IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA

BETWEEN

ELLIOTT ASSOCIATES, L.P.

Claimant

AND

REPUBLIC OF KOREA

Respondent

THE CLAIMANT'S RESPONSE TO THE RESPONDENT'S REQUEST FOR CORRECTION AND INTERPRETATION OF THE AWARD

1 August 2023

KL PARTNERS

THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. On 18 July 2023, the Republic of Korea (the ***ROK***) submitted a Request for Correction and Interpretation of Award (the ***ROK's Request***) pursuant to Articles 37 and 38 of the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the ***UNCITRAL Rules***). The ROK's Request seeks both a correction to and an interpretation of the Tribunal's Award of 20 June 2023 (the ***Award***). In accordance with the Tribunal's letter of the same date, the Claimant hereby submits its Response to the ROK's Request (the ***Response***) and respectfully requests that the ROK's Request be dismissed in its entirety.

2. As the Claimant sets out in further detail in this Response:

   (i) Pursuant to Article 38 of the UNCITRAL Rules, the Tribunal has only a limited power to correct mechanical, clerical errors. The Tribunal's utilization of a post-tax Top-Up Payment was not erroneous, but even if it was, the series of corrections requested by the ROK would entail the Tribunal making new findings by revisiting factual evidence and reevaluating the Tribunal's judgment; they are akin to a third bite at the apple of post-hearing submissions on quantum and should be dismissed (***Part II***); and

   (ii) Article 37 of the UNCITRAL Rules permits clarification of awards where there is ambiguity in the language or logic of a determination. There is no true ambiguity in the Tribunal's Award of pre-award interest. The Award is clear that while pre-award interest should be calculated at the Korean statutory rate, it is to be paid in US dollars, reflecting the Korean won-U.S. dollar conversion rate as of the date of the Award. The ROK's request for clarification is therefore unjustified and should be dismissed (***Part III***).

3. This Response is submitted without prejudice to the Claimant's Request for Correction of the Tribunal's Award of 20 July 2023 (the ***Claimant's Request***), which was submitted in partial response to the ROK's Request and in which the

Claimant reserved its right to respond fully to the ROK's Request, as it does now.[1] The Claimant's Response is accompanied by legal authorities **CLA-210** to **CLA-213**.

II. THE ROK'S ATTEMPT TO RE-OPEN THE TRIBUNAL'S QUANTIFICATION OF DAMAGES GOES FAR BEYOND THE PERMISSIBLE SCOPE OF ARTICLE 38 OF THE UNCITRAL RULES

A. THE SCOPE OF ARTICLE 38

4. As a general principle, an award made by an arbitral tribunal is "final and binding"[2] and an arbitral tribunal's mandate ends with its final award.[3] Reflecting this general principle, Article 38 of the UNCITRAL Rules permits only very limited corrections to a tribunal's final award. Article 38 provides as follows:[4]

> 1. 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 similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.
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> 2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

5. Article 38 is therefore a "slip rule" of a type seen in all major international arbitral rules,[5] pursuant to which the Tribunal has only a circumscribed power to make

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1 Claimant's Request, fn 2.

2 UNCITRAL Rules, Article 34(2); English Arbitration Act 1996, **Exh CLA-210**, s. 58(1).

3 *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630, **Exh CLA-213**, p. 644 (Diplock LJ) ("Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes functus officio as respects all the issues between the parties unless his jurisdiction is revived by the court's exercise of its power to remit the award to him for his reconsideration."); *Emirates Trading Agency LLC v. Sociedadede Fomento Industrial Pvt Ltd* [2015] EWHC 1452 (Comm), **Exh CLA-212**, ¶ 26 (Popplewell J) ("There is a longstanding rule of common law that when an arbitrator makes a valid award, his authority as an arbitrator comes to an end and, with it, his powers and duties in the reference: he is then said to be functus officio").

4 UNCITRAL Rules, Article 38(1)-(2).

5 *See*, for example, Article 38 of the 2018 HKIAC Rules; Article 36 of the 2021 ICC Rules; Article 27 of the 2020 LCIA Rules; Article 38 of the 2012 PCA Rules; Article 47 of the 2023 SCC Rules; and

corrections to "*any error in computation, any clerical or typographical error, or any error or omission of a similar nature*." This formulation, and its individual components, are readily understandable and are clearly intended to be of a piece. That is, the kind of error in "computation" of which this provision is intended to allow correction is the calculating equivalent of the "clerical or typographical" errors of which this provision also allows the correction.

6. This reading of Article 38 is also supported by the legal authorities that the ROK itself relies on in its Request.[6] For example, one commentary relied on by the ROK refers to the "strict scope" of Article 38,[7] and states that "rectification of obvious mistakes is subject to a post-award motion for correction, and not clarification. *Nothing will be interpreted again by the arbitral tribunal*, which will only perform a formal technical review."[8]

7. Other commentators agree that the types of errors that may be corrected in accordance with Article 38 are merely mechanical, including: the identification of

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Rule 33 of the 2016 SIAC Rules. *See also* G. Born, *International Commercial Arbitration* (3rd ed., 2022), **Exh RLA-175**, Chapter 24, p. 10 (referring to the slip rule in Article 36 of the 2021 ICC Rules and noting that "[o]ther institutional rules are similar, both in providing the arbitrators with the power to make corrections and in *narrowly limiting* that authority") (emphasis added).

6 G. Born, *International Commercial Arbitration* (3rd ed., 2022), **Exh RLA-175**, Chapter 24, p. 10 (of PDF) (citing an ICSID tribunal for the principle that "[t]he purpose of the correction exception to the *functus officio* principle is to correct obvious omissions or mistakes and avoid consequence were a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purpose is therefore to ensure that the true [intentions] of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings . . . Any purported correcting that goes beyond the scope of the Tribunal's limited mandate in this regard is likely to be subject to challenge."); N. Blackaby et al., *Redfern and Hunter on International Arbitration* (7th ed. 2023), **Exh RLA-176**, ¶ 10.14 ("There is usually a provision in the relevant arbitration rules, or in the law governing the arbitration, for the correction of computational, clerical, or similar errors. These are primarily intended to allow correction of 'slips' that are obvious on the face of the award.").

7 L. Olavo Baptista, "Correction and Clarification of Arbitral Awards" in *Arbitration Advocacy in Changing Times (ICCA Congress Series No. 15)* (A. Jan van den Berg ed., 2011), **Exh RLA-174**, p. 283 ("[A]rbitral tribunals have quite often redefined the real purpose of an *addendum*, explaining to the parties that provisions for *correction* have a restricted meaning and should not be raised as an appeal of the arbitral award. The strict scope of Art. 36 of the UNCITRAL Rules [1976, which is materially the same as Article 38 of the 2013 UNCITRAL Rules], for instance, was re-affirmed in several decisions of the Iran-US Claims Tribunal" (emphasis in original)).

8 L. Olavo Baptista, "Correction and Clarification of Arbitral Awards" in *Arbitration Advocacy in Changing Times (ICCA Congress Series No. 15)* (A. Jan van den Berg ed., 2011), **Exh RLA-174**, p. 280 (emphasis added).

a witness by the wrong name;[9] the failure to insert "not" before a verb;[10] mixing up "claimant" and "respondent";[11] changes to dates, names, and addresses that are referenced in an award; or correcting quotes that have been extracted from correspondence.[12] Equivalent errors in computation include, for example, sums that do not add up, figures that contain decimal points rather than commas or vice versa, or mixing up currencies.[13]

8. The following decisions of the Iran-US Claims Tribunal (whose Rules contain an equivalent provision[14]) are illustrative:

(i) In *American Intl Group, Inc and Islamic Republic of Iran*, the tribunal corrected a typographical error in the value "U.S. $2,857,153" so that it read "U.S. $2,857, 857,1~~5~~43".[15]

(ii) In *Uiterwyk Corp* and *Islamic Republic of Iran*, the tribunal corrected a computational error, which was identified by the fact that "the total amount

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9 J. Paulsson and G. Petrochilos, *UNCITRAL Arbitration* (2017), **Exh CLA-205**, Commentary on Section IV, Article 38, ¶ 5.

10 T. Webster and M. Bühler, *Handbook of ICC Arbitration: Commentary and Materials* (5th ed., 2021), **Exh CLA-209**, Chapter 6, p. 617, ¶ 36-5.

11 M. Scherer, L. Richman, et al., *Arbitrating under the 2020 LCIA Rules: A User's Guide* (2021), **Exh CLA-208**, Chapter 22, ¶¶ 71-73.

12 J. Choong, M. Mangan, et al., *A Guide to the SIAC Arbitration Rules* (2nd ed., 2018), **Exh CLA-204**, Chapter 14, ¶ 14.60. *See also* D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 812, Section B(1) (referring to corrections of "a misspelled party's name, inaccurate dates, or mistranslations").

13 T. Webster and M. Bühler, *Handbook of ICC Arbitration: Commentary and Materials* (5th ed., 2021), **Exh CLA-209**, Chapter 6, p. 617, ¶ 36-5. *See also* G. Born, *International Commercial Arbitration* (3rd ed., 2022), **Exh RLA-175**, Chapter 24, p. 10 ("Most corrections have, in practice, involved mathematical or computational errors. In one case, for example, a period had to be replaced with a comma in order to avoid any confusion with decimal point notation, the latter being a distinctive feature of the English numerical system."); D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 811, Section B(1) (referring to the correction of "errors or omissions in an award, such as a misplaced decimal point or a neglected signature").

14 *See* Article 36 of the 1983 Rules of the Iran-US Claims Tribunal. This provision is in relevant part identical to Article 38 of the 2013 UNCITRAL Rules.

15 *American Intl Group, Inc* and *Islamic Republic of Iran*, Award No 93–2–3 (December 19, 1983), reprinted in 4 Iran-US CTR 96, 111 (1983-II), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 815.

awarded the Claimant does not correspond to the sum of the amounts referred to in earlier paragraphs of the Partial Award."[16]

(iii) In *Harold Birnbaum* and *Islamic Republic of Iran*, the tribunal corrected a "mathematical error" in which it had incorrectly summed together the total value of certain assets. Accordingly, the tribunal corrected a value stated as "1,084,175,345 rials" so that it read "1,100,253,669 rials."[17]

9. Conversely, it is well settled that Article 38 of the UNCITRAL Rules does not permit a correction that concerns "an intellectual error in the tribunal's judgment",[18] "faulty legal analysis or factual findings",[19] or corrections that would "affect the reasoning or outcome of the award".[20] Accordingly, a requested correction will be improper where it requires a tribunal to "reconsider evidence; revise findings on the merits based on new evidence[;] add new findings and orders previously omitted in the original award"[21]; or where it would require a tribunal to "adjust[] the method used for a calculation".[22]

B. THE ROK'S REQUEST FOR CORRECTION

10. Measured against that standard, the ROK's Request for correction should be dismissed for two reasons. First, there is no inadvertent error in the Tribunal's utilization of a post-tax Top-Up Payment figure (***1***); but even if such an error exists, it would not fall within the scope of Article 38 (***2***).

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16 *Uiterwyk Corp* and *Islamic Republic of Iran*, Decision No 375-381-1 (November 22, 1988), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 815.

17 *Harold Birnbaum* and *Islamic Republic of Iran*, Correction to Award No 549–967–2 (July 19, 1993), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 816.

18 J. Paulsson and G. Petrochilos, *UNCITRAL Arbitration* (2017), **Exh CLA-205**, Commentary on Section IV, Article 38, ¶ 5.

19 G. Born, *International Commercial Arbitration* (3rd ed., 2022), **Exh RLA-175**, Chapter 24, p. 10.

20 M. J. Moser and C. Bao, *A Guide to the HKIAC Arbitration Rule*s (2nd ed., 2022), **Exh CLA-207**, Chapter 11, ¶ 11.89.

21 M. Scherer, L. Richman, et al., *Arbitrating under the 2020 LCIA Rules: A User's Guide* (2021), **Exh CLA-208**, Chapter 22, ¶ 73.

22 J. Ragnwaldh, F. Andersson, et al., *A Guide to the SCC Arbitration Rules* (2019), **Exh CLA-206**, Chapter 6, p. 143.

1. There is no inadvertent error in the Tribunal's Award

11. The ROK asserts that the Tribunal applied a post-tax Top-Up Payment value, despite its "affirmative intention" to use a pre-tax value,[23] and that it thereby made an "inadvertent" or "unwitting" error. [24] According to the ROK, this was in part due to the purported failure by the Claimant to provide a pre-tax Top-Up Payment value in its Reply Post-Hearing Brief,[25] which, the ROK suggests the Tribunal ought to have applied in its assessment of the Claimant's loss. None of these assertions bear the weight that the ROK places on them, for the following three reasons.

12. *First*, contrary to what is suggested in the ROK's Request, the Tribunal was not led astray by the Claimant's purported failure to provide a pre-tax Top-Up Payment value in its Reply Post-Hearing Brief. The Claimant was clear in its Post-Hearing Brief that the Top-Up Payment it had received was "net of withholding and other taxes" [26] and the Tribunal specifically cited to this paragraph of the Claimant's Post-Hearing Brief in the Award when it identified the value of the Top-Up Payment.[27] Moreover, the Parties made submissions on the Top-Up Payment in their prior pleadings,[28] and it was open to the ROK to argue that, in the event the Tribunal factored in the Top-Up Payment in its assessment of the Claimant's loss, the Tribunal ought to adopt a pre-tax valuation of the Top-Up Payment, including by using the methodology now set out in detail in its Request. The ROK's own omission to do so does not justify a belated attempt to argue that same point now. If there was any "failure" here, it was by

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23 ROK's Request, ¶ 10.

24 ROK's Request, ¶¶ 2, 7, 12.

25 ROK's Request, ¶ 21.

26 Claimant's Reply Post-Hearing Brief (***Reply PHB***), 18 May 2022, ¶ 102.

27 Award, ¶ 936 (citing to Claimant's Reply PHB, 18 May 2022, ¶ 102).

28 In particular, in its first Post-Hearing Brief, the ROK sought an order that "the Claimant shall, within 30 days of it or any Elliott Group entity receiving a "Top Up Payment" … pay an amount equivalent to the "Top Up Payment" to the ROK" (ROK's Post-Hearing Brief (***PHB***), 13 April 2022, ¶¶ 234, 236(b)). This can only have referred to the post-tax value of the Top-Up Payment actually received by the Claimant. *See also* Claimant's PHB, 13 April 2022, ¶ 238 (explaining why the post-tax value of amounts received by the Claimant should be used).

the ROK, which it should not now be allowed to remedy in post-*award* briefing in the guise of a purported correction application.

13. *Second*, there is no basis for the contention that the Tribunal's adoption of a post-tax Top-Up Payment value was "inadvertent". In its Award, the Tribunal refers to the fact that the Claimant received a Top-Up Payment from SC&T "of KRW 65,902,634,943 *net of withholding and other taxes*".[29] It therefore consciously chose to adopt a post-tax value for the Top-Up Payment.[30] In the case of *Fereydoon Ghaffari* and *Islamic Republic of Iran*, the Iran-US Claims Tribunal rejected a request for correction of an interest rate on the grounds that "[t]*he Tribunal was fully aware of the consequences of its choice*" and had elected the relevant figure "considering the evidence and arguments submitted in the present claim."[31] Here too, the Tribunal knowingly chose a post-tax Top-Up Payment value, taking into consideration the evidence and arguments submitted in the arbitration.

14. *Third*, the ROK's attempt to cast the Tribunal's findings as "erroneous" on the basis that the Tribunal purportedly intended to, but ultimately did not, "ensure consistency" in its adoption of only pre-tax values in assessing the Claimant's loss distorts the Tribunal's Award.[32] The Award indicates that the Tribunal adopted a pre-tax value for the proceeds from the sale of the Putback Shares, because the Tribunal intended to "ensure consistency" with its approach to valuing what the Claimant had paid for those same shares.[33] That is an entirely logical approach, as it ensures consistency in how the Tribunal valued the purchase value and the sale value of the same shares. That plain reading of the Tribunal's Award is further supported by the fact that the Tribunal noted in the same sentence that

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29 Award, ¶ 906 (emphasis added). *See also* Award, ¶ 936 (citing to Claimant's Reply PHB, 18 May 2022, ¶ 102).

30 Award, ¶ 936.

31 *Fereydoon Ghaffari* and *Islamic Republic of Iran*, Decision No DEC 123–968–2 (October 30, 1995), reprinted in 31 Iran-US CTR 124, 124–25 (1995), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 820 (emphasis added).

32 ROK's Request, ¶ 10, citing Award, ¶ 936.

33 Award, ¶ 934.

Mr. Boulton, in calculating the Claimant's net trading losses (but not the Top-Up Payment), had also taken into account pre-tax values:[34]

> 935. By the valuation date of 16 July 2015, the value of the Claimant's shareholding in SC&T had increased to KRW 69,300 per share. This translates into a total valuation of the Claimant's entire shareholding in SC&T (11,125,927 shares) of KRW 771,026,741,100, or approximately KRW 771 billion (KRW 535,881,584,700 for the 7,732,779 Putback Shares plus KRW 235,145,156,400 for the remaining 3,393,148 shares).
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> 936. The Claimant subsequently sold the Putback Shares which it had purchased before the Merger announcement and to which it had a reappraisal right (and which had been subsequently exchanged for 2,707,157 shares in New SC&T on 14 September 2015 as per the Merger Ratio) at a price of KRW 57,234 per share, plus a payment for delay, the total price per share amounting to KRW 59,050. This amounts in total to KRW 456,620,599,950, or approximately KRW 456.6 billion or, net of tax KRW 402 billion. *The Tribunal considers that the pre-tax amount is the one to be taken into account, to ensure consistency; and indeed Mr. Boulton in his calculation of the Claimant's trading losses also took into account the pre-tax amounts*. […]

15. That is as far as the Tribunal's reference to ensuring consistency went or needed to go. The Tribunal gave no indication that, for reasons of consistency or otherwise, it "intended" to apply a pre-tax value for the Top-Up Payment. There is therefore no basis for finding that the Tribunal made a computational error when it chose a value for the Top-Up Payment that it knew to be post-tax.

2. The ROK's purported correction would exceed the scope of Article 38

16. Even assuming, *arguendo*, that the ROK had identified an inadvertent error in the Tribunal's Award, that error and the corrections that the ROK seeks to address far exceed the scope of Article 38. According to the ROK:

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[34] Award, ¶¶ 935-936 (emphasis added).

(i) To correct its Award, the Tribunal must adopt an entirely new step in methodology for the purposes of calculating the Claimant's loss. In particular, rather than adopt the Top-Up Payment value set out in the Claimant's submissions,[35] the Tribunal must adopt a new mathematical formula in order to derive, by itself, the pre-tax value of the Claimant's Top-Up Payment.

(ii) The Tribunal must make a series of new factual findings, without providing the Claimant an opportunity to make submissions on those factual findings. In particular, the Tribunal must: (a) review the terms of the Settlement Agreement between the Claimant and SC&T and find that it is an appropriate basis for calculating the pre-tax value of the Top-Up Payment; (b) adopt the statement made by the ROK in its Post-Hearing Brief that a Top-Up Event was expected to occur in the event of a final judgment by the Korean Courts awarding former SC&T shareholders additional payment for their appraisal shares;[36] (c) review the factual findings of the Korean Supreme Court on 14 April 2022 and find that the Supreme Court affirmed an appraisal price of KRW 66,602 per share; and (d) apply those factual findings as inputs into the new mathematical formula, in order to derive a new, pre-tax value for the Claimant's Top-Up Payment.[37]

(iii) As a consequence of these new factual findings, and as the ROK accepts, the Tribunal would need to make not one, but "*a series*" of corrections to its Award.[38]

17. The ROK's requested corrections cannot be squared with the "limited mandate"[39] and "strict scope"[40] of Article 38 of the UNCITRAL Rules. The requested corrections are not the computational equivalent of clerical or typographical

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35 *See* Award, ¶ 936, citing Claimant's Reply PHB, 18 May 2022, ¶ 102.

36 ROK's PHB, 13 April 2022, ¶ 234.

37 ROK's Request, ¶¶ 14-20.

38 ROK's Request, ¶ 20 (emphasis added).

39 *See above* fn 7.

40 *See above* fn 8.

errors: they are not, for example, errors in summing together values already reflected in the Tribunal's Award; nor are they corrections of the use of a decimal point rather than a comma, or a mix up of currencies. To the contrary, in asserting that the Tribunal ought to have adopted a pre-tax Top-Up Payment value—an argument that the ROK never made in any pre-award submission despite being fully aware that a Top-Up Payment was expected—the ROK is questioning the Tribunal's judgment and analysis of the facts, and the ROK calls on the Tribunal to ignore the fact that neither party in the arbitration led evidence of the pre-tax Top-Up Payment sum and instead to reconsider and contort other factual evidence, make new findings of fact, and adjust the method that it used for its calculation of the Claimant's loss.

18. In *American Bell Intl Inc* and *Islamic Republic of Iran*, the Iran-US Claims Tribunal rejected a request for a correction of a computational error on the grounds that the respondents had "*submitted an elaborate reargumentation based on the evidentiary record aiming at the reconsideration and revision of some of the findings* on the basis of which computations are made in the Award."[41] The ROK's Request contains the same fundamental flaws: it is an impermissible reargumentation of a quantum issue after the close of proceedings and an attempt at a third bite at the apple. Accordingly, it should be dismissed.

19. Finally, and as noted in the Claimant's Request,[42] the ROK has provided the Tribunal with a copy of the affidavit supporting its application to the English courts to set aside the Award. This includes the application to set aside the award in part for "serious irregularity" under section 68 of the English Arbitration Act due to the alleged methodological error that the ROK requests be addressed by way of correction. Any suggestion that the Tribunal should extend the scope of Article 38 in order to address part of the ROK's set aside application should be resisted as the section 68 application is itself hopeless: such an application will require the ROK to show a serious procedural irregularity resulting in a substantial

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41 *American Bell Intl Inc* and *Islamic Republic of Iran*, Decision No DEC 58–48–3 (March 19, 1987), reprinted in 14 Iran-US CTR 173, 173–74 (1987-I), cited in D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **Exh RLA-173**, Chapter 26, p. 818 (emphasis added).

42 Claimant's Request, ¶ 11.

injustice, and there is no chance of it meeting this high hurdle as a result of an arbitral tribunal not including a step in its methodology for calculating damages that the ROK never itself argued for, by reference to exhibits that the ROK never submitted should be used in this way.[43] In short, the Claimant respectfully requests the Tribunal faithfully to apply Article 38 without regard to the ROK's other disappointing attempts to attack the Award.

III. THE ROK FAILS TO IDENTIFY AN AMBIGUITY IN THE TRIBUNAL'S AWARD WITHIN THE SCOPE OF ARTICLE 37

20. Article 37 permits the clarification of an award in order to remove ambiguity; it is not intended to correct or amend an award. To recall, Article 37(1) states as follows:

> Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

21. Pursuant to Article 37(1), a party may seek clarification of an award where "specific language or punctuation in the award is unclear – meaning *incomprehensible or susceptible to contradictory interpretations*."[44] An interpretation thus resolves ambiguity or vagueness in the terms of the award as opposed to modifying or supplementing the original decision.[45]

22. According to the ROK, there is "an ambiguity" in the Tribunal's determination that requires interpretation in order to enable performance of the Award.[46] Specifically, according to the ROK, there are "two possible interpretations of the meaning of the Award as to the currency in which pre-award interest is to be

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43 Indeed, for the Tribunal to introduce by way of an Article 38 correction such a new step in its methodology for calculating damages could itself amount to a serious procedural regularity.

44 D. Caron and L. Reed, *Post Award Proceedings under the UNCITRAL Arbitration Rules*, 11(4) Arbitration International 429 (1995), **Exh CLA-211**, p. 452 (referring to Article 35 of the 1976 UNCITRAL Rules, which is materially the same as Article 37 of the 2013 UNCITRAL Rules) (emphasis added).

45 J. Paulsson and G. Petrochilos, *UNCITRAL Arbitration* (2017), **Exh CLA-205**, Commentary on Section IV, Article 37, ¶ 2.

46 ROK's Request, ¶ 23.

computed," namely US dollars or Korean won.[47] This purported ambiguity arises because the Tribunal stated in its Award that "[t]he currency to which the pre-award interest is applicable is therefore Korean Won", and then subsequently ordered the ROK to pay pre-award interest at a rate of 5% on a sum reflecting the Claimant's loss in US dollars.[48] The ROK also claims that, if pre-tax interest is to be awarded in Korean won, there is ambiguity as to the applicable date of conversion from Korean won to US dollars.[49]

23. In reality, there is no ambiguity in the Tribunal's Award, for three reasons.

24. *First*, the Tribunal determined that "[t]he currency to which the pre-award interest is applicable is therefore Korean Won."[50] Read in context, the reference to the currency to which pre-award interest applies being Korean won was made to explain why the Korean statutory rate of 5% interest compounded annually was being used. It was not a determination that the amount awarded as pre-award interest should actually be *paid* in Won. Such a determination would have been incompatible with the Tribunal's finding in the immediately preceding sentence that "the Claimant is entitled to *payment* of compensation [of which pre-award interest forms a part] in US Dollars".[51] Consistent with its determination of the currency for payment of compensation, the Tribunal stated that the Claimant had a right to "*payment* of any compensation under the Treaty to be made in U.S. Dollars"[52] and the Tribunal went on to stipulate in its *dispositif* that pre-award interest should be *paid* in US dollars.[53]

25. *Second*, there is no ambiguity as to the date on which any currency in Korean won should be converted to US dollars for the purposes of payment. The Tribunal

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47 ROK's Request, ¶ 27.

48 ROK's request, ¶ 26.

49 ROK's Request, ¶ 27.

50 Award, ¶ 961.

51 Award, ¶ 961 (emphasis added).

52 Award, ¶ 952 (emphasis added).

53 Award, ¶ 995(c).

stated in no uncertain terms that "the appropriate date of conversion from KRW to USD is the date of this Award", namely, 20 June 2023.[54]

26. *Third*, in any event, no "clarification" of the Award is needed, because the ROK remains liable to pay the same amount of pre-award interest irrespective of whether it is calculated by reference to a US dollar figure or whether it is first calculated by reference to a Korean won figure and subsequently converted into US dollars. The Tribunal ruled that, for the purposes of calculating damages (including pre-award interest), any conversion from Korean won to US dollars must take place on the date of the Award.[55] Accordingly, this means that the "two possible interpretations of the meaning of the Award" identified in the ROK's Request are mathematically equivalent and would lead to exactly the same quantum of damages owed to the Claimant.[56]

27. Having failed to identify any actual ambiguity in the Tribunal's Award, the ROK's clarification Request should be dismissed.

IV. REQUESTS FOR RELIEF

28. The Claimant respectfully requests that the Tribunal:

(i) Dismiss the ROK's Request in its entirety, including the ROK's request for correction of the Award and the ROK's request for clarification of the Award; and

(ii) Order the ROK to pay the Claimant the legal costs incurred by the Claimant in relation to the ROK's Request in U.S. dollars, with interest.

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54 Award, ¶ 952.

55 Award, ¶¶ 952, 961.

56 As noted in the Tribunal's Award, the Claimant's loss is valued at KRW 68,744,114,123 or, when converted into US dollars on the date of the Award, USD 53,586,931.00 (*see* Award, ¶¶ 948 and 952). In either case, the ROK is required to pay 5% pre-award interest compounded annually. The total interest paid will be the same, if, in accordance with the Tribunal's Award, any interest on the KRW principal is converted to US dollars on the date of the Award.

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1 August 2023