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. 4

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

22 July 2019

I. PROCEDURAL HISTORY

1. On 1 April 2019, the Tribunal adopted Procedural Order No. 1, which provides, in respect of transparency regarding the Parties' written pleadings:

> **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.
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> 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.
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> 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.
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> 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.

2. Article 11.21(4) of the Treaty, in turn, provides:

> Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
>
> (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
>
> (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
>
> (c) A disputing party 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 the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1;
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> (d) The tribunal shall decide any objection by a disputing party regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information; and
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> (e) At the request of the disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 60 days of such a request, it shall be binding on the tribunal, and any decision or award issued by tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 60 days, the tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

3. By email dated 12 April 2019, pursuant to paragraph 10.1 of Procedural Order No. 1, the PCA invited the Parties to confirm that the Claimant's Notice of Arbitration (the "NoA"), the Respondent's Response to the Notice of Arbitration (the "Response"), and the Claimant's Amended Statement of Claim (the "ASoC") may be published without redactions.

4. By email dated 15 April 2019, the Respondent communicated its intention to propose a number of redactions to the NoA, the Response and the ASoC, and on 16 April 2019, the Respondent submitted redacted copies of the NoA, the Response, and the ASoC.

5. By email dated 26 April 2019, the Claimant responded to the Respondent's submission of redacted copies of the NoA, the Response, and the ASoC, requesting that the Respondent withdraw its proposed redactions or submit a revised request which explained how the proposed redactions were consistent with section 10.4 of Procedural Order No. 1. The Claimant indicated

that, as an interim measure, it was prepared to agree that the PCA publish the Respondent's redacted versions of the three pleadings on its website, pending the resolution of the issue as to whether any redactions were required.

6. On 29 April 2019, the PCA, writing upon the instructions of the Tribunal, invited the Respondent to comment on the Claimant's message of 26 April 2019 by 6 May 2019. The PCA indicated that, in light of the Claimant's consent, it had been instructed by the Tribunal to upload the redacted versions of the three pleadings on its website, pending the resolution of the issue that had arisen between the Parties.

7. By email dated 6 May 2019, the Respondent commented on the Claimant's email dated 26 April 2019 and provided reasons for its proposed redactions to the NoA, the Response, and the ASoC.

8. By email dated 16 May 2019, the Claimant responded to the Respondent's comments of 6 May 2019.

9. On 26 June 2019, the PCA wrote to the Parties on behalf of the Tribunal, requesting that the Parties comment on certain issues raised by their submissions and elaborate on their positions on some of those issues under Korean law.

10. By letters dated 5 July 2019, the Parties submitted their comments on the issues identified by the PCA in its letter of 26 June 2019.

11. On 8 July 2019, the PCA wrote to the Parties on behalf of the Tribunal, inviting the Parties to comment on certain further issues raised by their communications of 26 June 2019.

12. By letters dated 12 July 2019, the Parties submitted their comments in response to the PCA's letter of 8 July 2019.

II. POSITIONS OF THE PARTIES

1. The Respondent's Position

13. The Respondent relies on provisions of Korean law in support of the proposed redactions and requests that the Tribunal allow its proposed redactions to the NoA, the Response, and the ASoC.

14. In the Respondent's view, the Personal Information Protection Act ("PIPA") of the Republic of Korea prohibits the disclosure to the public at large of personal information, such as names and other information that make it possible to identify an individual. According to the Respondent, Korean courts will publish judgments pending appeal only in redacted form. In the published

version of those judgments, personal information is redacted, in contrast to the judgments dispatched to the parties to the proceeding, which are in an unredacted form. The Respondent asserts that it has accordingly redacted the names of individuals from the NoA, the Response, and the ASoC in order to comply with Korean law and thus to avoid any exposure to suit under that law.

15. The Respondent further argues that the rules applicable in the present arbitration entitle it to redact such information that is protected from disclosure under Korean law. Specifically, the Respondent points out that the Treaty and Procedural Order No. 1 govern the question as to what information may be redacted from written submissions, such as the NoA, the Response, and the ASoC. Article 11.21(4) of the Treaty and paragraph 10 of Procedural Order No. 1 allow a disputing party to redact "protected information." Article 11.28 of the Treaty defines "protected information" as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law" (*i.e.* the law of a party to the Treaty, which includes the Republic of Korea).

