

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**EURUS ENERGY HOLDINGS CORPORATION**

Claimant

and

**KINGDOM OF SPAIN**

Respondent

**ICSID Case No. ARB/16/4**

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**DECISION ON RECTIFICATION**

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***Members of the Tribunal***

Ms. Anne K. Hoffmann, LL.M., President

Mr. Oscar M. Garibaldi, Arbitrator

Prof. Andrea Giardina, Arbitrator

***Secretary of the Tribunal***

Ms. Veronica Lavista

*Date of dispatch to the Parties: 15 May 2023*

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Mr. Rafael Gil Nievas  
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**TABLE OF SELECTED DEFINED TERMS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
CL-[#]	Claimant's Legal Authority
Cl. Cost Submission	Claimant's Submission on Costs of 31 March 2023
Cl. Submission of 30 January 2023	Claimant's Submission on the Rectification or Supplementation of the Arbitral Award of 30 January 2023
EUR	Euros
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Joint Memorandum	Brattle-BDO Joint Memorandum presented on 10 December 2021
Request	Claimant's letter to the Tribunal of 28 December 2022
Resp. Cost Submission	Respondent's Submission on Costs of 31 March 2023
Resp. Submission of 20 February 2023	Respondent's Submission on Claimant's Request for Rectification of the Award of 20 February 2023
Tribunal	Arbitral Tribunal constituted on 2 May 2016 and reconstituted on 4 October 2021

## **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 for Spain on 16 April 1998 and for Japan on 21 October 2002 (the **'ECT'**), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the **'ICSID Convention'**).
2. The Claimant is Eurus Energy Holdings Corporation (**'Eurus'** or **'Claimant'**), a limited liability company incorporated under the laws of Japan.
3. The Respondent is the Kingdom of Spain (**'Spain'** or **'Respondent'**).
4. The Claimant and the 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 14 November 2022, the Tribunal rendered its Award. The Tribunal decided that it:
  1. Orders the Respondent to pay the Claimant the amount of EUR 106.2 million, plus interest calculated by reference to a 2-year Spanish sovereign bond compounded annually, payable from 1 June 2021, until payment of this Award;
  2. Orders the Respondent to pay the Claimant the amount of USD 4,332,197.16 in respect of the overall costs of the arbitration, including legal costs and fees, legal fees, plus interest calculated by reference to a 2-year Spanish sovereign bond, payable from the date of this Award until payment thereof; and
  3. All other claims are dismissed.
6. On 28 December 2022, pursuant to Rule 49 of the ICSID Arbitration Rules, the Claimant filed an electronic request for rectification of the Award (the **'Request'**). The Claimant filed its translation on 9 February 2023.
7. On 2 January 2023, ICSID confirmed receipt of the Request and transmitted it to the Members of the Tribunal and the Respondent.

8. On 5 January 2023, the Secretary-General registered the Request pursuant to Rule 49(2)(a) of the ICSID Arbitration Rules, and transmitted a copy of the Request, together with the Notice of Registration, to each Member of the Tribunal.
9. By letter of 9 January 2023, the Tribunal invited each Party to make submissions on the initial request within three weeks, respectively, *i.e.*, the Claimant by 30 January 2023 and the Respondent by 20 February 2023. Thereafter, the Tribunal would consider the Parties' submissions and determine the next steps.
10. On 30 January 2023, the Claimant filed a submission on the rectification or supplementation of the Award, along with Legal Authorities CL-0136 to CL-0142. The Claimant filed its translation on 9 February 2023.
11. On 20 February 2023, the Respondent filed a response to the Claimant's submission of 30 January 2023. The Respondent filed its translation on 6 March 2023.
12. On 27 February 2023, the Tribunal informed the Parties that it would prepare its decision on the basis of the submissions received and invited the Parties to make submissions on costs by 10 March 2023.
13. On 1 March 2023, the Claimant requested leave to submit a brief response in relation to the Respondent's request to stay enforcement of the Award pending its decision on the Request.
14. On 2 March 2023, the Tribunal rejected the Claimant's request and stated that it did not require further submissions, except for those on costs as previously invited.
15. On 10 March 2023, the Respondent informed the Tribunal that, due to certain information not yet being available, it was not in a position to file its cost submission as scheduled and requested an extension to do so until 22 March 2023.
16. On the same date, the Claimant informed the Tribunal that it did not object to the Respondent's request for an extension.

17. Also on 10 March 2023, the Tribunal granted the Respondent's request and extended the deadline for the filing of cost submissions until 22 March 2023.
18. On 22 March 2023, Respondent informed the Tribunal that certain information was still needed for its cost submission and, consequently, requested an extension to file such submission until 31 March 2023.
19. On 23 March 2023, the Arbitral Tribunal granted the requested extension.
20. On 31 March 2023, both Parties filed their respective cost submissions (the '**Cost Submissions**'). The Claimant filed its translation on 10 April 2023, and the Respondent filed its translation on 12 April 2023.
21. On 27 April 2023, the proceedings were closed.

### **III. PARTIES' POSITIONS**

#### **A. THE CLAIMANT'S POSITION**

22. The Claimant's Request relates to paragraphs 137 and 158 of the Award. These paragraphs set out the interest payable by the Respondent to the Claimant. The Tribunal ordered "the Respondent to pay the Claimant the amount of EUR 106.2 million, plus interest calculated by reference to a 2-year Spanish sovereign bond compounded annually, payable from 1 June 2021, until payment of this Award." The Claimant states that "[i]n awarding this interest, the Tribunal did not specify how a negative interest rate on the two-year Spanish bond should be addressed in calculating the interest due on the Award."<sup>1</sup>
23. In reference to Article 49(2) of the ICSID Convention, the Claimant asserts that ICSID tribunals have used their powers under this provision in instances where, although no error as such has been made by a tribunal, a computation issue needed to be amended based on information not previously known to or considered by the tribunal.<sup>2</sup>

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<sup>1</sup> Cl. Submission of 30 January 2023, ¶ 2.

<sup>2</sup> *Ibid.*, ¶ 8.

24. The Claimant also contends that “[w]hen considering whether an issue or error warrants rectification of an award, a tribunal should be mindful of the purpose of its rectification powers. As stated in *Gold Reserve v Venezuela*, that purpose is ‘to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. *The purpose is therefore to ensure that the true intentions of the tribunal are given effect in the award*, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings’.”<sup>3</sup> The Claimant is of the view that its Request concerns precisely such an omission which will result in an Award that the Tribunal did not intend to grant if it remained unrectified.<sup>4</sup>
25. In reference to para. 158 of the Award, the Claimant argues that the Tribunal may not have been aware that, at times in 2021, the rate of the two-year Spanish sovereign bond was negative and that, consequently, it did not specify how a negative interest rate on the two-year Spanish bond should be addressed in calculating the interest due.<sup>5</sup>
26. The Claimant asserts that applying the negative figures to the awarded interest would result in the compensation that was awarded to the Claimant to be reduced by approximately EUR 330,000, an amount that would increase, so the Claimant points out, if the Spanish two-year bond once again becomes negative before Spain pays the amounts awarded to the Claimant.<sup>6</sup> The Claimant further contends that reducing the Claimant’s compensation by applying negative figures to the interest calculation would go directly against the principle of full reparation.<sup>7</sup>
27. Moreover, by reference to the wording used by the Tribunal in paragraphs 137 and 158 of the Award, the Claimant states that it was the Tribunal’s intention to provide increased relief to the Claimant to compensate it for the time value of money.<sup>8</sup> The Claimant asserts in this regard that interest was awarded accurately to represent additional compensation

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<sup>3</sup> *Ibid.*, ¶ 9 (footnotes omitted, emphasis in original).

<sup>4</sup> *Ibid.*, ¶ 10.

<sup>5</sup> *Ibid.*, ¶ 12.

<sup>6</sup> *Ibid.*, ¶ 13.

<sup>7</sup> *Ibid.*, ¶ 16.

<sup>8</sup> *Ibid.*, ¶¶ 17 *et seq.*



due to the Claimant for the time value of money between June 2021 and the date of payment. Therefore, unless the Claimant's cost of capital was also negative – which is at present not the case – applying negative bond yields to the awarded interest rates would mean that the Claimant is not fully compensated for the time value of money, thereby not receiving full compensation, which would be illogical.<sup>9</sup>

28. The Claimant states further that its Request concerns an aspect of the Award that is accessory to the merits of the case, not designed to relitigate the substantive findings of the Tribunal. Rather, the Request concerns a technical matter that does not necessitate any complex exercise of retracing or clarifying the Parties' arguments or evidence previously submitted on the issue of interest.<sup>10</sup>
29. Alternatively, and in case the Tribunal does not consider the application of the rectification mechanism to be appropriate in the current circumstances, the Claimant requests that the Tribunal issue a supplementary decision under Article 49(2) of the ICSID Convention, clarifying that any negative rate on the bond used to calculate the interest due on the compensation awarded should be treated as a rate of zero.<sup>11</sup>
30. The Claimant refers to Prof. Schreuer's statement that Article 49(2) offers the "principal remedy in case of an inadvertent failure by the tribunal to decide one or more questions submitted to it by the parties." In reliance of that statement, the Claimant also argues that the Tribunal's oversight in relation to the treatment of the negative interest rates, if not appropriate for rectification, warrants the issuing of a supplementary decision.<sup>12</sup> The Claimant contends that the inadvertent omission of an item in the calculation of damages or of a factor determining costs are among the typical examples of omissions that justify a supplementary decision.<sup>13</sup>

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<sup>9</sup> *Ibid.*, ¶ 19.

<sup>10</sup> *Ibid.*, ¶¶ 20, 21.

<sup>11</sup> *Ibid.*, ¶ 23.

<sup>12</sup> *Ibid.*, ¶¶ 25–27, with reference to **Exhibit CL-0137**, SW Schill (ed), Schreuer's Commentary on the ICSID Convention: Volume II (3rd edn, 2022), p. 1170, Art. 49, ¶ 49 and p. 1179, Art. 49, ¶. 86.

<sup>13</sup> Cl. Submission of 30 January 2023, ¶ 28.

31. In its prayers for relief, the Claimant:

[...] respectfully requests that the Tribunal rectify (or supplement) paragraphs 137 and 158 of the Award by clarifying that any negative rate on the two-year Spanish bond that is relevant to calculating the interest due on payment of the Award amount should be zeroed-out; that is, negative rates should be treated as a rate of zero when calculating the applicable interest.

Specifically:

(a) Eurus requests that paragraph 137 of the Award be amended by adding the following text to the end of the paragraph:

‘Any negative values of a 2-year Spanish sovereign bond applicable to the calculation of the interest should be treated as carrying a nil value for the purposes of calculating the applicable interest.’

(b) Eurus requests that paragraph 158 of the Award be amended by adding the following text to the end of sub-paragraphs 1 and 2:

‘Any negative values of a 2-year Spanish sovereign bond applicable to the calculation of the interest should be treated as carrying a nil value for the purposes of calculating the applicable interest.’

Further, Eurus regrettably notes that its request for rectification or supplementation of the Award was necessary solely due to the Respondent’s unfounded refusal to agree to zeroing out negative rates when calculating the interest as awarded by the Tribunal. Eurus therefore respectfully requests that:

(a) Spain be ordered to pay Eurus’s costs incurred in connection with the preparation of its request and related submissions; and

(b) Spain be ordered to bear the entirety of the administrative expenses of ICSID and of the fees and expenses of the Tribunal relating to Eurus’ request for rectification and / or supplementation of the Award.<sup>14</sup>

## **B. THE RESPONDENT’S POSITION**

32. The Respondent takes the view that the Request should not be treated as a request for rectification of the Award, because the remedy of rectification is foreseen to “rectify any clerical, arithmetical or similar error in the award”.<sup>15</sup> The Respondent argues that this is presently not the case as the Claimant’s Request does not refer to any clerical or

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<sup>14</sup> *Ibid.*, ¶¶ 32-34.

<sup>15</sup> Resp. Submission of 20 February 2023, ¶ 8, with reference to Article 49(2) of the ICSID Convention.

arithmetical error in the computation of interest on the awarded compensation or the awarded amount itself.<sup>16</sup>

33. In addition, the Respondent does not consider it appropriate to treat the Claimant's Request as a request for a supplementary decision as, in its view, the Tribunal has not omitted the decision concerning the applicable interest rate. The Award clearly states that interest on the awarded amount must be calculated pursuant to a 2-year Spanish sovereign bond. The Respondent also contends that the Tribunal was surely aware that sovereign bonds, such as the Spanish ones, may fluctuate between positive and negative values as well as of the evolution of the financial markets and their impact on the 2-year Spanish sovereign bonds.<sup>17</sup>
34. The Respondent considers that the appropriate procedure to be followed in the present circumstances is that set out in Article 50 of the ICSID Convention which states that "[i]f any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General."<sup>18</sup> The Respondent asserts in this regard that there is a clear disagreement between the Parties: while the Claimant considers that any negative values of the 2-year Spanish sovereign bond applicable to the calculation of the interest should be equaled to zero, the Respondent considers that the negative values of the 2-year Spanish sovereign bond applicable to the calculation of the interest should be computed as negative in the manner to be further explained.<sup>19</sup>
35. The Respondent states that it does not share the Claimant's interpretation of the Award. More specifically, it contends that during the period where interest accrues, it should be calculated by applying the corresponding value of the 2-year Spanish sovereign bond, regardless of whether that is positive or negative. Consequently, at the end of that period,

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, ¶ 9.

<sup>18</sup> *Ibid.*, ¶ 10.

<sup>19</sup> *Ibid.*

*i.e.*, on payment of the Award, the total amount of accrued interests may be positive or negative.<sup>20</sup>

36. The Respondent states further that if at the end of the accrual period, the total amount of calculated interest is positive, such amount of interest would be due to the Claimant in addition to the awarded amount. If, on the other hand, at the end of the accrual period, the overall amount of calculated interest is negative, then – and only then – the amount of interest due should be equated to zero. Thus, if the final amount of interest due is negative, such amount should not be deducted from the awarded amount of compensation. As a result, such compensation would not be diminished by approximately EUR 330,000 or by any other amount due to the negative interest.<sup>21</sup>
37. Moreover, the Respondent points out that it is unclear how the Claimant arrived at the estimate that the total amount of negative interest at the end of the accrual period would result in a loss of EUR 330,000. Even if that were correct, the Respondent argues, the compensation would not be reduced by this amount, because in that case the final amount of interest due would be equaled to zero. The Respondent contends that this approach would be consistent with the principle of full reparation as well as the wording of the Award which uses the terms “plus” and “moreover”.<sup>22</sup> If the Tribunal followed this understanding of the Award, the awarded amount would be maintained in full but no interest would be due, which would also be consistent with the fact that the Spanish bond would not be yielding interest either and, therefore, no interest would be needed to ensure full reparation.<sup>23</sup> The Respondent clarifies in this regard that in order to determine the final amount of interest due, the negative value that the 2-year Spanish bond may yield should not be equaled to zero.<sup>24</sup>
38. The Respondent asserts that the Claimant’s view that “any” negative value of the interest rate of the 2-year Spanish sovereign bond should be equaled to zero when calculating the

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<sup>20</sup> *Ibid.*, ¶¶ 13, 14.

<sup>21</sup> *Ibid.*, ¶¶ 15, 16.

<sup>22</sup> *Ibid.*, ¶¶ 17, 18.

<sup>23</sup> *Ibid.*, ¶ 18.

<sup>24</sup> *Ibid.*, ¶ 20.

interest is an undue attempt to re-write the Award, without any basis in the Award, and to maximize the amount of interest due to the Claimant.<sup>25</sup>

39. Furthermore, the Respondent notes that an alternative interpretation of the Award on interest would be that the bond in question is the spot 2-year Spanish sovereign bond as of the valuation date, *i.e.*, 1 June 2021. This 2-year Spanish sovereign bond as of this date would apply throughout the whole accrual period until payment of the Award. If the spot 2-year Spanish sovereign bond as of valuation date was negative, the total amount of interest would be negative and, hence, should then be equaled to zero.<sup>26</sup>
40. The Respondent also requests a stay of enforcement of the Award based upon Article 50(2) of the ICSID Convention.<sup>27</sup> The Respondent is of the view that such a stay is necessary because, until the Tribunal issues its decision, the amount of interest due cannot be calculated, as the specific amount of interest owed by the Respondent cannot be determined. Therefore, if the Award were to be enforced before the Tribunal's decision was issued, the Parties' dispute regarding this point would not be settled yet, giving rise to further difficulties.<sup>28</sup>
41. Finally, and with regard to costs, the Respondent opposes the Claimant's request that the former bear all costs relating to the Request and rejects the reasons stated by the Claimant in support thereof.<sup>29</sup> The Respondent states that the ICSID Convention and the ICSID Arbitration Rules specifically provide for the possibility of a disagreement between the Parties on how to interpret a specific provision of an Award. The mere fact of such a disagreement is not a reason to award costs against the disagreeing party, in particular since the Respondent could also claim that it is the Claimant that has refused to agree with the former's interpretation of the Award.<sup>30</sup>

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<sup>25</sup> *Ibid.*, ¶ 21.

<sup>26</sup> *Ibid.*, ¶ 22.

<sup>27</sup> *Ibid.*, ¶¶ 24 *et seq.*

<sup>28</sup> *Ibid.*, ¶ 26.

<sup>29</sup> *Ibid.*, ¶ 28.

<sup>30</sup> *Ibid.*, ¶ 29.

42. Moreover, the Respondent contends that the Claimant's unintended interpretation of the Award is unfounded and an attempt to maximise the amount of interest while the Respondent's understanding of the Tribunal's decision is consistent with the general principles of international law and the wording of the Award. Consequently, the Respondent requests that the Claimant be ordered to pay all administrative expenses of ICSID, the fees and expenses of the Tribunal as well as the Respondent's costs incurred in relation to the Claimant's Request, together with an appropriate interest rate since the date when the costs were incurred until the date of payment.<sup>31</sup>

43. In its prayers for relief, the Respondent:

[R]espectfully requests the Arbitral Tribunal to:

- a) Reject Claimant's request that the Arbitral Tribunal orders that any negative values of a 2-year Spanish sovereign bond applicable to the calculation of the interest should be treated as carrying a nil value for the purposes of calculating the applicable interest on the awarded amount;
- b) Reject Claimant's request to amend the wording of paragraphs 137 and 158 of the Award accordingly as proposed by Claimant;
- c) Confirm the correct interpretation of the Award on the disputed issue in view of the Respondent's understanding of the Award described in section III of this Submission;
- d) Stay enforcement of the Award until the Tribunal issues its decision on Claimant's Request; and
- e) Order Claimant to pay all the administrative expenses of ICSID and the fees and expenses of the Arbitral Tribunal relating to Claimant's Request for Rectification of the Award, as well as of Spain's costs incurred in connection with Claimant's Request for Rectification of the Award, together with an appropriate interest rate since the date when the costs were incurred until the date of payment.<sup>32</sup>

#### IV. THE TRIBUNAL'S ANALYSIS

44. The Tribunal has carefully considered the Parties' positions and has concluded that the Award must be rectified to reflect that any negative rate on the two-year Spanish sovereign

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<sup>31</sup> *Ibid.*, ¶¶ 30, 31.

<sup>32</sup> *Ibid.*, ¶ 32.

bond that is relevant to calculating the interest due on payment of the Award should be treated as a rate of zero.

45. The Tribunal bases its decision upon Article 49(2) of the ICSID Convention, more specifically upon the power which it grants a tribunal to correct “[...] any clerical, arithmetical or similar error in the award.”<sup>33</sup> The Tribunal acknowledges that in the present circumstances, the requested rectification does not concern an arithmetical error in the calculation of net present value pursuant to the applicable discount rate, a correction to include the name of counsel, or a correction to reflect updated payment information in respect of a party’s ICSID fees and external legal fees – the standard scenarios that have been addressed by ICSID tribunals in the context of Article 49(2) of the ICSID Convention.<sup>34</sup>
46. The Tribunal agrees, however, that the rectification of an award can also be justified “[...] in instances where, although no error as such has been made by a tribunal, a computation issue needed to be amended based on information not previously known to or considered by that tribunal.”<sup>35</sup> This was the position adopted in *LETCO v. Liberia*, in which the tribunal rectified the award based on new information that was not previously known to the tribunal.<sup>36</sup>
47. The Tribunal is also guided by the considerations of the tribunal in *Gold Reserve v. Venezuela* pursuant to which the purpose of a rectification should be “[...] to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purpose is therefore

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<sup>33</sup> In full, Article 49(2) of the ICSID Convention states that:

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.

