IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE AGREEMENT ON RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN THE CARIBBEAN COMMUNITY AND THE DOMINICAN REPUBLIC AND THE UNCITRAL ARBITRATION RULES (1976)

In the arbitration proceeding between

MICHAEL ANTHONY LEE-CHIN

Claimant

and

THE DOMINICAN REPUBLIC

Respondent

ICSID Case No. UNCT/18/3

DECISION ON RECTIFICATION

Members of the Tribunal
Prof. Diego P. Fernández Arroyo, President
Mr. Christian Leathley
Prof. Marcelo Kohen

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Place of Arbitration: Washington D.C.
Date of dispatch to the Parties: February 29, 2024

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I. INTRODUCTION AND THE PARTIES

1. This case concerns a dispute submitted on the basis of the Agreement on Reciprocal Promotion and Protection of Investments contained in Annex III of the Agreement Establishing the Free Trade Area between the Caribbean Community ("**CARICOM**") and the Dominican Republic, signed on August 22, 1998, and which entered into force on February 5, 2002 (the "**Treaty**"), and the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**").

2. The Claimant is Mr. Michael Anthony Lee-Chin ("**Claimant**"), a national of Jamaica.

3. The Respondent is the Dominican Republic (the "**Republic**" or "**Respondent**").

4. Claimant and Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed on pages (i) and (ii) *supra*.

5. On July 15, 2020, the Tribunal issued the Partial Award on Jurisdiction ("**Partial Award**") jointly with the Dissenting Opinion of Prof. Marcelo Kohen.

6. The *dispositif* of the Partial Award provided as follows:

> *For the foregoing reasons, the Tribunal decides:*
>
> *(i) To declare that this dispute is within the jurisdiction of the Tribunal;*
>
> *(ii) To reject the jurisdictional objections filed by Respondent;*
>
> *(iii) To continue the arbitral proceeding as per the calendar to be fixed in consultation with the Parties in accordance with Option I of the Procedural Timetable (Revised Annex A [190] Procedural Order No. 1;)*
>
> *(iv) To defer the adoption of the decision on costs.*

7. On October 6, 2023, the Tribunal issued the Final Award jointly with the Dissenting Opinion of Prof. Marcelo Kohen.

8. The *dispositif* of the Final Award provided as follows:

> *For the foregoing reasons, the Tribunal decides:*

(i) To declare that this dispute is within the jurisdiction of the Tribunal;

(ii) To reject the jurisdictional objections filed by Respondent;

(iii) To find that Respondent has violated its obligations under the Treaty regarding expropriation, fair and equitable treatment and the umbrella clause;

*(iv) To order Respondent, as reparation for the violations referred to supra, to pay compensation for the damage caused to Claimant, which amounts to USD **43,590,090**;*

*(v) To order Respondent to pay interest, at the rate based on the yield on Dominican Republic sovereign bonds issued in U.S. dollars; such interest shall accrue, as regards the amount relating to damages for the failure to update the tipping fees (**USD 4,880,609**), from December 31, 2013, and, as regards the amount relating to damages on Lajun's shares (**USD 38,709,481**), from September 27, 2017; in both cases, interest shall be compounded annually and shall accrue until the date of actual payment;*

(vi) To reject all other claims of the Parties;

(vii) To order that each Party bear its own costs and 50 % of the arbitration costs.

II. PROCEDURAL HISTORY

9. On November 6, 2023, pursuant to Article 36(1) of the UNCITRAL Rules, Respondent submitted the Request for Rectification of the Final Award, jointly with Exhibits 1 to 5 and the Memorandum of Quadrant Economics LLC accompanied by Annex A (the "**Request for Rectification**").

10. On November 7, 2023, the Centre acknowledged receipt of the Request for Rectification and transmitted it to the Members of the Tribunal. On that same date, Claimant requested an opportunity to respond to the Request for Rectification by December 4, 2023.

11. On November 8, 2023, the Tribunal confirmed receipt of the Request for Rectification, observing that it had been submitted within the 30-day term set forth in Articles 2(2) and 36(1) of the UNCITRAL Rules. By this communication, the Tribunal proposed to the Parties the application to the rectification proceeding of the procedural rules for the arbitration agreed upon by the Parties and contained in Procedural Order No. 1 of October 23, 2018. The Tribunal proposed, in particular, the application of Section 3 of this Order regarding Fees and Expenses of the Tribunal Members, notwithstanding the provisions of Article 40(4) of the

UNCITRAL Rules. The Tribunal invited the Parties to confirm their agreement with the Tribunal's proposal by November 13, 2023, and Claimant to submit his comments on the Request for Rectification by December 4, 2023.

12. On November 13, 2023, Claimant agreed to the Tribunal's proposal of November 8, 2023, and Respondent indicated that it had no observations thereto.

13. On November 28, 2023, Claimant submitted his Opposition to the Respondent's Request for Rectification, jointly with Exhibits 1 to 17 (the "**Opposition to the Request for Rectification**").

14. On December 1, 2023, Respondent requested an opportunity to respond to the Opposition to the Request for Rectification, by Monday, December 4, 2023, and Claimant objected to the Respondent's request.

15. On that same date, the Tribunal invited Respondent to file its reply on the Request for Rectification, by December 4, 2023, and Claimant to submit his rejoinder on the Request for Rectification, by December 8, 2023, indicating that both submissions should not exceed 5 pages and were not to be accompanied by any exhibit or legal authority.

16. On December 4, 2023, Respondent submitted its Reply on the Respondent's Request for Rectification (the "**Reply on the Request for Rectification**.")

17. On December 8, 2023, Claimant submitted his Rejoinder in Opposition to the Respondent's Request for Rectification (the "**Rejoinder on the Request for Rectification**").

18. On December 27, 2023, the Tribunal invited the Parties to submit their statements of costs related to the rectification proceedings by January 8, 2024. Claimant submitted his statement on January 5, 2024, and Respondent submitted its statement on January 8, 2024.

III. THE PARTIES' POSITIONS

A. The Respondent's Position

19. Respondent argues that the Tribunal's determination of the final amount of compensation of the value of Lajun's shares "was based on an erroneous application of the elements taken into account by the Tribunal in calculating the fair market value of Lajun's shares that Lajun could have obtained between 2017 and 2034," which were listed in paragraph 558 and applied in paragraph 559 of the Final Award.[1]

A) Legal Basis for the Request for Rectification

20. First, Respondent refers to the text of Article 36(1) of the UNCITRAL Rules, which provides as follows:

> *Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.*

21. According to Respondent, this Article allows the Tribunal to correct errors in computation. Respondent refers to *Elliot v. Republic of Korea*, in which, upon hearing the respondent's request for rectification of the calculation of damages in the award, the tribunal made a distinction between "an error in computation" and "any clerical or typographical error," and concluded that it had the power to correct a figure in the award not only in the case of a mere typographic mistake, but also when the figure was the result of a 'material or substantive error in computation.'"[2] Respondent adds that the purpose of rectification proceedings is for the award to "effectively reflect" the decision made by the tribunal.[3]

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[1] Request for Rectification — § 7.

[2] Request for Rectification — § 5, referring to *Elliott Associates L.P. (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-51, Decision on Requests for Correction and Interpretation of the Award, dated September 1, 2023, § 45. See also Reply on the Request for Rectification — footnote 6.

[3] Request for Rectification — § 6.

B) Errors in Computation

22. According to Respondent, paragraph 559 of the Final Award contains the following three errors in computation in the determination of the value of Lajun's shares as per the criteria established in paragraph 558 of the Final Award.

a. Application of the Discount Rate

23. Respondent alleges that the Tribunal erred in its calculations by (i) failing to take into account the other elements of the discount rate in addition to the country risk premium, and (ii) not applying the discount rate to the annual cash flows on a compound basis.[4]

24. First, Respondent explains that, in paragraph 558 of the Award, the Tribunal indicated that a country risk premium of 6.71% would be appropriate to calculate the market value of Lajun's shares, and in footnote 720 it referred to Table 10 of the Second Report of Mr. Kaczmarek (Claimant's expert), listing "the various parameters that make up the discount rate or weighted average cost of capital (WACC, by its acronym in English) applicable to the existing business (*i.e.*, the operation and management of a landfill) and the position of the Parties with respect to each."[5]

25. In this regard, Respondent notes that "while the Tribunal made it clear that 6.71% is the country risk premium to be applied, it did not indicate its decision as to the other elements of the discount rate."[6] Therefore, if the Tribunal (a) accepted the other elements proposed by Claimant's expert, the applicable discount rate would be 17.1%, or (b) if it considered that the elements proposed by Claimant's expert were all acceptable except for the country risk premium (which the Tribunal took from Respondent's expert), the applicable discount rate would then be 13.8%.[7]

26. Second, Respondent explains that, once determined, the discount rate should be applied to the cash flows for the purpose of calculating the market value of Lajun's shares.[8] Respondent

[4] Request for Rectification — § 18.

[5] Request for Rectification — § 11.

[6] Request for Rectification — § 12.

[7] Request for Rectification — § 13.

[8] Request for Rectification — § 14.

claims that the manner in which this calculation should be made is not disputed by the Parties. Specifically, Respondent notes that both Parties' experts used the formula whereby, to calculate the net present value, the expected cash flows for each year must be discounted by dividing by 1 plus the discount rate raised to the power of the year in question.[9] However, the amount mentioned in paragraph 559 of the Award of "US$3,093,586 for *country risk premium*" appears to be the result of incorrectly multiplying the country risk premium by the total amount of expected profits.[10]

27. Respondent considers this to be a miscalculation by the Tribunal, and requests that the Tribunal correct it by calculating the value of Lajun's shares that results from correctly applying the appropriate discount rate to the expected cash flows.[11]

28. In the alternative, and "to the extent that the Tribunal considers that it is not an error not to have expressly indicated in the Award which discount rate is applicable, but rather an issue on which the Tribunal did not rule in the Award", Respondent requests the Tribunal to issue an additional award pursuant to Article 37 of the UNCITRAL Rules resolving this issue.[12]

b. Lajun's Cash Flows

29. Respondent explains that the second miscalculation in paragraph 559 of the Award concerns Lajun's cash flows until the termination of the Contract, which "appear to have been derived by the Tribunal by applying the parameters set forth in paragraph 558, items 1 to 6, to each of the remaining 17 years of the Contract, *i.e.* 2017 to 2034."[13]

30. Respondent submits that these calculations "are erroneous to the extent that they overlook the fact that the Parties agree that the Duquesa Landfill would lack capacity as of 2026."[14] Thus, the error stems from calculating Lajun's revenues and expenses for the period 2017-2034 (the year of termination of the Contract), rather than for the period 2017-2025—the year

[9] Request for Rectification — §§ 15-18. In its Reply, Respondent adds that "the correct application of the discount rate in a discounted cash flow model involves a compound calculation (that is, to bring them forward to the present, the income from year 1 is discounted only once; the income from year 2 is discounted twice; the income from year 3 must be discounted thrice; and so on)." [Tribunal's Translation] See Reply on the Request for Rectification — page 3.

[10] Request for Rectification — § 18.

[11] Request for Rectification — § 18.

[12] Request for Rectification — footnote 14.

[13] Request for Rectification — § 19.

[14] Request for Rectification — § 20.

in which, both Claimant and Respondent agree, the useful life of the Duquesa Landfill would come to an end.[15]

31. Respondent further alleges that, in his Opposition to the Request for Rectification, Claimant attempts to mislead the Tribunal by arguing that—according to J.S. Held (Respondent's technical expert)—(i) the Landfill's useful life could be extended until 2034 if certain investments were made in relation to new compaction operations at the Landfill, and that (ii) the Tribunal included estimated maintenance expenses and sanitary investments in the amount of USD 2 million per year in its calculations. Nevertheless, in the Respondent's view, "an investment in trash compaction is not a maintenance or sanitary cost, but rather a separate capital investment that the Tribunal failed to include in its decision, and but for such investment the Landfill could not have operated beyond 2025."[16] [Tribunal's Translation]

32. To conclude, the Tribunal makes a second miscalculation by wrongly including cash flows for 2026 to 2034.

c. Lajun's Debt

33. Respondent maintains that, to calculate the value of Lajun's shares, as pointed out by the Tribunal in paragraph 559 of the Final Award, it is necessary to subtract Lajun's debt, since the value of the company is no more than the value of the equity plus the value of the debt.[17] In this case, there is no dispute between the Parties regarding the fact that, as of 2017, Lajun had a debt of at least 3.9 million dollars. However, Respondent asserts, the deduction of Lajun's debt is incorrectly omitted from the calculations in paragraph 559 of the Award.[18]

C) Effects of the Requested Corrections

34. Respondent attaches to its Application for Rectification a Memorandum prepared by Quadrant Economics LLC, which explains the calculations to correct the errors identified and

[15] Reply on the Request for Rectification — page 3.

[16] Reply on the Request for Rectification — page 3.

[17] Request for Rectification — § 23, referring to App. C-127, First Report of Mr. Kaczmarek, § 16 ("*We then determined Claimant's equity share by subtracting net debt (i.e., debt less cash) from the enterprise value and taking a 90 percent share of the result*").

[18] Request for Rectification — § 24.

the effect of the proposed corrections on the value of Lajun's shares and on the amount of compensation due to Claimant for such shares.[19] In accordance with this Memorandum:

a) Correcting the calculation error regarding the discount rate and:

   a. applying the 13.8% rate to the cash flows set forth in paragraph 559 of the Award (without additional corrections), the value of 90% of Lajun's shares would be USD 15,346,896, or

   b. applying the 17.1% rate to the cash flows set forth in paragraph 559 of the Award (without additional corrections), the value of 90% of Lajun's shares is USD 12,956,390.[20]

b) Further correcting the cash flow calculation in paragraph 559 of the Award to take into account that the Duquesa Landfill would lack capacity as of 2026, the value of 90% shareholding in Lajun is USD 10,340,694 (with a discount rate of 13.8%) or USD 9,379,805 (with a discount rate of 17.1%).[21]

c) Further correcting the calculation of the value of Lajun's shares to take into account that Lajun had a debt of USD 3,903,888, the value of 90% of Lajun's shares is USD 6,827,195 (at a discount rate of 13.8%) or USD 5,866,305 (at a discount rate of 17.1%).[22]

35. Respondent rejects Claimant's position that the Tribunal would be using, on its own initiative, a separate methodology to calculate damages as such methodology "finds no support in economic or financial science, or any legal support whatsoever," and claims that it has filed the Request for Rectification since it considers that the Tribunal "did *not* intend to deviate

[19] Request for Rectification — § 26. Respondent stresses that this Memorandum cannot be regarded as "new evidence," as purported by Claimant, since "it makes no reference to the disputed facts at all, but simply seeks to provide a technical explanation for the miscalculations identified by Respondent in the Award." [Tribunal's Translation] See Reply on the Request for Rectification — footnote 3.

[20] Request for Rectification — §§ 27-28.

[21] Request for Rectification — § 29.

[22] Request for Rectification — § 30.

from universally accepted calculation formulas and methods, but just inadvertently erred in applying those calculation formulas and methods."[23] [Tribunal's Translation]

36. Finally, Respondent notes that, in his Response, Claimant refers to certain "methodological objections" that the Tribunal should also consider in the event it decided to correct the errors identified in the Request for Rectification. According to Respondent, Claimant's request is without merit and untimely, and hence cannot be addressed by the Tribunal.[24]

B. The Claimant's Position

A) Legal Basis for the Request for Rectification

37. Claimant argues that Article 36(1) of the UNCITRAL Rules provides Parties with a mechanism to address limited matters and circumscribed errors in a final award. For possible computational errors, this has widely been understood by the jurisprudence to mean that there must be a mistake in a tribunal's math calculations. According to Claimant, "[t]here is no math error here" instead, Respondent seeks "to change the methodology of how the Tribunal made its computations," for what it deems a "universally accepted methodology," this in "a transparent attempt to reduce the Republic's damages from USD 43 million to USD 5.9 million."[25]

38. Claimant adds that the change proposed by Respondent "would contravene the clear language and intent of the UNCITRAL Rules, undermine the finality and integrity of the arbitration process, and should be denied."[26]

39. Claimant notes that Article 36(1) of the UNCITRAL Rules includes either the exact same or very similar language as virtually every major international arbitral institution.[27] According to

[23] Reply on the Request for Rectification — p. 2. (emphasis in the original)

[24] Reply on the Request for Rectification — p. 4.

[25] Opposition to the Request for Rectification — §§ 1 and 13. See also Rejoinder on the Request for Rectification — §§ 1-2.

[26] Opposition to the Request for Rectification — § 1. See also Rejoinder on the Request for Rectification — § 7.

[27] Opposition to the Request for Rectification — § 17, referring to Exhibit 3 – Art. 36, ICC Arbitration Rules 2021 ("the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of a similar nature"); Exhibit 4 – Art 27.1, LCIA Arbitration Rules 2020 ("any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature"); Exhibit 5 – Art. 36(1), ICDR International Dispute Resolution Procedures 2021 ("correct any clerical, typographical, or computational errors"); Exhibit 6 – Rule 52, AAA Commercial Arbitration Rules

Claimant, a review of the decisions on rectification of computational, clerical, typographical errors, or any errors of a similar nature shows that any such errors must be "self-evident." Claimant adds in this regard that such rule intends to "remedy unintentional errors to restore what the tribunal intended," it cannot be used to change the substantive holding or reopen the merits of a case and it does not allow "challeng[ing] the methodology employed."[28]

40. In addition, Claimant points out that Respondent has violated the UNCITRAL Rules by introducing new evidence attached to the Request for Rectification in the form of the Memorandum of Quadrant Economics LLC, without prior leave by the Tribunal, in breach of the provisions set forth in Procedural Order No. 1. Claimant adds that, should the Tribunal decide to consider this new evidence, it would be compelled to reopen the arbitral proceedings to permit the Claimant to provide new evidence, including a rebuttal expert submission and other evidence to rebut the Memorandum, set a hearing to allow the Parties the opportunity to cross-examine experts and issue a new final award, something unprecedented and not allowed under the UNCITRAL Rules.[29]

B) Errors in Computation

41. Claimant points out that, in the Final Award, the Tribunal rejected the damages reports submitted by the Parties' experts and, instead, chose to use an independent methodology for the calculation of damages. Nevertheless, in its Request for Rectification, Respondent now seeks to rely on certain elements from the damages reports that do not apply to the independent methodology utilized by the Tribunal. For Claimant, none of the three alleged errors identified by Respondent is properly characterized as a calculation computational error.

2022 ("correct any clerical, typographical, or computational errors in the award"); Exhibit 7 – Art. 49, ICSID Convention ("clerical, arithmetical or similar error in the award").

[28] Opposition to the Request for Rectification — §§ 18-25, referring to Exhibit 11 – *Harold Birnbaum v. The Islamic Republic of Iran,* IUSCT Case No. 967 (Decision No. DEC 124-967- 2) (December 14, 1995) — § 10; Exhibit 12 – *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. The United Mexican* States, ICSID Case No. UNCT/17/1 (Corrections to the Final Award of 5 June 2020) (July 31, 2020) — § 18; Exhibit 13 – *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3 (Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification) (May 28, 2003) — § 25; Exhibit 14 – *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1 (Decision Regarding the Claimant's and the Respondent's Requests for Corrections) (December 15, 2014) — § 37; Exhibit 15 – *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18 (Decision on the Requests for Rectification) (September 26, 2023) — § 61; Exhibit 16 – *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31 (Decision on Rectification of the Award) (January 29, 2019) — § 37.

[29] Opposition to the Request for Rectification — §§ 2-4. See also Rejoinder on the Request for Rectification — § 7.

Instead, they each seek to change the Tribunal's methodology, and thus are being used to force a re-consideration and/or re-evaluation of the positions and evidence submitted by the Parties in order to change the Final Award.[30]

42. Particularly, Claimant rejects Respondent's three alleged errors in computation in the determination of the value of Lajun's shares as per the criteria established in § 558 of the Award, as follows.

a. Application of the Discount Rate

43. First, Claimant explains that, in its Final Award, the Tribunal chose to not use the Parties' experts' suggested implementation of the approach to value Lajun's shares. Instead, the Tribunal calculated the cash flows Lajun would generate and then reduced those cash flows by 6.71 %, equal to its preferred assessment of country risk.[31] According to Claimant, Respondent mistakenly holds that the Tribunal should have taken the 6.71 % and added that premium to the remaining discount rate parameters set out in its rejected proposal, after which this rate should have been applied to Lajun's cash flow on a compound basis.[32]

44. Respondent would thus be intending to increase this factor to 17.14 % or, in the alternative, to 13.8 %, by adding additional inputs that were not expressed in the Final Award. Instead, the Tribunal rejected the Weighted Average Cost of Capital ("WACC") approaches proposed by both Parties' experts, in favor of its own methodology.[33] This decision itself, "demonstrates the Tribunal's reasoning simply differs from that for which the Republic advocated."[34]

45. Further, Respondent would be trying to also alter the methodology utilized by the Tribunal for obtaining the fair market value of Lajun's shares by applying a formula on a compound basis.[35]

[30] Opposition to the Request for Rectification — § 26.
[31] Opposition to the Request for Rectification — § 27.
[32] Opposition to the Request for Rectification — § 28.
[33] Opposition to the Request for Rectification — § 28.
[34] Rejoinder on the Request for Rectification — § 3.
[35] Opposition to the Request for Rectification — § 28.

46. Claimant concludes that the purported discount rate "errors" identified by Respondent "are squarely directed towards the reasoning and methodology adopted by the Tribunal in the Final Award and do not constitute a computation error under Article 36 of the [UNCITRAL] Rules."[36] This would be even more evident in view of the new Memorandum of Quadrant Economics which proposed that the Tribunal use one of two discount rates (17.14 % or 13.8 %) and which is unable to and does not "correct" "any mathematical computational error by the Tribunal in this regard, but instead simply proposes that the Tribunal adopt a conceptually new approach in calculating the value of Lajun's shares —an approach the Tribunal already rejected."[37]

b. Lajun's Cash Flows

47. According to Claimant, in alleging that the Tribunal improperly included the projected cash flows from 2026 to 2034 in the valuation of Lajun's shares, the Respondent raises a factual matter that the Tribunal has already considered and ruled upon based on competent evidence.[38]

48. In particular, Claimant refers to the report by J.S. Held according to which the life of the Duquesa Landfill could be extended to 2034 without the construction of a waste-to-energy (WTE) plant.[39] Claimant explains that, in its determination, the Tribunal substantively agreed with J.S. Held regarding the potential extension in the use of the Landfill until 2034, and charged Claimant with the costs of being able to do so based on record evidence.[40]

49. As for Respondent's argument in its Reply that this extension could only be conducted if additional investments were made in the trash compaction in the Landfill, investments that were not considered by the Tribunal, Claimant notes in his Rejoinder that Respondent has cited no record evidence demonstrating that such compaction would require additional investments. On the contrary, based on the evidence submitted by J.S. Held at the final

[36] Opposition to the Request for Rectification — § 29.

[37] Opposition to the Request for Rectification — § 30.

[38] Opposition to the Request for Rectification — § 33.

[39] Opposition to the Request for Rectification — §§ 34-35, referring to Expert Witness Report, J.S. Held, December 14, 2020 — § 16.

[40] Opposition to the Request for Rectification — § 36.

hearing, such compaction "would require a 'relatively low investment,' so low in fact that no specific number was presented."[41]

c. Lajun's Debt

50. Finally, Claimant maintains the fact that the Tribunal's not deducting Lajun's debt to calculate the fair market value of Lajun's shares is not an error in computation either.[42]

51. Claimant explains that, while both Parties' experts subtracted the net debt of Lajun in arriving at the equity value of Lajun, they only made this subtraction because both experts used the WACC to calculate Lajun's "enterprise level of value." As such, it was necessary to then subtract the net debt of Lajun to value its equity.[43]

52. However, the Tribunal's valuation approach does not use or rely on a WACC discount rate. As such, as sustained by Claimant, it is not possible to conclude that the Tribunal's analysis yields an "enterprise level" value for Lajun that would necessitate a deduction of net debt, which is what Quadrant Economics LLC assumed for purposes of characterizing the net debt issue as a calculation error in its Memorandum. Accordingly, the proposition made by Respondent's expert is nothing but another attempt to change the methodology employed by the Tribunal.[44]

53. Claimant concludes by emphasizing some further methodological issues that he considers could be raised as regards the amount granted in the Final Award, and that the Tribunal would also have to take into account if it decided to consider Respondent's "methodological objections," but stresses that the Tribunal's methodology cannot be challenged other than for calculation errors, of which there are none in this case. Accordingly, Claimant refrained from

[41] Rejoinder on the Request for Rectification — § 4, referring to Expert Witness Report, J.S. Held, December 14, 2020 — § 57.

[42] Opposition to the Request for Rectification — § 37.

[43] Opposition to the Request for Rectification — § 38.

[44] Opposition to the Request for Rectification — § 39. Claimant alleges that the decision in *Elliot c. Republic of Korea* "does not permit 'correction' of a 'methodology'" and that "[a]t best, the decision stands only for the proposition that UNCITRAL Rule 36(1) may be used to correct 'material or substantive miscalculations,'" and does not permit an overhaul of the "approach to a damages award," as purported by Claimant in this case. See also Rejoinder on the Request for Rectification — § 5.

seeking the "correction" of these issues because he "understood that these were methodological differences of opinion for which there can be no relief."[45]

IV. THE TRIBUNAL'S ANALYSIS

54. Article 36(1) of the UNCITRAL Rules allows the Parties to request the rectification of an award upon the existence of certain types of errors therein. Said request must be submitted within 30 days following the issuance of the award, which term was observed by Respondent.

55. The Tribunal understands that the scope of correction under Article 36(1) of the UNCITRAL Rules is very limited and defined. The provision concerned refers to errors in computation, clerical or typographical errors, further mentioning the possibility to correct any errors of a "similar nature."

56. It could not be otherwise, as any correction of the merits of a decision would jeopardize a fundamental principle of arbitration, that which establishes the final and mandatory nature of arbitral awards. That is, under no circumstances can a request for rectification serve as an appellate procedure or as a means to reopen the arbitral proceeding.

57. All the reasons stated in the Final Award—and not only those related to the calculation of damages—have been carefully discussed and developed by the Tribunal in light of the evidence produced and discussed at length by the Parties in full respect for their respective rights.

58. In this regard, the Tribunal is in a similar situation as the Iran-United States Claims Tribunal, which, applying Article 36(1) of the UNCITRAL Rules in the case *Fereydoon Ghaffari v. The Islamic Republic of Iran*, stated as follows:

> *The Tribunal was fully aware of the consequences of its choice, and, considering the evidence and arguments submitted in the present claim, determined that an 8 percent rate of interest fairly compensated the Claimant for damages suffered due to delayed payment. The different from the rate of interest awarded by the Tribunal in Birnbaum did not result from an error*

[45] Opposition to the Request for Rectification — §§ 40-43. See also Rejoinder on the Request for Rectification — § 7.

in calculation or otherwise and is consequently not subject to correction pursuant to Article 36 of the Tribunal Rules.[46]

59. In light of these considerations, the Tribunal must assess whether the Request for Rectification filed by Respondent falls within the scope of application of Article 36(1) of the UNCITRAL Rules. As set out above, Respondent alleged that the Tribunal had incurred in three calculations errors, especially in §§ 558 and 559 of the Award.

60. First, Respondent contends that the Tribunal had wrongly applied a discount rate that only took into account the country risk premium—when it should have also allegedly included the risk-free rate and the equity risk premium, among others— and, in any event, said future cash flow discount rate should have been compounded by the relevant number of years.[47]

61. Second, Respondent considers that the quantification of the compensation granted should not have included Lajun's cash flows beyond 2025, as "the Duquesa Landfill would lack capacity as of 2026."[48]

62. Lastly, Respondent claims that Lajun's net debt value should be subtracted from the assessment of the fair market value of Lajun's shares, "since the value of the company is no more than the value of the equity plus the value of the debt."[49]

63. It should be stressed that none of Respondent's arguments concerns calculation errors *per se*. Indeed, Respondent did not challenge the mathematical operations performed by the Tribunal under the parameters set forth in the Final Award. In other words, the three alleged errors do not question the application of the parameters set by the Tribunal in the Final Award, but rather the very choice of those parameters.

64. In its § 558, the Final Award clearly stated the basis upon which the Tribunal would calculate the damages relating to Claimant's shares in Lajun. Respondent, however, uses Article 36(1) of the UNCITRAL Rules to express its discontent with the reasoning followed by the Tribunal

[46] *Fereydoon Ghaffari v. The Islamic Republic of Iran*, IUSCT Case No. 968, Decision No. DEC 123-968-2 (Opposition to Rectification, Annex 17) — § 11.

[47] Request for Rectification — § 12.

[48] Request for Rectification — § 20.

[49] Request for Rectification — § 23.

in assessing the compensation due, a reasoning which is deemed by Respondent, citing its own expert, as lacking "all economic and financial logic."[50]

65. Nonetheless, Article 36(1) of the UNCITRAL Rules is not the proper means for reviewing the Tribunal's reasons in its damage assessment, regardless of whether or not Respondent and its expert agree. In fact, the Request for Rectification may not be used as a vehicle for the Parties' dissatisfaction with the *ratio* or the specific decisions of the Final Award.[51]

66. Additionally, a tribunal is not bound by the expert reports of either Party. Such documents are ancillary to the allegations of the Party submitting them, and the Tribunal can make use thereof to the extent it deems appropriate. This means that the Tribunal may refer to passages of an expert report, without being bound by the expert's reasoning.

67. This is precisely the case of the country risk premium. It should be noted that the Tribunal did not subscribe to the discount rate methodology adopted in the expert report produced by Respondent. Instead, the Final Award specifically highlighted one element of said expert report, *i.e.,* the country risk premium. Thus, in exercise of its authority, except for the country risk premium, the Tribunal did not deem it appropriate to make use of the other elements of the table presented by Respondent's expert about the WACC.

68. The Tribunal considers it important to underline that the Final Award itself clearly states that "the Tribunal cannot follow either Party's expert reports, as they are both incompatible and based on premises inconsistent with this Tribunal's findings."[52] The Tribunal does not even address in this Decision its views on the objectivity of said reports, or the reasonings used therein and the manner in which they are presented.

69. Likewise, Article 36(1) of the UNCITRAL Rules cannot be used to reduce the time span adopted by the Tribunal in its assessment of the damages that should be awarded to Claimant. It should be noted that the Tribunal considered all the allegations made by both Parties,

[50] Request for Rectification — § 17.

[51] For these same reasons, Respondent's alternative request that the Tribunal issues an additional award pursuant to Article 37 of the UNCITRAL Rules indicating "which discount rate is applicable" must be dismissed as well.

[52] Final Award — § 557.

including the argument that the Duquesa Landfill would require certain works to be operational beyond 2025.

70. Again, in the regular exercise of its authority, the Tribunal expressly declared in § 558 of the Final Award that the calculation of damages should take into account "the profits that Lajun could have earned between 2017 (when the constructive expropriation took place) and 2034, by which period the company had ensured the operation of Duquesa."[53] In particular, the Tribunal does not find any error in this regard, but instead notes Respondent's discontent with the inclusion of the years following 2025 in its assessment of the *lucrum cessans*.

71. Lastly, Respondent's dissatisfaction with the Tribunal's assessment of the Fair Market Value of Lajun's shares should not be confused with a "calculation error" under Article 36(1) of the UNCITRAL Rules either. An assessment of the Fair Market Value is a quite contingent exercise and may have a subjective bias. This is clearly evidenced by the diametrically opposed results reached by specialists allegedly applying similar criteria. In this connection, it is not relevant that Respondent considers that the Tribunal's approach is contrary to "all economic and financial logic."[54]

72. An arbitration proceeding is not a purely economic or financial exercise, but rather a—modest, as it were—materialization of international justice. As such, the Tribunal is not bound by any theory postulate in its assessment of the appropriate level of damages to be awarded. On the contrary, the Tribunal is vested with broad powers to assess the compensation due for the proven violation of the obligations assumed, including the Fair Market Value of Lajun's shares, regardless of the approval or disapproval of the Parties' experts.

73. To sum up, the Tribunal considers that the Final Award contains no calculation errors that fall within the scope of application of Article 36(1) of the Rules. Accordingly, the Tribunal dismisses the Request for Rectification of the Final Award filed by Respondent in its entirety.

[53] Final Award — § 558.

[54] Request for Rectification — § 17.

V. COSTS

A. The Parties' Positions

74. The Application for Rectification contains no reference to costs. For his part, Claimant has requested that all costs relating to the rectification proceeding be attributed to Respondent, as the Request for Rectification is without merit.[55]

75. The Tribunal has decided that the Request for Rectification should be dismissed in its entirety.

B. The Tribunal's Analysis

76. The Tribunal requested that the Parties submit their respective statements of costs for this stage of the proceedings initiated with the submission of the Request for Rectification. Claimant submitted his statement of costs on January 5, 2024, and Respondent submitted its statement of costs on January 8, 2024.

77. Respondent requests costs in a total amount of USD 193,834.

78. Claimant requests costs in a total amount of USD 123,243.91.

79. In accordance with Article 38 of the UNCITRAL Rules, the Tribunal's fees and expenses amount to the following amount (in USD):

Arbitrators' fees and expenses	
Prof. Diego P. Fernández Arroyo	USD 12,052.92
Mr. Christian Leathley	USD 1,500.00
Prof. Marcelo Kohen	USD 5,700.24
Total	**USD 19,253.16**

80. Additionally, the direct expenses incurred in the proceeding amount to USD 1,974.85.

81. The above costs have been paid out of the advances made by the Parties in equal parts in the arbitration proceedings.

[55] Opposition to the Request for Rectification — § 5.

82. The Tribunal's decision on costs is governed by Articles 38 to 40 of the UNCITRAL Rules. Article 40 of the UNCITRAL Rules provides as follows:

> *1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
>
> *2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

83. The Tribunal notes that the rule drawn from Article 40 is that costs follow the event. In this regard, the Tribunal sees no exceptional circumstance that would requires it to depart from this rule, as Respondent's Request for Rectification was dismissed in its entirety.

84. In view of the foregoing considerations, the Tribunal finds that Respondent should be ordered to bear all costs resulting from the submission of its Request for Rectification.

VI. DECISION

85. For the foregoing reasons, the Tribunal decides:

(i) To dismiss the Request for Rectification of the Award filed by Respondent in its entirety, including the alternative request of an additional award;

(ii) To order Respondent to pay all costs resulting from the submission of its Request for Rectification including Claimant's Costs, the Arbitrators' Fees and Expenses, and the Direct Expenses incurred in this proceeding.

[signed]

Mr. Christian Leathley
Arbitrator

Date: February 14, 2024

[signed]

Prof. Marcelo Kohen
Arbitrator

Date: February 8, 2024

[signed]

Prof. Diego P. Fernández Arroyo
President of the Tribunal

Date: February 6, 2024

Statement of Professor Marcelo G. Kohen

Without prejudice to my dissenting opinions on the Partial Award and the Final Award, I agree with the dismissal of the request for rectification of the Final Award submitted by Respondent. As a matter of fact, I consider that its arguments do not concern mere errors in computation in the terms of Article 36(1) of the UNCITRAL Rules. They may be errors in the choice of methods and the way of assessing the amount of the compensation due. In other words, they would be errors of substance, not merely in computation.

It is true that the majority of the Tribunal did not follow any of the methods proposed by the Parties' experts. On the contrary, it used a method of its own, the Parties having no opportunity to give their opinion on the method finally chosen. To my mind, that does not preclude due process. The Tribunal examined the Parties' positions, and the majority made its decision. The assessment of the compensation amount being an essentially legal operation including financial calculations, and the majority having upheld jurisdiction, the Tribunal has authority to decide on the basis of its own legal reasoning and in view of the financial issues raised by the Parties. The majority decision adopts that conduct and, as such, is irreproachable, regardless of whether its analysis is consistent with law or not. The same applies to the failure to assess Lajun's debt for the purpose of determining its share value. Article 36(1) may not be used as an appeal.

Lastly, I would like to comment on the *obiter dictum* of paragraph 72 of this decision. It states that an arbitration proceeding is a manifestation of "international justice". I believe that arbitration is a private dispute resolution method-different from that of courts of justice- which is agreed by the parties in order to settle a particular dispute. What is more, the notion of "international justice" may be used to refer to permanent international adjudicatory bodies. It is well-known that there is no system of international justice, as there is on a national level.

[signed]

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Professor Marcelo G. Kohen
Date: February 8, 2024