16. The Respondent considers it irrelevant that some redacted names are already known to the public. Korean law nonetheless requires those names to be protected from disclosure. In the Respondent's view, the Claimant's assertion that paragraph 10.4 of Procedural Order No. 1 excludes from the definition of "protected information" any information that is already "in the public domain" misstates the meaning of that paragraph. Rather, according to the Respondent, paragraph 10.4 identifies two types of "protected information:" information defined in Article 11.28 of the Treaty and, in addition, information that a Party to the Treaty designates as confidential or sensitive and that is not already in the public domain.

17. Further, the Respondent submits that the PIPA exception, pursuant to which the press is excused from the prohibition on collecting and using personal information, "does not provide a general exception allowing anyone to publish all of an individual's personal information that has entered the public domain." More specifically, it does not excuse the re-publication of personal information on the ground that such information was already disseminated by the press.

18. According to the Respondent, the Ministry of Justice qualifies as a "personal information controller" within the meaning of the PIPA because it is the responsible entity with respect to the publication of documents in this arbitration. It follows that the Ministry of Justice is legally required to comply with the PIPA in respect of all personal information that it processes, including in relation to the Parties' submissions. This obligation, the Respondent argues, arises

irrespective of whether the Claimant, the Tribunal, or the PCA are also "personal information controllers" or whether the personal information is contained in "personal information files."

19. As to the timeliness of its redaction request, the Respondent submits that the requirement in Article 11.21(4) of the Treaty that redactions be proposed at the time of the submission of a document is not applicable to documents that were submitted prior to the constitution of the Tribunal. The Respondent therefore considers that it was right to request the redactions upon constitution of the Tribunal, and that, contrary to the Claimant's submission, there is no basis to conclude that it waived its right to do so.

20. The Respondent adds that the proposed redactions do not cause the Claimant, or the United States, or the public, any prejudice.

2. The Claimant's Position

21. The Claimant requests that the Tribunal reject the Respondent's proposed redactions in full, and direct that all pleadings be promptly transmitted to the non-disputing Party and made available to the public in accordance with the Respondent's obligations under Article 11.21(1) of the Treaty.

22. Specifically, the Claimant argues that Article 11.21 of the Treaty mandates the publication of pleadings subject only to the need to protect "protected information," a category that, as the Claimant recognizes, includes information protected from disclosure under Korean law. In the Claimant's view, the Respondent has however failed to meet its burden of showing that the names identified by the Respondent constitute information protected from disclosure under Korean law, providing only "minimal and vague justification" for its proposed redactions and referring to the PIPA by way of "example." According to the Claimant, the PIPA, in contrast with certain provisions of Korean criminal or civil procedure law that are of no relevance to this arbitration, does not require the proposed redactions.

23. The Claimant contests that the PIPA applies in the context of this arbitration. In the Claimant's view, the Respondent has not explained why either the Parties, the Tribunal or the PCA should qualify as "personal information controllers" for the purposes of the PIPA, given that the Parties, the Tribunal, and the PCA are not "operat[ing] personal information files." Nor has the Respondent explained why the pleadings in question constitute "personal information files," given that they do not arrange or organize the personal information of individuals in a systematic manner so as to enable "easy access to the personal information."

24. Moreover, the Claimant considers that the PIPA does not require the Respondent to redact information that has lawfully been published in press articles and is thus already in the public domain. The operative scope of the PIPA excludes any "[p]ersonal information collected or used for its own purposes of coverage and reporting by the press." In the Claimant's view, the rationale of this provision is that information already in the public domain does not require the same level of protection that the PIPA would otherwise provide. The Claimant asserts that this position is confirmed by a 2016 decision of the Korean Supreme Court, while the Respondent's position that personal information must be redacted by all except media outlets, even where the information is already in the public domain, is an untenable reading of the PIPA.

25. In addition, the Claimant notes that, in accordance with Article 11.21(4)(c) and (d) of the Treaty, the Respondent was required to designate information as "protected information" "at the time it is submitted to the tribunal," and to submit "a redacted version of the document that does not contain the information" at that time. When it filed its Response on 13 August 2018, the Respondent did not propose any redactions, even though the Response makes reference to many of the names the Respondent now seeks to redact. The Claimant emphasizes that the Respondent, similarly, submitted an unredacted version of the Response to the two co-arbitrators on 9 September 2018 and to all three members of the Tribunal on 27 November 2018, and waited until April 2019 to assert the existence of protected information in need of redaction. This delay, in the Claimant's view, "plainly does not meet the obligation to designate protected information 'at the time it is submitted to the tribunal'" and "fundamentally betrays the lack of substantive merits behind" the Respondent's proposed redactions. The Claimant concludes that the Respondent has thus waived any right to request redactions now.

