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. 15

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

6 July 2020

I. PROCEEDINGS

1. On 4 April 2019, following the first procedural meeting of 22 March 2019 and pursuant to the Tribunal's directions of 27 March 2019, the Claimant submitted an Amended Statement of Claim (the "**ASOC**").

2. On 14 May 2019, the Tribunal issued Procedural Order No. 2, setting out alternative procedural timetables for the proceedings, depending on whether the Respondent would raise any preliminary objections, the basis of such objections, and whether such objections would be dealt with in a bifurcated proceeding.

3. On 22 August 2019, the Respondent informed the Tribunal that, without prejudice to any jurisdictional or other objections it might raise in its Statement of Defence (the "**SOD**"), it would not seek bifurcation of the present proceedings.

4. On 26 August 2019, the Tribunal issued Procedural Order No. 5, approving the revised procedural timetable as agreed by the Parties. The Tribunal further took note of the Respondent's confirmation that it would not seek bifurcation of the proceedings, while reserving its right to raise jurisdictional and other objections.

5. On 27 September 2019, the Respondent submitted its SOD in accordance with Procedural Order No. 5.

6. On 21 February 2020, the Respondent informed the Tribunal that it intended to address the Parties' disagreement as to whether the Claimant is entitled to file a Rejoinder on Preliminary Objections in due course.

7. On 26 May 2020, the Respondent requested that the Tribunal confirm that the Claimant is not entitled to file a Rejoinder on Preliminary Objections. On the same date, the Claimant requested that the Tribunal allow the Claimant to respond to the Respondent's letter by 26 June 2020.

8. On 27 May 2020, the Respondent indicated that it had no objection to the time limit requested by the Claimant. On the same date, the Tribunal confirmed the agreed deadline of 26 June 2020 for the Claimant to respond to the Respondent's letter of 26 May 2020.

9. On 10 June 2020, the Tribunal issued Procedural Order No. 13, approving a revised procedural timetable agreed by the Parties, which *inter alia* amended the time limits for the filing of the Parties' second-round written submissions. The Tribunal indicated that the revised timetable

would be "subject to further arguments by the Parties as may be required in due course as to whether a Rejoinder on Preliminary Objections is warranted."

10. On 26 June 2020, the Claimant submitted comments on the Respondent's letter of 26 May 2020.

II. POSITIONS OF THE PARTIES

1. The Respondent's Position

11. The Respondent submits that the Claimant is not entitled to file a Rejoinder on Preliminary Objections because the Respondent has not raised any preliminary objection as contemplated by the Treaty, as understood by the Parties, and as reflected in the Tribunal's orders.

12. According to the Respondent, the "preliminary objections" described in Article 11.20(6) of the Treaty are similar to Rule 41(5) objections under the ICSID Convention, requiring the Tribunal to "assume to be true claimant's factual allegations" and to consider only the application of the law to those allegations. The Respondent states that the Claimant has expressly agreed that the "preliminary objections" under the Treaty are "limited in scope, and invite[] an enquiry that assumes all the facts to be as pleaded by the claimant."

13. The Respondent notes that it has raised "four threshold challenges" in its SOD, all of which are responsive to the factual assertions made by the Claimant in its ASOC. According to the Respondent, as the challenges do not accept, but rather deny, the accuracy or sufficiency of the Claimant's assertions, they do not fall within the "distinct and narrow category" of preliminary objections contemplated by the Treaty.

14. Referring to Procedural Order No. 2, the Respondent further contends that the Tribunal has recognized the situation in which the Respondent might raise a "preliminary objection" but not request bifurcation. Consequently, it is irrelevant that the Treaty prescribes bifurcated proceedings to address "preliminary objections" or that the procedural timetable established in Procedural Order No. 2 in the event of non-bifurcated proceedings envisages the possibility of the Claimant filing a Rejoinder on Preliminary Objections.

15. Lastly, the Respondent argues that the Claimant is not entitled to an "extra submission" under the principle of equality of arms, given that the threshold challenges in the SOD are directly responsive to the assertions made in the Claimant's ASOC, on which the Claimant will have a "second chance" to comment in its Statement of Reply. Noting that the proceedings are not bifurcated and that the Claimant's second-round written submission is not a Statement of Defence on Jurisdiction, but a Statement of Reply, the Respondent contends that granting the Claimant the

right to file a Rejoinder on Preliminary Objections would be "fundamentally unfair" to the Respondent.

2. The Claimant's Position

16. The Claimant submits that it is entitled to exercise its "existing right" to file a Rejoinder on Preliminary Objections in accordance with Article 11.20(6) of the Treaty, as the Respondent has raised preliminary objections by way of its "threshold challenges."

