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. 7

The Arbitral Tribunal

Dr. Veijo Heiskanen (Presiding Arbitrator)

Mr. Oscar M. Garibaldi

Mr. J. Christopher Thomas QC

Registry

Permanent Court of Arbitration

20 November 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:

> 10.1 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.
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> 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.
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> […]
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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.

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

> 1. Subject to paragraphs 2, 3, and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:
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> […]
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> (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 11.20.4 and 11.20.5 and Article 11.25;
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> […]
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> 3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in in accordance with Article 23.2 (Essential Security) or Article 23.4 (Disclosure of Information).
>
> 4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
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> […]
>
> (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[.]

3. Article 23.4 of the Treaty further provides:

> Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

4. On 26 August 2019, the Tribunal issued Procedural Order No. 5, approving a revised procedural timetable agreed by the Parties, extending the deadline for the submission of the Respondent's Statement of Defence (the "**SoD**") from 30 August 2019 to 27 September 2019, and adjusting subsequent time limits accordingly.

5. On 27 September 2019, the Respondent submitted its SoD, in accordance with the revised procedural timetable annexed to Procedural No. 5, along with a redacted version of the SoD pursuant to paragraph 10.5 of Procedural Order No. 1.

6. On the same date, the Respondent submitted an application to delay publication of the SoD, pending the outcome of proceedings at the Supreme Court of the Republic of Korea (the "**Application**").

7. By email dated 10 October 2019, the Claimant responded to the Respondent's Application, requesting that the Tribunal reject the Respondent's Application (the "**Claimant's Answer**").

8. By email dated 14 October 2019, the Respondent requested the Tribunal's leave to submit comments on, and to "correct some inaccurate assertions" in, the Claimant's Answer.

9. On 17 October 2019, with the Tribunal's leave, the Respondent submitted its comments (the "**Respondent's Comments**"), accompanied by two decisions of the Supreme Court of the Republic of Korea and the English translations of the summaries of those decisions.

10. On 21 October 2019, the Claimant submitted its reply to the Respondent's Comments (the "**Claimant's Comments**").

11. On 4 November 2019, the PCA wrote to the Parties on behalf of the Tribunal, inviting the Respondent to identify, by 12 November 2019, the passages of the Statement of Defence that in its view fall under Article 23.4 of the Treaty. The Tribunal indicated that the Claimant would then have an opportunity to provide any comment it may have on the Respondent's submission by 15 November 2019.

12. On 12 November 2019, the Respondent wrote to the Tribunal, identifying the passages of the Statement of Defence that in its view fall under Article 23.4 of the Treaty.

13. On 15 November 2019, the Claimant commented on the Respondent's letter of 12 November 2019, arguing that the Respondent's request is inconsistent with its obligations under the Treaty.

II. POSITIONS OF THE PARTIES

1. The Respondent's Position

14. The Respondent requests that the Tribunal grant the Application to delay publication of the SoD until the Korean courts issue their decisions in the pending criminal proceedings involving some individuals whose conduct is discussed in the SoD.[1]

15. The Respondent points out that, although there also are civil proceedings that bear relevance to this arbitration, the Application only seeks to postpone publication of the SoD pending the conclusion of the criminal proceedings listed therein.[2] The Respondent submits that the Claimant is therefore incorrect in suggesting that the Respondent seeks a "blanket, indefinite embargo."[3]

16. The Respondent further notes that the SoD necessarily addresses factual matters that are relevant to the pending proceedings and has "endeavoured not to take any position on the evidence and findings still before the Korean courts."[4] However, according to the Respondent, the discussion of the pending proceedings in the SoD might be construed as an attempt by the executive branch of the Government of the Republic of Korea to interfere with the Korean judiciary's duty to adjudicate objectively.[5] According to the Respondent, it is essential that the executive branch of the Government of the Republic Korea refrain from any action "that could be seen as potentially having an influence on, or in any way seeking to influence" the Korean courts' continuing deliberations on issues, particularly those that "might be seen (rightly or wrongly) as in any way determinative of the claim" against the Respondent in this arbitration.[6]

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1 Respondent's Application, p. 1; Respondent's Rejoinder, p. 4.

2 Respondent's Rejoinder, p. 1, referring to criminal proceedings against JY Lee and Geun-Hye Park, which have been remanded, and the criminal proceedings against Hyung-Pyo Moon and Wan-Seon Hong, which remain on appeal before the Supreme Court.

3 Respondent's Rejoinder, p. 2.

4 Respondent's Rejoinder, p. 3.

5 Respondent's Application, p. 2.

6 Respondent's Application, p. 2.

17. The Respondent denies that the risk of influence is "illusory" absent specific evidence of undue influence.[7] The Respondent stresses that the Application is not premised on the lack of independence of the Korean judiciary, but rather on the need to protect the public perception of the independence of the judicial process.[8]

18. In the Respondent's view, the risk of influence would be exacerbated by media reports that "sensationalize or potentially distort"[9] the narrative in the SoD which "would almost certainly invite speculation in the public" that the Respondent's submissions could "even subtly, indirectly or subconsciously" influence the Korean judiciary while the proceedings remain *sub judice*.[10] The Respondent therefore argues that the Tribunal should grant the Application to avoid even an appearance of a potential influence on the judiciary by another branch of the government.[11]

19. The Respondent argues that factual matters addressed in the SoD that are relevant to the continuing proceedings should neither be "factor[ed] into" the Supreme Court's deliberations nor appear to have the potential to do so.[12] In this regard, the Respondent contests the Claimant's assertion that the facts of the ongoing criminal proceedings are already established.[13] According to the Respondent, the factual findings of the proceedings in both the lower courts on remand and the Supreme Court are still subject to review, except those that are substantively finalized by the Supreme Court.[14]

20. The Respondent highlights that there is "an obvious public interest" in safeguarding the integrity of the pending court proceedings and protecting "public confidence in the legitimacy of the constitutional separation of powers in Korea," and that such public interest "clearly outweighs" the public interest in making the SoD available to the public.[15]

21. In response to the Claimant's assertion that the Respondent in this arbitration is the Republic of Korea *in toto*, which encompasses all organs of the State, including the judiciary, the Respondent submits that the unity of the State in international law is distinct from the reality of the pending

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7 Respondent's Rejoinder, p. 2.

8 Respondent's Rejoinder, p. 2.

9 Respondent's Application, p. 2.

10 Respondent's Rejoinder, p. 3.

11 Respondent's Rejoinder, p. 4.

12 Respondent's Rejoinder, p. 3.

13 Respondent's Rejoinder, p. 3.

14 Respondent's Rejoinder, p. 3, referring to the Korean Supreme Court Decisions No. 2007Do7042 and No. 2015Do17869 of *Moon/Hong* appeals, enclosed with the Respondent's Rejoinder.

15 Respondent's Rejoinder, p. 2.

criminal proceedings and the risk of the public viewing the SoD as an attempt to influence the criminal proceedings that remain *sub judice*.[16]

22. The Respondent denies that any exception enumerated in the Treaty applies to its Application as it is not asking the Tribunal to forgo the publication obligation.[17] The Respondent points out that Article 11.21.1 of the Treaty only requires the SoD to be made public "promptly," but not immediately upon submission to the Tribunal.[18] In the Respondent's view, the Treaty does not define "promptly," and the timing of the publication is therefore in the Tribunal's discretion.[19]

23. In any event, the Respondent argues that the exception to the publication under Article 11.21.3, read with Article 23.4 of the Treaty, applies.[20] The Respondent contends that the criminal proceedings are "fundamental to the integrity of law enforcement," and publication of the SoD that addresses these proceedings would "impede law enforcement or otherwise be contrary to the public interest."[21]

24. The Respondent submits that a delay of the publication of the SoD on the PCA's website until after decisions are issued by the Korean courts will not create any prejudice to the Claimant, including in preparing for its Statement of Reply, as the SoD has been available to the Claimant in full.[22]

25. The Respondent further advises the Tribunal of the potential need to submit an Amended SoD following the issuance of the relevant Korean court decisions.[23] The Respondent indicates that it will "apply to the Tribunal for its approval at the appropriate time," should the need arise.[24]

26. In its letter of 12 November 2019, the Respondent states, in response to the Tribunal's request that the Respondent identify the passages of the SoD that in its view fall under Article 23.4 of the Treaty, that "because it is not seeking to escape disclosure but merely to delay publication, its application does not require a finding by the Tribunal that the grounds under Article 23.4 of the Treaty are satisfied."[25] The Respondent stresses that "it does not seek the publication of a heavily

16 Respondent's Rejoinder, p. 3.
17 Respondent's Rejoinder, p. 1.
18 Respondent's Rejoinder, p. 1.
19 Respondent's Rejoinder, p. 1.
20 Respondent's Rejoinder, p. 1.
21 Respondent's Rejoinder, p.2.
22 Respondent's Application, p. 2; Respondent's Rejoinder, p. 3.
23 Respondent's Application, p. 2.
24 Respondent's Application, p. 2.
25 Respondent's letter of 12 November 2019, pp. 2-3.

redacted version of the Statement of Defence that blacks out the identified portions."[26] According to the Respondent, "[p]ublishing a heavily redacted version would exacerbate the risk of inaccurate and prejudicial media reporting by inviting conjecture as to the content of the redacted portions and the reasons the Republic of Korea chose to redact certain passages and others."[27]

2. The Claimant's Position

27. The Claimant requests that the Tribunal reject the Application, which the Claimant regards as "a blanket, indefinite embargo" on the publication of the SoD.[28]

28. Specifically, the Claimant points out that Article 11.21.1 of the Treaty mandates the Parties "promptly" to make available to the public the pleadings submitted to the Tribunal.[29] The Claimant disagrees with the Respondent's interpretation that Article 11.21 confers discretionary power to the Tribunal to delay publication indefinitely.[30] In the Claimant's view, the transparency obligation to publish written pleadings "promptly" "obviously requires" the SoD be "published *without delay*."[31]

29. The Claimant argues that the Respondent's reliance on Articles 11.21.3 and 23.4 to invoke an exception to transparency obligations under the Treaty departs from a fundamental principle enshrined in the Treaty and is "vague, unspecified and procedurally flawed."[32]

30. First, in the Claimant's view, the Respondent's argument under Article 23.4 is not centered on "any *real* risk of impeding law enforcement or other *actual* interference with the judicial process" but narrowly focuses on "any public *perception* of potential influence."[33] The Claimant asserts that it is readily apparent to the public both within and outside Korea that the reason the Respondent filed the SoD was to defend the claim brought against it under the Treaty.[34] The

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26 Respondent's letter of 12 November 2019, p. 3.
27 Respondent's letter of 12 November 2019, p. 3.
28 Claimant's Answer to the Application, p. 3; Claimant's Reply Comments, p. 4.
29 Claimant's Answer to the Application, p. 1.
30 Claimant's Reply Comments, p. 1.
31 Claimant's Reply Comments, p. 1 [emphasis added by the Claimant].
32 Claimant's Reply Comments, p. 4.
33 Claimant's Reply Comments, p. 2.
34 Claimant's Reply Comments, p. 2.

Claimant also points out that it is "plain from the face" of the SoD that the Respondent sought to avoid engaging with the key facts relating to the court proceedings "at every opportunity."[35]

31. The Claimant contests that the publication of the SoD could pose a risk of undue influence.[36] The Claimant argues that any risk of undue influence is "entirely illusory" absent any evidence that the Korean judiciary is susceptible to improper influence from the executive branch of the Government.[37] The Claimant considers the Parties to be in agreement that there is no genuine reason to fear that the publication of the SoD would compromise the independence of the Korean judiciary.[38] Moreover, the Claimant notes, since only issues under Korean law are involved in the pending criminal proceedings, the publication of the SoD centering on questions of international law cannot impact the deliberations of the Korean courts.[39]

32. Second, the Claimant submits that the risk that the public might perceive the publication of the SoD as an attempt by the executive branch to influence the judiciary is implausible.[40] In particular, the Claimant notes that the Respondent expressly concedes that it "endeavoured in the [SoD] not to take any position on the evidence and findings" still before the courts.[41] The Claimant further notes that the Respondent has failed to identify any media report or public speculation that could undermine public confidence in the judiciary following the publication of its Response, which likewise addressed facts relevant to the criminal proceedings.[42]

33. Third, the Claimant submits that it is highly unlikely that the lower courts would revisit factual findings not substantively finalized by the Supreme Court, as the lower courts have no reason to reopen any factual aspects that were not reviewed or clarified in the Supreme Court's judgment.[43] The Claimant also points out that the Respondent wrongly suggests that the factual findings of the *Moon/Hong* appeals remain subject to review by the Supreme Court.[44] According to the

35 Claimant's Reply Comments, p. 2.
36 Claimant's Answer to the Application, p. 2; Claimant's Reply Comments, p. 2.
37 Claimant's Answer to the Application, p. 3.
38 Claimant's Reply Comments, p. 2.
39 Claimant's Answer to the Application, p.3.
40 Claimant's Reply Comments, p. 2.
41 Claimant's Answer to the Application, p. 3; Claimant's Reply Comments, p. 2.
42 Claimant's Reply Comments, p. 2.
43 Claimant's Reply Comments, pp. 2-3.
44 Claimant's Rely Comments, p. 3.

Claimant, in neither case is the ground of appeal of "grave mistake of fact that affects the decision" available.[45]

34. Fourth, the Claimant characterizes the Respondent's invocation of Articles 11.21.3 and 11.23.4 in the Respondent's Rejoinder as "groundless" and "late."[46] The Claimant notes that the Application does not invoke any applicable exception in the Treaty as a justification for the delay sought.[47] The Respondent, in the Claimant's view, has not only failed to comply with the Treaty requirement to "clearly designate the protected information at the time it is submitted to the [T]ribunal,"[48] but has also failed to identify what specific information in the SoD it regards as "confidential information."[49] According to the Claimant, such failure is "fatal" as there is no basis on which the Tribunal can balance the alleged harm the publication might cause against the consequence of the Application.[50]

35. The Claimant further rejects the notion that the SoD is an action solely of the executive branch of the Government of the Republic of Korea.[51] The Claimant notes that the Respondent, for purposes of this Arbitration, is not only the executive branch but the Republic of Korea *in toto*, including the judiciary.[52] In the Claimant's view, the Respondent's "posture adopted for litigation […] bears no relationship to factual, or legal, reality."[53]

36. The Claimant emphasizes that there is an overriding public interest in the transparency of these arbitration proceedings, which concerns not only the Korean public and the American public but also the global public with an interest in the Korean business market and climate.[54] The Claimant further argues that the Respondent's Application is "plainly excessive," particularly when the dates on which the Korean courts will issue their decisions are uncertain.[55]

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45 Claimant's Reply Comments, p. 3.

46 Claimant's Reply Comments, p. 3.

47 Claimant's Answer to the Application, p. 2.

48 Claimant's Reply Comments, p. 3, citing Article 11.21.4(b) of the Treaty.

49 Claimant's Answer to the Application, 3; Claimant's Reply Comments, p. 3.

50 Claimant's Reply Comments, p. 3.

51 Claimant's Answer to the Application, p. 2.

52 Claimant's Answer to the Application, p. 2.

53 Claimant's Answer to the Application, p. 2.

54 Claimant's Answer to the Application, p. 1; Claimant's Reply Comments, p. 4.

55 Claimant's Answer to the Application, p. 4.

37. The Claimant further notes that the procedural timetable does not make provision for the Respondent to submit an Amended SoD following the issuance of the relevant Korean court decisions.[56]

38. Finally, in its comments on the Respondent's letter of 12 November 2019, the Claimant argues that the Respondent has failed to identify any confidential information in the passages which it contends fall within the scope of Article 23.4. According to the Claimant, it does not have to provide any special justification for the prompt publication of the SoD "since this is what the Respondent is already obligated to do."[57]

III. THE TRIBUNAL'S ANALYSIS

39. The Respondent did not initially invoke any specific provisions of the Treaty or Procedural Order No. 1 in support of its Application, explaining (in its Comments) that "it is unnecessary to support [the] application for postponing publication of the [SoD] with any of the exceptions under the Treaty, because the [Respondent] is not … asking the Tribunal to forgo the application of a Treaty requirement."[58] According to the Respondent, "[t]he Treaty does not require the [SoD] to be published immediately upon submission to the Tribunal. Article 11.21.1 requires publication 'promptly,' but 'promptly' is not defined in the Treaty, and so the timing of publication is in the Tribunal's discretion."[59]

40. Subsequently, in its Comments, the Respondent argued that, in any event, the "exception to publication under Article 11.21.3, read with Article 23.4 of the Treaty, applies here."[60] According to the Respondent, Article 11.21.3 does not require the Respondent "to furnish or allow access to information that it may withhold in accordance with Article 23.4."[61] In its letter of 12 November 2019, the Respondent further developed its position, arguing that its Application "does not require a finding by the Tribunal that the grounds under Article 23.4 of the Treaty are satisfied" since "[t]hose grounds are necessary to permanently block the disclosure of information, which is not the application currently before the Tribunal."[62]

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56 Claimant's Answer to the Application, p. 4.

57 Claimant's letter of 15 November 2019, p. 4.

58 Respondent's Comments, p. 1.

59 Respondent's Comments, p. 1.

60 Respondent's Comments, p. 1.

61 Respondent's Comments, p. 1.

62 Respondent's letter of 12 November 2019, pp. 2-3.

41. The Tribunal is unable to agree with the Respondent's primary position that the timing of the publication of the Parties' submissions or indeed of any of the other documents mentioned in Article 11.21.1 is entirely within the Tribunal's discretion. Article 11.21.1 requires that documents to be published under the provision be transmitted "promptly" to the non-disputing Party and made available to the public. While the language of Article 11.21.1 is not entirely clear as to whether the term "promptly" qualifies not only the transmittal of the documents but also their publication ("the respondent shall … *promptly transmit* [the following documents] to the non-disputing Party and *make them available* to the public;" emphasis added), it is clear from the context that the Tribunal has no power to suspend the publication of the documents referred to in the provision indefinitely, which is effectively what the Respondent requests. The Tribunal therefore rejects the Respondent's argument that the Tribunal can delay the publication of the SoD in the absence of any justification, or exception, applicable under the Treaty. For the same reason, the Tribunal is unable to accept the Respondent's argument, set out in its letter of 12 November 2019, that the Application "does not require a finding by the Tribunal that the grounds under Article 23.4 of the Treaty are satisfied" because the Respondent merely seeks a delay in the publication of the SoD.

42. As noted above, in its Comments the Respondent has indeed invoked the exceptions in Article 11.21.3 of the Treaty, "read with Article 23.4 of the Treaty." Article 11.21.3 provides:

> Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 23.2 (Essential Security) or Article 23.4 (Disclosure of Information).

43. Article 23.4 (Disclosure of Information) of the Treaty provides, in turn:

> Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

44. Article 11.21.3, read together with Article 23.4 of the Treaty, thus allows the Respondent (i) to decline to disclose protected information; and (ii) to decline to furnish or allow access to confidential information the disclosure of which would, *inter alia*, "impede law enforcement or otherwise be contrary to the public interest." The term "protected information" is defined in Article 11.28 of the Treaty as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law." Paragraph 10.4 of Procedural Order No. 1 further specifies that "[t]he 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."

45. According to paragraph 10.1 of Procedural Order No. 1, the publication of documents listed in Article 11.21.1 of the Treaty is "subject to the prior redaction of protected information." Paragraph 10.5 of Procedural Order No. 1 further provides:

> 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.

46. The term "confidential information" (referred to in Article 23.4) is not defined in the Treaty, but Article 23.4 exempts, from a respondent's obligation to furnish or allow access to confidential information, only that subset of confidential information "the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private."[63]

47. The Tribunal notes that, in response to the Tribunal's invitation, the Respondent has now identified the passages in the SoD that in its view fall under Article 23.4 of the Treaty. In providing that information, however, the Respondent stressed that "it does not seek the publication of a heavily redacted version of the Statement of Defence that blacks out the identified portions."[64] Indeed, according to the Respondent, "[p]ublishing instead a heavily redacted version would exacerbate the risk of inaccurate and prejudicial media reporting by inviting conjecture as to the content of the redacted portions and the reasons the Republic of Korea chose to redact certain passages and not others."[65] The issue before the Tribunal therefore is not whether the Respondent is entitled to redact the information in the relevant passages of the SoD which in its view fall under Article 23.4 of the Treaty, pending the completion of the relevant criminal proceedings in the Republic of Korea, but whether the Respondent is entitled under Article 23.4 of the Treaty to delay the publication of the SoD in its entirety.

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63 To the extent that the term "confidential information" covers information related to "legitimate commercial interests of particular enterprises, public or private," there appears to be some overlap between the two terms (as the term "protected information" also covers "any information not in the public domain that is designated as such by a Party on grounds of commercial or technical confidentiality").

64 Respondent's letter of 12 November 2019, p. 3.

65 Respondent's letter of 12 November 2019, p. 3.

48. In this connection, the Tribunal notes that Article 23.4 of the Treaty appears to be designed to allow the respondent State to decline to furnish or allow access to certain confidential information altogether and not merely to require that it be redacted from information otherwise provided. This reading is consistent with the content of Article 23 which deals with "Exceptions," that is, exceptions to the obligations of the State Parties under the Treaty, as well as Article 11.21.4, which sets out the procedure for protecting "protected information" from disclosure to the non-disputing Party and the public (but does not preclude its disclosure to the party to the dispute and the arbitral tribunal), and does not specifically address "confidential information." In the present case, however, the Respondent has already disclosed the relevant information in its SoD, without making any redactions to it at the time of its submission in accordance with Article 11.21.4(c) and paragraph 10.5 of Procedural Order No. 1. Consequently, the Respondent has not taken the view that the relevant information in the SoD, which in its view is covered by the exception in Article 23.4 of the Treaty, cannot be published at all. The Respondent's position is that it should not be published pending the completion of the criminal proceedings in the Republic of Korea.

49. Having carefully considered the matter, including by way of seeking further information from the Parties, the Tribunal finds that the Respondent's position cannot be upheld under Article 23.4 of the Treaty. In the Tribunal's view, Article 23.4 cannot be applied in such a broad manner as suggested by the Respondent, to delay the publication of the SoD in its entirety, that is, including information that indisputably does not fall under Article 23.4. Even assuming Article 23.4 were applicable to justify delaying the publication of a party's submission, it could only apply to and justify delaying the publication of confidential information in the submission that is specifically identified as such. In the present case, while the Respondent has sought to identify the information which in its view falls under Article 23.4 of Treaty, it has specifically confirmed that it does not wish to redact such information in order to allow a prompt publication of the SoD.

50. Moreover, and in any event, the Tribunal notes that the Respondent has failed to make a *prima facie* case that the disclosure of the relevant information in the SoD "would impede law enforcement or otherwise be contrary to the public interest," as required by Article 23.4. Indeed, the Respondent does not argue that the disclosure of the relevant information, as such, would justify delaying the publication of the SoD; it contends that "media reporting could wrongly cast the Statement of Defence as an attempt to sway the judicial process or to defend the alleged actions of the former Park administration," and that "[s]uch reporting, while untrue, could threaten the public's perception of the integrity of the criminal proceedings."[66] What the Respondent is

[66] Respondent's letter of 12 November 2019, p. 2. See also the Application, p. 2 ("[I]t is essential that the executive branch of the government of the Republic of Korea not take any action that could be seen as

thus concerned about is not the information in the SoD as such, but the potentially misleading or untrue reporting by the media of the Respondent's position in these proceedings. While the Respondent's concern may be legitimate, it is not a subject matter that falls under Article 23.4, which only covers "information." The Respondent's concerns must be addressed by means other than delaying the publication of the SoD, and indeed, the very fact that the Respondent has voiced its concerns in support of the Application shows, in itself, that it does not intend to interfere with the pending criminal proceedings in the Republic of Korea, or that its pleadings in this international claim be seen as an attempt to influence the course of justice in the Republic of Korea.

IV. THE TRIBUNAL'S DECISION

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

(a) The Respondent's Application to delay the publication of the Statement of Defence is dismissed; and

(b) The Tribunal's decision on costs is reserved.

Place of Arbitration: London, United Kingdom

Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal

potentially having an influence on, or in any way seeking to influence, the Supreme Court's and other Korean courts' continuing deliberations on these issues while they remain *sub judice*. The Republic of Korea is concerned that the discussion of these pending criminal proceedings in its Statement of Defence, regardless of the actual content or intent, may be construed as an attempt to interfere with the Korean courts' duty to objectively consider the issues before them, in particular where those issues might be seen (rightly or wrongly) as in any way determinative of the claim against the Republic of Korea in this proceeding. The risk of such influence on the criminal proceedings would be exacerbated by media reports that sensationalise or potentially distort the Republic of Korea's submissions.").