26. The Claimant further argues that the Respondent's proposed redactions are "artificial in the extreme." Pointing out that Article 2 of the PIPA refers not only to names but to "information which, if not by itself, makes it possible to identify any specific individual if combined with other information," the Claimant suggests that the Respondent has "left untouched" other information in the submissions concerned that makes it possible to identify relevant individuals.

27. Finally, the Claimant argues that the Respondent wrongly suggests that the Claimant, to challenge the Respondent's redactions, must show that they would cause the Claimant prejudice. The Claimant considers that this test has no basis in the Treaty or Procedural Order No. 1 and, in any event, denies that the redactions would not be prejudicial to it.

III. ANALYSIS OF THE TRIBUNAL

28. The relevant provisions governing the redactions to the Parties' submissions are Article 11.21(4) and 11.28 of the Treaty and paragraph 10 of Procedural Order No. 1. Article 11.21(4) of the Treaty provides:

> Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
>
> (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provide the information clearly designates it in accordance with subparagraph (b).
>
> (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.
>
> (c) A disputing party 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 the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1.
>
> (d) The tribunal shall decide any objection by a disputing party regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information; and
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> (e) At the request of the disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 60 days of such a request, it shall be binding on the tribunal, and any decision or award issued by tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 60 days, the tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

29. Article 11.28 of the Treaty defines "protected information" as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law."

30. Paragraph 10 ("Transparency") of Procedural Order No. 1 further provides:

> 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.

31. The Parties disagree on the interpretation of paragraph 10.4 of Procedural Order No. 1. The Respondent takes the view that paragraph 10.4 identifies two types of information – information defined in Article 11.28 of the Treaty and, in addition, information that a Party to the Treaty designates as confidential or sensitive that is not already in the public domain, and thus expands the scope of the type of "protected information" defined in Article 11.28 of the Treaty.[1] By contrast, the Claimant suggests that paragraph 10.4 of Procedural Order No. 1 "expressly

[1] Respondent's email of 6 May 2019.

excludes from the definition of 'protected information' any information that is already in the public domain."[2]

32. The Tribunal agrees with the Respondent's reading of paragraph 10.4 of Procedural Order No. 1. Paragraph 10.4 provides that 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." (Emphasis added.) The phrase "shall include" indicates that the description that follows denotes a class of information that is *additional* to the class defined in Article 11.28 of the Treaty. Consequently, the qualification "not in the public domain" applies only to the additional class of protected information defined in paragraph 10.4, not to the protected information defined in Article 11.28 of the Treaty. This reading of paragraph 10.4 is also consistent with the position that neither the Parties nor the Tribunal has the power to amend or modify the terms of the Treaty and read a qualification ("not in the public domain") into Article 11.28 that is not there.

33. The definition of "protected information" in Article 11.28 of the Treaty does not specifically exclude information that is already in the public domain. The Tribunal must therefore determine whether such information is excluded under Korean law, which governs the issue, as Article 11.28 defines as "protected information" only information that is "privileged or otherwise protected from disclosure *under a Party's law*." (Emphasis added.)

34. The Parties disagree on this issue as well. According to the Respondent, the PIPA, which governs protection of "personal information" under Korean law,[3] does not provide for any exception that personal information ceases to be protected by the PIPA after it has entered the public domain, and that the PIPA is applicable to the Ministry of Justice of the Republic of Korea as a "personal information controller." The Ministry of Justice is therefore bound to comply with the PIPA in respect of the personal information contained in the pleadings in this arbitration. The Claimant, in turn, takes the view that the information that the Respondent seeks to redact is already in the public domain, and the PIPA does not require the Respondent

[2] Claimant's email of 24 April 2019.
[3] Article 2(1) of the PIPA defines "personal information" as "information relating to a living individual that makes it possible to identify the individual by his/her full name, resident registration number, image, etc. (including information which, if not by itself, makes it possible to identify any specific individual if combined with other information."

to redact such information. The Claimant also contends that the Parties, the PCA and the Tribunal do not qualify as "personal information controllers" under the PIPA, and that pleadings do not qualify as "personal information files" under the PIPA. According to the Claimant, the PIPA is therefore inapplicable to the question of whether names should be redacted from the pleadings in this arbitration before they are published.

35. Having carefully considered the Parties' submissions and the supporting legal authorities, the Tribunal concludes that, under Korean law, protection from disclosure extends to information that is already in the public domain in circumstances where the information has been disclosed by the press. While Article 58(1)(4) of the PIPA, which lists the exceptions to protected information, specifically provides that it does not apply to "[p]ersonal information collected or used for its own purposes of reporting by the press," it does not make any general exception for information that is already in the public domain. Indeed, the exception for the press itself only applies to information "collected or used" by the press "for its own purposes of reporting" and does not apply to the use of such information by third parties. This reading of the provision is consistent with the Interpretation Guideline of the PIPA, which explains that the exception in Article 58(1)(4) "does not extend to all personal information processed by the press, … but applies only in respect of personal information that is processed to accomplish their own purpose."[4] The Tribunal further notes that there is no evidence before it to suggest that any of the individuals whose names the Respondent proposes to redact have given their consent to the publication of their personal information, which under Korean law may serve as a basis for an exception to the prohibition.[5] While the position of Korean law on this issue may appear to be somewhat formalistic in that it requires protection of personal information that is already in the public domain, this is not material for the present purposes because under Article 11.28 of the Treaty the issue is governed by Korean law and the Tribunal must give effect to it.

36. The Parties also disagree on whether the Ministry of Justice, which is responsible for the publication in the Republic of Korea of submissions filed in this arbitration, qualifies as a "personal information controller" within the meaning of Article 2(5) of the PIPA.[6] The issue

[4] Interpretation Guideline of the Personal Information Protection Act; Commentary on Statutes and Guidelines/Official Notices for Personal Information Protection, December 2016, Exh. C-312.
[5] *See* Claimant's Submission on Redactions, 5 July 2019, paras. 13-17 (discussing Supreme Court Case No. 2014Da235080, 17 August 2016, Exh. C-311).
[6] Article 1(5) of the PIPA defines "personal information controller" as "a public institution, legal person, organization, individual, etc. that processes personal information directly or indirectly to operate the personal information files for official or business purposes."

arises because the relevant provisions of PIPA, including Chapters III to VII, regulate the activities of personal information controllers.

37. It is common ground that the Claimant, the PCA, or the Tribunal do not constitute "personal information controllers" under the PIPA. Moreover, while a "personal information controller" appears to have been established within the Ministry of Justice,[7] the personal information contained in the Parties' submissions does not appear to qualify as information that would be processed by the Ministry (or by a personal information controller established within the Ministry) in its capacity as a personal information controller. More specifically, the personal information contained in the Parties' submissions (consisting exclusively of proper names of individuals) does not appear to constitute "personal information files for official or business purposes" within the meaning of Article 2(5) of the PIPA. The question of whether the Ministry of Justice (or a personal information controller established within the Ministry) qualifies as a personal information controller therefore appears to be irrelevant to the issue before the Tribunal, that is, whether the personal information contained in the Parties' submissions is protected from disclosure.

38. In this connection, the Tribunal notes that the PIPA does not merely regulate processing of personal information for purposes of operating personal information files by personal information controllers. Subject to certain limited exceptions, it also protects "personal information," which includes "information relating to a living individual that makes it possible to identify the individual by his/her full name."[8] Such information is protected under the PIPA whether or not it is organized in the form of "personal information files," and whether or not it is under the control or in the possession of a personal information controller. Thus, for instance, Article 17 of the PIPA provides that a personal information controller may communicate "personal information" (rather than "personal information files") to a third party only with the consent of the data subject or where the information is provided in accordance the limited exceptions set out in Article 15 of the PIPA.[9] Similarly, the exceptions set out in Article 58 of the PIPA apply to "personal information" that is under the control or in the possession of a party other than a personal information controller.[10]

[7] *See, e.g.*, the Ministry's Personal Information Protection Guideline, which regulates the operation of the personal information controller within the Ministry.
[8] See the definition of "personal information" in Article 2(1) of the PIPA. "Processing" of personal information is defined separately in Article 2(2), whereas "personal information controller" is defined in Article 2(5).
[9] Under Article 17, "A personal information controller may provide … the *personal information* of a data subject to a third party in any of the following circumstances: … ." (Emphasis added.)
[10] Under Article 58, "Chapter III through VII shall not apply to any of the following *personal information*: … ." (Emphasis added.)

39. Consequently, for the purposes of this arbitration, the Ministry of Justice (and more broadly, the Republic of Korea) must be considered under Korean law to be entitled to request the redactions that it is seeking in this arbitration, whether or not it qualifies as a "personal information controller" under Korean law, and whether or not the information requested to be redacted is organized in the form of "personal information files for official or business purposes." What matters under Article 11.28 of the Treaty is that personal information is protected from disclosure under Korean law. In this connection, the Tribunal notes that the Ministry of Justice has redacted the personal information of the individuals concerned from the Parties' submissions published on its website, even if the information is in the public domain. The redacted versions of the NoA, the Response, and the ASoC published on the Ministry's website are the same as those that the Respondent proposes should be published (and are now provisionally published) on the PCA website. The Tribunal is therefore satisfied that the personal information that the Respondent requests to be redacted constitutes "protected information" under Korean law.