17. In response to the Respondent's proposition that its threshold objections are not "preliminary objections," the Claimant considers that the Respondent "entirely misconstrues" Article 11.20(6) of the Treaty by arguing that that only one "type" of objection can constitute "preliminary objections" within the meaning of the Treaty. While the Claimant agrees that Article 11.20(6) sets out the procedure for a particular "type" of preliminary objection, it points out that Article 11.20(6) also recognizes "the tribunal's authority to address other objections as a preliminary question." In support of this claim, the Claimant relies on a Non-Disputing Party Submission of the United States in *Seo v. The Republic of Korea*, in which the United States made clear that Articles 11.20(6) and 11.20(7) of the Treaty "leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question."

18. The Claimant further contends that the Tribunal consistently "recognized and enshrined in the procedural timetable" the Claimant's right to file a Rejoinder on Preliminary Objections in the event the Respondent raises preliminary objections. Accordingly, the Claimant takes the view that, under the correct interpretation of the Treaty and the Tribunal's orders, it is immaterial to its existing right to file a Rejoinder on Preliminary Objections whether the Respondent's "threshold objections" fall within the "distinct and narrow" category of objections described in Article 11.20(6) or whether the Respondent has declined the option of bifurcating the proceedings.

19. According to the Claimant, the Respondent attempts to "re-characterize" its threshold challenges to jurisdiction and admissibility as arguments responsive to the Claimant's claims on the merits. Given that the Respondent has raised the objections to jurisdiction and admissibility in its SOD for the first time, the Claimant contends that due process and equality of arms require that the Claimant be given the "corresponding right" to respond in the form of a Rejoinder on Preliminary Objections. The Claimant further notes that it would be procedurally efficient for the Tribunal to be fully briefed on the Parties' views on its competence prior to the hearing.

III. THE TRIBUNAL'S ANALYSIS

20. The structure and timetable of these proceedings was established in Procedural Order No. 2, which the Tribunal issued after having provided directions to the Parties for their consultations, and after further consultations between the Parties. The Tribunal's directions of 27 March 2019 provided, in relevant part:

> 2. In accordance with Article 11.20(6) of the Treaty, following the Claimant's amended Statement of Claim, the Respondent may raise any objection that, as a matter of law, a claim submitted is not a claim for which an award in favor of the Claimant may be made under Article 11.26. Such an objection, if raised by the Respondent, shall be considered as a preliminary matter, and the proceedings shall be bifurcated accordingly.
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> 3. The Respondent may also request, on the same date and whether or not it raises an objection in accordance with Article 11.20(6) of the Treaty, that the proceedings be bifurcated to address any other preliminary objection that in the Respondent's view should be addressed as a preliminary matter. In such an event, the Claimant shall be given an opportunity to comment on the Respondent request for bifurcation. The Tribunal will then determine, on the basis of the Parties' submissions, whether proceedings should be bifurcated.
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> 4. In the event the Respondent does not request bifurcation in accordance with paragraph 2 or 3 above, it may raise a plea that the Tribunal does not have jurisdiction no later than in the Statement of Defence, pursuant to Article 23(2) of the UNCITRAL Rules.[1]

21. On 15 April 2019, the Parties jointly submitted to the Tribunal a draft procedural calendar, indicating the aspects of the calendar on which the Parties were able to agree, as well as the remaining points on which they were unable to agree. One of the points on which the Parties were able to agree was that the potential last step in Phase 3 ("Second-Round Written Submissions") in Track A1 (if bifurcation is not requested) of the proceedings would be "Claimant's Rejoinder on Objections (if necessary)."[2] The Tribunal recorded the Parties' agreement on this and other agreed points in Procedural Order No. 2, confirming that the potential last step in Phase 3 of Track A1 would be "(Claimant's Rejoinder on Preliminary Objections, if any)."

22. The Respondent did not raise a preliminary objection under Article 11.20(6)(a) of the Treaty, which allows a respondent State to raise an objection on the basis that "as a matter of law, a claim

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[1] PCA Letter to the Parties dated 27 March 2019, p. 3.

[2] More precisely, the Tribunal defined Track A1 as one in which "the Respondent in its Statement of Defence does not request bifurcation (because it does not raise preliminary objections at all or, even if it raises such objections, does not request bifurcation), the arbitration shall proceed in accordance with the following schedule."

submitted is not a claim for which an award in favor of the claimant may be made under Article 11.26." Nor did the Respondent request bifurcation on any other basis. Accordingly, the Tribunal determined in Procedural Order No. 5 that the proceedings would be conducted in accordance with the procedural calendar of Track A1 of Procedural Order No. 2.[3] While the Parties subsequently agreed a number of times, with the Tribunal's approval, to amend the dates by which certain procedural steps were to be taken, they did not submit to the Tribunal any proposal to modify the structure of the proceedings as set out in Procedural Orders Nos. 2 and 5. Accordingly, the last step to be taken in Phase 3 ("Second-Round Written Submissions") of Track A1 remains "(Claimant's Rejoinder on Preliminary Objections, if any)."

