

**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. 21

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

9 November 2021

I. PROCEEDINGS

1. On 1 April 2019, the Tribunal issued Procedural Order No. 1, which provides, in relevant part:

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.

[...]

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) [...].

2. On 1 November 2021, the Tribunal issued Procedural Order No. 20 concerning the conduct of the hearing. Paragraph 12 of Procedural Order No. 20 addressed the presentation of new evidence at the hearing:

In accordance with paragraph 9.4 of PO1, documents that do not form part of the record may not be presented at the Hearing, except with leave of the Tribunal.

3. By letters dated 3 November 2021, both Parties sought leave from the Tribunal to submit additional documents into the record. The Claimant sought leave to submit proposed exhibits C-720 to C-724 and legal authority CLA-192. The Respondent sought leave to submit proposed exhibits R-336 and R-337. The Tribunal provided the Parties with an opportunity to comment on the opposing Party's requests by 5 November 2021.
4. On 5 November 2021, the Respondent submitted its comments on the Claimant's submission, requesting that the Tribunal (i) deny permission to the Claimant to introduce into the record proposed exhibits C-720, C-722, C-723, C-724 and CLA-192 because "there [were] no exceptional circumstances justifying the entry into record of these five documents at this late date, on the eve of the hearing"; and (ii) permit the introduction into the record of proposed exhibit C-721 and all documents listed in the index attached to its letter "to ensure completeness of the evidentiary record." If these documents were to be introduced, the Respondent suggested that C-exhibit numbers be assigned to them.
5. By letter of the same date, the Claimant submitted its comments on the Respondent's letters of 3 and 5 November 2021. With respect to the Respondent's letter of 3 November 2021, the Claimant (i) agreed to the Respondent's proposed addition of exhibit R-336 to the record, provided that the Claimant also be permitted to add to the record "an email exchange between Three Crowns and Deutsche bank in which Three Crowns sought Deutsche Bank's consent to disclose the document and Deutsche Bank refused to consent"; and (ii) agreed to the Respondent's

proposed addition of exhibit R-337 to the record. Conversely, the Claimant argued that the Respondent's objections to the addition of proposed exhibits C-720, C-722, C-723, C-724 and CLA-192 into the record were "notable for their inconsistency," and rejected the Respondent's argument that it would be "unduly burdensome" if these proposed exhibits were admitted at this stage of the proceedings. In respect of the Respondent's request regarding proposed exhibit C-721, the Claimant agreed that the 26 documents listed in the index attached to the Respondent's letter of 5 November 2021 be added to the record. According to the Claimant, "[t]hat both sides' requests are few, relevant to material issues in the arbitration, and [would] cause no unfair prejudice or burden to the other party justifies [the admission of all the documents identified by both Parties on 3 November 2021] in such exceptional circumstances."

6. By e-mail dated 6 November 2021, the Respondent advised the Tribunal that the Claimant's letter dated 21 August 2021 and the e-mail exchange between Three Crowns and Deutsche Bank enclosed with it were already on the record as exhibit R-315.

II. THE TRIBUNAL'S ANALYSIS

7. The Tribunal notes that the Claimant does not object to the Respondent's request to submit proposed exhibits R-336 and R-337 into the record. Similarly, the Respondent does not object to the Claimant's request to submit proposed exhibit C-721, provided that the 26 further documents listed in the Respondent's index of 5 November 2021 are also admitted into the record. The Claimant does not object to the admission of these 26 documents.
8. The Respondent objects to the admission into the record of the Claimant's proposed exhibits C-720, C-722, C-723 and C-724, as well as legal authority CLA-192. The Tribunal notes that the Respondent's objection to the admission of these documents is based on paragraph 6.4 of Procedural Order No. 1, while it relies in support of its own request for leave on paragraph 9.4 of Procedural Order No. 1. The Tribunal further notes that the Claimant has not objected to the Respondent's request for leave to submit proposed exhibits R-336 and R-337, and has not argued that the Respondent has failed to establish exceptional circumstances within the meaning of paragraph 6.4 of Procedural Order No. 9. The Claimant does note, however, that in its view the fact that both Parties' requests are "few, relevant to material issues in the arbitration, and will cause no unfair prejudice or burden to the other party justifies their admission in such exceptional circumstances."
9. The Tribunal notes that the disputed documents are not voluminous and are publicly available. In the circumstances, their admission into the record would not cause any prejudice to the Respondent. Accordingly, the Tribunal finds that the circumstances are sufficiently exceptional

within the meaning of paragraph 6.4 of Procedural Order No. 1 to justify the admission of the disputed documents into the record. Pursuant to paragraph 6.4 of Procedural Order No. 1, the Respondent may comment on such evidence and submit counter-evidence without having to seek leave.

III. ORDER

10. In view of the above, the Tribunal, having regard to paragraphs 6.4 and 9.4 of Procedural Order No. 1, orders as follows:
- (a) Exhibits R-336 and R-337 are admitted into the record;
 - (b) Exhibit C-721 is admitted into the record;
 - (c) The Claimant shall assign “C” exhibit numbers to the 26 documents listed in the Respondent’s index of 5 November 2021 and submit these documents into the record; and
 - (d) Exhibits C-720, C-722, C-723, and C-724 as well as legal authority CLA-192 are admitted into the record.

Place of Arbitration: London, United Kingdom



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal