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CERTIFICATE

INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.

v.

KINGDOM OF SPAIN

(ICSID CASE NO. ARB/16/18) - Rectification

I hereby certify that the attached document is a true copy of the English version of the Tribunal's Decision on the Requests for Rectification of the Award dated 26 September 2023, which was issued in the English and Spanish languages.

Meg Kinnear
Secretary-General

Washington, D.C., 26 September 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

INFRACAPITAL F1 S.À R.L. AND INFRACAPITAL SOLAR B.V.

Claimants

and

KINGDOM OF SPAIN

Respondent

ICSID Case No. ARB/16/18

DECISION ON THE REQUESTS FOR RECTIFICATION

Members of the Tribunal
Mr. Eduardo Siqueiros T., President
Prof. Peter D. Cameron
Mr. Luis González García

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: 26 September 2023

REPRESENTATION OF THE PARTIES

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Except for the terms defined below, or otherwise indicated in this Decision, all other terms defined in (a) the Decision on Jurisdiction, Liability and Directions on Quantum and (b) the Award which are used herein, shall have the same meaning ascribed to them therein.

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings of 2006
Award	Award rendered on 2 May 2023 in the arbitration proceeding between *Infracapital F1 S.à r.l. and Infracapital Solar B.V. and the Kingdom of Spain* (ICSID Case No. ARB/16/18)
Claimants	Infracapital F1 S.à r.l. and Infracapital Solar B.V.
Claimants' Request for Rectification	Claimants' Request for Rectification of the Award, dated 16 June 2023
Claimants' Reply	Claimants' Reply to Respondent's Response to Claimants' Request for Rectification of the Award, dated 21 July 2023
Claimants' Response	Claimants' Response to Respondent's Request for Rectification of the Award, dated 12 July 2023
Claimants' Rejoinder	Claimants' Rejoinder to Respondent's Reply on the Rectification of the Award, dated 28 July 2023
Decision	Decision on Jurisdiction, Liability and Directions on Quantum in the arbitration proceeding between *Infracapital F1 S.à r.l. and Infracapital Solar B.V. and the Kingdom of Spain*, dated 13 September 2021
Experts	Jointly, The Brattle Group, appointed by Claimants, and BDO, appointed by Respondent
Experts' Joint Memorandum	Joint Report prepared by the Parties' respective experts titled: "*Brattle-BDO Joint Memorandum*", dated 1 April 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965

Quantum Submissions	Jointly, the Claimants' Quantum Submission and Respondent's Quantum Submission, both dated 22 April 2022.
Requests for Rectification	Jointly, Claimants' Request for Rectification and Respondent's Request for Rectification
Respondent	Kingdom of Spain
Respondent's Request for Rectification	Respondent's Request for Rectification of the Award, dated 15 June 2023
Respondent's Response	Respondent's Response to Claimants' Request for Rectification of the Award, dated 12 July 2023
Respondent's Reply	Respondent's Reply to Claimants' Response to Respondent's Request for Rectification of the Award, dated 21 July 2023
Respondent's Rejoinder	Respondent's Rejoinder regarding Claimants' Request for Rectification of the Award, dated 28 July 2023
Tribunal	Arbitral Tribunal constituted on 24 October 2017 and reconstituted on 24 October 2019

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Energy Charter Treaty which entered into force on 16 April 1998, for Spain, Luxembourg and the Netherlands (the "**ECT**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the "**ICSID Convention**").

2. The Claimants are Infracapital F1 S.à.r.l., a private limited liability company incorporated under the laws of Luxembourg, and Infracapital Solar B.V., a private limited liability company incorporated under the laws of the Netherlands (together, "**Claimants**").

3. The Respondent is the Kingdom of Spain ("**Spain**" or the "**Respondent**").

4. Claimants and Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 13 September 2021, the Tribunal presided by Mr. Eduardo Siqueiros T., and also comprising Prof. Peter D. Cameron, and Mr. Luis González García (the "**Tribunal**") issued its Decision on Jurisdiction, Liability and Directions on Quantum, attached to the Decision was a partial dissenting opinion by Prof. Peter D. Cameron (the "**Decision**").

6. On 2 May 2023, the Tribunal rendered its Award (hereinafter the "**Award**").

7. On 15 June 2023, pursuant to Article 49(2) of the ICSID Convention, and Rule 49 of the Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**"), Respondent submitted a Request for Rectification of the Award ("**Respondent's Request for Rectification**"), accompanied by the lodging fee in accordance with ICSID Arbitration Rule 49(1)(d).

8. On 16 June 2023, the Secretary-General registered Respondent's Request for Rectification pursuant to ICSID Arbitration Rule 49(2)(a), and transmitted a copy of Respondent's Request for Rectification, together with the Notice of Registration, to each Member of the Tribunal.

9. On 16 June 2023, Claimants submitted a Request for Rectification of the Award ("**Claimants' Request for Rectification**"), accompanied by the lodging fee in accordance with ICSID Arbitration Rule 49(1)(d).

10. On 20 June 2023, the Secretary-General registered Claimants' Request for Rectification pursuant to ICSID Arbitration Rule 49(2)(a), and transmitted a copy of Claimants' Request for Rectification, together with the Notice of Registration, to each Member of the Tribunal.

11. On 21 June 2023, the Tribunal invited the Parties to submit a simultaneous response to the other Party's Request for Rectification, as well as a subsequent reply and rejoinder, if any, under a proposed procedural calendar.

12. Upon a petition of Respondent to modify the procedural calendar, on 22 June 2023, the Parties reached an agreement to amend such calendar, which was confirmed by the Tribunal.

