



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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**CERTIFICATE**

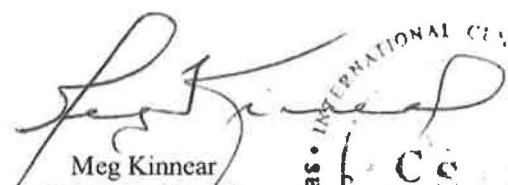
**LSF-KEB HOLDINGS SCA AND OTHERS**


**v.**

**REPUBLIC OF KOREA**

**(ICSID CASE NO. ARB/12/37) – RECTIFICATION**

I hereby certify that the attached document is a true copy of the Tribunal's Decision on Rectification dated May 8, 2023.

  
Meg Kinnear  
Secretary-General

A circular stamp of the International Centre for Settlement of Investment Disputes (ICSID). The outer ring contains the text "INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES". The inner circle contains the acronym "ICSID".

Washington, D.C., May 8, 2023

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the rectification proceeding between

**LSF-KEB HOLDINGS SCA, LSF SLF HOLDINGS SCA, HL HOLDINGS SCA,  
KUKDONG HOLDINGS I SCA, KUKDONG HOLDINGS II SCA, STAR HOLDINGS  
SCA, LONE STAR CAPITAL MANAGEMENT SPRL, LONE STAR CAPITAL  
INVESTMENTS S.À.R.L.**

Claimants

and

**REPUBLIC OF KOREA**

Respondent

**ICSID Case No. ARB/12/37 – Rectification**

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**DECISION ON RECTIFICATION**

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***Members of the Tribunal***

The Honourable Ian Binnie CC, KC, President  
The Honourable Charles N. Brower, Co-Arbitrator  
Professor Brigitte Stern, Co-Arbitrator

***Secretary of the Tribunal***

Ms. Geraldine R. Fischer

*Date of dispatch to the Parties: 8 May 2023*

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## I. PROCEDURAL BACKGROUND

1. On 30 August 2022, the Tribunal rendered its Award in *LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37) (the “**Award**”), together with Judge Brower’s Concurring Opinion and Professor Stern’s Dissenting Opinion.
2. On 14 October 2022, pursuant to Article 49(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and Rule 49 of the Rules of Procedure for Arbitration Proceedings (2006) (the “**ICSID Arbitration Rules**”), the Republic of Korea (“**Korea**” or the “**Respondent**”) submitted a Request for Rectification of the Award (the “**Rectification Request**”), together with Legal Authorities RA-381 through RA-385,<sup>1</sup> to the ICSID Secretary-General.
3. Article 49(2) of the ICSID Convention provides as follows:

*(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered. (Emphasis added)*
4. Korea asked the Tribunal to “rectify and amend” the Award by:

*a. modifying the final sentence of Award footnote 184 to state that “the Claimant’s requested damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2013,” not “the Claimants damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2011”;*

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<sup>1</sup> There are two sets of legal authorities RA-381 through RA-385. In the original arbitration, the Respondent filed legal authorities numbered RA-381 through RA-385 with Respondent’s Submission on Costs, dated 15 August 2016, which are different than the same-numbered authorities filed with the Rectification Request. For clarity, when referenced in this Decision on Rectification, the Tribunal has labelled the authorities cited by the Respondent to indicate whether these authorities are from the “[original arbitration]” or the “[rectification proceeding].”

*b. indicating that the total loss resulting from the Hana transaction was USD 432,037,364, not USD 433,000,000; and*

*c. indicating that the principal amount of damages incurred by Claimant as of 3 December 2011 was USD 216,018,682, not USD 216,500,000.*<sup>2</sup>

5. Korea also requested that Judge Brower's Concurring Opinion be modified to substitute "USD 432,037,364" instead of "USD 433 million" as the principal sum.<sup>3</sup>
6. On 19 October 2022, the ICSID Secretary-General registered the Rectification Request and notified the Parties and the Tribunal of its registration pursuant to Rule 49(2) of the ICSID Arbitration Rules.<sup>4</sup>
7. In accordance with ICSID Arbitration Rule 49(3), on 21 October 2022 the Tribunal fixed a schedule for the Parties to file additional rounds of observations on the Rectification Request.
8. Pursuant to the Tribunal's schedule, on 21 November 2022, LSF-KEB Holdings SCA, LSF SLF Holdings SCA, HL Holdings SCA, Kukdong Holdings I SCA, Kukdong Holdings II SCA, Star Holdings SCA, Lone Star Capital Management SPRL and Lone Star Capital Investments S. à r. l. (the "**Claimants**") filed a response to the Rectification Request (the "**Claimants' Response**"). As part of their prayer for relief, the Claimants "request[ed] that the Tribunal rectify the 'mismatch' error identified by [the] Respondent, but do so completely [...]" by also modifying all of the relevant exchange rate calculations. Specifically, the Claimants ask[ed] the Tribunal by way of Counter-Request to:

- *Rectify the Award to reflect that, upon application of the correct exchange rate as calculated on the date of the relevant agreement, the U.S. Dollar value of the price set in the July 2011 SPA was USD 4.168 billion;*

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<sup>2</sup> Respondent's Rectification Request, ¶ 39 (emphasis original). Korea submitted a table "show[ing] the paragraphs and footnotes that Korea has identified as containing errors requiring rectification": Respondent's Rectification Request, ¶ 40.

<sup>3</sup> Respondent's Rectification Request, ¶ 40.

<sup>4</sup> The Request was accompanied by the lodging fee in accordance with ICSID Arbitration Rule 49(1)(d).

