

**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 REQUEST FOR CORRECTION
OF THE AWARD**

20 July 2023



THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. On 18 July 2023, the Republic of Korea (**ROK**) submitted its Request for Correction and Interpretation of Award (the **ROK's Request**), purporting to correct “an error in the computation of damages”¹ in the Tribunal’s Award of 20 June 2023 (the **Award**), pursuant to Article 38 of the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the **UNCITRAL Rules**).
2. The ROK’s Request for Correction far exceeds the permissible scope of Article 38 of the UNCITRAL Rules. Rather, the ROK’s purported “corrections” to the Tribunal’s methodology for calculating damages are akin to a third bite at the apple of post-hearing submissions on quantum and should be dismissed (**Part II**).
3. In the event that the Tribunal finds that the scope of Article 38 corrections extends to corrections in calculation methodology, the Claimant hereby submits a Request for Correction of the Tribunal’s Award, as set out in this application, which is duly filed within the deadline stipulated under the UNCITRAL Rules (**Part III**).

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

4. The Claimant reserves the right to respond fully to the ROK’s Request within the time-limit specified by the Tribunal in its letter of 18 July 2023. At this juncture, and without delay, the Claimant observes that the ROK’s Request for Correction goes far beyond the permissible scope of Article 38.²

A. THE SCOPE OF ARTICLE 38

5. As a general principle, an arbitral tribunal’s mandate ends with its final award. Reflecting this general principle, Article 38 of the UNCITRAL Rules permits only very limited corrections to a tribunal’s final award. To recall, Article 38 provides as follows:³

¹ ROK’s Request, ¶ 2.

² The Claimant reserves all rights to respond to whether the ROK’s Request also exceeds the scope of Article 37 of the UNCITRAL Rules. For the avoidance of doubt, the fact that any statement set out in the ROK’s Request is not expressly referred to or addressed in this submission does not amount to an acceptance of that statement.

³ UNCITRAL Rules, Article 38(1)-(2).

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.
 2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
6. Article 38 is therefore a “slip rule” of a type seen in all major international arbitral rules,⁴ pursuant to which the tribunal has only a very circumscribed power to make 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. As the Tribunal will know, typical examples of such errors include:
- a. the identification of a witness by the wrong name;⁵
 - b. the failure to insert “not” before a verb;
 - c. sums that do not add up, contain decimal points rather than commas or vice versa, or mix up currencies;⁶

⁴ 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 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).

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

⁶ 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”).

- d. mixing up “claimant” and “respondent”;⁷
 - e. changes to dates, names and addresses that are referenced in an award; or
 - f. correcting quotes that have been extracted from correspondence.⁸
7. Article 38 does not permit changes to an award to address “an intellectual error in the tribunal’s judgment”⁹ or “faulty legal analysis or factual findings”.¹⁰ Nor would it be permissible to make changes that “affect the reasoning or outcome of the award”.¹¹ Accordingly, a requested change 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”¹²; or where it would require a tribunal to “adjust[] the method used for a calculation”.¹³

B. THE ROK’S REQUEST FOR CORRECTION

8. In seeking to adjust the method used for calculating damages, the ROK’s Request for Correction goes far beyond the permissible scope of Article 38. Over the course of its six-page explanation of its purported “correction” of the Tribunal’s Award, the ROK:¹⁴
- a. calls on the Tribunal to reconsider the evidence and to make a new factual finding in relation to the quantum of damages owed by the ROK as a consequence of its Treaty breaches;¹⁵

⁷ M. Scherer, L. Richman, et al., *Arbitrating under the 2020 LCIA Rules: A User’s Guide* (2021), **Exh CLA-208**, Chapter 22, ¶¶ 71-73.

⁸ J. Choong, M. Mangan, et al., *A Guide to the SIAC Arbitration Rules* (2nd ed., 2018), **Exh CLA-204**, Chapter 14, ¶ 14.60; 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”).

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

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

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

¹² M. Scherer, L. Richman, et al., *Arbitrating under the 2020 LCIA Rules: A User’s Guide* (2021), **Exh CLA-208**, Chapter 22, ¶ 73.

¹³ J. Ragnwaldh, F. Andersson, et al., *A Guide to the SCC Arbitration Rules* (2019), **Exh CLA-206**, Chapter 6, p. 143.

¹⁴ See ROK’s Request, ¶¶ 9-21.

¹⁵ See ROK’s Request, ¶¶ 14-21 (referring to the Settlement Agreement, 15 March 2016, **Exh C-450**; the Seoul High Court Appraisal Price Decision, 30 May 2016, **Exh C-53**; and the Supreme Court Appraisal Price Decision, 14 April 2022, **Exh C-782**).

- b. invites the Tribunal to adjust its methodology for calculating damages to include an entirely new step in order to derive a new input to the Tribunal's calculation—a figure that is presently absent not only from the Award but from any of the ROK's previous submissions; and
 - c. asks the Tribunal to make numerous consequential adjustments to the figures that do appear in the Award to reflect this new methodology and this new input in the quantum of damages it awards.
9. The nature and number of adjustments to the Tribunal's analysis that this would entail confirm that the ROK's Request for Correction goes far beyond the accepted scope of corrections of a "computation[al]" or "clerical or typographical" nature, which are the limits of what Article 38 permits. The ROK's Request for Correction is more akin to a third bite at the apple of post-hearing submissions on quantum, not seeking correction of a calculation that the Tribunal has already made but, for the first time, inviting the Tribunal to perform a different calculation to derive a different figure upon which to base a different award of damages.
10. As the Claimant will set out fully in due course, the ROK's Request for Correction plainly exceeds the scope of permissible corrections to the Award that is envisaged under Article 38 of the UNCITRAL Rules, and it should accordingly be dismissed.
11. The Claimant notes that the ROK has now provided the Tribunal with a copy of the affidavit supporting its application to the English courts to set aside the Award. This includes the apparent application to set aside the Award in part for "serious irregularity" under section 68 of the English Arbitration Act 1996 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 "substantial 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 and by reference to exhibits that the ROK never submitted should be used in this way. Indeed, the Tribunal's introduction by way of an Article 38 correction of such a new step in its methodology for calculating

damages could itself amount to a serious procedural irregularity. 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. IN THE ALTERNATIVE, THE TRIBUNAL SHOULD CORRECT A FURTHER METHODOLOGICAL ERROR IN ITS CALCULATION OF THE CLAIMANT'S LOSS

12. If the Tribunal does consider that Article 38 encompasses methodological corrections, then the Claimant respectfully requests the Tribunal to make the following correction that would have far more significant effect in increasing the Tribunal's damages award than the ROK's Request would reduce it.
13. The Tribunal indicated in the Award that its quantification of the Claimant's loss was intended to reflect the "principle of full compensation set forth in the *Chorzów Factory* case".¹⁶ Accordingly, the Tribunal assessed the Claimant's damages by taking the value of the Claimant's shareholding as of 16 July 2015 and deducting the amounts the Claimant subsequently received (i) between 17-25 September 2015, by selling its non-Putback shares on the market; (ii) on 18 March 2016, by selling its Putback Shares to SC&T pursuant to the Settlement Agreement; and (iii) on 12 May 2022, by way of a "Top Up Payment" under the Settlement Agreement (in relation to the price of the Putback Shares sold to SC&T).¹⁷
14. Similarly, the Tribunal's determination on interest was "based on the principle that the 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".¹⁸
15. Consistent with this intent and the underlying principles of international law, the Tribunal then held that interest should be paid on the Claimant's losses "compounded yearly from 16 July 2015 until the date of this Award".¹⁹

¹⁶ Award, ¶ 931.

¹⁷ Award, ¶¶ 935-938.

¹⁸ Award, ¶ 961.

¹⁹ Award, ¶ 961.

16. The Tribunal clearly intended that its subsequent computations should reflect these principles and determinations. However, in computing the award of interest, there have been errors, so that the outcome has deviated from these determinations and principles, contrary to the Tribunal’s own intention.
17. In particular, the partial set off of the Claimant’s loss was piecemeal over time, rather than immediate on 16 July 2015. The Tribunal recognized that fact in its Award, but its calculation failed to reflect that fact. The Tribunal based its interest calculation on the Claimant’s net loss (KRW 68.74 billion) with interest running on that final net amount from 16 July 2015.²⁰ But in fact the value of the SC&T shares that the Claimant held on 16 July 2015 was KRW 771,026,741,100,²¹ which it only subsequently recovered in partial tranches months and years later: (i) between 17-25 September 2015 (KRW 179,759,400,000);²² (ii) on 18 March 2016 (KRW 456,620,599,950);²³ and (iii) on 12 May 2022 (KRW 65,902,634,943).²⁴ The Tribunal therefore made a methodological error in its calculation of interest and erroneously failed to make the Claimant “whole” (as it intended to do), when it omitted to calculate interest based on the actual amount of funds of which the Claimant was deprived for the period between 16 July 2015 and 20 June 2023.
18. Accordingly, the Claimant hereby proposes a correction to the Award to ensure that the computation reflects the Tribunal’s decision to compensate the Claimant “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”.²⁵
19. Correcting for the Tribunal’s error, the Claimant’s interest entitlement should instead have been calculated on the following basis:

²⁰ Award, ¶ 938.

²¹ Award, ¶ 935.

²² Award, ¶ 937. *See also* First Boulton Report, 4 April 2019, ¶ 6.2.12; Second Boulton Report, 17 July 2020, ¶ 10.2.6; Reply, 17 July 2020, ¶ 554; Second Smith Statement, 16 July 2020, ¶ 66; EALP, Records of SC&T Share Disposition, 15 September to 1 October 2015, **Exh C-672**; Spreadsheet of EALP’s disposal of non-Putback shares in SC&T, 14 September to 1 October 2015, **Exh C-443**.

²³ Award, ¶ 936. *See also* Reply, 17 July 2020, ¶ 553; Second Smith Statement, 16 July 2020, ¶ 66(i); BAML Cash Statement for EALP, 1 March to 1 May 2016, **Exh C-449**.

²⁴ Award, ¶ 936. *See also* Claimant’s Reply PHB, 18 May 2022, ¶ 102.

²⁵ Award, ¶ 961.

Time period	Change in funds that the Claimant was deprived of (KRW)	Opening Balance of Funds Deprived (KRW)	Interest on Opening Balance (KRW)²⁶	Closing (KRW)
16 July 2015 – 16 September 2015	771,026,741,100 <i>Value of the Claimant's SC&T shares on 16 July 2015</i>	771,026,741,100	6,520,476,800	777,547,217,900
17 September 2015 – 17 March 2016	(179,759,400,000) <i>Recovery via sale of non-Putback shares on the market between 17-25 September 2015²⁷</i>	597,787,817,900	14,803,357,630	612,591,175,529
18 March 2016 – 11 May 2022	(456,620,599,950) <i>Recovery via sale of Putback shares to SC&T under the Settlement Agreement on 18 March 2016</i>	155,970,575,579	54,615,392,804	210,585,968,384
12 May 2022 – 20 June 2023	(65,902,634,943) <i>Recovery via the Top Up Payment under the Settlement Agreement on 12 May 2022</i>	144,683,333,441	8,048,624,846	152,731,958,287
Total interest due on 20 June 2023			83,987,852,080	

²⁶ The Claimant has calculated its damages and interest in this table using KRW for illustrative purposes only. The Claimant reserves all rights to respond to the ROK's Request for Interpretation in relation to the currency applicable to pre-award interest.

²⁷ For ease of calculation, EALP conservatively assumes that all the non-Putback shares were sold on the market on 17 September 2015 when in fact they were sold over the period 17-25 September 2015.

20. Accordingly, the Tribunal should make the following corrections in the Award:

Original	Correction	Award Reference
<p>The Tribunal considers it appropriate that the interest accrued should be compounded yearly from 16 July 2015 until the date of this Award.</p>	<p>The Tribunal considers it appropriate that the interest accrued should be compounded yearly from 16 July 2015 until the date of this Award, taking into account the value of the shares lost by the Claimant on 16 July 2015 (being KRW 771,026,741,100), as well as the sums recovered by the Claimant subsequently, including: (i) KRW 179,759,400,000 (recovered via sale of non-Putback shares on the market between 17 and 25 September 2015); (ii) KRW 456,620,599,950 (recovered via sale of Putback shares to SC&T under the Settlement Agreement on 18 March 2016); and (iii) KRW 65,902,634,943 (recovered via the Top Up Payment under the Settlement Agreement on 12 May 2022).</p>	<p>¶ 961</p>
<p>For the foregoing reasons, the Tribunal determines as follows: [...] c. The Respondent is ordered to pay the Claimant pre-award interest at a rate of 5 percent on the sum in sub-paragraph (b) above, compounded yearly from 16 July 2015 until the date of this Award; [...]</p>	<p>For the foregoing reasons, the Tribunal determines as follows: [...] c. The Respondent is ordered to pay the Claimant pre-award interest at a rate of 5 percent on the sum in sub-paragraph (b) above, compounded yearly from 16 July 2015 until the date of this Award on KRW 771,026,741,100, taking into consideration the sums recovered by the Claimant between 17 and 25 September 2015, on 18 March 2016 and on 12 May 2022, as set out at paragraph 961 above; [...]</p>	<p>¶ 995(c)</p>

IV. REQUESTS FOR RELIEF

21. For the reasons above, which the Claimant will set out in more detail in due course, the ROK's Requests for Correction and Interpretation should be dismissed.
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.

Respectfully submitted,

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