40. The issue that remains to be determined is whether the Respondent has waived its right to request redaction of the protected personal information, as contended by the Claimant.

41. The Respondent indicated its intention to propose redactions to the Parties' submissions, including the NoA and the Response, as well as the ASoC submitted by the Claimant on 4 April 2019, in its email message of 15 April 2019, in response to an email from the PCA dated 12 April 2019 in which the PCA had requested that the Parties confirm that the NoA, the Response, and the ASoC may be uploaded to the PCA website without any redactions. The Respondent had previously, on 18 August 2018, communicated its Response directly to the Claimant, and subsequently, on 28 November 2018, after the constitution of the Tribunal on 15 November 2018, to the Tribunal at the Tribunal's request. Both versions of the Response were unredacted. Similarly, the Claimant had previously, on 12 July 2018, communicated its NoA directly to the Respondent, and subsequently, on 27 November 2018, to the newly-constituted Tribunal (both the NoA and the Response had been previously communicated to the co-arbitrators, but not to the presiding arbitrator).

42. The Tribunal notes that, while Procedural Order No. 1 had not yet been issued at the time the Claimant and the Respondent communicated the NoA and the Response, respectively, to the other party and to the Tribunal, Article 11.21.4(c) of the Treaty contains a provision similar to paragraph 10.5 of Procedural Order No. 1. Thus, pursuant to Article 11.21.4(c), "[a] disputing party 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 the information." (Emphasis added.) On its face, the provision only applies to a party's own submissions and does not deal with the scenario where a party may wish to propose redactions to a document submitted by the other party.

43. The Tribunal notes that the Respondent failed to submit redacted versions of its Response when communicating it to the Claimant 18 August 2018 and when communicating it to the Tribunal on 28 November 2018; it only indicated to the Respondent its intention to propose redactions on 15 April 2019, when communicating its intention to propose redactions to all three documents in question (the NoA, the Response, and the ASoC). Consequently, the Respondent, having failed to designate any information contained in the Response as "protected information" within the meaning of Article 11.28 of the Treaty when communicating its Response to the Claimant and to the Tribunal, must be considered to have waived its right to object to the publication of the Response without redactions.

44. The Tribunal further notes that the Respondent did not propose to make any redactions to the NoA when it was communicated by the Claimant to the Respondent on 12 July 2018, or when it was communicated by the Claimant to the Tribunal on 27 November 2018. Nevertheless, in the absence of any specific provisions on the issue in Article 11.24 of the Treaty, the Tribunal is unable to find that the Respondent must also be considered to have waived the right to propose redactions to the NoA.

45. Procedural Order No. 1, which sets out further rules regarding the transparency regime applicable in this arbitration, was issued on 1 April 2019. Paragraph 10.5 of Procedural Order No. 1 provides that, "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." Paragraph 10.6 of Procedural Order No. 1 further provides that, "[i]n 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 Procedural Order No. 1." The latter provision does not specifically deal with the situation where a party that has submitted the document has not proposed any redactions, but the other party considers that the information contained in the other party's submission contains protected information and should be redacted. The Tribunal considers that paragraph 10.6 may be applied by analogy in such a situation, and accordingly a party that considers that redactions

are required to the other party's submission must apply to the Tribunal for a decision within 21 days after the receipt of the document. The Respondent was therefore required to indicate any redactions it wished to make to the ASoC within 21 days of its submission by the Claimant on 4 April 2019. The Tribunal notes that the Respondent complied with this deadline as it indicated its intention to propose redactions to the ASoC on 15 April 2019. Accordingly, the Respondent is entitled to propose redactions to this document.

IV. THE TRIBUNAL'S DECISION

46. For the reasons set out above, the Tribunal decides as follows:

(a) **The Respondent has waived its right to propose redactions to the Respondent's Response;**

(b) **The Respondent is entitled to propose redactions to the Claimant's Notice of Arbitration and Statement of Claim and to the Claimant's Amended Statement of Claim;**

(c) **The Tribunal's determination under subparagraph (a) above is without prejudice to the Respondent's right to request the redaction of protected information in future submissions to the Tribunal; 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