- *Rectify the Award to reflect that, upon application of the **correct exchange rate** as calculated on the date of the relevant agreement, the U.S. Dollar value of the price set in the December 2011 SPA was USD 3.461 billion; and*
  - *Rectify the Award to reflect that, once **the errors above** are rectified, the pre-interest value of Claimants' loss, as assessed on December 3, 2011, is USD 706.8 million (prior to any reduction for contributory fault).<sup>5</sup> (Emphasis added)*
9. The Claimants also asked that Judge Brower's Concurring Opinion be updated to use "USD 706.8 million" instead of "USD 433 million."<sup>6</sup>
  10. On 29 November 2022, the Respondent applied to have the Claimants' Response declared inadmissible as unresponsive to the question before the Tribunal (the "**Respondent's Application**"). On 2 December 2022, the Claimants filed an opposition to the Respondent's Application to strike their Response which was accompanied by Legal Authorities CA-866 and CA-867.
  11. On 20 January 2023, the Tribunal issued its "**Decision on the Respondent's Application**," ordering that certain portions of the Claimants' Response be struck out and inviting the Claimants to redact or resubmit a revised Response to the Rectification Request on or before 30 January 2023. The Tribunal also amended the schedule for the Parties' second round of pleadings on the Rectification Request.
  12. In particular, in its Decision the Tribunal noted:

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<sup>5</sup> Claimants' Response, ¶ 36. Like the Respondent, the Claimants also submitted a table with "references to the specific parts of the Award where the errors should be rectified." Claimants' Response, ¶ 38.

<sup>6</sup> Claimants' Response, ¶ 38. The Claimants requested the use of "values and exchange rates assessed on the Tribunal's chose July 2011 and December 2011 dates, per the Tribunal's stated intentions" (Claimants' Response, ¶ 6). While noting that "throughout this arbitration, both Parties and the Tribunal have consistently and correctly assessed the quantum of loss in U.S. Dollars" (Claimants' Response, ¶ 6), the Claimants sought adjustment of the Award not only for Excess Principal and Double Interest (as requested by the Respondent) but also to correct for the different Korean Won/U.S. Dollar exchange rates for 8 July 2011 and 3 December 2011. According to the Claimants, application of the relevant exchange rates to the respective share prices in Korean Won on 8 July 2011 and on 3 December 2011, results in a loss in share value attributable to the Treaty violation of USD 706.8 million. In the result, taking into account the Claimants' 50% contribution to the loss, the Claimants calculated their entitlement, as rectified, to be USD 353.4 million plus interest from 3 December 2011 until payment rather than USD 216.5 million. *See* Claimants' Response, ¶¶ 20-29.

- (i) The Claimants' "alternative solution" to the Request for Rectification was untimely, and therefore inadmissible, unless it could be admitted as a valid response to the error raised by the Respondent.<sup>7</sup> It was therefore necessary to define the precise "error" in the Award sought to be addressed by the Respondent's Request for Rectification "in relation to the computation of interest";<sup>8</sup>
- (ii) Both Parties agreed that the Tribunal had made a "clerical arithmetical or similar error in the Award" within the scope of ICSID Convention Article 49(2);
- (iii) The Tribunal was therefore required (ICSID Convention Article 49(2) uses the term "shall") to consider adjustments to the interest calculation to update Professor [REDACTED] interest calculations to 3 December 2011 being the "Date of Injury";<sup>9</sup>
- (iv) However, the Tribunal did not agree with the Claimants that the Respondent had requested whatever modifications were necessary to correct the alleged "misalignment" between the Tribunal's reasoning and its award of damages. In the Tribunal's view, the Respondent had clearly sought only rectification of the interest component of an award stated in U.S. Dollars;<sup>10</sup>
- (v) The Respondent's request made no reference to exchange rates and in the Tribunal's view, foreign currency exchange rates constituted an allegation of an entirely different "clerical, arithmetical or similar error" in the Award not raised by the Respondent's request for an interest correction;<sup>11</sup>
- (vi) Accordingly, the Claimants were not entitled under the guise of a "response" to raise an entirely new complaint about foreign currency exchange issues that were not part of the Respondent's request and that ought to have been raised by the

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<sup>7</sup> Decision on the Respondent's Application, ¶¶ 24, 26.

<sup>8</sup> Decision on the Respondent's Application, ¶ 26; Respondent's Rectification Request, ¶ 4.

<sup>9</sup> Decision on the Respondent's Application, ¶ 27.

<sup>10</sup> Decision on the Respondent's Application, ¶¶ 29-30.

<sup>11</sup> Decision on the Respondent's Application, ¶¶ 30-32.

Claimants, if pursued at all, as an independent request for rectification under Article 49(2) of the ICSID Convention, which had not been done;<sup>12</sup>

- (vii) The Claimants' Response was therefore struck from the record to the extent that it sought to raise foreign exchange issues rather than observations on the Respondent's request to rectify the alleged erroneous interest calculation;<sup>13</sup> and
- (viii) The Claimants were invited to resubmit their Response on or before 30 January 2023 either in a redacted format or by way of a fresh document.<sup>14</sup>

13. On 30 January 2023, the Claimants filed a Revised Response to Korea's Rectification Request (the "**Claimants' Revised Response**") in which they "insisted" (their choice of word) that despite the strike-out, the Tribunal address and resolve their foreign exchange rate arguments:

*[The] Claimants **insist** that Respondent's proposed rectifications will leave uncorrected significant errors caused when the Tribunal relied in the Award on calculations that did not reflect the Tribunal's own reasoning in the Award, as identified (albeit only in part) in Respondent's Request.*<sup>15</sup> (Emphasis added)

14. On 2 February 2023, the Respondent requested the Tribunal to declare the Claimants' Revised Response inadmissible and "order Claimants again to submit a revised response limited to observations on Korea's submissions concerning interest on the US Dollar-denominated damages computation in the Award and eliminating any request that the

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<sup>12</sup> Decision on the Respondent's Application, ¶ 32.

