragraph 46(i) of the Application is deferred to an appropriate stage of the proceedings;
- (c) The Claimant is granted leave to add to the record the exhibits accompanying the Application; and
- (d) The Tribunal's decision on costs is reserved.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal