

**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, 1976**

PCA CASE Nº 2018-55

-between-

- 1. MASON CAPITAL, L.P. (U.S.A.)**
- 2. MASON MANAGEMENT LLC (U.S.A.)**
(“Claimants”)

-and-

REPUBLIC OF KOREA
(“Respondent,” and together with Claimants, the “Parties”)

PROCEDURAL ORDER NO. 11

The Arbitral Tribunal

Professor Dr. Klaus Sachs (Presiding Arbitrator)

The Rt. Hon. Dame Elizabeth Gloster

Professor Pierre Mayer

Registry

Permanent Court of Arbitration

8 July 2022

WHEREAS on 25 February 2019, the Tribunal issued Procedural Order No. 1, which, *inter alia*, stated:

9.1. The PCA shall make available to the public, on its website, the information and documents listed in Article 11.21.1 of the FTA, subject to the prior redaction of protected information in accordance with the following sub-paragraphs.

9.2. Documents that are to be made public pursuant to Article 11.21.1(c) of the FTA 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 FTA, but shall not include expert reports, witness statements, fact exhibits or legal authorities.

9.3. Hearings shall be opened to the public pursuant to Article 11.21.2 of the FTA by transmitting a live feed of the hearing to a separate viewing room at the hearing venue, and the PCA shall make the appropriate logistical arrangements in consultation with the Parties and the Tribunal. 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.

9.4. Protected information 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.

9.5. Further to Article 11.21.4(b) of the FTA, a Party claiming that documents produced to the other Party contain protected information shall clearly designate the documents at the time the documents are produced to the other Party, and designate the type of information in the document claimed to be protected information.

9.6. Pursuant to Article 11.21.4(c) of the FTA, a Party claiming that certain information constitutes protected information shall:

- (a) if it is submitting a document to the Tribunal containing information it claims to be protected; or
- (b) if the other Party has submitted a document to the Tribunal produced by the Party containing information it claims to be protected,

submit a redacted version of the document that does not contain such information within 21 days. Only the redacted version shall be provided to the non-disputing Party pursuant to the FTA, and/or made public pursuant to the preceding sub-paragraphs.

9.7. 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 FTA 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 FTA.

[...]

WHEREAS on 9 March 2022, the Tribunal issued Procedural Order No. 10, which, *inter alia*, stated:

9.2. Following the Hearing, the PCA will publish the transcripts of the Hearing on the PCA's website. Prior to publication of the transcripts, the PCA will make the transcripts available to the Parties so that the Parties may propose redactions of protected information. The Parties may

propose redactions of protected information even if such information was not designated as protected during the Hearing.

WHEREAS between 21 to 25 March 2022, a hearing was held at the New York International Arbitration Center, 620 8th Avenue, New York, NY 10018, United States;

WHEREAS on 22 April 2022, the Tribunal provided to the Parties the revised transcript of the hearing and invited the Parties to submit their proposed redactions of protected information, if any;

WHEREAS on 29 April 2022, the Parties submitted their respective post-hearing briefs, with supporting evidence;

WHEREAS on 11 May 2022, oral closing submissions were held by videoconference;

WHEREAS on 13 May 2022, Respondent submitted proposed redactions of protected information in the Parties' respective post-hearing briefs;

WHEREAS also on 13 May 2022, the Parties requested a one-week extension to submit the Parties' proposed redactions of protected information in the hearing transcripts, which was subsequently granted;

WHEREAS on 23 May 2022, Respondent submitted its proposed redactions of protected information in the hearing transcript and post-hearing briefs and Claimants advised that they did not seek to submit any proposed redactions of protected information;

WHEREAS also on 23 May 2022, the Tribunal invited Claimants to indicate whether they objected to Respondent's designation of information as protected information in the hearing transcript;

WHEREAS on 24 May 2022, Claimants submitted a letter, with supporting exhibits, setting out their objections to Respondent's proposed redactions to the hearing transcript and post-hearing briefs;

WHEREAS on 25 May 2022, the Tribunal invited Respondent to provide any comments on Claimants' letter of 24 May 2022;

WHEREAS on 30 May 2022, Respondent submitted its response, with supporting exhibits, to Claimants' letter of 24 May 2022.

THE TRIBUNAL HEREBY ORDERS:

1. This procedural order deals with Claimants' objections against Respondent's proposed redactions to the hearing transcript and the post-hearing briefs pursuant to Article 11.21.4(d) of the FTA and Section 9.7 of Procedural Order No. 1.
2. Claimants object to the redaction of three categories of information redacted by Respondent: (a) evidence discussed or quoted in Korean court decisions, (b) references to and quotations from the statements to the prosecutor provided by Respondent's fact witness, Mr. Cho, and (c) the identity of the Korean government officials convicted for the criminal scheme.
3. Respondent submits that the information designated by it as protected information in

accordance with Article 11.28 of the Treaty and Section 9.4 of Procedural Order No. 1 falls within three categories: (i) personal information of individuals which is protected from disclosure under Korea's Official Information Disclosure Act and Personal Information Protection Act ("PIPA"); (ii) trial records and investigative files which are protected from disclosure under Korea's Criminal Procedure Act; and (iii) Blue House and Ministry of Health and Welfare ("MHW") documents which are protected from disclosure pursuant to Articles 9(1)(2) and 9(1)(5) of Korea's Official Information Disclosure Act.

4. The Tribunal understands that while Claimants' categories (b) and (c) correspond to Respondent's categories (ii) and (i), Claimant's category (a) of evidence discussed or quoted in Korean court decisions comprises information that Respondent assigns to all three of its categories. For ease of reference, the Tribunal will follow Respondent's categorization to discuss each of the three categories of protected information in turn.
5. *First*, as regards the protection of personal information of individuals, Claimants submit that the individuals implicated in the Korean courts' criminal decisions are not private individuals but public officials who participated in a criminal scheme. Claimants further contend that their identity and their actions are publicly known. Respondent argues that the identity of individuals referenced or implicated in Korean court decisions falls under "personal information" subject to non-disclosure pursuant to Article 9(1) of the Official Information Disclosure Act and Article 2.1 of the PIPA. According to Respondent, it is irrelevant as a matter of Korean law that the public may already know the identity of these individuals.
6. Article 11.28 of the FTA defines "protected information" as "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law". Respondent submits that the Korean Official Information Disclosure Act and the PIPA protect the personal information of individuals from disclosure.
7. Claimants do not dispute the applicability of these Korean laws. Rather, they argue that the individuals concerned are public officials whose identity is already public knowledge. The Tribunal notes that while Section 9.4 of Procedural Order No. 1 refers to "information not in the public domain", Article 11.28 of the FTA does not contain any such limitation. As per its wording, the definition of protected information in Section 9.4 of Procedural Order No. 1 is not exhaustive. By contrast, neither the FTA nor Korean law exclude the redaction of information that is already in the public domain.
8. Moreover, it has not been suggested that the Korean Official Information Disclosure Act and the PIPA make a distinction between public officials and private citizens when it comes to the protection of personal information. In the Tribunal's view, neither of these circumstances is a sufficient reason to uphold Claimants' objection to Respondent's proposed redactions of personal information of individuals.
9. *Second*, it is Claimants' submission that prosecutorial evidence, even if not directly incorporated in Korean court decisions, is part of public criminal proceedings and available to the public upon request pursuant to Article 3 of the Korean Official Information Disclosure Act. According to Claimants, there is no basis to redact the testimony that a witness in this arbitration had previously provided to Korean prosecutors. Respondent argues that statements of witnesses to Korean prosecutors are protected from disclosure under Korea's Criminal Procedure Act and that, as per a ruling of the Korean Supreme Court, the procedures in the Korean Official Information Disclosure Act do not apply to the trial records and investigative files of concluded criminal proceedings.
10. The Tribunal agrees with Respondent's analysis that, as confirmed in a ruling of the Korean

Supreme Court,¹ Article 59-2 of the Korean Criminal Procedure Act regulates the public access to finalized litigation records as *lex specialis* and takes precedence over Article 3 of the Korean Official Information Disclosure Act. As per Article 59-2 of the Korean Criminal Procedure Act, the trial records and investigative files of Korean prosecutors are not available to the general public but may only be inspected under certain conditions by a limited group of interested persons. The Tribunal accepts that this narrowly circumscribed access to the trial records and investigative files of Korean prosecutors is a valid reason to designate such information as protected according to Article 11.21.4 of the FTA. In the Tribunal's view, this assessment is not changed by the fact that the redacted information concerns the testimony of a witness in this arbitration.

11. *Third*, Claimants contest that the Blue House and MHW documents recording the steps taken in furtherance of the criminal scheme were in the national interest and are thus exempt from disclosure. Claimants argue that while Korean court decisions are undisputedly public, Respondent proposes redacting from the public record of this arbitration evidence directly incorporated into its own courts' (public) decisions. Respondent submits that the Blue House and MHW documents are protected from disclosure pursuant to Articles 9(1)(2) and 9(1)(5) of Korea's Official Information Disclosure Act as they contain protected information recording internal analysis and discussions within the former administration as to government policies, consideration of pending issues as well as decision-making processes in relation to various national interests, including regulations on business sectors. Respondent emphasizes that it has not redacted the Korean court decisions themselves.
12. The Tribunal accepts that disclosure of internal documents of the Korean government and administration recording internal discussions and decision-making processes might affect Respondent's national interests and can be a valid reason for redaction pursuant to Article 11.21.4 of the FTA. The Tribunal is further of the view that Respondent is entitled to a certain degree of discretion in determining which disclosure might endanger its national interests. The Tribunal is not convinced that Respondent exceeded this discretion by making the proposed redactions to the hearing transcript and the post-hearing briefs.

¹ Korean Supreme Court, 2013Du20882 dated 15 December 2016 (Exhibit B to Respondent's letter of 30 May 2022), paras. 1-2.

13. Based on the foregoing, the Tribunal **decides** as follows:
- a. Claimants' objections to Respondent's proposed redactions to the hearing transcript and the Parties' post-hearing briefs are dismissed.
 - b. Respondent's proposed redactions comply with Article 11.28 of the FTA and Section 9.4 of Procedural Order No. 1.

Place of arbitration (legal seat): Singapore

A handwritten signature in blue ink, appearing to read "Klaus Sachs".

Professor Dr. Klaus Sachs
(Presiding Arbitrator)

On behalf of the Tribunal