23. As summarized above, the Parties now disagree on whether the Claimant should be allowed to file such a submission, currently due on 23 December 2020. The Respondent requests that the Tribunal "confirm that no Third Submission is to be filed by the Claimant" because such a "Third Submission" could be filed (i) only if the Respondent raised a preliminary objection under Article 11.20(6)(b) of the Treaty, which it did not do; and (ii) because in any event, allowing such a submission would undermine the equality of arms since the Claimant would be able to make three submissions on jurisdiction, whereas the Respondent would only be able to make two.

24. As to the Respondent's first argument, Article 11.20(6) of the Treaty makes it clear that, if the respondent State raises a preliminary objection under that provision, a tribunal has no choice but to bifurcate the proceedings.[4] Consequently, had the Respondent raised such an objection in these proceedings, the Tribunal would have addressed it as a preliminary question, and it would have been fully briefed by the Parties in a bifurcated proceeding and either upheld (which would have resulted in a dismissal of the Claimant's entire case) or dismissed the objection. While in the latter scenario the proceedings would have proceeded to the merits, the Parties would and could not have been required to make any further submission on the Respondent's preliminary objections under Article 11.20(6) because those objections would already have been decided. Accordingly, when the Parties agreed, with the Tribunal's approval, that the Claimant would be able to file a "Rejoinder on Preliminary Objections, if any," they could not have meant that the Claimant's right to make such a submission was subject to the Respondent's raising a preliminary objection under Article 11.20(6) of the Treaty.

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[3] See Procedural Order No. 5 of 26 August 2020.

[4] According to Article 11.20.6(b) of the Treaty, "[o]n receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor."

25. Article 11.20(6) of the Treaty also makes it clear that the type of preliminary objections envisaged in that provision is not the only type of preliminary objections available to a respondent State; Article 11.20(6) specifically provides that it is "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." The Respondent has indeed raised in its SOD such other "threshold issues of jurisdiction and admissibility" in response to the Claimant's claims. The Respondent contends that (i) the impugned acts of the Respondent and the NPS do not constitute measures "adopted or maintained" by the Respondent, within the meaning of Article 11.1 of Chapter Eleven of the Treaty (which defines its scope of application of Chapter Eleven) (SOD, Section III:A); (ii) the conduct of NPS is not attributable to the Respondent (SOD, Section III:B); (ii) the Claimant has not made an investment within the meaning of Article 11.28 of the Treaty (SOD, Section III:C); and (iv) the Claimant has committed an abuse of process because its investment was made after the alleged breach, or because its claims have already been settled (SOD, Section III:D and III:E). These objections are preliminary objections in the sense that, were the Tribunal to uphold any of them, the Claimant's claims would be dismissed in their entirety and without any determination of their merits.

26. The Respondent now suggests that, when raising these objections in its SOD, it did not raise any "preliminary objections" in a substantive sense; it merely responded to matters addressed by the Claimant in its ASOC, with the exception of one matter which the Claimant had not addressed, *i.e.*, whether the Claimant committed an abuse of process when commencing the present arbitration because its investment was made after the alleged breach, or because its claims have already been settled. The Respondent submits that the Claimant should not be allowed to make a further submission on jurisdiction as this would mean that it would be entitled to make three submissions on at least three of the four threshold issues, whereas the Respondent would only be entitled to make two submissions. According to the Respondent, this would be contrary the principle of equality of arms.

27. While the Respondent's position is arguable, the fact remains that the Parties agreed, and the Tribunal approved in Procedural Order No. 2, that the Claimant should be allowed to file a Rejoinder on Preliminary Objection in the event that the Respondent raises any preliminary objections, which is what it has done. The Tribunal therefore cannot revisit a decision it has already taken, with the Parties' agreement, in the absence of a demonstration of compelling reasons to reconsider its decision.

28. While making this determination, the Tribunal is mindful of both Parties' right to due process and fair proceedings. The Tribunal therefore reminds the Claimant that it is expected to set out in its upcoming Statement of Reply and Defence to Preliminary Objections its full response to the

Respondent's jurisdictional and admissibility objections, as set out in the SOD. Accordingly, the Claimant's Rejoinder on Preliminary Objections should be limited to responding to any new points made by the Respondent on its preliminary objections in its Statement of Rejoinder and Reply to Preliminary Objections.

IV. THE TRIBUNAL'S DECISION

29. In light of the above, the Respondent's request that the Tribunal confirm that the Claimant is not allowed to file a Rejoinder on Preliminary Objections is denied.

Place of Arbitration: London, United Kingdom

Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal