

**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. 19

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

28 October 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.
4. On 22 March 2021, in light of the Claimant's request that the Respondent produce certain documents relating to the indictment of Jae-yong Lee by the Respondent's Public Prosecutor's Office (the "PPO") (the "PPO Indictment"), the Respondent voluntarily produced six further documents in respect of which a legal impediment to production had fallen away because the documents had been made public by the media or were superseded by final outcomes in Korean court proceedings.
5. On 20 September 2021, the Tribunal issued Procedural Order No. 18 concerning the Claimant's application of 14 July 2021 that the Tribunal, *inter alia*, issue orders for the production of newly identified documents. The Tribunal decided, in relevant part:

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.

6. On 13 October 2021, a Case Management Conference (the "CMC") in preparation of the November 2021 hearing was held. At the CMC, the Claimant requested that the Respondent be ordered to produce all documents pursuant to Procedural Order No. 18 by 20 October 2021. The Respondent stated in response that it had already produced 14 out of the 18 documents sought by the Claimant as well as ten documents beyond the Claimant's list. The Respondent further explained that it was working with the PPO to continue searching for the remaining documents that may be responsive to the Tribunal's order in Procedural Order No. 18, including the remaining four (if they exist) requested by the Claimant. The Respondent accordingly opposed the Claimant's request. The Parties agreed that any new documentary evidence arising from document production pursuant to Procedural Order No. 18 could be submitted into the record by either Party by 3 November 2021, without either Party having to request leave from the Tribunal.

7. Following the CMC, by e-mail of the same date, the Claimant reiterated its request that the Tribunal order the Respondent to (i) produce any further documents that it may be able to locate pursuant to Procedural Order No. 18 by 20 October 2021 and (ii) by the same deadline, “represent that all documents subject to disclosure over which it has custody and control have been produced, or specify whether it is aware of other documents that may be produced after the deadline and provide an explanation for that delayed production.”
8. On 15 October 2021, the Respondent provided comments on the Claimant’s e-mail, requesting that the Tribunal dismiss the Claimant’s request of 13 October 2021 and order the Claimant to pay the Respondent’s costs of having to address the Tribunal, particularly in the absence of prior consultation between the Parties as directed by the Tribunal. In support of its position, the Respondent asserted that (i) it had produced to the Claimant one additional document listed on the Claimant’s Annex; and that (ii) it had “produced all documents that it has identified as responsive to PO18 and over which it has custody and control, save that based on media reports on which the Claimant’s requests are based,” there may be “three more documents from the Claimant’s Annex subject to disclosure that it is making its best efforts to locate.”
9. On 16 October 2021, in view of the time-sensitivity of the matter, the Tribunal informed the Parties of its decision on the Claimant’s request of 13 October 2021 by e-mail. The Tribunal indicated that a reasoned decision in the form of a procedural order would be issued in due course.

II. THE TRIBUNAL’S ANALYSIS AND DECISION

10. The Tribunal notes that the Claimant’s request is based on the concern that “further documents will be produced [by the Respondent] at a time when it is materially more difficult to make use of those documents during the hearing.” According to the Claimant, “it is customary to set a deadline for document production sufficiently in advance of the start of the hearing to enable the receiving party to review and consider the documents well in advance of the deadline for introduction of new evidence.” The Claimant also requests that the Respondent be directed to “represent that all documents subject to disclosure over which it has custody and control have been produced, or specify whether it is aware of other documents that may be produced after the deadline and provide an explanation for that delayed production.”
11. The Respondent argues, in response, that it is “wholly unnecessary for the Tribunal to order the deadline and representation and explanation sought.” The Respondent notes that it has already confirmed that it has produced all documents that it has identified as responsive to Procedural Order No. 18 and over which it has custody and control, save for three further documents that

may exist and that it is making its best efforts to locate. The Respondent further confirms that “it will continue in good faith to comply with its document production obligations.”

12. The Tribunal notes that it is common ground between the Parties that the Respondent has a continuing obligation under Procedural Order No. 18 to produce responsive documents. It further notes that there are no substantive differences between the Parties regarding the scope of the Respondent’s obligation. Accordingly, any time limit that the Tribunal may impose for the production of any remaining documents that the Respondent may locate can only serve as a procedural measure to facilitate the Parties’ preparation for the hearing. Having considered the Parties’ positions, the Tribunal concludes that there is, in the circumstances, some merit in fixing a time limit for the Respondent’s production of any remaining documents. The Tribunal considers that Friday, 22 October 2021 is an appropriate time limit for such production.
13. As to the Claimant’s further request that the Tribunal order the Respondent to represent that it has produced all relevant documents or specify whether it is aware of other documents that may be produced after the time limit and provide an explanation for such delayed production, the Tribunal notes that the Claimant has not articulated any basis or justification for its request. The Tribunal finds none. The Respondent appears to have fully cooperated with the Claimant and has already produced to the Claimant a number of documents pursuant to Procedural Order No. 18. There is nothing in the Respondent’s prior conduct in respect of document production that suggests it will not continue to comply with its document production obligations, even after the hearing. On the contrary, the Respondent confirms in its letter of 15 October 2021 that “it will continue in good faith to comply with its document production obligations.” Consequently, the Tribunal denies the Claimant’s second request.
14. In view of the above, the Tribunal orders as follows:
 - (a) The Respondent is ordered to produce any further documents that it may be able to locate pursuant to Procedural Order No. 18 by Friday, 22 October 2021. The Claimant may then review the documents produced by the Respondent and determine whether it wishes to submit any of them onto the record by 3 November 2021, the time limit agreed by the Parties for the submission of any further documentary evidence;
 - (b) The Claimant’s request that the Respondent be ordered to represent that all documents subject to disclosure over which it has custody and control have been produced, or specify whether it is aware of other documents that may be produced after the deadline and provide an explanation for the delayed production, is denied;

- (c) The Tribunal's order in subparagraph (a) above is without prejudice to the Respondent's obligation of ongoing disclosure; 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