

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

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**Elliott Associates, L.P.**  
**(U.S.A.)**  
*Claimant,*

v.

**Republic of Korea,**  
*Respondent.*

**PCA Case No. 2018-51**

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**Response to Claimant's Request for  
Correction of the Award**

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4 August 2023

**Arnold & Porter**

**PETER & KIM**  
ATTORNEYS AT LAW

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## I. INTRODUCTION

1. On 18 July 2023, Respondent, the Republic of Korea (“**Korea**”), submitted a request for correction and interpretation of the Award (“**Korea’s Request**”).<sup>1</sup> In its Request, Respondent identified certain errors in the Award’s computation of damages, which errors resulted from the Tribunal’s inadvertent use of a post-tax figure where it had specifically and expressly stated it intended to apply a pre-tax amount.<sup>2</sup> On the same date, the Tribunal instructed Claimant to provide “any comments it may have on Respondent’s Request by no later than Tuesday, 1 August 2023.”<sup>3</sup>

2. On 20 July 2023, Claimant submitted a document titled “Claimant’s Request for Correction of the Award” (“**Claimant’s Request**”). Although styled as a request for correction, the first four pages of Claimant’s Request are in fact comments in opposition to Korea’s Request. In the final four pages of its Request, Claimant asks—“in the alternative”—that the Tribunal correct “*a further methodological error* in its calculation of the Claimant’s loss” (emphasis added).<sup>4</sup> Korea submits this Response to Claimant’s Request in accordance with the Tribunal’s instructions of 21 July 2023.<sup>5</sup>

3. As discussed below, Claimant’s Request is utterly without merit and must be denied. Claimant itself acknowledges that its Request seeks to alter the “methodology” adopted by the Tribunal for determining Claimant’s loss, and argues that such a challenge to methodology is outside the scope of Article 38 of the UNCITRAL Rules (“**Article 38**”).<sup>6</sup> That acknowledgment alone is reason to deny Claimant’s Request, which evidently was not made in good faith but rather for tactical reasons having to do with Claimant’s opposition to Korea’s Request. This tactic fails, however, because unlike Claimant’s Request, Korea’s Request seeks merely to replace a single erroneous figure (with corresponding mechanical changes to other

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<sup>1</sup> Capitalized terms used but not defined herein have the meaning assigned to them in Korea’s Request.

<sup>2</sup> Korea’s Request, ¶ 2.

<sup>3</sup> See PCA’s Letter to the Parties on behalf of the Tribunal, 18 July 2023, p. 2.

<sup>4</sup> Claimant’s Request, Section (III) (with heading, “In the alternative, the Tribunal should correct a further methodological error in its calculation of the Claimant’s loss”).

<sup>5</sup> See PCA’s Letter to the Parties on behalf of the Tribunal, 21 July 2023, p. 2.

<sup>6</sup> See Claimant’s Request, ¶¶ 8, 12 (arguing that methodological corrections are outside scope of Article 38 and characterizing its own request as necessary to correct a “further methodological error”).

parts of the Award) and does not challenge the Tribunal’s methodology or reasoning in any way. In the sections that follow, Korea: summarizes Claimant’s Request (Section II); demonstrates that the Request is outside the scope of Article 38 and is of a fundamentally different nature than Korea’s Request (Section III); and requests that the Tribunal deny Claimant’s Request and award Korea its costs (Section IV).

## **II. CLAIMANT REQUESTED “CORRECTION” TO THE METHOD BY WHICH THE TRIBUNAL CALCULATED PRE-AWARD INTEREST**

### **A. The Tribunal’s Award of Pre-Award Interest**

4. As Claimant itself acknowledges, its requested “correction” seeks to alter the method adopted by the Tribunal to calculate pre-award interest.<sup>7</sup> To put that request in context, it is necessary to first review the Tribunal’s findings with respect to pre-award interest.

5. To recall, the Tribunal held that “the Claimant’s loss of value of its investment as a result of the Respondent’s breach of the Treaty amounts to KRW 68,744,114,123.”<sup>8</sup> The Tribunal then ordered Korea to pay this amount (converted to US Dollars) as “compensation for the losses caused to the Claimant by the Respondent’s breach”<sup>9</sup> (“**Damages Amount**”). The Tribunal further ordered Korea to pay pre-award interest on the Damages Amount at the rate of 5 percent, compounded yearly from 16 July 2015 until the date of the Award (“**Pre-Award Interest**”).<sup>10</sup>

6. The Tribunal explained its rationale for awarding the Pre-Award Interest at paragraph 961 of the Award:

Having considered the Parties’ positions and the evidence before it, including arbitral practice dealing with awards of interest, the Tribunal finds that the determination of the applicable interest rate should be based on the principle that the Claimant must be made whole and accordingly

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<sup>7</sup> See Claimant’s Request, ¶ 12 (characterizing Claimant’s requested correction as “methodological” in nature).

<sup>8</sup> Award, ¶ 948. For the avoidance of doubt, Korea’s reference herein to figures in the Award is without prejudice to the corrections that Korea has requested in its Request of 18 July 2023. For convenience and consistency, Korea uses KRW figures throughout this submission.

<sup>9</sup> Award, ¶ 995(b). See also Award, ¶¶ 938 (KRW 68.7 billion is amount to which Claimant is entitled in compensation), 948 (same), 952 (converting to USD).

<sup>10</sup> Award, ¶ 995(c).

must be entitled to compensation based on what it would have obtained had it invested the funds corresponding to the amount of compensation during the period when it was deprived of such funds. . . . [T]he Tribunal determines that the applicable interest rate should be 5% . . . . The Tribunal considers it appropriate that the interest accrued should be compounded yearly from 16 July 2015 until the date of this Award.<sup>11</sup>

7. Stated simply, the Tribunal determined that interest should be paid on the Damages Amount (“the funds corresponding to the *amount of compensation*”) during the period when Claimant was deprived of the Damages Amount (“the period when it was deprived of *such funds*”), which the Tribunal further determined to be the period from 16 July 2015 through the date of the Award. The Tribunal’s stated methodology for calculating the Pre-Award Interest can thus be expressed as: Interest on the Damages Amount (KRW 68,744,114,123) at the rate of 5 percent, compounded yearly from 16 July 2015 through the date of the Award. This is precisely what the Tribunal ordered in the *dispositif* of the Award.<sup>12</sup>

#### **B. Claimant’s Requested Alteration to the Tribunal’s Methodology**

8. In its Request, Claimant urges the Tribunal to change its methodology for calculating the Pre-Award Interest—and in so doing to effectively change its findings as to the Damages Amount itself. As discussed above, in the Tribunal’s methodology, the principal amount that accrues pre-award interest is the Damages Amount (KRW 68,744,114,123). Claimant argues that this methodology fails to make it “whole,” as the Tribunal intended.<sup>13</sup> In place of the Tribunal’s methodology, Claimant argues that the principal on which interest should accrue should correspond initially to the *fair market value (FMV) in the but-for world* of Claimant’s *entire* SC&T shareholding (“**Counterfactual FMV**”); then, in each subsequent period, the amount of principal is (i) reduced by an amount equivalent to Claimant’s actual share sale proceeds during that period, and (ii) increased by an amount equivalent to the interest earned in prior periods.<sup>14</sup> According to Claimant, the relevant principal amount on which interest should be computed is approximately KRW 771 billion in the first time period

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<sup>11</sup> Award, ¶ 961.

<sup>12</sup> See Award, ¶ 995(c).

<sup>13</sup> See Claimant’s Request, ¶ 17.

<sup>14</sup> See Claimant’s Request, ¶ 17, Table at ¶ 19.

(reflecting the Counterfactual FMV for Claimant’s entire shareholding); KRW 597 billion in the second time period; KRW 155 billion in the third period; and KRW 144 billion in the fourth period.<sup>15</sup> It will not escape the Tribunal’s notice that the amount of principal on which Claimant seeks to accrue pre-award interest is larger—by an order of magnitude—than the amount of compensation awarded by the Tribunal, i.e., the Damages Amount (approximately KRW 68.7 billion).

9. Claimant does not explain why Korea should be ordered to pay interest on principal amounts that the Tribunal did not consider to be losses of Claimant and as to which the Tribunal did not award compensation. Contrary to Claimant’s mistaken premise, the Tribunal did *not* find that Claimant had been “deprived”—in any period—of funds corresponding to the Counterfactual FMV. To the contrary, as discussed further below, the Tribunal found that Claimant’s loss (i.e., the Damages Amount) was limited to *the difference between* total Counterfactual FMV and Claimant’s total actual proceeds from sale of the shares.<sup>16</sup> That is why the Tribunal ordered Pre-Award Interest on the Damages Amount and not on Counterfactual FMV. Far from seeking to be “made whole,” Claimant is seeking a windfall by attempting to recover interest on amounts that did not constitute any part of the loss awarded by the Tribunal. Put differently, Claimant effectively is seeking to challenge the Tribunal’s determination of the amount of Claimant’s principal loss (i.e., the Damages Amount).

10. In the following section, Korea demonstrates that Claimant’s Request is impermissible under Article 38 and should be denied.

### **III. CLAIMANT’S REQUEST IS OUTSIDE THE SCOPE OF ARTICLE 38**

#### **A. The Proper Scope of Article 38**

11. Article 38 states in relevant part: “Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a

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<sup>15</sup> Claimant’s Request, Table at ¶ 19.

<sup>16</sup> See Award, ¶¶ 919, 932.

similar nature.”<sup>17</sup> Commentary confirms that the scope of Article 38 is limited in several important ways.

- a. *First*, only the listed categories of errors are correctible under Article 38:
  - (i) errors in computation; (ii) clerical or typographical errors; and (iii) any other error or omission that is “of a similar nature” to the first two categories.<sup>18</sup>The corollary to this principle is that substantive errors in reasoning—including for example errors in legal or factual analysis—are outside the scope of Article 38.<sup>19</sup> As discussed further below, Claimant’s attempt to superimpose a further restriction on the scope of Article 38 by effectively eliminating the category of “errors in computation”<sup>20</sup> is misguided.
- b. *Second*, the error must be “obvious on the face of the award.”<sup>21</sup>
- c. *Third*, the purpose of the correction must be to effectuate the tribunal’s true intentions rather than to alter those intentions.<sup>22</sup> As to this requirement, it goes without saying that the arbitral tribunal itself will know best whether the

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<sup>17</sup> UNCITRAL Rules, Article 38(1).

<sup>18</sup> See, e.g., **RLA-177**, Stuart Isaacs, *Life after Death: The Arbitral Tribunal’s Role Following Its Final Award*, in JURISDICTION, ADMISSION AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 357, 362 (Neil Kaplan & Michael J. Moser eds., 2018) (“[T]he errors that may be corrected are *confined* to errors in computation, clerical errors, typographical errors and errors of a similar nature” (emphasis added)).

<sup>19</sup> See, e.g., **CLA-205**, Jan Paulsson & Georgios Petrochilos, UNCITRAL ARBITRATION (2017), Art. 38, ¶ 1 (“[C]orrection’ of the award . . . does not provide a means by which to revisit the substantive holding of the award.”); **RLA-173**, David Caron & Lee Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2d. ed. 2013), Art. 38, p. 813 (correction process is “not a means for revisiting the substance of the award or for reconsidering the arbitral tribunal’s reasoning”).

<sup>20</sup> See Claimant’s Request, ¶ 6 (arguing that the only “errors in computation” that can be corrected pursuant to Article 38 are “clerical or typographical errors” in calculation, such as a misplaced decimal point).

<sup>21</sup> **RLA-176**, Nigel Blackaby *et al.*, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (7th. ed. 2023), ¶ 10.14. See also **RLA-174**, Luiz Olavo Baptista, *Correction and Clarification of Arbitral Awards*, in ARBITRATION ADVOCACY IN CHANGING TIMES (INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 15) 275, 283 (Albert Jan van den Berg ed., 2011) (“[I]t is clear that rectification of obvious mistakes is subject to a post-award motion for correction. . .”).

<sup>22</sup> See **RLA-175**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (3d. ed. 2022), § 24.03 (“It is correct to say that a correction ensures that the arbitrators’ true intentions are fully effectuated (and not to alter those intentions), but it is difficult to conclude that a correction does not change the (mistaken) meaning of their original award.”).

requested correction is consistent or inconsistent with what it had intended to do in the award.

12. In the following section, Korea demonstrates that Claimant’s Request fails to meet each of the foregoing requirements.

**B. Claimant’s Request Is Manifestly Impermissible Under Article 38**

*1. Article 38 does not permit challenges to a tribunal’s chosen methodology*

13. By its own admission, Claimant’s Request seeks to alter the *method* adopted by the Tribunal to calculate Claimant’s loss and the Pre-Award Interest.<sup>23</sup> As discussed above, the Tribunal ordered Korea to pay pre-award interest on “the amount of compensation” only, *i.e.*, the Damages Amount (KRW 68,744,114,123).<sup>24</sup> Claimant urges the Tribunal to change that methodology, and instead to award interest initially on the Counterfactual FMV of its entire shareholding, and then in subsequent periods on principal amounts that continue to far exceed the Damages Amount.<sup>25</sup> Claimant itself acknowledges that such a request is impermissible under Article 38: “[A] requested change will be improper where it requires a tribunal to . . . ‘adjust[] the method used for a calculation.’”<sup>26</sup> It is thus common ground that Claimant’s request to change the method by which the Tribunal calculated the Pre-Award Interest is not an “error of computation” or an error “of a similar nature” within the meaning of Article 38 and instead is an impermissible challenge to the Tribunal’s substantive reasoning. That alone is sufficient ground to deny Claimant’s Request.

*2. Claimant has not identified an “obvious” error*

14. Only errors that are obvious on the face of the award can be corrected under Article 38.<sup>27</sup> Here, what Claimant has identified as an “error” is not an error at all—let alone

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<sup>23</sup> Claimant’s Request, ¶ 12 (characterizing Claimant’s requested correction as “methodological” in nature).

<sup>24</sup> See Award, ¶¶ 948, 961, 995(b)–(c).

<sup>25</sup> Claimant’s Request, ¶ 17.

<sup>26</sup> Claimant’s Request, ¶ 7 (citing to **CLA-206**, Jakob Ragnwaldh *et al.*, A GUIDE TO THE SCC ARBITRATION RULES (2019), p. 143). See also **RLA-173**, David Caron & Lee Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2d. ed. 2013), Art. 38, p. 813 (“[T]he correction process is not a means for revisiting the substance of the award or for reconsidering the arbitral tribunal’s reasoning.”).

<sup>27</sup> See **RLA-176**, Nigel Blackaby *et al.*, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (7th. ed. 2023), ¶ 10.14.



an obvious one. Rather, Claimant is challenging the Tribunal’s deliberate decision to award interest on the Damages Amount only. There is no scope for such a challenge under Article 38.

15. Claimant alleges vaguely that “there have been errors” in the Tribunal’s application of the principle that “Claimant must be made whole and accordingly must be entitled to compensation based on what it would have obtained had it invested the funds corresponding to the amount of compensation during the period when it was deprived of such funds.”<sup>28</sup> Upon examination, however, it is evident that the Tribunal faithfully and correctly implemented its stated principle. Specifically, the Tribunal adopted a methodology for calculating Pre-Award Interest that compensated Claimant for having been deprived of “the funds corresponding to the amount of compensation”—i.e., the Damages Amount (KRW 68,744,114,123)—from 16 July 2015 through the date of the Award.

16. Claimant has attempted to manufacture an “error” by *altering* the applicable principle. Specifically, Claimant asks that the Tribunal award it compensation for supposedly having been “deprived” of the Counterfactual FMV of its shares (despite the fact that Claimant continued to hold those shares during the relevant periods),<sup>29</sup> whereas the Tribunal determined that the purpose of the Pre-Award Interest was to compensate Claimant for loss of the use of *the Damages Amount only*. Claimant, in other words, effectively seeks to change not only the Tribunal’s methodology as to Pre-Award Interest but also its finding as to the principal amount of Claimant’s loss. Article 38 does not permit such a challenge to the substantive reasoning of the Tribunal.<sup>30</sup>

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<sup>28</sup> Claimant’s Request, ¶¶ 14, 16 (citing Award, ¶ 961).

<sup>29</sup> Claimant’s Request, Table at ¶ 19.

<sup>30</sup> Claimant suggests that the Tribunal erred in the manner in which it implemented the full reparation principle as set forth in the *Chorzów Factory* case. *See* Claimant’s Request, ¶ 13 (citing Award, ¶ 931), ¶ 16 (alleging that Tribunal “deviated” from full reparation principle). That argument challenges the substantive reasoning of the Award and thus is impermissible under Article 38. In any event, the argument goes nowhere—the Tribunal held that its award of the Damages Amount, and *not* the amount of damages sought by Claimant, comported with the full reparation principle of *Chorzów Factory*. *See, e.g.*, Award, ¶ 931.

3. *Claimant's requested correction is contrary to the Tribunal's express findings*

17. As noted above, requests for correction under Article 38 must effectuate—and not seek to change—the true intentions of the arbitral tribunal.<sup>31</sup> Here, Claimant's Request directly contradicts the Tribunal's intentions as expressly stated in the Award.

18. *First*, Claimant's suggested correction deviates from the Tribunal's finding on the quantification of Claimant's loss and its determination of the amount of compensation for that loss. At paragraph 919 of the Award, the Tribunal clearly states, and the Parties agreed, that “any compensation to which the Claimant may be entitled should be quantified as the difference between the FMV, or the fair market value, of the Claimant's shares in SC&T in the but-for scenario and the actual sales proceeds from the Claimant's sale of the SC&T shares it held, including the proceeds it received under the Settlement Agreement with SC&T.”<sup>32</sup> At paragraph 932 of the Award, the Tribunal further determined that Claimant's loss is quantified as “the difference between SC&T's share price on the valuation date, 16 July 2015, and the price at which the Claimant subsequently disposed of its shareholding.”<sup>33</sup> Similarly, at paragraph 933 of the Award, the Tribunal explained that Claimant's loss was “realized” only at the time of its sale of shares, and only to the extent that the actual proceeds from such sale were lower than the Counterfactual FMV of the shares being sold.<sup>34</sup>

19. It is thus evident from the Tribunal's findings that the Counterfactual FMV itself is *not* the loss suffered by Claimant, nor is it the amount of compensation awarded by the Tribunal. Accordingly, Claimant's argument in its Request that it was “deprived” of funds corresponding to the entire Counterfactual FMV—and that such amount should be the principal loss upon which interest should accrue<sup>35</sup>—is directly contrary to the Tribunal's clear findings in the Award.

20. *Second*, Claimant's suggested correction also deviates from the Tribunal's finding on Pre-Award Interest. As is evident on the face of the Award, the Tribunal awarded

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<sup>31</sup> **RLA-175**, Gary Born, *INTERNATIONAL COMMERCIAL ARBITRATION* (3d. ed. 2022), § 24.03.

<sup>32</sup> Award, ¶ 919. *See also* Award, ¶ 824.

<sup>33</sup> Award, ¶ 932.

<sup>34</sup> Award, ¶ 933.

<sup>35</sup> Claimant's Request, Table at ¶ 19.

the Pre-Award Interest on the sum representing “compensation for the losses caused to the Claimant by the Respondent’s breach”<sup>36</sup>—i.e., the Damages Amount. The Tribunal, in this regard, determined that the Claimant is entitled “to compensation based on what it would have obtained had it invested *the funds corresponding to the amount of compensation*”—i.e., had it invested the Damages Amount (KRW 68,744,114,123).<sup>37</sup> Consistent with that reasoning, the Tribunal ordered Korea to pay Pre-Award Interest on the Damages Amount only.

21. Claimant, however, asks the Tribunal to re-calculate the Pre-Award Interest using the Counterfactual FMV, rather than the Damages Amount, as the principal.<sup>38</sup> This is directly contrary to the Tribunal’s finding in the Award that the purpose of the Pre-Award Interest is to compensate Claimant for loss of use of the Damages Amount, which reflects the *difference between* the Counterfactual FMV and Claimant’s actual sale proceeds.

4. *Claimant’s proposed “correction” is flawed and improper*

22. For completeness, Korea notes that even if Claimant had identified an error susceptible to correction under Article 38 (*quod non*), its proposed correction is irreparably flawed. Specifically, Claimant’s proposed “correction” seeks to add more than KRW 50 billion to the Pre-Award Interest ordered in the Award. It does this in three steps, all flawed.

- a. *First*, it changes the methodology by which the Pre-Award Interest was determined—from a straightforward computation of interest on the Damages Amount to a computation of interest on varying principal amounts of loss, disaggregated by time period. This methodological change is impermissible for the reasons already discussed.
- b. *Second*, in the first two of its four time periods, it awards to Claimant interest on funds corresponding to the Counterfactual FMV of shares that Claimant still held during that period. This is obviously in error, as the Tribunal never held that Claimant had been deprived of such funds or that such funds constituted any part of Claimants’ loss. For example, the principal amount alleged by Claimant in the first period (i.e., 16 July 2015 – 16 September 2015) is

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<sup>36</sup> Award, ¶ 995(b)–(c).

<sup>37</sup> Award, ¶ 961 (emphasis added).

<sup>38</sup> Claimant’s Request, ¶¶ 19, 20.

KRW 771,026,741,100,<sup>39</sup> which corresponds to the Counterfactual FMV of Claimant’s entire shareholding, despite that Claimant continued to hold all of its shares during that time period and therefore had not yet realized any loss or been deprived of the use of any funds.<sup>40</sup> Similarly, in the second period (i.e., 17 September 2015 – 17 March 2016), Claimant alleges a principal amount of KRW 597,787,817,900,<sup>41</sup> which includes the full Counterfactual FMV of the Putback Shares (KRW 535,881,584,700<sup>42</sup>), which Claimant still held during that period and as to which Claimant had not yet realized any loss or been deprived of the use of any funds.<sup>43</sup>

- c. *Finally*, in each of the second, third, and fourth time periods, Claimant adds to the principal the compounded interest from all prior time periods,<sup>44</sup> contrary to the Tribunal’s direction that interest be compounded “yearly.”<sup>45</sup> This error also compounds the magnitude of the second error, by including wrongfully added interest from the first two time periods into the principal amount in the third and fourth time periods.

23. Because it seeks to compute pre-award interest on funds the use of which Claimant was never deprived (funds amounting to the Counterfactual FMV rather than the Damages Amount), Claimant’s proposed “correction” is irreparably flawed and must not be implemented in any event.

### **C. Claimant’s Attempt to Equate its Improper Request to Korea’s Request Fails**

24. Korea invites the Tribunal to ask the question: Why has Claimant made a correction request that it knows to be manifestly without merit? The answer can only be that Claimant sees some tactical value in making such a request in the context of its opposition to

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<sup>39</sup> Claimant’s Request, Table at ¶ 19.

<sup>40</sup> *See* Award, ¶ 933 (no loss realized until shares sold).

<sup>41</sup> Claimant’s Request, Table at ¶ 19.

<sup>42</sup> *See* Award, ¶ 935 (total valuation of Putback Shares on 16 July 2015).

<sup>43</sup> *See* Award, ¶ 937.

<sup>44</sup> Claimant’s Request, Table at ¶ 19.

<sup>45</sup> Award, ¶¶ 961–962, 995(c).

Korea's Request. Indeed, as noted above, Claimant devotes the bulk of its Request to seeking to show (unsuccessfully) that Korea's Request is outside the scope of Article 38. For the reasons discussed below, Claimant's attempt to equate Korea's *proper* request to correct an error in computation (or error of a similar nature) with Claimant's *improper* request to change the Tribunal's method and approach to calculating interest fails.

25. In framing its Request "in the alternative," Claimant suggests that the Tribunal must either accept or reject both Parties' requests.<sup>46</sup> This is false. While Claimant is correct that its own Request is inadmissible, its attempt to doom Korea's Request to the same fate is misguided and wrong.

26. Korea's Request satisfies all three prongs of the test for admissibility under Article 38 discussed above: it seeks to correct (i) an "error in computation" (and/or an error similar in nature to an error in computation)—namely, the inadvertent use of a post-tax figure where a pre-tax figure was intended;<sup>47</sup> (ii) that is evident on the face of the Award—i.e., the Tribunal's intention to apply a pre-tax (Top Up Payment) figure and the fact that the figure it applied was post-tax both are evident on the face of the Award;<sup>48</sup> (iii) in order to align the damages computation with the Tribunal's stated rationale and methodology.<sup>49</sup> Implementing Korea's requested correction does not require any change to the Tribunal's substantive method or approach. Rather, it merely requires substituting the pre-tax amount of the Top-Up Payment for the post-tax figure, so that the Tribunal's intention can be correctly implemented.<sup>50</sup>

27. Claimant challenges Korea's Request by trying to characterize it as a "methodological" correction outside the scope of Article 38, akin to Claimant's own attempt to change the methodology by which the Tribunal calculated the Pre-Award Interest.<sup>51</sup> In so doing, Claimant conflates impermissible methodological corrections with corrections of "any

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<sup>46</sup> See Claimant's Request, ¶ 22 ("In the event that the Tribunal accepts the ROK's submissions as to the permissible scope of Article 38, the Claimant requests the Tribunal to make the corrections set out in paragraph 20 herein.").

<sup>47</sup> See Korea's Request, ¶¶ 2, 10–12.

<sup>48</sup> See Korea's Request, ¶¶ 10–12.

<sup>49</sup> See Korea's Request, ¶¶ 9, 14–21.

<sup>50</sup> See Korea's Request, ¶¶ 14–21.

<sup>51</sup> Claimant's Request, ¶¶ 8–9, 12.

error in computation” (or error of a similar nature), which are expressly permitted under Article 38. Indeed, Claimant seeks effectively to eliminate the separate category of “any error in computation” from the list of correctible errors in Article 38. Specifically, in paragraph 6 of its Request, Claimant argues that the only kind of “error in computation” that may be corrected under Article 38 is an error that “is the calculating equivalent of the ‘clerical or typographical’ errors of which this provision also allows the correction.”<sup>52</sup> In other words, according to Claimant, the category of “any error in computation” should be limited to typos and other clerical errors in figures, such as a misplaced decimal point and the like. This proposition, for which Claimant cites no legal authority, is contrary to the plain language of Article 38, which lists “any error in computation” and “any clerical or typographical error” as two *separate* categories, each with its own distinct meaning.<sup>53</sup>

28. Commentary to Article 38 and to similar “correction” provisions in other arbitral rules confirms the distinct nature of the different categories of correctible errors,<sup>54</sup> not all of which are clerical in nature:

Material errors are computational, such as mistakes in the calculation of a certain amount. Clerical errors are purely typographical or of a similar technical nature, such as erroneous dates, inverted numbers and displaced words. Both must be self-evident.<sup>55</sup>

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<sup>52</sup> Claimant’s Request, ¶ 6.

<sup>53</sup> UNCITRAL Rules, Article 38(1) (permitting correction of “any error in computation, any clerical or typographical error, or any error or omission of a similar nature”).

<sup>54</sup> See, e.g., **RLA-177**, Stuart Isaacs, *Life after Death: The Arbitral Tribunal’s Role Following Its Final Award*, in JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 357, 362 (Neil Kaplan & Michael J. Moser eds., 2018) (“[T]he corrections to an award which are envisaged fall into four types: errors in computation, clerical errors, typographical errors, and errors of a similar nature. The identification of what falls within each of those types will usually be straightforward but it is not always the easy matter which it may seem. A particular error may fall into more than one of those types.”).

<sup>55</sup> **RLA-174**, Luiz Olavo Baptista, *Correction and Clarification of Arbitral Awards*, in ARBITRATION ADVOCACY IN CHANGING TIMES (INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 15) 275, 280 (Albert Jan van den Berg ed., 2011).

29. Commentary and jurisprudence also confirm that “any error in computation” is a *broader* category than “any clerical or typographical error.”<sup>56</sup> “[T]ypical examples” of computational errors or errors of a similar nature<sup>57</sup> include:

- “if the tribunal’s award leaves no doubt that default interest at a certain annual rate should be awarded for two years but the dispositive portion of the award only computes one year’s worth of interest”;<sup>58</sup>
- “a failure to account for an amount that should have been accounted for in a calculation”;<sup>59</sup>
- “miscalculations, use of wrong data, or omission of data in the tribunal’s assessment of costs”;<sup>60</sup>
- “contains miscalculations or uses wrong data in calculations”;<sup>61</sup> and
- “the figures awarded by the Tribunal either do not add up or do not correspond to those in the discussion part of the award.”<sup>62</sup>

30. Korea’s requested correction is of a piece with the above examples, as it seeks to correct the Tribunal’s inadvertent use of a post-tax figure (wrong data) that does not correspond to the Tribunal’s stated intention to use pre-tax figures (failure to account for an amount that should have been accounted for). Unlike Claimant’s misguided Request, Korea’s Request does not seek any alteration to the Tribunal’s stated methodology or approach.

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<sup>56</sup> See, e.g., **CLA-205**, Jan Paulsson & Georgios Petrochilos, UNCITRAL ARBITRATION (2017), Commentary on Section IV, Art. 38, ¶ 5 (“[E]rrors are not confined to the purely mechanical.”).

<sup>57</sup> In paragraph 6 of its Request, Claimant has listed six “typical examples” of errors that are subject to correction. However, Claimant has omitted to include other examples found on the same pages of the commentaries to which Claimant refers.

<sup>58</sup> **CLA-205**, Jan Paulsson & Georgios Petrochilos, UNCITRAL ARBITRATION (2017), Art. 38, ¶ 5 (cited in Claimant’s Request, ¶¶ 6–7).

<sup>59</sup> **CLA-205**, Jan Paulsson & Georgios Petrochilos, UNCITRAL ARBITRATION (2017), Art. 38, ¶ 10 (cited in Claimant’s Request, ¶¶ 6–7).

<sup>60</sup> **CLA-207**, Michael J. Moser & Chiann Bao, A GUIDE TO THE HKIAC ARBITRATION RULES (2d. ed. 2022), ¶ 11.89 (cited in Claimant’s Request, ¶ 7).

<sup>61</sup> **CLA-208**, Maxi Scherer *et al.*, ARBITRATING UNDER THE 2020 LCIA RULES: A USER’S GUIDE (2021), ¶ 72 (cited in Claimant’s Request, ¶¶ 6–7).

<sup>62</sup> **CLA-209**, Thomas H. Webster & Michael W. Bühler, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS (5th. ed. 2021), p. 617 (cited in Claimant’s Request, ¶ 6).

31. Claimant is similarly wrong to argue that the “nature and number of adjustments” required by Korea’s proposed correction is a reason to deny the request.<sup>63</sup> Korea’s proposed correction requires nothing more than (1) replacing an erroneously applied post-tax figure with the corresponding pre-tax figure (as intended by the Tribunal); and (2) making corresponding mechanical adjustments to other parts of the Award.<sup>64</sup> Claimant’s complaint is directed primarily to the fact that the pre-tax figure itself is not stated in the Award and for that reason must be computed using simple arithmetic from information that is available in the record and not in dispute. This complaint is unavailing for several reasons, including: (1) Claimant itself is responsible for withholding the pre-tax figure from the Tribunal and should not be heard to complain if such figure is instead derived through simple arithmetic and uncontested evidence; (2) Claimant notably does not argue that Korea has miscalculated or misstated the pre-tax figure and accordingly has conceded its accuracy; and (3) so long as the error is evident on the face of the Award, a slight complexity in the necessary corrections is not a reason to deny the request.<sup>65</sup>

32. Accordingly, Claimant’s attempt to torpedo Korea’s Request by equating it with its own doomed request must fail.<sup>66</sup>

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<sup>63</sup> Claimant’s Request, ¶ 9.

<sup>64</sup> See **RLA-173**, David Caron & Lee Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2d. ed. 2013), Art. 38, p. 816 (quoting from *Harold Birnbaum and Islamic Republic of Iran*, IUSCT Case No. 967, Correction to Award No. 549-967-2, 19 July 1993, correcting award where correction to one erroneous figure necessitated corresponding corrections to a number of other parts of award in which that figure was used).

<sup>65</sup> See **RLA-178**, *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Decision on Rectification, 8 May 2023 (Binnie, Brower, Stern), ¶ 45 (holding that “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 [] to correct the error.”).

<sup>66</sup> Claimant’s suggestion, at paragraph 11 of its Request, that it could “amount to a serious procedural irregularity” if the Tribunal were to correct via the Article 38 correction mechanism its inadvertent use of a post-tax figure where the pre-tax figure was intended is without merit. If it is correct (as Korea contends) that there is an error that can be corrected via Article 38, it is within the Tribunal’s power to correct such error and doing so would not amount to a “serious procedural irregularity.” Moreover, Claimant has been in possession of the pre-tax figure at all relevant times and should have supplied that figure to the Tribunal. Having withheld that figure from the Tribunal, Claimant is in no position to fault the Tribunal for looking to the arbitral record to find it.



**IV. CONCLUSION AND REQUEST FOR RELIEF**

33. For the reasons set forth above, Korea respectfully requests that the Tribunal grant the following relief:

- a. Deny Claimant's Request in its entirety; and
- b. Order Claimant to pay all of Korea's legal fees and expenses incurred in connection with Claimant's Request.

\* \* \*

Respectfully submitted,



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