

**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. 1

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

1 April 2019

WHEREAS on 3 December 2018, the Tribunal provided the Parties with a draft of Procedural Order No. 1;

WHEREAS on 22 March 2019, a First Procedural Meeting was held by video-conference, in which counsel and representatives for both Parties, all members of the Tribunal, and the PCA participated;

WHEREAS this Procedural Order records the agreement of the Parties on procedural matters set out herein, and where no agreement was reached, sets forth the Tribunal's directions, having heard the Parties and deliberated;

THE TRIBUNAL HEREBY ORDERS:

1. Place of Arbitration (Legal Seat)

- 1.1 The Tribunal determines that the place of arbitration (legal seat) shall be London, United Kingdom.
- 1.2 The physical venue of hearings will be determined in due course, after consultation of the Parties.

2. Translation and Interpretation

- 2.1 To the extent that a Party is required to file documents with a translation into English and/or Korean pursuant to paragraph 8 of the Terms of Appointment, informal translations shall be accepted as accurate unless contested by the other Party. In the event that a Party contests the accuracy of a translation, the Parties shall attempt to reach agreement on the translation (including, if needed, through the introduction of certified translations). If no agreement is reached, the Tribunal shall take a decision, for which it may appoint a certified translator.
- 2.2 Documents produced in response to requests or orders for production may be produced to the requesting Party in their original language, without translation.
- 2.3 Oral argument before the Tribunal may be given in English or Korean. Interpretation of oral argument into the other procedural language shall be provided unless the Parties agree to dispense with interpretation into Korean. Witnesses and experts may testify orally in a language of their choosing, with interpretation, as applicable, into both procedural languages. The PCA shall make the necessary arrangements, in consultation with the Parties, for retaining the services of interpreters.
- 2.4 Each Party shall bear the costs of translating its respective written submissions. The costs of translating documents emanating from the Tribunal or the PCA as well as the costs of interpretation at the hearing shall be borne from the deposit held by the PCA.

3. Procedural Calendar

- 3.1 The procedural calendar will be fixed in a subsequent Procedural Order, after consultation of the Parties.
- 3.2 Short extensions may be agreed by the Parties (subject to the criteria in point 4.6 below), notified to the Tribunal before the original due date, and approved by the presiding arbitrator.

4. Filings and Submissions

- 4.1 On the due date of any written submission, the Party in question shall send, by e-mail, the submission together with any witness statements, expert reports or opinions, and lists of supporting exhibits, legal authorities, and exhibits to any expert reports (but excluding such supporting exhibits, legal authorities, and exhibits to any expert reports) to the Tribunal, PCA, and opposing counsel. Within two business days following the filing by e-mail, the Party in question shall submit the documents that were e-mailed, together with copies of the supporting exhibits, legal authorities, and exhibits to any expert reports, to the Tribunal, PCA, and opposing counsel, in electronic form by upload to a secure file sharing platform or FTP link.
- 4.2 All written submissions, including witness statements and expert reports or opinions, shall be provided as fully text-searchable Adobe Portable Document Format (“**PDF**”) files, and preceded by a hyper-linked table of contents. All documents (including exhibits and legal authorities) shall also be submitted as fully text-searchable PDF files.
- 4.3 Within five business days following the filing by e-mail, the Party in question shall send hard copies of the written submission and all accompanying documents, except for legal authorities, to the Tribunal, PCA, and opposing counsel, by courier, printed double-sided in A4 or letter-size paper, unbound in self-standing ring binders, organized in chronological or other appropriate order, with a separate tab for each exhibit, and preceded by a list describing each document by exhibit number, date, name, author, and recipient (as applicable). (As to members of the Tribunal, Mr. Thomas will require exhibits electronically only.) A copy of all documents shall also be submitted in electronic form via a USB flash memory drive, as searchable PDF files.
- 4.4 For any simultaneous submissions, each side shall submit all electronic and hard copies only to the PCA. The PCA shall distribute copies to the Tribunal and opposing counsel once both submissions have been received.
- 4.5 Unless otherwise provided, all time limits shall refer to midnight at the legal seat of arbitration on the day of the deadline.
- 4.6 Extensions may be agreed between the Parties, or granted by the Tribunal for justifiable reasons, provided that (i) the request for an extension is submitted as soon as practicable after a Party becomes aware of the circumstances which prevent it from complying with the deadline, and (ii) absent extenuating circumstances, such extensions do not affect the dates fixed for any hearing or other meeting involving the Tribunal.

5. Document Production

- 5.1 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. Requests for the production of documents shall be in writing and set forth reasons for the request in respect of each document or class of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable time limit.
- 5.2 Any documents produced in response to the opposing Party’s request or Tribunal’s order shall be “Bates numbered” and transmitted to the requesting Party in electronic/text-searchable form, accompanied by an index that indicates which documents have been produced in response to which requests.

- 5.3 If the requested Party objects to production, the following procedure shall apply:
- 5.3.1 The requested Party shall submit a response stating which documents or class of documents it objects to producing. The response shall state the reasons for each objection.
 - 5.3.2 The requesting Party shall respond to the other Party's objection, indicating, with reasons, whether it disputes the objection.
 - 5.3.3 The Parties shall seek agreement on production requests to the greatest extent possible.
 - 5.3.4 To the extent that agreement cannot be reached between the requesting and the requested Party, the Parties shall jointly submit all outstanding requests to the Tribunal for decision.
 - 5.3.5 Document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as **Annex 1** (a modified Redfern schedule). The Parties shall use the model format throughout their exchange of requests, objections, and responses.
 - 5.3.6 The Tribunal shall rule on any such application, and may for this purpose refer to the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the procedural calendar, unless the Tribunal in its production order fixes a different time period.
 - 5.3.7 Should 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.
- 5.4 The Tribunal may also request the production of documents on its own motion.
- 5.5 The Parties shall not copy the Tribunal or the PCA on their correspondence up until point 5.3.4 above or on exchanges of documents in the course of the document production phase.
- 5.6 Documents produced according to the above schedule shall not be considered on the record unless and until a Party subsequently submits them as exhibits with its written submissions or with the leave of the Tribunal after the exchange of submissions.

6. Evidence and Legal Authorities

- 6.1 In addition to the relevant provisions of the UNCITRAL Rules and the provisions on document production above, the Tribunal may use, as a guideline, the *IBA Rules on the Taking of Evidence in International Arbitration 2010*, when considering matters of evidence.
- 6.2 The 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.
- 6.3 In the Reply and Rejoinder, the Parties shall submit additional written witness testimony, expert opinion testimony, and documentary or other evidence, only to respond to or rebut matters raised in the other Party's immediately prior written submission, or to take account of new evidence received through document production.

- 6.4 Subject to paragraph 9.4 of this Procedural Order, following the submission of the Reply and Rejoinder, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances. Should such leave be granted to one side, the other side shall have an opportunity to comment and submit counter-evidence.
- 6.5 The Parties shall identify each exhibit submitted to the Tribunal with a distinct number. Each exhibit submitted by the Claimant shall begin with the letter “C” followed by the applicable number (*i.e.* C-1, C-2, etc.); each exhibit submitted by the Respondent shall begin with the letter “R” followed by the applicable number (*i.e.* R-1, R-2, etc.). The Parties shall use sequential numbering throughout the proceedings.
- 6.6 Statements of fact witnesses or reports of experts shall be numbered separately as “CWS-” for the Claimant’s witness statements and as “CER-” for the Claimant’s expert reports, and “RWS-” for the Respondent’s witness statements and “RER-” for the Respondent’s expert reports, followed by the applicable number and name (*i.e.* CWS-1 [Smith]).
- 6.7 The Parties shall identify each legal authority submitted to the Tribunal with a distinct number. Each legal authority submitted by the Claimant shall begin with the letters “CLA” followed by the applicable number (*i.e.* CLA-1, CLA-2, etc.); each legal authority submitted by the Respondent shall begin with the letters “RLA” followed by the applicable number (*i.e.* RLA-1, RLA-2, etc.). The Parties shall use sequential numbering throughout the proceedings.
- 6.8 All evidence submitted to the Tribunal, including evidence submitted in the form of copies, shall be deemed to be authentic and complete, unless a Party disputes within a reasonable time its authenticity or completeness, or the Party submitting the relevant evidence indicates the respects in which any document is incomplete.
- 6.9 Excel spreadsheets or other calculations performed by experts shall be provided in their native electronic format (*i.e.* in Excel format rather than PDF).
- 6.10 Legal authorities shall be submitted in electronic version only, unless the Tribunal specifically requests hard copies.

