INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

WATKINS HOLDINGS S.À.R.L. AND OTHERS

and

KINGDOM OF SPAIN

ICSID Case No. ARB/15/44 – Revision

DECISION ON CLAIMANTS' RULE 41(5) APPLICATION FOR DISMISSAL OF RESPONDENT'S REQUEST FOR REVISION OF THE AWARD

Members of the Tribunal
Prof. Dr. Pierre Tercier, President of the Tribunal
Dame Elizabeth Gloster, Arbitrator
Prof. Hélène Ruiz Fabri, Arbitrator

Secretary of the Tribunal
Ms. Celeste E. Salinas Quero

Assistant to the Tribunal
Mrs. Maria Athanasiou

---

22 January 2024

REPRESENTATION OF THE PARTIES

Representing Watkins Holdings S.à r.l. and others:

Ms. Marie Stoyanov
Mr. Antonio Vázquez-Guillén
Mr. David Ingle
Ms. Agustina Álvarez
Mr. Pablo Torres
Ms. Lucinda Critchley
Mr. Gary Smadja
Allen & Overy LLP
Serrano 73
28006 Madrid
Kingdom of Spain

Representing the Kingdom of Spain:

Ms. María del Socorro Garrido Moreno
Ms. María Andrés Moreno
Ms. Inés Guzman Gutiérrez
Ms. Lorena Fatás Pérez
Ms. Lourdes Martinez de Victoria Gómez
Ms. Amparo Monterrey Sánchez
Ms. Elena Oñoro Sainz
Ms. Marina Porta Serrano
State Attorney's Office
International Arbitration Department
Marqués de la Ensenada 14-16
28004 Madrid
Kingdom of Spain

Table of Contents

I. INTRODUCTION AND THE PARTIES

1. This case concerns the Request for Revision submitted on 19 May 2023 (the "**Request for Revision**") by the Kingdom of Spain ("**Spain**" or "**Respondent**") under Article 51 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") regarding the Award rendered in the arbitration ICSID Case No. ARB/15/44 between (i) Watkins (Ned) B.V., (ii) Watkins Spain, S.L., (iii) Watkins Holdings S.à r.l., (iv) Parque Eólico La Boga, S.L., (v) Northsea Spain S.L., (vi) Parque Eólico Marmellar, S.L. and (vii) Redpier, S.L. (together, the "**Claimants**") and Spain (together the "**Parties**").

2. This decision concerns Claimants' preliminary objection pursuant to Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), requesting that Respondent's Request for Revision be dismissed on the basis that it manifestly lacks legal merit.

II. PROCEDURAL HISTORY

3. On 19 May 2023, Spain filed an *Application for Revision of the Award rendered in the case Watkins v. Kingdom of Spain (ICSID Case No. ARB/15/44)* on 21 January 2020 ("the "**Watkins Award**" or the "**Award**") and requested a stay of the enforcement of the Award.

4. The Watkins Award was rendered by the tribunal composed of Mr. Tan Sri Dato' Cecil Abraham as President, and by Dr. Michael C. Pryles and Prof. Ruiz Fabri, as arbitrators (the "**Original Tribunal**" or the "**Watkins Tribunal**"). The Watkins Tribunal unanimously found that it had jurisdiction over the claims, but for one claim concerning the 7% tax on the value of electrical energy production. The Watkins Tribunal found, by majority, that Spain had breached Article 10(1) of the Energy Charter Treaty (the "**ECT**") and awarded damages to the Claimants in the sum of EUR 77 million.

5. After the issuance of the award, on 19 May 2020, Spain filed a request for rectification of the Watkins Award. The rectification proceeding concluded on 13 July 2020 with a *Decision on Spain's Request for Rectification of the Award*. In such Decision the Watkins Tribunal, by majority, denied and dismissed the Request (the "**Rectification Decision**").

6. On 21 July 2020 Spain applied for the annulment of the Watkins Award. On 21 February 2023, the *ad hoc* Committee issued its *Decision on Annulment* unanimously rejecting Spain's application (the "**Decision on Annulment**" or the "**Annulment Decision**").

7. On 23 May 2023, the Secretary-General registered the Request for Revision and on 7 June 2023, confirmed that the enforcement of the Award had been provisionally stayed in accordance with Rule 54(2) of the 2006 ICSID Arbitration Rules (the "**ICSID Rules**").

8. On 25 May 2023, the Parties were informed, in accordance with Rule 51(3) of the ICSID Rules, that it was not possible to reconstitute the original Watkins Tribunal pursuant to Rule 51(2) and were invited to constitute a new tribunal (the "**Revision Tribunal**").

9. On 13 June 2023, following her appointment by Spain, Prof. Ruiz Fabri, a national of France and a member of the original Watkins Tribunal, accepted her appointment.

10. On 22 June 2023, following her appointment by the Claimants, Dame Elizabeth Gloster KC, a national of the United Kingdom, accepted her appointment.

11. On 14 August 2023, the Secretary-General informed the Parties that, pursuant to the Parties' agreement, she would appoint Prof. Pierre Tercier as the President of the Revision Tribunal.

12. On 17 August 2023, following Prof. Tercier's acceptance of his appointment, the Parties were informed that the Revision Tribunal was constituted in accordance with Rule 51(3) of the ICSID Rules and that the revision proceedings were deemed to have begun pursuant to Rules 6 and 53 of the ICSID Rules.

13. On 17 August 2023, Claimants filed their *Application under Rule 41(5) of the ICSID Arbitration Rules* (the "**Rule 41(5) Application**", "**Claimants' Application**" or the "**Application**").

14. On 23 August 2023, the Revision Tribunal held its **First Session**. During the First Session, the Tribunal discussed a draft Procedural Order No. 1 which was sent to the Parties on 25 August 2023, for them to confer on the items addressed in the draft, modify their contents and advise the Revision Tribunal of any items where there was disagreement. On the same date, the Revision Tribunal invited Spain to file a reply to the Claimants' Application by 20 September 2023.

15. On 14 September 2023, the Parties presented their agreed draft Procedural Order No. 1 and submitted in writing their respective positions on the items where there still was disagreement.

16. On 20 September 2023, Respondent filed its *Reply to Claimants' Application to Dismiss the Revision Application under Rule 41(5) of the Arbitration Rules* (the "**Reply to the Application**" or the "**Reply**").

17. On 22 September 2023, following comments received from both Parties on the draft order, the Tribunal issued **Procedural Order No. 1** setting out the procedural rules that apply to the present proceedings.

18. On 26 September 2023, the Tribunal invited the Claimants and the Respondent to present supplementary submissions, respectively, on 6 October and 16 October 2023.

19. On 6 October 2023, Claimants submitted their additional comments to *Spain's Reply to the Application* ("**Claimants' Additional Comments**").

20. On 16 October 2023, Respondent filed its *Final Comments to Claimants' Application to Dismiss the Revision Application under Rule 41(5) of the Arbitration Rules* ("**Respondent's Additional Comments**").

21. On 27 October 2023, a *Hearing on Claimants' Rule 41(5) Application* took place.

22. On 3 November 2023, the Parties simultaneously filed their Statements of Costs.

23. On 17 November 2023, the Final Transcripts of the Hearing, with the Parties's agreed corrections, were forwarded to the Parties and the Revision Tribunal.

24. On 22 January 2024, the Revision Tribunal closed the proceeding.

III. THE PARTIES' POSITIONS

25. This section provides a summary of the Parties' positions as set out in their written submissions. The Revision Tribunal's summary is not an exhaustive account of the written submissions. The Revision Tribunal has carefully considered the Parties' written and oral submissions in their entirety.

A. CLAIMANTS' POSITION

(1) The Request for Relief

26. Claimants request that the Tribunal: "*(a) dismiss Spain's Request for Revision in its entirety pursuant to ICSID Arbitration Rule 41(5), as it is manifestly without legal merit; and (b) order Spain to pay all the costs of this revision proceeding, including, but not limited to, ICSID administrative expenses, the Tribunal's fees and expenses, and the Claimants' legal fees and costs, plus interest at a commercial rate.*"[1]

(2) In general

27. Spain's Request for Revision is manifestly without merit and must be promptly dismissed. The sole reason Spain filed for revision is to secure the stay of enforcement of the Award. Since the Award was rendered on 21 January 2020 (*i.e.*, more than three years ago), Spain has applied for the Award to be rectified, annulled, and now revised. All three submissions relied on the same alleged error in the computation of damages. Neither the Original Tribunal nor the *ad hoc* Committee has taken any action to rectify or annul the Award. This is now the third time a panel has been appointed to hear Spain's case on that same error. Spain cannot be permitted to re-litigate this matter indefinitely to avoid complying with the Award.[2]

28. Spain also stated during the annulment proceedings that it had notified the Award to the European Commission as State Aid, as it has done for all of the Energy Charter Treaty ("ECT") awards rendered against it to date, again, purely with the intention of avoiding compliance with the Award.[3]

(3) The Legal Standard for Revision under Article 51

29. Article 51 of the ICSID Convention provides "strict conditions" which must be satisfied for the Request for Revision to succeed, as revision is a "strictly limited" remedy for the review of awards. [4] These grounds are cumulative.[5]

[1] Claimants' Application, para. 62; C-Additional Comments, para. 15.
[2] Claimants' Application, para. 7.
[3] Claimants' Application, para. 9.
[4] Claimants' Application, para. 23.
[5] Claimants' Application, para. 24.

(4) Spain's Request for Revision must be dismissed pursuant to Rule 41(5)

30. Spain's Request for Revision does not satisfy any of the limbs required under Article 51.

31. *First*, there is no "fact" that could form the basis of a request under Article 51. The purported error in the calculation of damages is not a "fact" for the purposes of Article 51. It is rather a determination made by the Original Tribunal in the Award. Finding that tribunals' determinations can be "facts" that are susceptible to revision would open the door to requests for revision in relation to any alleged errors made by tribunals in their determinations. That is not – and cannot be – the purpose of revision. It would go against the test of Article 51 itself and the widely accepted principle of finality of ICSID awards.[6]

32. *Second*, the purported "fact" does not pre-date the Award. Spain must demonstrate that the "fact" that it has recently discovered existed at the time of the Award and was capable of being known at that time.[7]

33. *Third*, even if the Original Tribunal's finding on damages were a "fact", Spain has also failed to demonstrate that the purported "fact" could decisively affect the Award. Because of the Request for Rectification, the Original Tribunal, which decided that request, was fully aware of the purported error in its calculations, in its Decision on Rectification.[8]

34. *Fourth*, the purported "fact" was not "newly discovered" on 21 February 2023 when Spain received the Decision on Annulment: it was known to both Spain and the Original Tribunal at the time of the Award. Spain fails to explain how it could have filed its Application for Rectification of the Award on exactly the same basis three years earlier, on 6 March 2020, if it was not yet aware of this alleged error. Indeed, Spain's Requests for Rectification and Revision are so similar that Spain has reproduced almost verbatim several paragraphs of the former in the latter.[9]

35. *Fifth*, Article 51(1) provides that the applicant's ignorance of the relevant "fact" at the time of the award must not have been due to negligence. While Spain did not act negligently, there was no "fact" of which it was ignorant.[10]

[6] Claimants' Application, paras. 31-35.
[7] Claimants' Application, para. 36.
[8] Claimants' Application, paras. 37-39.
[9] Claimants' Application, paras. 41-43.
[10] Claimants' Application, para. 54.

36. Finally, pursuant to Article 51(2), Spain must have brought this claim within 90 days of its discovery of the purported "fact". On Spain's case, it became aware of the purported error only with the Decision of the Annulment, thus allowing it to get around the 90-day time bar set out in Article 51(2). This is wrong. Spain brought its Request for Revision on precisely the same basis as its Request for Rectification dated 6 March 2020. Spain fails to explain how it could have filed a Request for Rectification in March 2020 based on an error in the Award that it has only discovered in the past few months. Spain's Request for Revision should be dismissed on this basis alone.[11]

(5) The Additional Comments

37. In their Additional Comments to Spain's Reply, Claimants submit that Spain expressly recognized that it did not discover the purported error in the damages calculation via the Decision on Annulment.[12] Thus, Spain's Request is manifestly time-barred.[13]

38. On any view, that the Decision on Annulment is the "newly discovered fact" that engages Article 51 is a frivolous proposition.[14] Since Article 51 requires both the applicant and the tribunal to have been ignorant of the purported fact at the time of the award, the relevant fact must have been capable of being known at the time of the award – in other words, it must have pre-dated it.[15] The Decision on Annulment cannot – by definition – have existed at the time of the Award, much less have pre-dated it.[16]

39. In any event, Spain's claim that the purported error pre-dates the Award is also wrong.[17] The purported error is not a fact, let alone one that pre-dates the Award: it is a determination made in the Award.[18]

(6) The Costs

40. Concerning Spain's request that the Tribunal order Claimants "*to pay the full costs of these proceedings (Arbitration and Revision), including the fees and expenses of counsel for the Kingdom of Spain*", Claimants submit that the Original Tribunal has already rendered its decision on the costs of the arbitration proceedings in the Award, and it cannot now be revisited. The ad hoc Committee upheld the Original Tribunal's Award in

[11] Claimants' Application, paras. 55-57.
[12] C-Additional Comments, para. 4.
[13] C-Additional Comments, para. 6.
[14] C-Additional Comments, para. 8.
[15] C-Additional Comments, para. 9.
[16] C-Additional Comments, para. 10.
[17] C-Additional Comments, para. 13.
[18] C-Additional Comments, para. 14.

its entirety, including the decision on costs. That decision is therefore *res judicata*, and it is not open to the Tribunal to review it.[19]

41. As to the costs of these revision proceedings, Spain should be obliged to pay the entirety of the costs of these proceedings, including (but not limited to): (a) ICSID's administrative fees and expenses; (b) the Tribunal's fees and expenses; and (c) Claimants' legal fees and disbursements.[20]

42. In light of Spain's failure to pay any amounts under the Award to date, the Tribunal should also order Spain to pay interest on these amounts at a commercial rate.[21]

B. RESPONDENT'S POSITION

(1) The Request for Relief

43. Respondent requests that the Tribunal "*a)* [d]*ismiss Claimant's Application to dismiss the Revision Application under Rule 41(5) of the ICSID Arbitration Rules. b) The Award be revised under Article 51 of the ICSID Convention in accordance with Section III of this petition and the final amount on damages be reduced to EUR 62.4 million. c) The Claimants be ordered to pay the full costs of these proceedings (Arbitration and Revision), including the fees and expenses of counsel for the Kingdom of Spain.*"[22]

(2) In general

44. Spain would be seriously defenceless in the event of a premature decision on such a serious matter and the lethal consequences it could have for the integrity of the ICSID system, without going into the merits of its allegations.[23]

(3) The Legal Standard for Revision under Article 51

45. The requirements demanded by Article 51 of the ICSID Convention are: (i) that it is a fact that could have decisively influenced the award; (ii) that the fact was unknown by the Tribunal and by the party requesting the review; and (iii) that the ignorance by the party that urges the review is not due to its own negligence.[24]

[19] Claimants' Application, para. 59.
[20] Claimants' Application, para. 60.
[21] Claimants' Application, para. 61.
[22] Respondent's Reply, para. 69; R-Additional Comments, para. 11.
[23] Respondent's Reply, para. 17.
[24] Respondent's Reply, para. 22. Respondent refers to Section III.B of its Application for Revision of the Award for an analysis of these requirements.

46. The fact that could have decisively influenced the award must be a fact; it cannot be a legal question and the Decision on Annulment can be considered as a fact for the purposes of its Application for Revision.[25]

(4) The Merits of Spain's Application

47. The Request for Revision does satisfy the limits required under Article 51.

48. *First*, a Committee's determination is a fact for the purposes of Article 51. The Annulment Decision shows the very serious error committed by the Watkins Tribunal in the quantification of damages, an error that causes a prejudice whose possible remedy is the revision of the Watkins Award.[26] On the other hand, the only reason why the Watkins Tribunal rejected Spain's Request for Rectification was precisely because, in their view, there was no clerical, arithmetical or similar error.[27] The present situation is precisely the kind of situation in which a revision is appropriate. The key fact based on which the Decision on Rectification was rendered, has been discovered to be inaccurate. Had the Tribunal known that there was an error in the computation of damages, its Decision on Rectification would have undoubtedly been in favour of the request made by Spain.[28] Thus, Spain cannot but maintain that we are before a new fact for the purposes of Article 51 of the ICSID which obliges the Tribunal to review the Watkins Award.[29]

49. *Second*, even if the Decision on Annulment was issued after the Watkins Award, it reveals an error that pre-dates it.[30]

50. *Third*, the purported fact does decisively affect the Award. In light of the new fact discovered by the ad hoc Committee, the existence of an error, the calculation of damages conducted by the Tribunal in its Decision on Rectification should be revised and the impact of the 7% tax should be deducted. If the error is resolved, the damages of the Watkins Award would amount EUR 62.4 million instead of EUR 77 million.[31]

[25] Respondent's Reply, para. 24. Respondent refers to paras 28 to 33 of its Application for Revision of the Award for an analysis of this point.
[26] Respondent's Reply, para. 31.
[27] Respondent's Reply, paras 34-35, quoting para. 65 of the Rectification Decision (Annex-02).
[28] Respondent's Reply, para. 36.
[29] Respondent's Reply, para. 38.
[30] Respondent's Reply, para. 39.
[31] Respondent's Reply, paras. 40-45.

51. *Fourth*, the date the Decision on Annulment was rendered is 21 February 2023. It is thus undeniable that the fact was newly discovered. This issue is independent of whether Spain has initiated Rectification or Annulment proceedings.[32]

52. *Fifth*, there was a new fact that Spain ignored: the Annulment Decision. Until the Decision was rendered, Spain had no authority on which to rely to initiate the Revision proceeding.[33]

53. *Sixth*, the Application for the revision of the Award was submitted to the Secretary-General of ICSID within the 90-days' time limit provided for in Article 51(2) of the ICSID Convention after the discovery of a fact of such a nature as decisively affecting the Award and that was unknown to the Watkins Tribunal and to the Applicant. The discovery of the decisive fact took place on 22 February 2023 with the dispatch of the Decision on Spain's annulment application.[34]

(5) The Additional Comments

54. To reject the request of Spain out of hand, without going into the merits of the case, is a blatant violation of the rights of Spain. Such a flat rejection, moreover, would seriously undermine the ICSID system: damages have been determined inconsistent with the Tribunal's findings. This is a serious attack on the legal certainty of all those who rely on the ICSID system.[35]

55. There is a new fact: the Decision on Annulment. Therefore, Spain has the right to be heard and the Tribunal the obligation to hear the Request for Revision with the seriousness required.[36]

56. The new fact has to be distinguished from the argument. There is only one argument that has been put in front of the Watkins Tribunal and in front of the *ad hoc* Committee and that one argument of Spain has been crystalized in one new fact: the Decision on Annulment. One thing is Spain's argument, which is not new, and another is the fact in which it is crystalized, which is new.[37]

[32] Respondent's Reply, paras. 46-54.
[33] Respondent's Reply, para. 55.
[34] Respondent's Reply, paras 56-61.
[35] R-Additional Comments, para. 2.
[36] R-Additional Comments, para. 4.
[37] R-Additional Comments, para. 7.

57. The argument put forward by Spain is known since the Award was rendered and the error in the calculation of damages was made, however, it is not an uncontested newly fact until the Decision on Annulment was rendered.[38]

58. The Watkins Tribunal rendered an award in which the calculation of damages was inconsistent with the previous findings. It could not be rectified by the Tribunal itself, it could not be annulled by the Annulment Committee, which affirmed its existence and legitimized it, adopting the arguments of Spain. There must be a procedure to modify this mistake. Spain alleges that it is this precise procedure, the Revision procedure, since there is a new fact, the Decision on Annulment that post-dates the award, in which the argument is adopted by an independent third party and reveals its existence since the Award was rendered.[39]

(6) The Costs

59. Pursuant to Article 52(4) of the ICSID Convention and Arbitration Rule 53, Article 61(2) and Arbitration Rule 47(1)(j) apply *mutatis mutandis* to revision proceedings. There exists wide consensus that Article 61 of the ICSID Convention confers upon the Tribunal a "*degree of discretion*" to decide the allocation of costs. Hence, the Tribunal is to allocate the expenses incurred by the Parties in connection with the revision proceedings and the fees and expenses of the members of the Tribunal.[40]

60. In deciding how to allocate the costs of these proceedings, the Tribunal should be guided by the principle that "*costs follow the event*" if there are no indications that a different approach should be called for.[41]

61. In this regard, it is evident that Spain has been compelled to go through these revision proceedings.[42] Thus, Watkins should be responsible for the costs incurred by Spain in connection with these revision proceedings. Spain also notes that it would still be entitled to recover the costs it incurred in the unlikely event that the Revision Tribunal decided not to proceed to the Revision of the Watkins Award. Spain was left with no choice but to initiate this revision proceedings and it should be compensated for the costs incurred.

[38] R-Additional Comments, para. 8.
[39] R-Additional Comments, para. 9.
[40] Respondent's Reply, paras 62-63.
[41] Respondent's Reply, para. 64.
[42] Respondent's Reply, para. 65.

Spain has in effect been forced to go through the process in order to achieve success and should not be penalized by having to pay for the process itself.[43]

IV. THE REVISION TRIBUNAL'S ANALYSIS

A. THE ISSUE

62. The issue is whether Respondent's Request for Revision of the Watkins Award under Article 51 of the ICSID Convention should be dismissed under Rule 41(5) of the ICSID Arbitration Rules on the basis that it is manifestly without legal merit.

63. For the purpose of deciding the Rule 41(5) Application, the Revision Tribunal will *first* set out the relevant legal regime, *i.e.*, Rule 41(5) of the ICSID Rules of Arbitration and Article 51 of the ICSID Convention (see section B below) and *second* apply the legal regime to the present case (see section C below). The Revision Tribunal will then decide on the Parties' cost applications (see section V below) and conclude (see section VI below).

B. THE APPLICABLE LEGAL REGIME

(1) Rule 41(5) of the ICSID Arbitration Rules

64. As stated above, the present application is brought under Rule 41(5) of the ICSID Arbitration Rules on "Preliminary Objections". Rule 41(5) sets out the following:

> *Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.*

[43] Respondent's Reply, paras 66-68.

65. This provision provides for the possibility of an expedited procedure for objections that a claim manifestly lacks legal merit. The aim is to dismiss manifestly unmeritorious claims at an early stage in the proceedings. The Tribunal's ruling on a Rule 41(5) application is therefore an important decision, with *res judicata* effect and with the potential to affect the right of a respondent party to have a further opportunity to present its case. The standard for determining whether a claim is manifestly without legal merit is therefore high and requires the applicant party "*to establish its objection clearly and obviously, with relative ease and despatch.*"[44] "Manifest" implies that it is not necessary to undertake a detailed analysis. In addition, the objection under Rule 41(5) must relate to a legal or factual impediment.

66. In the present case, there is an alleged legal impediment based on Article 51 of the ICSID Convention itself, namely the question as to whether Respondent has satisfied the conditions required for the Request for Revision. The Revision Tribunal now turns to Article 51 of the ICSID Convention.

(2) Article 51 of the ICSID Convention

67. In the ICSID system, an award is final and binding and not subject to any appeal or review by domestic courts, except for the remedies provided for in the ICSID Convention itself.[45] These remedies are set out in Section 5 (Articles 50-52) of the ICSID Convention, entitled "*Interpretation, Revision and Annulment of the Award*". They constitute the only available procedures. They are strictly regulated by the ICSID Convention and the ICSID Arbitration Rules. The remedy application before this Tribunal – and the alleged legal impediment that supports Claimants' Rule 41(5) Application – is the revision process under Article 51 of the ICSID Convention. Article 51 reads as follows:

> *(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to*

[44] Exh. CL-196, *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, paras. 88, 92.

[45] Article 53 of the ICSID Convention provides the following: "*(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*"

> *the applicant and that the applicant's ignorance of that fact was not due to negligence.*
>
> *(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.*
>
> *(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.*
>
> *(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.*

68. A revision process involves the modification of the original award on the basis of newly discovered facts that were unknown at the time the ICSID award was rendered. The conditions for a revision that the applicant must fulfil are the following:

    (i) There must be a discovery of a fact.

    (ii) The discovered fact must have a decisive influence on the ICSID award, i.e., it would have led to a different decision if it had been known to the ICSID tribunal.

    (iii) The discovered fact must have been unknown to the ICSID tribunal and to the party applying for revision at the time the award was rendered.

    (iv) The applicant's ignorance of the fact is not due to negligence; and

    (v) The party must file its application within 90 days of the discovery of such fact and within three years of the date the award was rendered.

69. The Parties agree on the abovementioned conditions.[46] However, they disagree on their application.

[46] Claimants' Application, para. 23; Respondent's Reply, para. 22.

(3) The question

70. In light of the applicable legal regime, the question or issue before this Revision Tribunal is a purely legal one. It is whether it can be established "*clearly and obviously, with relative ease and dispatch*" that Respondent has failed to comply with the conditions of Article 51 of the ICSID Convention in support of its Request for Revision, such that its Request is manifestly without legal merit and should be dismissed under Rule 41(5) of the ICSID Arbitration Rules.

71. In this context, the Revision Tribunal need not examine the merits of the alleged discovered fact and assumes for the purposes of its decision on the Rule 41(5) Application that the alleged error exists.[47]

72. The Revision Tribunal will therefore examine the Parties' positions in this regard, which have been extensively pleaded both orally and in writing.

C. THE APPLICATION

(1) The present case

73. In the present case, the ICSID Tribunal in the case *Watkins v. Kingdom of Spain (ICSID Case No. ARB/15/44)* rendered its Final Award on 21 January 2020, finding, among other things, that Respondent had breached Article 10(1) of the ECT. The Tribunal decided in the operative part of its Award the following:

> "*(a) Unanimously, the Tribunal has jurisdiction under the ECT and the ICSID Convention over the Claimants' claim;*
>
> *(b) Unanimously, the Tribunal has no jurisdiction under the ECT and the ICSID Convention with regard to the claim that the Respondent's tax measures namely the 7% tax on the value of electrical energy production created by Law 15/2012 violates the ECT;*
>
> *(c) By Majority, the Respondent has breached Article 10(1) of the ECT by failing to accord fair and equitable treatment to the Claimants;*

[47] Tr. 27.10.2023, p. 62 (Claimants: 16-18).

> *(d) By Majority, in the light of the Tribunal's decision in (c), the Tribunal for purposes of judicial economy, does not need to determine the Claimants' claim with regard to the violation of the Umbrella Clause;*
>
> *(e) By Majority, the Claimants are awarded damages in the sum of € 77 million for violation of the ECT;*
>
> *(f) By Majority, the Respondent shall pay interest on the sum awarded in (e) from 20 June 2014 to the date of this Award at 1.16% per annum compounded monthly;*
>
> *(g) By Majority, the Respondent shall pay post-award interest at the rate of 2.16% per annum compounded monthly from the date of the Award to the date of payment;*
>
> *(h) Unanimously, the Claimants' claim for gross-up tax is dismissed;*
>
> *(i) By Majority, the Respondent shall pay the Claimants 75% of the Claimants' cost of the proceedings;*
>
> *(j) Any claim, request or defence of the parties that has not been expressly accepted in this section X is hereby dismissed.*"[48]

74. Respondent then filed an Application for Rectification of the Award. It argued that "[d]*espite having established the Tribunal's lack of jurisdiction*" in respect of the 7% Levy, "*the impact of this tax has not been neutralized when calculating the damages*", and thus adjustments had to be made to the financial model submitted by Claimants' experts.[49]

75. The ICSID Tribunal rendered its Decision on Rectification on 13 July 2020, deciding to dismiss Respondent's request as follows:

> "*60. The Tribunal is of the view that the Respondent's proposed correction is not just a simple mathematical operation, as it requires the Tribunal accepting an argument of the Respondent, which was not specifically pleaded, nor was it raised in the Respondent's submissions or evidence. This, in the context of a rectification request, is 'impermissible'.*

[48] Respondent's Application for Revision, Annex-01, Watkins Award, dated 21 January 2020, para. 775.
[49] Respondent's Application for the Revision of the Watkins Award, dated 19 May 2023, para. 17.

61. The Respondent contends that the Tribunal 'refers to several adjustment raised by Accuracy.' However, none of the adjustments raised by Accuracy includes the adjustment that the Respondent is now proposing with regard to the 7% Levy. There was no submission by Accuracy of any calculations with regard to the economic impact of the 7% Levy. The Respondent is now attempting in this application for rectification, to raise novel arguments regarding the proposed adjustments, which, in the Tribunal's view, is not permissible.

62. The Tribunal is of the view that Article 49(2) of the ICSID Convention does not enable the Respondent to introduce new calculations so that the quantum which has been assessed by the Tribunal can be reviewed and adjusted. This is beyond the jurisdiction of the Tribunal in an application for rectification. The Tribunal refers to the tribunal's decision in LG&E Energy Corp. et al. v. Argentina *and relies on the passage which adopts the passage of Professor Schreuer, which was quoted in the* ad hoc *Committee's decision in* Vivendi v. Argentina*, which reads as follows:*

In addition, the Claimants misconceive the function of the recourse to a supplementary decision by asserting that it allows Argentina to respond to their new arguments and evidence. The supplementation process is not a mechanism by which parties can continue proceedings on the merits or seek a remedy that calls into question the validity of the Tribunal's decision. Referring to Professor Schreuer, the ad hoc Committee in the Vivendi case noted:

[…] *it is important to state that that procedure [by which ICSID awards and decisions may be supplemented and rectified], and any supplementary decision or rectification as may result, in no way consist of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification.*

63. The Tribunal refers and relies on the tribunal's decision in Marco Gavazzi and Stefano Gavazzi v. Romania*, which held that, 'the rectification must not affect the merits of the [d]ecision, and must not lead to a complex exercise to retrace or clarify the parties' arguments and evidence on the text to be rectified.'*

> *64. The Tribunal is of the view that if the Respondent's proposed correction is adhered to, it would involve a review of the evidence, the submissions and the expert reports that have been filed in the arbitration proceedings. The Tribunal is of the view that this is not permissible in an application for rectification.*
>
> *65. The Tribunal wishes to reiterate that with regard to the second issue in respect of quantification of damages, which also relates to the Majority Award, the Tribunal had considered all the evidence, the pleadings, the expert reports and the extensive submissions of the parties and finds that there is no clerical, arithmetical or similar error that needs to be corrected and therefore, for the reasons set out above, the request for rectification by the Respondent has no merit and is therefore, rejected.*"[50] [Footnotes omitted]

76. Following the ICSID Tribunal's Decision on Rectification, Respondent sought annulment of the ICSID Award on several grounds including the "[f]*ailure to state reasons in respect of the Tribunal's decision on the lack of jurisdiction over the 7% TVPEE used for the determination of damages*".[51]

77. The ICSID Annulment Committee issued its decision on 21 February 2023, dismissing Respondent's request. On the relevant point raised by Respondent, the ICSID Annulment Decision stated the following.

> *247.* [N]*o explanation was given as to how the figure EUR 77 million was arrived at. There is no mention of whether the 7% Levy was taken into account in the computation. Table 13 in the 'Rebuttal Quantum Report', which the Tribunal referred to as the source of the EUR 77 million, does not contain any mention of the 7% Levy. Nowhere in the Tribunal's discussion on the quantum was the 7% Levy mentioned.*
>
> […]
>
> *254. The Tribunal in its Rectification Decision maintained that its computation had excluded the 7% Levy, when it actually had not done so in relation to is computation of future damage:*

[50] Respondent's Application for Revision, Annex-02, Watkins Decision on Rectification, dated 21 January 2020, paras. 60-65.
[51] Respondent's Application for Revision, Annex-05, Memorial in support of the Application for Annulment, dated 7 May 2021, paras. 219-230.

> *57. The Tribunal, in the Majority Award, in its analysis of quantum, took the view that the Claimants were not entitled to past damages and this is provided for in paragraph 688 of the Majority Award; that having held that Spain had violated the ECT with effect from 20 June 2014, rejected the claim for damages claimed by the Claimants, prior to 20 June 2014 and awarded compensation in the sum of EUR 77 million. The Tribunal notes that the 7% Levy was introduced by Spain on 27 December 2012 and hence the Tribunal in the Majority Award in its analysis pertaining to the issue of damages,* ***rightly excluded the 7% Levy****.*[52]

[…]

255. It went on to explain however it was Spain's case that the 7% Levy did not cause any harm (viz. neutral) and quoted Spain's Counter-Memorial in support:

> *[t]he impact of the TVPEE on renewable producers such as those subject to this arbitration has been neutralised, given that the TVPEE is one of the costs remunerated to those producers through the specific remuneration they receive, as analysed in this Counter-Memorial when examining the current remuneration regime of renewable energy producers. In other words, the specific remuneration received by renewable producers enables them to recover certain costs that, unlike conventional technologies, cannot be recovered in the market, and, also, to obtain a reasonable return. Among those costs is precisely the TVPEE.*

256. It appears clear to the Committee that the Tribunal in its Decision on Rectification had accepted Spain's representation made during the hearing that the 7% levy was in fact "neutralised" and rejected the adjustments proposed by Spain as "novel". It reasoned that Spain ought to have raised them through its pleadings or submissions in the arbitration and not having done so, it should not be permitted to do so at the rectification stage. The Tribunal also noted that there was no submission by Accuracy on any calculations with regard to the economic impact of the 7% Levy.

257. The Committee takes the view that while the Tribunal could have undertaken a better check of its final computation when it was brought up by

[52] Respondent's Application for Revision, Annex-03, Watkins Decision on Annulment, dated 21 February 2023, paras. 247, 254. Emphasis in the original.

> *Spain in the rectification process, the Tribunal's error in computation remains, merely a mistake, and not one that comes within the meaning of Article 52(1) (e) – for failure to state reasons.*
>
> […]
>
> *303. The Committee has found that the Tribunal had made a mistake in its computation of the damages payable by Spain and had declined to make such a correction in its Decision on Rectification. In the Committee's view, an uncorrected mistake remains a mistake or an error which does not engage the intervention of Article 52(1)(e) of the Convention. This Committee is not permitted to act like an appellate tribunal and correct the error that has been identified, which the Tribunal could have but did not correct under Article 49(2) of the Convention. As such, the Committee declines to make any partial annulment relating to the quantification of damages and the award on costs, requested by Spain.*[53][Footnotes omitted]

78. Respondent then filed an application for revision of the Award before this Revision Tribunal, arguing that a "new fact" arises from the Decision on Annulment, namely that the *ad hoc* Committee reviewed the calculations made by the Original Tribunal and found that there was an error in the calculation of damages that had not been corrected. Respondent pointed in its Request for Revision that the ICSID Tribunal rejected Spain's Request for Rectification on the basis that there was no clerical arithmetical or similar error. For Respondent, "[t]*he key fact on which the Decision on Rectification was rendered, has been discovered to be inaccurate*" and that "[h]*ad the Tribunal known that there was an error in the computation of damages, its Decision on Rectification would have undoubtedly been in favour of the request made by Spain*."[54]

79. Having set out the relevant procedural background and the decisions in the case before it, the Revision Tribunal now turns to determine whether the conditions of Article 51 of the ICSID Convention have been met, taking into account the standard set out in Rule 41(5) of the ICSID Arbitration Rules and discussed above (see above paras. 64-72).

[53] Respondent's Application for Revision, Annex-03, Watkins Decision on Annulment, dated 21 February 2023, paras. 247, 254-257, 303.
[54] Respondent's Application for Revision, para. 37.

(2) The conditions

80. As noted above, the Parties agree that one of the conditions which must be met to grant a request for revision under Article 51 of the ICSID Convention is that there must be a discovered fact that would lead to a different conclusion if it had been known (see above paras 68-69).

81. For Respondent, such a fact is not "something" that caused the Original Tribunal to decide first, as it did in its Award, and/or second, as it did in its Decision on Rectification. In neither case is it an error on the part of the Original Tribunal. Spain submits there is a "new fact," namely the Annulment Decision of the *ad hoc* Committee which allegedly states that the Original Tribunal did indeed err in this regard. Differently, Respondent alleges that the "new fact" "crystallised" with the *ad hoc* Committee's recognition in this regard.

82. To follow Respondent's line of argument, one would have to accept the fact that the Original Tribunal would have decided differently in its Award, had it known that the *ad hoc* Committee recognized the error of the former. Indeed, when asked during the Hearing on Claimants' Rule 41(5) Application whether Respondent would file these Revision Proceedings if the Annulment Decision did not exist, Respondent answered in the negative arguing that in such a case there would be no "new fact" under Article 51.[55] The Revision Tribunal considers Respondent's arguments to be farfetched and paradoxical.

83. *First*, a discovered fact within the meaning of Article 51 of the ICSID Convention presupposes an event, materiality or circumstance that changes a particular result. It does not presuppose additional steps that crystallize such an event or circumstance. If this were the case, any decision by a body other than the tribunal originally constituted under the ICISD Convention taking a different position from the latter could pave the way for endless applications for revision under Article 51 on the basis that such decisions constitute a "discovered fact". This is certainly not the object of the ICSID Convention, which limits the occasions on which challenges to an ICSID Award may be made.

[55] Tr. 27.10.2023, p. 83 (Tribunal 8-17 ("*The Arbitral Tribunal has discussed. We have one question and then a few comments. The question that we have -- it is a theoretical question, but nevertheless it could be interesting – is to Spain. What would have been the situation if there would have been no Annulment Committee and no Decision of the Annulment Committee? Would it change anything, in your view, in the procedure that you would have followed? You understand my question?*"; Respondent 18-23: "*Yes, Mr President, I do understand. I believe that in that case the Kingdom of Spain would have no way to go to a revision proceeding because it would not have a new fact to put forward [to] a revision tribunal in order to try to solve the error that was made*.")

84. *Second*, and more importantly, to assert that the *ad hoc* Committee's Decision is the discovered fact under Article 51 of the ICSID Convention, would require that this fact must have been "unknown" to both the Original Tribunal and Respondent at the time the Award or the Rectification Decision were rendered. "Unknown" does not imply "non-existent". Rather, under Article 51 the alleged "unknown fact" must have existed previously but was not made known to the original tribunal or the applicant party. In the present case, it is not conceivable to allege or pretend that the Annulment Decision existed at the time the Award or the Rectification Decision were rendered. The Annulment Decision was a step that could not precede the Award and a step that followed the Rectification Decision. On this basis alone, Respondent's argument, and thus its Request for Revision, is manifestly without legal merit.

85. *Third* and in any event, even if the Revision Tribunal could somehow entertain the argument of crystallization of the discovered fact and hence admit that the subject matter of the Annulment Decision is what the Revision Tribunal should be looking at as the "new fact", such argument would still fail. This is because the subject matter of the Annulment Decision is not new, either for the Original Tribunal or for Respondent applying for the revision. Indeed, the description of the factual background of the case shows that Respondent brought to the attention of the Original Tribunal the same request and arguments that it brought before the *ad hoc* Committee and now before this Revision Tribunal. Respondent did not discover a fact that was not brought to the attention of the Original Tribunal but was brought to the attention of the *ad hoc* Committee. It would also be paradoxical if the Original Tribunal had to take into account something that it itself created. In other words, the award created the purported error, which therefore did not precede it.

86. In light of the foregoing, the Revision Tribunal does not need to consider the other requirements of Article 51 and finds that the conditions of Article 51 have not been met.

87. At this point the Revision Tribunal points to the fact that the ICSID system, like in most arbitration systems, operates in a defined and purposeful way. That is, the resolution of investor-State disputes in a just, fair, efficient and final manner. Indeed, this is a system that parties themselves contract to and accept to be bound by. It means that the possibilities for challenging an award or decision, even if there are errors, are limited and in line with the goal of providing a final system for dispute settlement. Further, revision is not intended to enforce points made in an annulment decision. Nor is it intended to fill in gaps that may exist in the system itself.

88. Indeed, the Revision Tribunal concludes that, if a party exhausts all such remedies and finds no redress, that does not mean that the system abrogates that party's rights to a just outcome or fair process. In the present case, the Revision Tribunal considers that Respondent had ample opportunity to present its case and that its rights were preserved at all times.

89. Finally, the Revision Tribunal notes that the Secretary-General confirmed that the enforcement of the Award was provisionally stayed in accordance with Rule 54(2) of the ICSID Rules (see para. 7 *supra*). The Revision Tribunal dismisses the Request for Revision as manifestly without legal merit, and notes that, in accordance with Rule 54(3) of the ICSID Rules the stay of enforcement of the Award is, thereby, automatically terminated.

V. THE COSTS

90. The Revision Tribunal's power to decide on the Parties' costs claims in the present proceedings is found in Article 61(2) of the ICSID Convention. Article 61(2) of the ICSID Convention provides the following:

> *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.*

91. This provision gives the Revision Tribunal discretion to allocate all costs of this revision proceeding, including counsel fees and other costs, between the Parties as it deems appropriate. In this respect, the Parties also agree that the principle in such cases is that "costs follow the event", even if Respondent submits that it should still be entitled to compensation of its costs in the event that Claimants succeed in their Rule 41(5) Application.[56]

92. In view of the fact that the Revision Tribunal has found that Respondent's Article 51 Revision Application has been dismissed under Rule 41(5) for being manifestly without legal merit, the Revision Tribunal decides to order Respondent to bear its own legal fees, to pay Claimants' legal fees, as well as the costs of the revision proceeding, *i.e.*, the fees and expenses of the Revision Tribunal as well as ICSID's administrative fees and

[56] Respondent's Reply, paras. 66-68.

expenses in relation to these Proceedings. The Revision Tribunal does not consider that this decision "penalises" Respondent in any way, in the circumstances in which these proceedings were initiated. On the contrary, Respondent's rights have been consistently preserved.

93. The costs of the revision proceeding, including the fees and expenses of the Revision Tribunal, ICSID's administrative fee, and the direct expenses amount to (in USD) amount to:

Arbitrators' fees and expenses	
Prof. Tercier	38,000.00
Dame Elizabeth Gloster	24,238.71
Prof. Ruiz Fabri	10,795.00
ICSID's administrative fee	42,000.00
Direct expenses	14,532.97
Total	**129,566.68**

94. The costs of the revision proceeding have been paid out of the advances paid by the Claimants and the Respondent in equal parts.[57]

95. Claimants' legal fees and related disbursements totalled EUR 244,839.70 and the advance paid to ICSID to cover the estimated costs of the revision proceeding (fees and expenses of the Revision Tribunal, ICSID's administrative fee, and direct expenses) amounted to USD 150,000.00.[58] Spain's legal fees totalled EUR 50,000.00 and the advance paid to ICSID to cover the estimated costs of the revision proceeding amounted to EUR 149,332.94.[59]

96. The Revision Tribunal considers these costs to be reasonable.

97. The Revision Tribunal considers that even if it were appropriate to award interest, Claimants did not substantiate their claim in any way, in particular in relation to the rate

[57] ICSID will provide a final statement of the case account to the Parties. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.
[58] Claimants' Statement of Costs of 3 November 2023, paras. 8 and 9.
[59] Respondent's Statement of Costs of 3 November 2023, para. 5.

to be applied or as to its basis. The Revision Tribunal therefore rejects the claim for interest.

VI. DECISION

98. In view of the above, the Revision Tribunal:

a. Dismisses Spain's Request for Revision under ICSID Arbitration Rule 41(5) as manifestly without legal merit;

b. Orders the Respondent to bear the costs of the present revision proceedings (the fees and expenses of the Revision Tribunal, ICSID's administrative fee, and direct expenses), which amount to USD 129,566.68;

c. Orders the Respondent to bear Claimants' legal fees and expenses, which amount to EUR 244,839.70;

d. Notes that, in accordance with Rule 54(3) of the ICSID Rules, the stay of enforcement of the Award is automatically terminated on this date.

Dame Elizabeth Gloster
Arbitrator

Date: 22 January 2024

Prof. Hélène Ruiz Fabri
Arbitrator

Date:

Prof. Dr. Pierre Tercier
President of the Tribunal

Date:

Dame Elizabeth Gloster
Arbitrator

Date:

Prof. Hélène Ruiz Fabri
Arbitrator

Date: 22 January 2024

Prof. Dr. Pierre Tercier
President of the Tribunal

Date:

Dame Elizabeth Gloster
Arbitrator

Date:

Prof. Hélène Ruiz Fabri
Arbitrator

Date:

Prof. Dr. Pierre Tercier
President of the Tribunal

Date: 22 January 2024