13. On 12 July 2023, Claimants filed their response entitled "*Claimants' Response to Respondent's Request for Rectification of the Award"* ("**Claimants' Response**")

14. On 12 July 2023, Respondent filed its response entitled "*Respondent's Response to Claimants' Request for Rectification of the Award"* ("**Respondent's Response**")

15. On 21 July 2023, Claimants filed their reply entitled "*Reply to Respondent's Response to Claimants' Request for Rectification of the Award*" ("**Claimants' Reply**").

16. On 21 July 2023, Respondent filed its reply entitled "*Reply to Claimants' Response to Respondent's Request for Rectification of the Award*" ("**Respondent's Reply**").

17. On 28 July 2023, Claimants filed a rejoinder entitled "*Rejoinder to Respondent's Reply on the Rectification of the Award"* ("**Claimants' Rejoinder**")

18. On 28 July 2023, Respondent submitted a rejoinder entitled "*Respondent's Rejoinder regarding Claimants' Request for Rectification of the Award"* ("**Respondent's Rejoinder**")

19. Respondent's Request for Rectification included a request to stay the enforcement of the Award until a decision on the Requests for Rectification was issued. On 24 August 2023, the Tribunal issued its Decision on the Respondent's Request for the Stay of Enforcement of the Award, rejecting such request.

20. On 24 August 2023, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

III. THE PARTIES' POSITIONS

A. INTRODUCTION

21. Claimants and Respondent have each submitted a Request for Rectification arguing that (i) the text of the Award simply misses a word to be properly read (Claimants' Request) or, (ii) that the Tribunal improperly decided the amount of damages despite its earlier findings that were the premise for the calculation of the damages, and requires adjustments to the text (Respondent's Request).

22. In the Decision, the Tribunal found, among others, that (i) "*Respondent breached of Article 10(1) of the ECT by clawing back past remuneration";*[1] (ii) "*Respondent breached Article 10(1) to the extent that the remuneration of each of the plants failed to ensure payment to Claimants of a reasonable rate of return on their investment during the lifetime of Claimants' PV Plants, as a consequence of the adoption of the Disputed Measures";*[2] and (iii) directed the Parties "*to attempt to reach an agreement on the amount of compensation*

[1] Decision, ¶ 822(4).
[2] Decision, ¶ 822(5).

to be paid by Respondent to Claimants in respect to its obligations on post-tax rate of return in accordance with the Tribunal's findings."[3]

23. In line with the Tribunal's directions, the experts of both Parties[4] issued a joint report titled "Brattle-BDO Joint Memorandum", dated 1 April 2022 ("**Experts Joint Memorandum**"). In the Experts Joint Memorandum, the Experts presented their respective positions, addressing the points of agreements and disagreement.

24. The key elements of disagreement among the Experts were: the Effective Tax Rate; the Actual Costs of the Claimants' PV Plants, the Approach to calculate the Reasonable Return Damages; Elements of the Retroactivity Damages; and the Regulatory Risk. In their Joint Memorandum, the Experts presented the Tribunal with different findings and tables to support their respective positions, including a joint table ("**Joint Table 1**") determining the amount to be awarded by the Tribunal depending on the Tribunal's findings under each of the points of disagreement, to be complemented with the Sensitivities to Brattle's Damages (Brattle Table 7) or BDO's Damages (BDO Table 6).

25. The Requests for Rectification have a common premise: the effect of the so-called "tax shield" that arises from shareholder loans in the determination of the applicable rate of return. This was relevant to the Tribunal's analysis in the determination of, among others, the "Reasonable Return Damages" which were awarded to Claimants in the Award.[5]

B. CLAIMANTS' POSITION ON THE REQUEST FOR RECTIFICATION

26. Claimants request the Tribunal:[6]

(a) To reject Respondent's Request for Rectification; and

(b) To rectify paragraph 129 of the Award under Article 49(2) of the ICSID Convention, such that it reads "*...the tax shield benefit of the shareholder loans*

[3] Decision, ¶ 822(7).
[4] The Brattle Group in the case of Claimants, and BDO in the case of Respondent.
[5] Award, ¶¶ 176-179.
[6] Claimants' Response, ¶ 36, Claimants' Reply, ¶ 34 (emphasis in the original).

*should **not** be factored into the conversion of the 7% post-tax target return into a pre- tax return.*"

27. Claimants believe that the rectification of the Award requires a simple correction of a "clerical error"[7] in paragraph 129 of the Award that states: "*The Tribunal therefore concludes that the tax shield benefit of the shareholder loans should be factored into the conversion of the 7% post-tax target return into a pre-tax return*". They contend that the word "not" is missing to properly express the Tribunal's conclusions. The corrected paragraph should read "… *the tax shield benefit of the shareholder loans should **not** be factored into the conversion …*".

28. As Claimants note, paragraph 129 is the last paragraph and conclusion of section (V)(1)(a) of the Award, which deals with the effective tax rate that must be applied to convert the 7% post-tax target return into a pre-tax target return. Claimants contend that the Tribunal set out, in such section, its reasoning and decision as to whether the tax shield benefit of the shareholder loans should be factored into the tax rate that would be used to convert the 7% post-tax target return into a pre-tax target return.[8]

29. According to Claimants, the analysis made by the Tribunal in the Award needed to decide whether to include the tax shield resulting from the shareholders loans during a *first step*, i.e., when the 7% post-tax target return is converted into a pre-tax target return, or in a *second step* – as proposed by Brattle, when converting the post-tax target return into a pre-tax target return that assumes a single pre-tax return of 8.7%.[9] Claimants remind the Tribunal that Brattle's proposal was to "mirror" what the Spanish regulator did under the Original Regime and did not factor the interest tax shield in the conversion of the 7% post-tax target rate of return into a pre-tax rate of return, and that this was acknowledged by the Tribunal in the Award.[10]

[7] Claimants' Request for Rectification, ¶ 9.
[8] Claimants' Request for Rectification, ¶ 11.
[9] Claimants' Request for Rectification, ¶ 16.
[10] Claimants' Request for Rectification, ¶ 12(a), making reference to the Award, ¶ 64.

30. Claimants then examine and support the reasoning process carried out by the Tribunal in the Award to arrive at an amount of "Reasonable Return Damages" that it determined based on the tables prepared jointly by the Experts in the Experts' Joint Memorandum.[11]

31. Thus, Claimants contend, it is clear that the word "not" is missing from paragraph 129, based on: (a) the Tribunal's reasoning in paragraphs 119 to 121 of the Award; (b) the Tribunal's express reference to Brattle's pre-tax figure of 8.7%; and (c) the determination that the damages suffered by the Claimants is EUR 18 million based on Joint Table 1 of the Experts' Joint Memorandum.[12]

32. In response to the arguments included in Respondent's Request for Rectification, Claimants contend that these should be rejected, because the reasoning of the Tribunal in the Award allows for a proper interpretation with the simple addition of the word proposed by Claimants in paragraph 129 of the Award.[13]

33. Further, Claimants contend that Respondent's Request for Rectification exceeds the scope of what is permitted by Article 49(2) of the ICSID Convention, as it would require the Tribunal to re-draft multiple paragraphs of the Award, as well as revise the entire damages determination.[14] If granted by the Tribunal, the proposed changes would create inconsistencies in the Award and make it ripe for annulment.[15]

34. In addition, they contend that Respondents' Request for Rectification does not propose the correct damages figure even if its tax shield theory were correct. If the Tribunal were to correct the Award in the manner suggested by Spain, for the tax shield benefit to be factored into the conversion of the post-tax return into a pre-tax return, then the Tribunal could not simply adopt a damages figure of EUR 15.7 million because it is indisputable that that figure does <u>not</u> represent the loss suffered by the Claimants' PV Plants, given that such proposal uses an average effective tax rate of 12.8% across all of the Claimants' PV

[11] Claimants' Request for Rectification, ¶ 15, making reference to Joint Table 1 of the Experts' Joint Memorandum and Award, ¶ 176. See also Claimants' Response, ¶ 15.
[12] Claimants' Request for Rectification, ¶ 18; Claimants' Response, ¶ 28.
[13] Claimants' Response, ¶ 18.
[14] Claimants' Response, ¶¶ 3(b) and 19; Claimants' Reply, ¶ 26.
[15] Claimants' Response, ¶ 3(b); Claimants' Reply, ¶ 3(c).

Plants, and "*it is undisputed between the parties that the tax shield benefit varies across the Claimant's PV Plants.*"[16]

35. Claimants add that Spain failed to provide a damages figure that is consistent with its claim that the Tribunal should take account of the individual tax shield benefit enjoyed by each PV Plant for purposes of converting the 7% post-tax return into a pre-tax return.[17] Claimants should not suffer from under-compensation simply because Spain failed to provide a calculation for what it now claims is the correct approach to damages.[18]

36. As a result, Claimants propose, there are only two possibilities with respect to the Award: (a) the Claimants are correct that the Tribunal did not intend to take account of the tax shield in converting the 7% post-tax return to a pre-tax return and paragraph 129 contains a typographical error; or (b) if the Tribunal did intend to take account of the tax shield, then the Tribunal used its discretion to award the damages in the amount EUR 24.9 million, given that Spain had failed to provide a calculation of damages that reflected its position on the tax shield.[19]

37. Claimants contend that Respondent failed to provide a damages figure corresponding to the loss suffered by each PV Plant and instead proposed to use an average pre-tax rate of return of 8.0% (the pre-tax return used in BDO's calculations) rather than the single 8.7% pre-tax rate referred to in paragraph 176 of the Award (and used in Brattle's calculations), but that Respondent then claims that using BDO's average pre-tax return of 8.0%, the correct damages awarded according to Brattle Table 7 is EUR 15.7 million.[20] Hence, Claimants request that the Tribunal reject the "corrections" to the Award proposed by Spain, since this would be inconsistent with the reasoning of the Tribunal.[21]

[16] Claimants' Response, ¶ 3(c).
[17] Claimants' Response, ¶ 22.
[18] Claimants' Response, ¶ 26.
[19] Claimants' Response, ¶ 3(e).
[20] Claimants' Response, ¶ 10.
[21] Claimants' Response, ¶¶ 13 and 16, making reference to the proposed changes in language to paragraphs 176, 177, 179 and 219(1) of the Award.

38. In response to Respondent's claim that Claimants' Request for Rectification is merely a "*last-minute reaction*" to its own request and is a "*course and desperate attempt*" to avoid the Award being rectified in the manner proposed by Spain, Claimants not only reject the proposition, but refer to evidence that Claimants made payment of the lodging fee in anticipation of its request the day before Respondent even submitted its Request for Rectification.[22]

39. In their Rejoinder, Claimants contend that Respondent's position should be rejected because BDO did not use a different effective tax rate for each plant, as was directed by the Tribunal in the Decision, and therefore arrived at an average tax shield benefit for the PV Plants. By factoring the tax shield through the average effective tax rate, Claimants argue that BDO did not consider the individual tax shield of each PV Plant. It overestimates the tax shield benefit enjoyed by the PV Plants, which results in under-compensation to Claimants. Spain's proposed damages, Claimants add, are flawed because they do not account for the different tax shield benefits that each of the Claimants' PV Plants enjoyed.[23]

C. RESPONDENT'S POSITION ON THE REQUEST FOR RECTIFICATION

40. Respondent requests the Tribunal:[24]

(a) To rectify the Award under Article 49(2) of the ICSID Convention in accordance with Respondent's Request for Rectification, reducing the amount of awarded damages to EUR 15.7 million; and

(b) To reject Claimants' Request for Rectification.

41. The essence of Respondent's position is that the Tribunal's order to pay Claimants the amount of EUR 24.9 million is not consistent with the Tribunal's own finding that the shareholder loans interest tax shield must be taken into consideration for the conversion of post-tax reasonable target return into a pre-tax return, necessary for the calculation of damages. Thus, if the shareholder loans interest tax shield had been taken into

[22] Claimants' Reply, ¶¶ 5-8.
[23] Claimants' Rejoinder, ¶¶ 12-17.
[24] Respondent's Response, ¶ 34, Respondent's Reply, ¶ 41.

consideration, the Effective Tax Rate to be considered in the calculation should have been 12.8% (and not 19.6%), and the pre-tax return to be considered in the calculation should have been 8.0% (and not 8.7%). Thus, Respondent contends, if this "error" is corrected, the awarded amount should have been EUR 15.7 million instead of EUR 24.9 million.[25]

42. Respondent notes that the Tribunal concluded in the Award that the reasonable target rate of return in the "but-for scenario" should be 7% post-tax, and that, in order to convert such post-tax rate of return into a pre-tax rate, an Effective Tax Rate needed to be applied. Further, Respondent observes that the Tribunal had accepted a 19.6% Effective Tax Rate in the Decision[26] under the assumption that the Claimants had no debt financing that translated into a tax shield benefit that lowered this rate. Thus, the Experts' debate was whether to include or not the tax shield benefit of the shareholder loans of the Claimants' PV Plants in order to determine the Effective Tax Rate.[27]

43. In this connection, Respondent contends that the Tribunal agreed with BDO that the Effective Tax Rate should include the tax shield benefit of the shareholder loans,[28] which resulted in a lower Effective Tax Rate (12.8%) and in a pre-tax rate of return of 8.0%. However, according to Respondent, the Effective Tax Rate that was mistakenly used by the Tribunal to convert the post-tax target return into a pre-tax return was maintained at 19.6%, which does not take into consideration the shareholder loans interest tax shield.[29]

44. If the Tribunal had concluded that the pre-tax return should have been 12.8%, then, taking into account the decisions of the Tribunal on the other issues of the Experts disagreements (the Actual Costs of the Claimants' PV Plants, the Elements of the Retroactivity Damages; and the Regulatory Risk), the Tribunal should have selected within Brattle Table 7 of the Joint Memorandum: (i) BDO's Effective Tax Rate to determine the pre-tax return, because it includes the tax shield benefit of the shareholder loans; (ii) the own IT code; and (iii) a

[25] Respondent's Request for Rectification, ¶¶ 4-5, Respondent's Response, ¶ 3.
[26] Decision, ¶ 816.
[27] Respondent's Request for Rectification, ¶¶ 17-18.
[28] Respondent's Request for Rectification, ¶ 19, citing Award, ¶ 129.
[29] Respondent's Request for Rectification, ¶¶ 20-21.

different regulatory risk. In such case, the correct damage determination following the Tribunal's findings should have been EUR 15.7 million.[30]

45. According to Respondent, paragraph 176 of the Award makes the following statement (which contradicts its finding that the interest tax shield of the shareholder loans should be considered): "*Taking into account that the Tribunal has accepted that: (i) the Effective Tax Rate to apply pre-tax should be 8.7%,* […]". In that regard, Respondent states that the Effective Tax Rate proposed by the Experts was either BDO's Effective Tax Rate (12.8%), which included the interest tax shield of the shareholder loans, or Brattle's Effective Tax Rate (19.6%), that excluded the interest tax shield. In no case, Respondent adds, was the Effective Tax Rate 8.7%. This percentage was Brattle's proposed pre-tax return rate following Brattle's approach for the Effective Tax Rate, which according to Respondent, was rejected by the Tribunal.[31]

46. Considering the above arguments, Respondent requests that the Tribunal amend the text of paragraphs 176, 177, 179 and 219(1) of the Award. To this end, Respondent proposes specific language to be utilized.[32] Such proposed language addresses the position by Respondent expressed in the preceding paragraphs.

47. On the other hand, Respondent rejects Claimants' Request for Rectification because it is "*a last-minute reaction to Respondent's Request for Rectification of the Award by which Claimants unduly attempt to avoid a rectification requested by the Respondent that is evidently necessary*."[33]

48. Nonetheless, Respondent asserts that Claimants' Request for Rectification is a "*clear acknowledgement*" that the Award has incurred in a calculation error.[34] But a grammatical

[30] Respondent's Request for Rectification, ¶¶ 22-31, Respondent's Response, ¶¶ 11-14.
[31] Respondent's Request for Rectification, ¶¶ 40-41.
[32] Respondent's Request for Rectification, ¶¶ 44-52.
[33] Respondent's Response, ¶¶ 5 and 30.
[34] Respondent's Response, ¶¶ 6-10.

interpretation of paragraph 129 in the context of paragraph 128 should make the Tribunal's intentions clear.[35]

49. In that regard, Respondent contends that Claimants' Request for Rectification is, in fact, not a request to rectify the Award but rather an appeal of the Tribunal's decision on the tax shield benefit of the shareholder loans, and that Article 49(2) of the ICSID Convention is clear as to the reasons why an award should be rectified.[36]

50. According to Respondent, Claimants are "*unduly using the rectification remedy set out in the ICSID Convention to file an appeal*" on the Tribunal's Decision, and arbitral doctrine is unanimous that the rectification remedy cannot be used to re-open debates on the merits of issues already decided.[37]

51. Further, Respondent questions the assertion made by the Tribunal in paragraph 176 of the Award, stating that "*the Effective Tax Rate to apply pre-tax should be 8.7%*", when neither Brattle nor BDO proposed an Effective Tax Rate of 8.7%. In particular, Respondent states that Brattle calculates an Effective Tax Rate of 19.6% which results in a pre-tax return of 8.7%, while BDO calculates an Effective Tax Rate of 12.8% which results in a pre-tax return of 8%.[38]

52. In its Rejoinder, Respondent rejects Claimants' position in respect to the alleged failure by BDO to consider the tax shield benefit from shareholder loans that each one of Claimants' PV Plants to arrive to the EUR 15.7 million damages figure. It contends that the tax shield benefit from shareholder loans enjoyed by each one of Claimants' PV Plants, as indicated in their Annual Accounts, was factored in by BDO to calculate the Effective Tax Rates for each plant, and then the single Effective Tax Rate of 12.8% applied across all of Claimants' PV Plants was calculated by BDO as an average (or aggregate) of the Effective Tax Rate of each plant.[39]

[35] Respondent's Response, ¶¶ 23-26.
[36] Respondent's Response, ¶¶ 16-17.
[37] Respondent's Rejoinder, ¶¶ 13-14.
[38] Respondent's Rejoinder, ¶ 25.
[39] Respondent's Rejoinder, ¶¶ 20-31.

IV. THE TRIBUNAL'S ANALYSIS

A. APPLICABLE STANDARD

53. The issue is clear. Both Parties support their respective request on the basis of Article 49(2) of the ICSID Convention, which provides:

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

54. ICSID Arbitration Rule 49 details the procedure to be followed for rectification of an award. Both Claimants and Respondent followed the requirements for submission of their respective requests, and neither has alleged the other failed to meet such requirements.

55. The Tribunal further notes that both Claimants and Respondent submitted their respective Request for Rectification within the period established in the provisions cited of the ICSID Convention and the ICSID Arbitration Rules.

56. A rectification of an award is limited in scope. It can only be granted where there has been an outright error of a *"... clerical, arithmetical or similar error in the award."* The rectification procedure is not an appeal,[40] nor intended to address and seek corrections of the award that may deal with the analysis of the merits of the case.[41]

57. As Claimants contend, it cannot be a remedy which requires a "*complex exercise to retrace or clarify the parties' arguments and evidence on the text to be rectified*", as expressed by

[40] **CL-339**, *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44 ("***Watkins v. Spain***"), Decision on Spain's Request for Rectification of the Award, 13 July 2020, ¶ 39.
[41] **CL-339**, *Watkins v. Spain*, Decision on Spain's Request for Rectification of the Award, ¶ 38, citing *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*) ("***Vivendi v. Argentina***"), Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, 28 May 2003, ¶ 11, citing Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, The ICSID Convention: A Commentary (Cambridge University Press, 2d ed. 2009), Art. 49, ¶ 47.

the *Gavazzi v. Romania* tribunal.[42] Indeed, the Tribunal does not have the power under Article 49(2) of the ICSID Convention to re-draft the Award nor to make new determinations of fact or law. Thus, Claimants seek that Respondent's Request for Rectification be rejected because, in their view, the proposed corrections go well beyond the intended scope of rectification proceedings. [43]

58. Respondent supports its position by stating that, contrary to Claimants' assertion, Respondent is not requesting to "revise the entire damages determination", but is rather "… *simply requesting that the correct figure of damages is selected so that the awarded compensation is in accordance with the Tribunals' findings.*"[44] Even if the correction of the error should expand to all paragraphs of the Award affected by the error.[45]

59. Considering the above, and the fact that both the Decision and the Award have a logic to their analysis on the subject, there is no dispute that the adjustment to the Award to be carried out by the Tribunal is to correct an error, should any exist. This correction should not be deemed to be outside of the scope of a rectification of the Award under Article 49(2) of the ICSID Convention.

60. Although it is appropriate to rectify an error of the type addressed under Article 49(2) of the ICSID Convention, the Tribunal is aware that it cannot, however, amend its reasoning, modify the legal analysis, or alter findings with elements that are not already addressed in the Award.

61. The Tribunal therefore concludes that the rectification remedy contemplated in the ICSID Convention generally involves straightforward, clerical or arithmetical errors or correcting obvious omissions, so the real intentions of the tribunal are given effect in the award. The remedy therefore cannot be used to re-consider and/or re-evaluate the positions and evidence submitted in the case.

[42] Claimant's Response, ¶ 6, citing **CL-333**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Decision on Rectification, 13 July 2017, ¶ 56.
[43] Claimants' Response, ¶¶ 6-7.
[44] Respondent's Reply, ¶ 15.
[45] Respondent's Reply, ¶ 16.

B. APPLICABILITY OF THE TAX SHIELD

62. The Requests for Rectification share one common element: whether or not the Tribunal's logic in its analysis allows it to reach the decision made on damages due to Claimants. The issue in contention is the same: the effect on factoring the "tax shield benefit" in the calculation of damages.

63. By way of background, in the Decision, the Tribunal concluded that the New Regime resulted in a post-tax reasonable return below the targeted post-tax return of 7% under the Original Regime,[46] but acknowledged that it was not clear to the Tribunal whether or not Claimants had received the alleged benefit of a tax shield on the interest paid under shareholder loans.[47]

64. Since the Tribunal deemed that it lacked sufficient information to determine damages, it directed the Parties to attempt to seek an agreement or submit elements to the Tribunal for such determination. To that end, the Tribunal determined "*essential parameters*" to be taken into account by the Experts appointed by the Parties. Among these, the following were identified:[48]

a) a 7% after-tax target rate of return; and

b) a 19.6% average tax rate across all of Claimants' PV Plants, under the assumption that Claimants' PV Plants have no debt financing that translated into a tax shield benefit that lowered this rate, provided, however, that should any of the PV Plants owned directly or indirectly by Claimants had received such a tax-shield benefit, this factor would need to be taken into account individually for each PV Plant, as required, in order to determine the actual tax rate.

65. After having received the Quantum Submissions –accompanied by the Experts Joint Memorandum– the Tribunal proceeded in the Award to calculate the compensation due to Claimants.

[46] Decision, ¶ 752.
[47] Decision, ¶ 749.
[48] Decision, ¶¶ 810-821.

66. In the description of Claimants' position on the impact of the interest tax-shield, the Tribunal identified that Brattle

> "*… adopts the same approach as the Spanish regulator under the Original Regime, by assuming there is no impact from the interest tax shield for purposes of converting the 7% post-tax return into a pre-tax target return. By doing so, Brattle calculates an effective tax rate of 19.6% and therefore converts the 7% post-tax return into an 8.7% pre-tax return*", adding that
>
> "*…Brattle then uses the 8.7% pre-tax rate of return to derive the amount of revenue needed to ensure the Claimants receive the equivalent of the Original Regime's 7% post-tax return. In a second step, Brattle then reflects the actual taxes paid in 'real life' at each of the PV Plants, including by taking into account the interest tax shield.*"[49]

67. On the other hand, in describing Respondent's position in the Award, the Tribunal indicated that, according to Respondent,

> *"… there is evidence in the record that confirms that there are various shareholder loans that were granted to the Claimants' PV Plants, and hence that they benefited from the deductibility of the interest paid for said loans and attracted the corresponding tax shield, and points to the Experts' Joint Memorandum where BDO has included the necessary information to that effect. Therefore, BDO included such tax shield benefit to determine the effective tax rate."*[50]

68. In its analysis, the Tribunal again confirmed that the targeted return under the Original Regime was 7% post-tax and that a 19.6 % average tax rate should be applied. Further, it was clear –without dispute among the Parties and their Experts– that Claimants' PV Plants had in fact received a tax-shield benefit.[51]

69. The Tribunal relied on the agreements reached by the Experts. In particular, the Tribunal acknowledged in its analysis that:

> a) *"The Experts agree that to calculate both the Reasonable Return and Retroactivity Damages, it is first necessary to convert the 7% post-tax rate of return under the Original Regime into a pre-tax rate of return that*

[49] Award, ¶ 64, with reference to Claimants' Quantum Submission, ¶ 10(a).
[50] Award, ¶ 93, with reference to Respondent's Quantum Submission, ¶ 19, the Joint Expert Memorandum, ¶¶ 29-31 and Exhibit BQR-06.
[51] Award, ¶¶ 113-129.

> *will be used in the But-for scenario. The Experts further agree that, to convert the Original Regime's 7% post-tax return into a pre-tax return, it is necessary to estimate an effective tax rate to use in that conversion";*[52] *and*
>
> b) *"[the Experts] ... acknowledge that interest generated by the shareholder loans are deductible expenses that reduce the project effective tax rate, i.e., the effective tax paid by the projects, even in an all-equity basis (as shareholder loans may also be deemed equity funds."*[53]

70. But there were disagreements. As stated by the Tribunal in the Award,

> *"... [p]erhaps the primary area of disagreement among the Experts is that, while Brattle believes that the Spanish regulator took into account any interest tax shield (external debt or shareholder loans) when setting remuneration, BDO believes Claimants' PV Plants indeed had tax shield benefits through the various shareholder loans granted, and the exercise should follow the Tribunal's instructions in the determination of the effective tax rate."* [54]

71. The Tribunal acknowledged the debate among the Experts as to when the tax shield should be factored into the calculation, and in reference to the analysis carried out in the Decision, stated the following in the Award:

> *"In the event that any of the PV Plants benefitted from a tax shield arising from debt financing, then the tax rate should be adjusted accordingly. The Tribunal did not, however, state 'how' and 'when' this element is to be factored in. This is where the first divergence of approach emerges in the Experts' Joint Memorandum and the Parties' submissions."*[55]

This mention was made to address BDO's reliance on paragraphs 748 and 754 of the Decision suggesting that the Tribunal determined that the interest tax shield should be factored in the first step.[56]

72. While Respondent argued that

> *"... the impact of the tax shield should be applied in a <u>first step</u> while converting the 7% post-tax into a pre-tax rate, because failure to do so*

[52] Award, ¶¶ 34 and 112, making reference to Experts' Joint Memorandum, ¶ 9.
[53] Award, ¶ 36, making reference to Experts' Joint Memorandum, ¶ 32.
[54] Award, ¶ 37, making reference to Experts' Joint Memorandum, ¶ 26.
[55] Award, ¶ 113.
[56] Experts Joint Memorandum, ¶¶ 37-43 and Respondent's Quantum Submission, ¶ 25.

> *means that Claimants will receive higher compensation based on the tax rate that would not be paid in the 'real world'."*[57]

Claimants' position was that factoring the tax-shield benefit

> *"... should [be made], but only in the second step – that is, when computing the Revised Cash Flows in both the 'Actual' and 'But-for' scenarios. Claimants argue that it is in this second step that they 'fully' take the interest tax shield into account at each PV Plant."*[58]

73. The Tribunal took both positions into account and concluded that the benefits of the financing secured by each of the PV Plants should affect each plant individually. At the time it issued the Decision, the Tribunal stated that the individual impact of such tax shield was one of the so-called "*essential parameters*":

> *"If ... any of the [PV Plants] ... had debt financing that received a tax shield benefit, this factor shall need to be taken into account individually for each PV Plant, as required, in order to determine the actual tax rate."*[59]

74. The Tribunal also acknowledged –as Claimants assert– that attempting to factor the tax shield in the first step would require the 7% post-tax return to be converted into an infinite number of different pre-tax returns in order to determine the remuneration due to each individual PV Plant.[60]

75. In the Tribunal's view, the benefits of financing and tax-shield benefits can only be achieved in the so-called "second-step" when remuneration is subject to taxes in the normal course based on the specific characteristics of the individual PV Plant.

76. This is why the Tribunal relied on the Experts' Joint Table 1 which summarized the results of the calculations following the Experts' respective assumptions.[61] The Experts' Joint Table 1 shows the amount of damages following the approach of both Brattle (Claimants' Expert) and BDO (Respondent's Expert). While BDO only presented one option in

[57] Award, ¶ 116, making reference to Respondent's Quantum Submission, ¶ 23 (emphasis in original).
[58] Award, ¶ 115 (emphasis in the original), making reference to Claimants' Quantum Submission, ¶ 15.
[59] Decision, ¶ 817.
[60] Claimants' Response, ¶ 15(f), making reference to Award, ¶ 124.
[61] The Experts' Joint Table 1 is shown in Award, ¶ 59.

considering its approach and assumptions, Brattle presented three. This "joint table" has been referred to by both Parties in their respective Request for Rectification.[62]

			Brattle options			BDO Approach
		Marginal Plant	Average Plant	Own It Code	Real Plant	
Assumptions						
Setting remuneration		Exclude Interest Tax Shield	Exclude Interest Tax Shield	Exclude Interest Tax Shield	Exclude Interest Tax Shield	Include Interest Tax Shield
Damages estimation		Include Interest Tax Shield	Include Interest Tax Shield	Include Interest Tax Shield	Include Interest Tax Shield	Include Interest Tax Shield
Investment costs		Marginal plant same technology	Average plant same technology	Own IT-Code	Actual Plants	Revised Actual Investment costs (Own IT-code)
Production and operating costs		Marginal plant same technology	Average plant same technology	Own IT-Code	Actual Plants	Actual Plants
Regulatory risk		Different But-for and Actual	Different But-for and Actual	Different But-for and Actual	Different But-for and Actual	Same But-For and Actual
Retroactivity Damages	€ mln [1]	-5.4	-8.3	-6.9	0.8	-9.2
Reasonable Return Damages	€ mln [2]	-21.5	-17.2	-18.0	-50.7	-0.6
Total Damages	€ mln [3] [1]+[2]	-27.0	-25.6	-24.9	-49.9	-9.9

77. In the option within the Experts' Joint Table 1 selected by the Tribunal for the determination of damages, the assumptions on this point are evident: (i) it excludes the Interest Tax Shield in setting the remuneration, but (ii) it includes the Interest Tax Shield upon the determination of damages. The selection is highlighted.

78. Furthermore, the Tribunal noted that the determination of damages reflected "… *the 'sensitivities' to the Effective Tax Rate and regulatory risk assumptions in Brattle's calculations, as provided in Brattle Table 7 of the Expert's Joint Memorandum*."[63] When one examines Table 7, it is unquestionable that the Tribunal accepted Brattle's Effective Tax Rate to determine the pre-tax return of 8.7%.

79. As is clear from the above, the Tribunal relied in its determination of damages on Brattle's option under the Owned IT Code in Joint Table 1. Thus, it stated in paragraph 176 of the Award:

> *"Taking into account that the Tribunal has accepted that: (i) the Effective Tax Rate to apply pre-tax should be 8.7%, (ii) the investment and operating costs to apply to Claimants' PV Plants should be those of an 'Own IT Code' as one of the options presented by Brattle; (iii) the Interest Tax Shield should be factored in since Claimants did receive a benefit of deduction of the interest paid under shareholder loans, and further that (iv) the regulatory risk identified is different in the 'But-for' and the 'Actual' scenarios, the Tribunal determines that the amount of Reasonable Return*

[62] Claimants' Request for Rectification, ¶ 15; Respondent's Request for Rectification, ¶ 12.
[63] Award, ¶ 178.

Damages should be EUR 18.0 million as accepted by the Experts in Joint Table 1 of the Experts' Joint Memorandum."

80. The Tribunal notes that the reference to "… *(i) the Effective Tax Rate to apply pre-tax should be 8.7%, …"* in paragraph 176 needs a slight adjustment to properly reflect its analysis and conclusion. The Tribunal accepted Brattle's Effective Tax Rate in order to determine the pre-tax <u>return</u> of 8.7%. This is evident not only in recalling Claimants' position,[64] but in the analysis made by the Tribunal of the Effective Tax Rate that is required to reach the pre-tax return.[65] Since the Effective Tax rate is utilized to convert a post-tax rate of return to a pre-tax rate of return, the language should be adjusted to "… *(i) the Effective Tax Rate to <u>determine</u> the pre-tax <u>return</u> should be 8.7%, …"* [the underlined is text added by the Tribunal.]. The Tribunal believes that a clarification to this paragraph is also appropriate since it is intimately linked to the language in paragraph 129 of the Award. Likewise, the adjustment does not alter the analysis, or the conclusions reached by the Tribunal.

81. In view of the reasoning carried out by the Tribunal in the Award –as has been discussed above– there is no room to question that the statement made in paragraph 129 of the Award is incorrect, and that it is due to an inadvertent and unfortunate error of the Tribunal. The error can be remedied, as suggested by Claimants, by the simple addition of the word "not" so that it reads as follows: "*The Tribunal therefore concludes that the tax shield benefit of the shareholder loans should **not** be factored into the conversion of the 7% post-tax target return into a pre-tax return.*"

82. The Tribunal acknowledges that to dissipate any doubts and provide further clarity, the sentence could be complemented by adding additional text to the conclusion that logic requires, such as for example: "*The Tribunal therefore concludes that the tax shield benefit of the shareholder loans should **not** be factored into the conversion of the 7% post-tax target return into a pre-tax return, <u>but rather when remuneration is subject to taxes, since this will consider the specific characteristics of each the individual PV Plants</u>.*" Nevertheless, the Tribunal believes this is unnecessary and would simply create a debate

[64] See Award, ¶¶ 64, 114.
[65] See Award, ¶¶ 112, 114, 116, 117, 129, 141, 147, 151, 156, 158, 159-161.

on whether or not such additional language has modified the Award in a manner not permitted under a request for rectification as the ones that have been submitted by the Parties.

83. The addition of the simple word "not" does not alter the considerations or the conclusions of the Tribunal. The same applies for the inclusion of the words "to determine" (instead of "to apply") and "return" in paragraph 176 of the Award. These simply attempt to *rectify an error* in the language of its own conclusions, which conclusions are properly supported in the Award.

C. COSTS

84. In neither of their respective Requests for Rectification, or subsequent submissions, did the Parties make any specific request to allocate the costs.

85. The Tribunal has broad discretion under Article 61(2) of the ICSID Convention to allocate costs among the Parties.[66]

86. Additionally, ICSID Arbitration Rules 47(1)(j) and 49(4) read as follows:

> Rule 47(1)(j): The award shall be in writing and shall contain: "*any decision of the Tribunal regarding the cost of the proceeding.*"
>
> Rule 49(4): "*Rules 46-48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule*."

87. Considering that both Parties have submitted a Request for Rectification, and each has made subsequent submissions to address the other's position (Response, Reply and Rejoinder) as per the agreed procedural calendar for this stage of the proceedings, and both have acted not only in good faith, but also with diligence to pursue their respective requests, the Tribunal determines that each Party should bear their own costs, and share equally the

[66] Article 61(2) of the ICSID Convention reads as follows: "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

costs of this stage of the arbitration, including the fees and expenses of the Tribunal, the ICSID's administrative fees, and direct expenses.

88. The fact that Respondent submitted, as part of its Request for Rectification, a separate Request to Stay Enforcement of the Award does not affect this determination, since the latter request did not alter in any significant manner the process, despite the fact that the Tribunal was required to issue its Decision on the Respondent's Request for the Stay of Enforcement of the Award.

89. The costs of the rectification proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to:

Arbitrators' fees and expenses	
Mr. Eduardo Siqueiros T.	USD 12,500.00
Prof. Peter D. Cameron	USD 10,063.00
Mr. Luis González García	USD 9,083.33
ICSID's administrative fees[67]	USD 0.00
Direct expenses (estimated)	USD 1,662.00
Total	**USD 33,308.33**

90. The costs of the rectification proceeding have been paid out of the advances made by the Parties in equal parts.[68]

V. DECISION

91. For the reasons given above, the Tribunal DECIDES:

(1). To accept Claimants' Request for Rectification of the Award dated 16 June 2023, and consequently rectify the Award as follows:

[67] The administrative fee, as set out in the ICSID Schedule of Fees, is collected annually on the anniversary of the tribunal constitution, in this case on October 24 of each year.
[68] The remaining balance in the ICSID case account will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

(A) Adjust paragraph 129 of the Award to read:

"The Tribunal therefore concludes that the tax shield benefit of the shareholder loans should not be factored into the conversion of the 7% post-tax target return into a pre-tax return."

(B) Adjust paragraph 176 of the Award to read:

"Taking into account that the Tribunal has accepted that: (i) the Effective Tax Rate to determine the pre-tax return should be 8.7%, (ii) the investment and operating costs to apply to Claimants' PV Plants should be those of an 'Own IT Code' as one of the options presented by Brattle; (iii) the Interest Tax Shield should be factored in since Claimants did receive a benefit of deduction of the interest paid under shareholder loans, and further that (iv) the regulatory risk identified is different in the 'But-for' and the 'Actual' scenarios, the Tribunal determines that the amount of Reasonable Return Damages should be EUR 18.0 million as accepted by the Experts in Joint Table 1 of the Experts' Joint Memorandum."

(2). To reject Respondent's Request for Rectification of the Award dated 15 June 2023.

(3). Each Party shall bear its own legal representation costs and expenses related to the Requests for Rectification, and shall bear 50% of the costs of the rectification proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses.

(4). All other claims are dismissed.

Prof. Peter D. Cameron
Arbitrator

Date: 22 September 2023

Mr. Luis González García
Arbitrator

Date:

Mr. Eduardo Siqueiros T.
President of the Tribunal

Date:

Prof. Peter D. Cameron
Arbitrator

Date:

Mr. Luis González García
Arbitrator

Date: 25 September 2023

Mr. Eduardo Siqueiros T.
President of the Tribunal

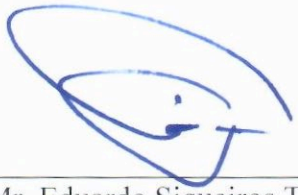
Date:

Prof. Peter D. Cameron
Arbitrator

Date:

Mr. Luis González García
Arbitrator

Date:



Mr. Eduardo Siqueiros T.
President of the Tribunal

Date: 26 September 2023