7. Witnesses

- 7.1 Any person may present evidence as a witness, including a Party or a Party’s officer, employee, or other representative.
- 7.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal.
- 7.3 Each witness statement shall contain at least the following:
- (a) The name, date of birth, and present address of the witness;
 - (b) a description of the witness’s position and qualifications, if relevant to the dispute or to the contents of the statement;
 - (c) a description of any past and present relationship between the witness and the Parties, counsel, or members of the Tribunal;
 - (d) an affirmation of the truth of the statement;

- (e) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge; and
 - (f) the signature of the witness.
- 7.4 Before any oral hearing, and within the time period set forth in the procedural calendar, a Party may be called upon by the Tribunal or the other Party to produce at the hearing for examination and cross-examination any witness or expert whose written testimony has been submitted with the written submissions. The facts contained in the written statement of a witness whose cross-examination has been waived by the opposing Party shall not be deemed established simply by virtue of the fact that no cross-examination has been requested. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances. The same applies if the cross-examination has been limited only to certain portions of the witness statement. Should a Party wish to present any of its own witnesses or experts for examination at the hearing who have not been called by the Tribunal or the other Party, it shall request leave of the Tribunal.
- 7.5 Each Party shall be responsible for summoning its own witnesses to the relevant hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 7.6 The Tribunal may, on its own initiative or at the request of a Party, summon any other witness to appear.
- 7.7 If a witness or expert who has been called to testify by the Tribunal or the other Party does not appear to testify at the hearing, the witness's or expert's testimony, together with evidence submitted with such testimony, shall be stricken from the record, unless the Tribunal determines that a valid reason has been provided for failing to appear. In such case, the Tribunal may summon the witness to appear a second time if satisfied that the testimony of the witness is relevant and material.
- 7.8 Each Party shall cover the costs of appearance of its own witnesses. The Tribunal shall decide, if so requested, upon the appropriate allocation of such costs in its final award.
- 7.9 At any hearing, the examination of each witness shall proceed as follows:
- (a) The presiding arbitrator shall admonish the witness;
 - (b) the Party presenting the witness may conduct a brief direct examination;
 - (c) the adverse Party may then cross-examine the witness. The scope of the direct examination and cross-examination covers matters addressed in the written witness statement, with the exception that the opposing party may put questions to the witness on any documentary evidence in the record of which the witness may reasonably be expected to have personal knowledge;
 - (d) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination; and
 - (e) The Tribunal may examine the witness at any time, either before, during, or after examination by one of the Parties.

- 7.10 The Tribunal shall, at all times, have complete control over the hearing, including all aspects concerning the examination of witnesses.
- 7.11 Unless the Parties agree otherwise and save for party representatives, a fact witness shall not be present in the hearing room during the hearing of arguments and oral testimony, discuss the arguments and testimony of any other witness, or read any transcript of the arguments or any oral testimony, prior to his or her examination.

8. Experts

- 8.1 Each Party may retain and submit the evidence of one or more experts to the Tribunal.
- 8.2 Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit shall suffice.
- 8.3 The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the Parties agree otherwise, expert witnesses shall be allowed to be present in the hearing room at any time.
- 8.4 In accordance with Article 27 of the UNCITRAL Rules, the Tribunal may, on its own initiative or at the request of a Party, appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference (including expert fees), and conclusions of any such expert. The Tribunal shall decide, if so requested, upon the appropriate allocation of the costs of any such expert in its final award.

9. Hearings

- 9.1 After consultation of the Parties, the Tribunal shall determine the place, time, agenda, and all other technical and ancillary aspects of any hearing.
- 9.2 The PCA shall arrange for hearings to be audio recorded, and make the recording available to the Parties.
- 9.3 If necessary, the PCA shall, in consultation with the Parties, arrange transcription using LiveNote or a similar software so that the transcript is available on a real-time basis. At the end of each day of hearings, the Parties shall be provided with the transcript of that day (in draft or final form).
- 9.4 No new evidence may be presented at or after the hearing except with leave of the Tribunal (following a request by the Party seeking to introduce new evidence, and an opportunity for the opposing Party to be heard on the request). PowerPoint slides and demonstrative exhibits in aid of argument may be used by any Party during the hearing, provided that these materials reflect evidence on the record and do not introduce new evidence, directly or indirectly. Should the Tribunal grant leave to a Party to present new evidence in the course of the hearing, it shall grant the other Party the opportunity to introduce new evidence to rebut it.

10. Transparency

- 10.1 The PCA shall make available to the public, on its website, the information and documents listed in Article 11.21(1) of the Treaty, subject to the prior redaction of protected information in accordance with the following sub-paragraphs.

- 10.2 Documents that are to be made public pursuant to Article 11.21(1)(c) of the Treaty shall include pleadings, memorials, and briefs submitted to the Tribunal by a disputing Party, as well as any written submissions submitted pursuant to Article 11.20(4) and 11.20(5) of the Treaty, but shall not include expert reports, witness statements, fact exhibits or legal authorities.
- 10.3 Hearings shall be opened to the public pursuant to Article 11.21(2) of the Treaty. The Tribunal will determine the modalities for granting public access to hearings in due course, in consultation with the Parties. If a Party intends to use information designated as protected information during a hearing, it shall so advise the Tribunal in advance of that hearing, which shall make appropriate arrangements to protect the information from disclosure.
- 10.4 The term “protected information” shall bear the meaning set out in Article 11.28 of the Treaty and shall include any information not in the public domain that is designated as such by a Party on grounds of commercial or technical confidentiality, special political or institutional sensitivity (including information that has been classified as secret by a government or a public international institution), or information in relation to which a Party owes an obligation of confidence to a third party.
- 10.5 Pursuant to Article 11.21(4)(c) of the Treaty, a party claiming that certain information constitutes protected information shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain such information. Only the redacted version shall be provided to the non-disputing Party pursuant to the Treaty, and/or made public pursuant to the preceding sub-paragraphs.
- 10.6 In the event that a Party objects to the other Party’s designation of information as protected information, it may apply to the Tribunal for a decision pursuant to Article 11.21(4)(d) of the Treaty within 21 days after the receipt of the redacted document. The Tribunal’s decision shall be without prejudice to the right of a disputing Party to seek a determination from the Joint Committee in accordance with Article 11.21(4)(e) of the Treaty.
- 10.7 In respect of the Tribunal’s awards, decisions, and orders, each Party may propose within 21 days after the receipt of any award, decision, or order from the Tribunal the designation of any parts of such documents as protected information. To the extent that the other Party disagrees with the proposed designation, the procedure set out in paragraph 10.6 of this Order shall apply. The Tribunal shall remain constituted only for the purpose of making any order under this paragraph in relation to its final award or other final decision.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Model Redfern Schedule for Document Requests

| No. | Documents or category of documents requested (requesting Party) | Relevance and materiality, incl. references to submission (requesting Party) | | Reasoned objections to document production request (objecting Party) | Response to objections to document production request (requesting Party) | Decision (Tribunal) |
|-----|-----------------------------------------------------------------|------------------------------------------------------------------------------|----------|----------------------------------------------------------------------|--------------------------------------------------------------------------|---------------------|
| | | References to Submissions, Exhibits, Witness Statements or Expert Reports | Comments | | | |
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