<sup>13</sup> Decision on the Respondent's Application, ¶ 35.

<sup>14</sup> Decision on the Respondent's Application, ¶ 36.

<sup>15</sup> Claimants' Revised Response, ¶¶ 5-6. The Claimants renewed their alternative claim from the earlier struck out Response, requesting that the Tribunal:

- *Correct Respondent's calculations to reflect that, **upon application of the correct exchange rate** as calculated on the date of the relevant agreement, the U.S. Dollar value of the price set in the December 2011 SPA was USD 3.461 billion; and*
- *Correct Respondent's calculations to reflect that, once the error above is rectified, the pre-interest value of Claimants' loss, as assessed on December 3, 2011, is USD 480.32 million (prior to any reduction for contributory fault).* (Emphasis added)

Claimants' Revised Response, ¶ 13.

Tribunal rectify purported errors in foreign currency exchange rates.” The Claimants filed observations opposing this request on 3 February 2023.

15. On 7 February 2023, the Tribunal informed the Parties that it saw “no compelling need to strike out” the Claimants’ Revised Response as “it will only be considered insofar as the content deals with the interest question raised by the Respondent.” The Tribunal then invited the Respondent to reply to the Claimants’ Revised Response by 21 February 2023.
16. On 14 February 2023, the Respondent notified the Tribunal that it would not be filing a reply to the Claimants’ Revised Response and requested that the Tribunal proceed to issue a ruling on Korea’s Rectification Request.
17. Further to the Tribunal’s 11 April 2023 request, on 18 April 2023, the Parties presented their Submissions on Costs (the “**Claimants’ Cost Submission**” and the “**Respondent’s Cost Submission**”).<sup>16</sup>
18. On 1 May 2023, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rules 49(4) and 46.

## **II. THE PARTIES’ ARGUMENTS**

19. The Parties’ arguments, as advanced respectively in the Respondent’s Rectification Request and the Claimants’ Revised Response, may be summarized as follows.

### **A. THE RESPONDENT’S RECTIFICATION REQUEST DATED 14 OCTOBER 2022**

20. The Respondent notes that in its Award dated 30 August 2022, the Tribunal “found that [the] Claimant [*i.e.*, LSF-KEB Holdings SCA] suffered a loss due to a Treaty breach, [on] 3 December 2011 (**‘Date of Injury’**)”<sup>17</sup> of USD 433 million of which Korea was responsible for 50% being USD 216.5 million.<sup>18</sup>

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<sup>16</sup> On 19 April 2023, the Claimants submitted an unsolicited response to the Respondent’s Cost Submission to which the Respondent presented an unsolicited reply on 20 April 2023.

<sup>17</sup> Respondent’s Rectification Request, ¶ 4.

<sup>18</sup> Respondent’s Rectification Request, ¶¶ 36-38.

21. The Respondent surmised that the Tribunal's Award was based on the Report of the Claimants' expert Professor [REDACTED] [REDACTED] which gives the figure of USD 433 million as including interest from 24 May 2011 to 30 September 2013, not 30 September 2011, and thus, the Respondent says, the Award:

- (i) Erroneously included interest for the period 24 May 2011 to 2 December 2011 (which the Respondent labels "Excess Principal") which predated the Date of Injury;<sup>19</sup> and
- (ii) Thereafter erroneously ordered interest from 3 December 2011 to 30 September 2013 despite having already included that period of time in the USD 433 million assessment (which the Respondent labels "Double Interest").<sup>20</sup>

In the result, based on its calculations under the heading "Calculation of Interest on Damages,"<sup>21</sup> the Respondent submits the Award should be reduced to USD 216,018,682 (instead of USD 216.5 million) and, as rectified, directed to carry interest from and after 3 December 2011.<sup>22</sup>

22. According to the Respondent, rectification to remove the Excess Principal and the Double Interest can be (and indeed "shall" be) achieved by correcting one clerical (or similar) error and two arithmetical (or similar) errors all of which are within the scope of Article 49(2) of the ICSID Convention.<sup>23</sup>
23. Having regard to the Claimants' 50% contribution to the loss, the Respondent therefore contends that its liability should be reduced from USD 216.5 million to USD 216,018,682

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<sup>19</sup> Respondent's Rectification Request, ¶¶ 4, 35.

<sup>20</sup> Respondent's Rectification Request, ¶¶ 4, 36.

<sup>21</sup> The Respondent arrives at the "rectified" award of USD 216,018,682 by resort to Professor [REDACTED] "Hana Interest Factors" that he computed for every business day from 24 May 2011 to 30 September 2013 which "obviate the need to refer directly to daily interest rate quotes." On this basis, the Respondent calculates the Excess Principal at USD 402,458 and the Double Interest at USD 560,178 for a total of USD 962,636, creating a revised principal loss as of 3 December 2011 of USD 432,037,364. See Respondent's Rectification Request, ¶¶ 21, 35-37.

<sup>22</sup> Respondent's Rectification Request, ¶ 38.

<sup>23</sup> Respondent's Rectification Request, ¶ 16.

as of 3 December 2011 plus interest thereafter compounded annually at the one-month U.S. Treasury note rate from 3 December 2011 to the date of payment.<sup>24</sup>

**B. THE CLAIMANT'S REVISED RESPONSE DATED 30 JANUARY 2023**

24. Following the Tribunal's Decision of 20 January 2023, the Claimants filed their Revised Response on 30 January 2023.<sup>25</sup> In their view, the Tribunal had erred in striking out their previous submission predicated on foreign exchange rates. The Claimants presented an alternative exchange rate position in the following terms:

*Despite correcting the date of injury and starting the interest calculations from that date, Respondent's proposed rectification nevertheless mistakenly continues to employ the **exchange rate** from February 9, 2012 [...].*

[...]

*[The] Respondent should have used in its calculations the **exchange rate** for (or closest to) the date of the December 3, 2011 agreement in order to correctly assess the value of the share purchase price set in the December 2011 SPA in U.S. Dollars.*<sup>26</sup> (Emphasis added)

25. The Claimants contend, in what amounts to a separate and distinct Counter-Request, that the difference between their loss calculated as of 3 December 2011 (*i.e.*, the Date of Injury], is properly stated as **USD 480.32 million** (as compared with USD 432.04 million, put forward by the Respondent in its Rectification Request). Thus, based on its revised foreign exchange rate position, the **Claimants say that the Respondent's Request understated the loss attributable** to the price reduction—*i.e.* the amount to which interest applies from 3 December 2011—by USD 48.3 million<sup>27</sup> and the award to the Claimants should be increased to USD 240.16 million.<sup>28</sup>

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<sup>24</sup> Respondent's Rectification Request, ¶ 38.

<sup>25</sup> Decision on the Respondent's Application, ¶ 36.

<sup>26</sup> Claimants' Revised Response, ¶¶ 8-9.

<sup>27</sup> Claimants' Revised Response, ¶ 11, referring to Respondent's Rectification Request, ¶¶ 37, 39.

<sup>28</sup> The Claimants present their revised exchange rate calculation as follows:



26. In short, the Claimants say that “if [the] Tribunal is to make the correction identified by [the] Respondent in its Rectification Request, the Tribunal in doing so **must** also correct the [foreign exchange rate] error introduced in [the] Respondent’s own calculations”<sup>29</sup> (Emphasis added).

### III. THE TRIBUNAL’S DECISION

#### A. JURISDICTION TO ADDRESS THE RESPONDENT’S RECTIFICATION REQUEST

27. The Tribunal acknowledges (as the Parties agree) that in identifying the Claimants’ U.S. Dollar loss, the Tribunal made “clerical, arithmetical or similar errors” in referencing Professor ██████ “Workpaper Hana-1” for the USD 433 million calculation without making an adjustment for interest before and after 3 December 2011. The error occurred because the Tribunal fixed a Date of Injury different from the timeframe anticipated by Professor ██████ as stated explicitly in paragraph 891 of the Award:

*In accordance with the foregoing analysis, the Tribunal is satisfied based on the calculations of the Claimants’ expert, Professor ██████ ██████ that the loss attributable to the price reduction is USD 433 million, being the drop in value of the control premium from 8 July 2011 SPA of approximately USD 4.1 billion at KRW 13,390 per share and the 3 December 2011 SPA of approximately USD 3.6 billion at KRW 11,900 per share (after*

Table A. Korean Proposed Rectification Calculation, with Correct Exchange Rate for Tribunal's Date of Injury			
		Date	USD (Millions)
(1)	Hana's Original Offer Price (May 24, 2011 exchange rate)	5/24/2011	4,341.68
(2)	After-Tax Dividend		400.2
(3)	Loss After Dividend		3,941.48
(4)	Final SPA Price (December 3, 2011 exchange rate)	12/3/2011	3,461.16
(5)	Cumulative Loss to Lone Star After Hana Sale, Pre-Interest		480.32
(6)	Half of Cumulative Loss, Pre-Interest		240.16

Claimants’ Revised Response, ¶ 12, p. 6.

<sup>29</sup> Claimants’ Revised Response, ¶ 13.

*adjustment for the mid-2011 dividend of USD 400.2 million).*<sup>30</sup>  
(Emphasis added)

The Tribunal made no reference to foreign exchange rates and its Award was denominated in U.S. Dollars.

28. The Tribunal notes that as a reflection of the Parties' differing views of the relevant "clerical, arithmetical or similar error," they arrive at remarkably different results. Whereas the Respondent's analysis would reduce its liability from USD 216.5 million to USD 216,018,682 million, the Claimants' Counter-Request would increase the Respondent's liability from USD 216.5 million to USD 353.41 million (as stated in their initial Response) or USD 240.16 million (as asserted in their Revised Response).<sup>31</sup> Such divergent answers confirm that the Parties are not addressing the same "clerical, arithmetical or similar error."

<sup>30</sup> Award, ¶ 891, citing Exhibit CWE-034, ██████████ Second Expert Report, p. 15; ██████████ Second Expert Report, ¶¶ 88-108, analysing Professor ██████████ 25% premium and potential setoff for KEBCS' increase in value.

<sup>31</sup> Interestingly, the Claimants' Counter-Request exceeds even the calculation of their expert Professor ██████████ of the loss on the Hana Transaction (albeit Professor ██████████ employed different parameters). Professor ██████████ calculation is reproduced in Respondent's Request, ¶ 9, p. 6 (emphasis in red added by the Respondent):

Workpaper Hana-1 Damage Analysis Hana Offer Case			
	Date	Interest Factor [a]	USD (Millions) [b]
[1] Hana Original Offer Price			4,341.7
Date of Close: May 24, 2011	5/24/2011		
[2] + Interest ( May 24, 2011 to July 20, 2011)		1.0000	0.1
[3] - After-Tax Dividend 1	7/20/2011		400.2
[4] Cumulative Loss as of July 20, 2011			3,941.6
[5] + Interest ( July 21, 2011 to February 9, 2012)		1.0001	0.4
[6] Cumulative Loss as of February 9, 2012	2/9/2012		3,942.0
[7] - Price Paid by Hana on February 9, 2012			3,509.5
[8] Cumulative Loss to Lone Star After Hana Sale			432.6
[9] + Interest ( February 10, 2012 to September 30, 2013)		1.0010	0.4
[10] Cumulative Loss on September 30, 2013	9/30/2013		433.0
[11] Add: Tax Gross-Up			257.4
[12] Quantum of Damages			690.3

29. The Respondent made a timely objection to the Tribunal's calculations with respect to the calculation of interest on damages. The Claimants did not raise their foreign exchange rates concerns within the time frame permitted by Article 49(2) of the ICSID Convention.
30. The Claimants have not objected to the Tribunal's jurisdiction to deal with the Respondent's Rectification Request. They agreed that the Respondent "(incompletely) identified an error warranting rectification."<sup>32</sup> The Claimants reference to "incompletely" simply reasserted their (inadmissible) argument that the "Respondent's proposed rectification nevertheless mistakenly continues to employ the wrong exchange rate from February 9, 2012[.]"<sup>33</sup>
31. In accordance with Article 49(2) of the ICSID Convention, the Tribunal has jurisdiction to rectify (indeed, "shall rectify") the interest calculation.<sup>34</sup>

**B. THE SUBJECT MATTER OF THE RESPONDENT'S RECTIFICATION REQUEST**

32. Korea is quite specific in defining the subject matter of its Rectification Request as "clerical, arithmetical or similar errors" in the Award as follows:

*Korea respectfully requests that the Tribunal rectify certain clerical, arithmetical or similar errors in the Award in relation to the computation of interest.*<sup>35</sup> (Emphasis added)

33. The Tribunal does not agree with the Claimants' characterization of the subject matter of the Respondent's Rectification Request in their Revised Response, in which the Claimants recalled that they:

*agreed with Respondent that the Tribunal needed to rectify the mismatch between the damages that the Tribunal said it was awarding, and the calculations to which the Tribunal turned to do so.*<sup>36</sup>

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<sup>32</sup> Claimants' Revised Response, ¶ 7.

<sup>33</sup> Claimants' Revised Response, ¶ 8.

<sup>34</sup> **Exhibit RA-381** [rectification proceeding], C. Schreuer *et al.*, "Article 49" in *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed., 2009), ¶ 39 (The ICSID Convention "makes a subtle distinction between supplementation and rectification. ... [A] supplemental decision is discretionary. The rectification of an error is obligatory").

<sup>35</sup> Respondent's Rectification Request, ¶ 4.

<sup>36</sup> Claimants' Revised Response, ¶ 2.

34. The Respondent's Rectification Request says nothing about an alleged "mismatch between the damages the Tribunal said it was awarding, and the calculations to which it turned to do so." The Respondent's Request does not allege any error in the Tribunal's award of USD 216.5 million except with regard to the calculation of interest before and after 3 December 2011.
35. The difference between the "clerical, arithmetical or similar error in the award" raised respectively by the Respondent and the Claimants is illustrated by the starting point of each of their analyses. The Claimants start with Korean currency by identifying the share price in Korean Won at different dates, and then exchanging the Korean Won value for U.S. Dollars.<sup>37</sup> In the Claimants' analysis, it is not necessary even to consider the interest question because their approach, they say, renders the interest issue moot. The Respondent's Rectification Request, on the other hand, never goes behind the Tribunal's statement of the loss in U.S. Dollars. Accepting for present purposes the loss figure of USD 433 million, the "clerical, arithmetical or similar error" that concerns the Respondent is the so-called "Excess Principal" (which is really a calculation of interest added to the Principal, because such interest notionally accrued before 3 December 2011) and the "Double Interest" (accruing between the Date of the Injury and Professor ████████ end date of 30 September 2013).
36. Accordingly, the Tribunal will proceed to consider the interest error which is the only error properly before it.

**C. SOME COMMENTS ON THE SCOPE OF RECTIFICATION**

37. The words "**any** clerical, arithmetical or similar error in the award" (emphasis added) are general but in practice have become somewhat narrowed.

**(1) Rectification Does Not Include a Re-argument of the Merits or an Appeal of the Result**

38. In *Victor Pey Casado v. Chile*, the tribunal observed: "It follows that, as is already implicit in the notion of 'rectification', the procedure does not encompass any alleged mistake of

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<sup>37</sup> Claimants' Revised Response, ¶¶ 9-10.

law by the tribunal or any factual determination or discretionary assessment by it. The procedure is not an appeal, and this in turn illuminates why Article 49 of the Convention makes the rectification of any duly established ‘clerical, arithmetical or similar error’ into a duty of the tribunal.”<sup>38</sup>

### **(2) ICSID Convention Article 49(2) Does Not Permit the Tribunal to Change its Methodological Approach to Quantum**

39. In *Watkins Holding v. Spain*, the tribunal observed that “the request for rectification is not intended to change the methodological approach in the calculation of quantum as opposed to amending a pure mathematical calculation.”<sup>39</sup>

### **(3) ICSID Convention Article 49(2) is Not Intended to Encompass “Complex Exercises”**

40. In *Gavazzi v. Romania*, the tribunal observed that “the rectification must not affect the merits of the [d]ecision, and must not lead to a **complex exercise** to retrace or clarify the parties’ arguments and evidence on the text to be rectified.”<sup>40</sup> (Emphasis added).
41. In *Watkins Holding v. Spain*, the tribunal suggested that “[t]he request for rectification is intended to be utilized to correct ‘inadvertent omissions and **minor** technical errors.’”<sup>41</sup> In *Railroad Development v. Guatemala*, the tribunal expressed concern that “[i]n these circumstances to rectify the Award as requested is not just a simple mathematical operation, it implies the Tribunal accepting a change of pleading in the context of a rectification request. This is beyond the power of the Tribunal under Article 49(2) of the ICSID Convention.”<sup>42</sup> (Emphasis added).

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<sup>38</sup> As quoted in **Exhibit RA-382** [rectification proceeding], *Watkins Holding S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Spain’s Request for Rectification of the Award, 13 July 2020 (“*Watkins Holding v. Spain*”), ¶ 39.

<sup>39</sup> **Exhibit RA-382** [rectification proceeding], *Watkins Holding v. Spain*, ¶ 42.

<sup>40</sup> *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Rectification, 13 July 2017, ¶ 56, as quoted in **Exhibit RA-382** [rectification proceeding], *Watkins Holding v. Spain*, ¶ 63.

<sup>41</sup> **Exhibit RA-382** [rectification proceeding], *Watkins Holding v. Spain*, ¶ 37.

<sup>42</sup> **Exhibit RA-384** [rectification proceeding], *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant’s Request for Supplementation and Rectification, 18 January 2013 (“*Railroad Development v. Guatemala*”), ¶ 47.

42. On the other hand, the same tribunal (in *Railroad Development v. Guatemala*) seems to have undertaken and given effect to a quite sophisticated calculation:

*In the Award the Tribunal did its own assessment of the appropriate discount rate to calculate the NPV of existing leases and noted the disagreement of the parties in this respect (Award, paras. 271 and ff). The Tribunal reached the conclusion that a discount rate of 17.36% would be appropriate. It is evident that the Tribunal misapplied the discount rate. The Tribunal has recalculated the NPV of the income streams of leased real estate set forth in Expert Thompson's Rebuttal Report using the 17.36% discount rate. The results are identical to those in the table in paragraph 18 of the Request. Paragraphs 277 and 283(2) of the Award shall be rectified accordingly.*<sup>43</sup> (Emphasis added).

#### **(4) The Absence of an Objection is Important**

43. Professor Schreuer points out that in *Santa Elena v. Costa Rica*: "In the absence of any objection from the Respondent, the Tribunal agreed ... to rectify two clerical errors in the text of the Award."<sup>44</sup>

#### **(5) The Interest Recalculation Proposed Here is Somewhat Complex**

44. In light of these comments, the Tribunal approaches the Rectification Request with caution. While the Respondent is not pursuing an appeal in the guise of rectification, nor is it seeking to change the methodology adopted by the Tribunal in its Award, nevertheless the recalculation would require the Tribunal to negotiate a series of steps switching back and forth amongst different documents and tables (all of which, to be sure, are already in evidence) as follows. The Tribunal is to:

- (i) Direct itself to the accrued interest calculations in the [REDACTED] Second Report;<sup>45</sup>

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<sup>43</sup> **Exhibit RA-384** [rectification proceeding], *Railroad Development v. Guatemala*, ¶ 43.

<sup>44</sup> **Exhibit RA-381** [rectification proceeding], C. Schreuer *et al.*, "Article 49" in *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed., 2009), ¶ 47, referring to *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Decision on Rectification, 8 June 2000, ¶¶ 7-8.

<sup>45</sup> Respondent's Rectification Request, ¶ 18.

- (ii) Direct itself to Row 2 of the [REDACTED] Summary Table as the source relevant to the “first tranche” of USD 0.1 million;<sup>46</sup>
- (iii) Direct itself to Row 5 of the [REDACTED] Summary Table as the source relevant to the “second tranche” of USD 0.4 million,<sup>47</sup> noting that the Tribunal must divide this tranche into two periods: 21 July 2011 to 2 December 2011 [Excess Principal] and 3 December 2011 to 9 February 2012 [Double Interest];<sup>48</sup>
- (iv) Direct itself to Row 9 of the [REDACTED] Summary Table as the source relevant to the “third tranche” of 0.4 million;<sup>49</sup>
- (v) Refer itself to Professor [REDACTED] “Hana Interest Factors” which would “obviate the need [for the Tribunal] to refer directly to daily interest quotes”<sup>50</sup> and identify and apply the following factors:
  - a) of 1.000031507 for 20 July 2011 [first tranche];<sup>51</sup>
  - b) of 1.000098909 for 2 December 2011 [second tranche part 1];<sup>52</sup>
  - c) of 1.000067400 for the 21 July 2011 to 2 December 2011 period [second tranche part 2 excess principal];<sup>53</sup>
  - d) at this point the Tribunal is to divide the factor calculated for the full period from 24 May 2011 to 9 February 2012 of 1.000135078 by the factor used by Professor [REDACTED] relevant to the earlier period from 24 May 2011 to

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<sup>46</sup> Respondent’s Rectification Request, ¶ 19(a).

<sup>47</sup> Respondent’s Rectification Request, ¶ 19(b).

<sup>48</sup> Respondent’s Rectification Request, ¶ 23.

<sup>49</sup> Respondent’s Rectification Request, ¶ 19(c).

<sup>50</sup> Respondent’s Rectification Request, ¶ 21.

<sup>51</sup> Respondent’s Rectification Request, ¶ 22.

<sup>52</sup> Respondent’s Rectification Request, ¶ 25.

<sup>53</sup> Respondent’s Rectification Request, ¶ 26.



2 December 2011 [1.000098909] to produce a factor applicable to the period 3 December 2011 to 9 February 2012 of 1.000036165;<sup>54</sup>

- e) with respect to the third tranche the Tribunal ought to have taken the Hana Interest Factor used by Professor [REDACTED] for the full period 24 May 2011 to 30 September 2013 [1.001100604] and divided it by the above factor of 1.000135078 relevant to the earlier period to produce a Hana Interest Factor applicable to the third tranche of 1.000965396;<sup>55</sup>
- f) by applying the above factors, the Tribunal ought to have calculated the value of the first tranche (for accrued interest from 24 May 2011 until 20 July 2011) at USD 136,794 and part 1 of the second tranche (for accrued interest from 21 July 2011 to 2 December 2011) at USD 265,664 for a total of USD 402,458 and deducted the resulting USD 402,458 representing Excess Principal;<sup>56</sup>
- g) and further applied the above factors to calculate the value of part 2 of the second tranche (for accrued interest from 3 December 2011 to 9 February 2012) at USD 142,548 and for the third tranche (for accrued interest from 10 February 2012 to 30 September 2013) of USD 417,630 for a total of USD 560,178 to be deducted as Double Interest;<sup>57</sup>
- h) and calculated the cumulative total of USD 962,636 which, deducted from USD 433 million, produces a reduced principal loss as of 3 December 2011 of USD 432,037,364,<sup>58</sup> of which 50% results in compensation owing to the Claimants of USD 216,018,682;<sup>59</sup> and

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<sup>54</sup> Respondent's Rectification Request, ¶ 27.

<sup>55</sup> Respondent's Rectification Request, ¶ 32.

<sup>56</sup> Respondent's Rectification Request, ¶ 35.

<sup>57</sup> Respondent's Rectification Request, ¶ 36.

<sup>58</sup> Respondent's Rectification Request, ¶ 37.

<sup>59</sup> Respondent's Rectification Request, ¶ 38.



- (vi) substituted the amended figure of USD 216,018,682 as the “Principal Loss” to carry interest at the rate of one-month U.S. Treasury bills from 3 December 2011 compounded annually until payment.<sup>60</sup>

45. In the end, notwithstanding the apparent complexity of the exercise, the Tribunal must respect the facts that an inadvertent error was made in the calculation of the Principal Loss by reason of over-inclusion of interest in the Award, and the Tribunal is obliged to do what it can to fulfil its duty [“shall rectify”] to correct the error.
46. The Respondent has provided a clear path to the rectification of the interest issue with which, importantly, the Claimants have not disagreed. Nor have the Claimants taken the position that this is a case inappropriate for rectification pursuant to Article 49(2) of the ICSID Convention. On the contrary, the Claimants have belatedly urged rectification using a series of foreign exchange calculations every bit as complex as the interest calculations submitted by the Respondent.
47. While the agreement of the Parties would not confer a jurisdiction the Tribunal does not otherwise possess, the wording in ICSID Convention Article 49(2) contains no explicit bar to complex calculations and a general caution expressed by some Tribunals must yield to the special circumstances of the case. In the present instance, an error has occurred and the Respondent’s interest rate calculations, complex or not, have not been challenged.

#### **D. THE QUANTUM**

48. The Tribunal has examined and agrees with the Respondent’s calculations of interest and rectifies the Award by reducing the Respondent’s Principal Loss from USD 216,500,000 to USD 216,018,682.
49. The Tribunal notes that, although calculation of the Claimants’ loss as of 3 December 2011 is reduced under the Award as rectified, the reduced Principal Loss will nevertheless attract interest from 3 December 2011, as stated in paragraph 948(e)(ii) of the Award.

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<sup>60</sup> Respondent’s Rectification Request, ¶ 38.

#### IV. COSTS

50. In accordance with ICSID Arbitration Rules 47(1)(j) and 49(4), the Decision on Rectification is to contain the Tribunal's determination concerning the cost of the proceeding.
51. Pursuant to Article 61(2) of the ICSID Convention<sup>61</sup> and Rules 47(1)(j) and 49(4) of the ICSID Arbitration Rules,<sup>62</sup> the Tribunal is given discretion as to how and by whom the costs of the rectification proceeding are to be paid.<sup>63</sup>
52. The costs incurred by the Tribunal in addressing the Rectification Request are as follows (in USD):

Hon. Ian Binnie CC, KC	21,450.00
Hon. Charles N. Brower	7,581.94
Professor Brigitte Stern	9,450.00
<b>TOTAL</b>	<b>38,481.94</b>

53. The above costs have been paid out of the advances made by the Parties in equal parts.
54. On 11 April 2023, the Parties were requested to make cost submissions. The Claimants responded on 18 April 2023 that they had incurred costs of USD 121,567.10 to address the rectification request, including a disbursement to their quantum experts [the Brattle Group] of USD 30,387.50.<sup>64</sup> On the same day, the Respondent requested that the Claimants be

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<sup>61</sup> ICSID Convention, Article 61(2):

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

<sup>62</sup> ICSID Arbitration Rules (2006), Rule 47(1)(j) ("The award shall be in writing and shall contain ... (j) any decision of the Tribunal regarding the cost of the proceeding"); Rule 49(4) ("Rules 46-48 shall apply, *mutatis mutandis*, to any decision of the Tribunal pursuant to this Rule [i.e., Rule 49, which addresses rectification]").

<sup>63</sup> **Exhibit CA-001**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ("**ADC v. Hungary**"), ¶ 530 ("It is clear from Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules [2006] that the Tribunal has a wide discretion with regard to costs").

<sup>64</sup> Claimants' Cost Submission, p. 2.

ordered to bear Korea's total rectification proceeding costs of USD 151,770.95 and KRW 8,027,250 (approximately USD 6,085.46), which includes legal fees and costs of USD 53,779.05 and KRW 2,659,500 (roughly USD 2,016.17) that were primarily "incurred in order to respond to the Claimants' repeated, untimely backdoor rectification requests."<sup>65</sup> On the costs to be awarded, the Respondent also asks for "interest, compounded annually at the average one-year U.S. Treasury rate, from the Tribunal's decision on costs to the date of payment."<sup>66</sup>

55. The Respondent's position is that if the Tribunal were to grant Korea's Rectification Request, the Tribunal should exercise its discretion to award costs to Korea not only in accordance with the "general principle" that "costs follow the event,"<sup>67</sup> but also in view of what the Respondent characterizes as the Claimants' "regrettable procedural conduct throughout the Rectification Proceeding."<sup>68</sup>
56. The reference to "regrettable procedural conduct" recalls that in response to Korea's rectification request in relation to interest, the Claimants brought forward a different "clerical, arithmetical or similar error" related to foreign exchange rates. The Tribunal ruled that the only "error" properly before it was the interest error, and that the alleged exchange rate "error" was inadmissible because it had not been raised within the 45 days permitted by Article 49(2) of the ICSID Convention.<sup>69</sup>

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<sup>65</sup> Respondent's Cost Submission, ¶¶ 2, 10.

<sup>66</sup> Respondent's Cost Submission, ¶ 12(a).

<sup>67</sup> Respondent's Cost Submission, ¶ 4, citing **Exhibit RA-074**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 107; **Exhibit CA-001**, *ADC v. Hungary*, ¶ 533; **Exhibit RA-384** [original arbitration], *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 380.

<sup>68</sup> Respondent's Cost Submission, ¶ 4, referring to, *inter alia*, **Exhibit RA-281**, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, ¶ 515; **Exhibit RA-383** [original arbitration], ICC Commission Report, "Decisions on Costs in International Arbitration" (2015), ¶ 16 ("Arbitrators tend to take party conduct into account").

<sup>69</sup> Respondent's Cost Submission, ¶ 5; Decision on the Respondent's Application, 20 January 2023, paras. 34-35:

*In this Tribunal's view, the Respondent's Application must be allowed. Firstly, the Claimants raise foreign currency exchange issues irrelevant to the disposition of the Respondent's Request for Rectification of the U.S. Dollar award in its submission of 14 October 2022. Secondly, to use the Respondent's metaphor, the Claimants improperly attempt to use the Respondent's Request as a "Trojan Horse" to raise foreign currency exchange issues that ought to have*

57. The Tribunal directed the Claimants to file a revised response, which they did on 30 January 2023.<sup>70</sup> However, notwithstanding the Tribunal's ruling on inadmissibility, the Claimants revised response persisted to focus on an alleged foreign exchange error.
58. Throughout the rectification proceeding, the Claimants chose not to address either Korea's calculation of interest or, in the circumstances, the applicability of Article 49(2).
59. The Respondent has identified USD 53,779.05 and KRW 2,659,500 of its costs as primarily attributable to the Claimants' "backdoor rectification requests." The Respondent's request for this sum is entirely justified. The sum of USD 53,779.05 and KRW 2,659,500 is therefore awarded to the Respondent plus interest, compounded annually at the average one-year U.S. Treasury rate, from the Tribunal's Decision on Rectification to the date of payment. In other respects, in recognition of the fact that neither Party caused the interest error, each side will bear the remainder of its own representation costs and expenses and the Tribunal's rectification proceeding costs shall be divided equally.

## V. DECISION

60. For the reasons set out above, the Tribunal grants the Respondent's request for rectification of the Award by:
- a) Modifying the final sentence of Award footnote 184 to state that "the Claimant's **requested** damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September **2013**," not "the Claimants damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2011;"
  - b) Providing that the total loss resulting from the Hana transaction was USD 432,037,364, not USD 433,000,000;

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*been raised, if pursued at all, as an independent request for rectification under Article 49(2) of the ICSID Convention.*

*For these reasons, the Claimants' Response to Korea's Request for Rectification of the Award dated 21 November 2022 is struck out to the extent it raises issues beyond observations on the Respondent's submissions dealing with interest rates.*

<sup>70</sup> See Claimants' Revised Response and paragraph 13 *supra*.

- c) Providing that the principal amount of damages due Claimant LSF-KEB Holdings SCA as of 3 December 2011 was USD 216,018,682, not USD 216,500,000; and
  - d) Amending the text of the Award as more specifically provided in Appendix A.
61. The Tribunal orders the Claimants to pay USD 53,779.05 and KRW 2,659,500 to the Respondent plus interest, compounded annually at the average one-year U.S. Treasury rate, from the date of this Decision on Rectification to the date of payment.

## APPENDIX A

Original	Rectification	Citation in Award
“the Claimants damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2011.”	“the Claimant’s requested damages are USD 433 million, a figure that includes interest from 24 May 2011 to 30 September 2013.”	Footnote: 184.
“USD 433 million”	“USD 432,037,364”	<p>Paragraphs: 7, 10, 15, 18, 19(b), 20, 22, 24, 193, 197, 502, 572, 660, 742, 765, 774, 800, 819, 841, 856, 881, 888, 891, 892, 894, 895, 945(b), 948(a), and 948(c).</p> <p>Footnote: 9.</p> <p>Titles of subsections: VIII.A. and XIV.D.(3).</p> <p>Concurring Opinion of Judge Charles N. Brower, paragraphs: 1, 26.</p>
“USD 216.5 million”	“USD 216,018,682”	Paragraphs: 24–25, 896, 922, and 948(e)(i).

Charles N. Brower

The Honourable Charles N. Brower  
Arbitrator

Date: 3 May 2023

\_\_\_\_\_  
Professor Brigitte Stern  
Arbitrator

Date:

\_\_\_\_\_  
The Honourable Ian Binnie CC, KC  
President of the Tribunal

Date:

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The Honourable Charles N. Brower  
Arbitrator

Date:



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Professor Brigitte Stern  
Arbitrator

Date: 3 May 2023

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The Honourable Ian Binnie CC, KC  
President of the Tribunal

Date:



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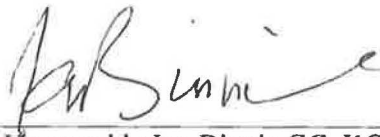
The Honourable Charles N. Brower  
Arbitrator

Date:

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Professor Brigitte Stern  
Arbitrator

Date:

A handwritten signature in black ink, appearing to read 'Ian Binnie', written over a horizontal line.

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The Honourable Ian Binnie CC, KC  
President of the Tribunal

Date: 5 May 2023