<sup>34</sup> See **Exhibit CL-0141**, *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26), Decision on Rectification, 24 June 2016, ¶ 92.

<sup>35</sup> Cl. Submission of 30 January 2023, ¶ 8.

<sup>36</sup> **Exhibit CL-0139**, *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia* (ICSID Case No. ARB/83/2), Rectification Decision, 14 May 1986.

to ensure that the true intentions of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings.”<sup>37</sup>

48. In the present circumstances, the Parties have addressed the issue of interest, including the interest rate, through the Experts’ Joint Memorandum and in their submissions on quantum. They agreed that Spanish sovereign bonds are the appropriate reference for the determination of interest. They merely disagreed with regard to the appropriate term of the bond. On the basis of these submissions, the Tribunal determined that the Claimant is owed payment of interest calculated by reference to a 2-year Spanish sovereign bond compounded annually, payable from 1 June 2021 until payment of the Award.
49. The Parties did not, however, specifically address the aspect of negative interest. Accordingly, the Tribunal was not previously requested to consider this aspect or presented with information necessary to address it. As will be shown below, addressing this point in this Decision does not require the Tribunal to amend its legal analysis, modify its reasoning, or alter its findings. To the contrary, if the point were not addressed, the Award would contradict the Arbitral Tribunal’s intentions. Consequently, the Arbitral Tribunal is of the view that it has the power to rectify the Award on the basis of Article 49(2) of the ICSID Convention.<sup>38</sup>
50. It is undisputed between the Parties that during the time in which interest is accruing, the 2-year Spanish sovereign bond is not only yielding interest at a positive rate, but also at a negative rate. Nor is it in dispute that, in the case of a negative rate and as a result thereof, the Claimant’s compensation would be reduced. When awarding interest, however, the Tribunal’s clearly stated intention was to hold the Claimant harmless in a situation in which

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<sup>37</sup> **Exhibit CL-0140**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Decision Regarding the Claimant’s and the Respondent’s Requests for Corrections, 15 December 2014, ¶ 38.

<sup>38</sup> The Tribunal notes in this regard that the Respondent argues that Article 49(2) of the ICSID Convention is the wrong basis for Claimant’s Request which should instead be based on a different provision, namely Article 50 of the ICSID Convention. Notably, the Respondent does not request that the Claimant’s Request be dismissed for procedural reasons, and it goes on to address the merits of the Claimant’s Request. The Tribunal notes that any application pursuant to Article 50 of the ICSID Convention is required to be addressed initially to the Secretary-General, before it is transmitted, as appropriate, to the arbitral tribunal. The Respondent has not addressed this procedural requirement in its submission in response to the Claimant’s Request.



it is owed monies by the Respondent due to the latter's breach of the ECT.<sup>39</sup> The reduction of the awarded sum of EUR 106.2 million as a result of negative interest rates would thus contradict the Tribunal's intention.

51. Moreover, when it requested to be awarded interest by reference to Spanish sovereign bonds, the Claimant stated that these bonds' yields "[...] represent the Respondent's borrowing costs, and as such satisfy the 'forced loan' theory, which analogises a damages decision to a forced loan from the Claimant to the Respondent. Under the forced loan theory, the Claimant should therefore be compensated for this forced loan in exactly the same way as willing lenders to Spain."<sup>40</sup> The Respondent agreed in principle that the payable interest rate should be determined by reference to Spanish sovereign bonds, and in so doing it did not contest the analogy to the forced loan.
52. Under the "forced loan" analogy, as long as the interest rate during the accrual period remains positive, the Respondent has to pay interest for the money it "borrows" from the Claimant. But when the interest rate is negative, the Claimant would have to pay money for lending funds to the Respondent. No lender in the Claimant's position would accept such an arrangement, but would likely use the money to invest elsewhere rather than to lend it the Respondent with additional loss. Therefore, if one assumes that the compensation owed to the Claimant is the equivalent of a "forced loan" from the Claimant to the Respondent – and the former does not have a choice as to whether it wishes to make this loan –, the Claimant should not be double-punished by, on top of having to make the "forced loan," having to pay money in order to do so. Forcing the Claimant to accept such a scenario would not be consistent with the Tribunal's intentions or with its task to make the Claimant whole pursuant to the *Chorzow Factory* principles.
53. The Tribunal also notes that while the Respondent objects to an approach whereby "any" negative value of the interest rate of the 2-year Spanish sovereign bond would be equaled to zero<sup>41</sup>, it does propose to equate the amount of interest due to zero if, at the end of the

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<sup>39</sup> See Award, ¶¶ 38, 39.

<sup>40</sup> Joint Memorandum, ¶ 134.

<sup>41</sup> See ¶¶ 34, 35 above.

accrual period, the overall amount of calculated interest is negative.<sup>42</sup> The Respondent has not offered an explanation as to why a negative interest rate occurring during the accrual period should be treated differently from an overall negative interest at the end thereof. In the Tribunal's view, this differentiation is not persuasive and, indeed, reflects an internally inconsistent position on the Respondent's part. If the Respondent is of the view that it is not necessary to adjust any negative value of interest during the accrual period by equating it to zero, it is not clear why such an adjustment should be made in case the overall amount of interest is negative at the end of that time. In any event, as set out above, the Tribunal determined that full compensation to the Claimant be in the principal amount of EUR 106.2 million, and the application of a negative interest rate to that amount would be inconsistent with that determination and the Tribunal's intentions.

54. Finally, the Tribunal rejects the Respondent's application for a stay of enforcement. This application has been made on the basis of Article 50(2) of the ICSID Convention. For the reasons set out above, this provision is not applicable in the present circumstances.

## **V. COSTS**

### **A. THE PARTIES' POSITIONS**

#### **1. The Claimant's Position**

55. Referring to the ICSID Convention and ICSID Arbitration Rules, the Claimant asserts that if its Request succeeded, costs should follow the event and the Respondent should be ordered to pay all of Eurys' costs on an indemnity basis. This would be the case, the Claimant argues, if the Tribunal clarified that any negative rate on the two-year Spanish bond that is relevant to calculating the interest due on payment of the Award should be zeroed-out, *i.e.*, that negative interest rates should be treated as a rate of zero when calculating the applicable interest.<sup>43</sup>

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<sup>42</sup> See ¶ 36 above.

<sup>43</sup> Cl. Cost Submission, ¶¶ 5, 6.

56. The Claimant further asserts that if the Tribunal does not deem rectification or supplementation to be the appropriate method for addressing the issue raised and, instead, decides to make a clarification pursuant to Article 50 of the ICSID Convention as proposed by the Respondent, the Claimant should still be deemed the successful Party and, consequently, not bear any of the costs associated with obtaining the clarification of the Award.<sup>44</sup>
57. If, on the other hand, the Tribunal follows the Respondent's position, the Claimant contends that it would be appropriate for each Party to bear its own costs in connection with the Request, given that the Respondent "[...] admitted that 'the ruling by the Arbitral Tribunal under Article 50 of the ICSID Convention, clarifying how its decision to award interest by reference to the 2-year Spanish sovereign bond should be interpreted, is required.'"<sup>45</sup> The Claimant refers to decisions of other ICSID tribunals that have used this approach.<sup>46</sup> The Claimant also points out that its Request became necessary due to the Respondent's refusal to agree that the Award needed rectification, or some form of clarification, when initially approached by the Claimant to confirm the Tribunal's intentions and the ultimate purpose of the Award.<sup>47</sup>
58. The costs claimed by the Claimant are as follows (excluding the arbitration costs):
- ICSID lodging fee: USD 10,000
  - Legal fees: JPY 12,346,430
  - Experts' fees and expenses: JPY 204,468

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<sup>44</sup> *Ibid.*, ¶ 7.

<sup>45</sup> *Ibid.*, ¶ 8, with reference to Resp. Submission of 20 February 2023, ¶ 10.

<sup>46</sup> *Ibid.*, ¶ 8, with reference to **Exhibit CL-0143**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Claimant's Request for Rectification and/or Supplementary Decision of the Award, 25 October 2007, ¶ 58; **Exhibit CL-0144**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Decision on Claimant's Request for Supplemental and Rectification of Award, 18 January 2013, ¶ 51; **Exhibit CL-0145**, *Philip Morris Brands Sàrl and others v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Decision on the Rectification of the Award, 26 September 2016, ¶ 43.

<sup>47</sup> *Ibid.*, ¶ 9.

- Total: USD 10,000 and JPY 12,550,898.<sup>48</sup>

59. In its cost submission, the Claimant requests the following relief:

(a) ORDER that Spain pay the costs incurred by Eurus relating to the Request, including the costs of the Tribunal and the legal and other costs incurred by Eurus, on a full indemnity basis, in the amount of US\$10,000 plus JPY 12,550,898, as well as any costs incurred after the date of this 2023 Costs Submission, together with interest on such costs; and

(b) ORDER such other and/or further relief as the Tribunal may deem appropriate.<sup>49</sup>

## 2. The Respondent's Position

60. By reference to Article 61 of the ICSID Convention, the Respondent states that the Tribunal has a very broad discretion with respect to the allocation of costs both in terms of the procedural costs and the costs incurred by the Parties. It asserts that this discretion is unfettered and that the ICSID Arbitration Rules neither favour a specific approach nor do they elucidate the criteria that a tribunal should consider as relevant in ruling on the allocation of costs.<sup>50</sup>

61. More specifically, the Respondent asserts that in the present case, an award on costs should be made in favour of the Respondent. It also contends that the Tribunal has not erred or omitted in its Award the decision on what the applicable interest rate should be for the purposes of calculating the interests on the awarded compensation<sup>51</sup> and, consequently, considers the Claimant's Request to be an undue attempt to re-write the Tribunal's Award on interest which should be taken into consideration so as to award costs related to the Request in favour of the Respondent.<sup>52</sup>

62. The Respondent requests that the Tribunal order the Claimant to pay all administrative expenses of ICSID, the fees and expenses of the Tribunal relating to the Claimant's Request as well as the Respondent's costs incurred in connection with the Claimant's Request,

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<sup>48</sup> *Ibid.*, ¶ 16.

<sup>49</sup> *Ibid.*, ¶ 18 (emphasis omitted).

<sup>50</sup> Resp. Cost Submission, ¶¶ 11-13.

<sup>51</sup> *Ibid.*, ¶ 15.

<sup>52</sup> *Ibid.*, ¶ 19.

together with the appropriate interest rate since the date when the costs were incurred until the date of payment. These costs are as follows:

- Translations: EUR 184.32
- Printing services: EUR 60.20
- Courier services: EUR 290.64
- Legal fees: EUR 3,000
- Total: EUR 3,535.16.<sup>53</sup>

63. In its prayers for relief, the Respondent requests that the Tribunal

[O]rders Claimant to pay all the administrative expenses of ICSID and the fees and expenses of the Arbitral Tribunal relating to Claimant's Request for Rectification or Supplementation of the Award, as well as all of Spain's costs incurred in connection with Claimant's Request for Rectification or Supplementation of the Award in the amount of 3,535.16 €, together with an appropriate interest rate since the date when the costs were incurred until the date of payment.<sup>54</sup>

## **B. THE TRIBUNAL'S DECISION ON COSTS**

64. It is undisputed between the Parties that Article 61 of the ICSID Convention gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. In the present decision on costs, the Tribunal is guided by the same principle as in its Award, *i.e.*, by the principle that "costs follow the event".

65. The Claimant has prevailed with its request for rectification of the Award. The Tribunal, therefore, considers that the Claimant is, in principle, entitled to be reimbursed for the fees and costs it incurred with respect to the Request.

66. Consequently, the Respondent shall bear the arbitration costs relating to the Request, including the fees and expenses of the Tribunal, ICSID's administrative fees, including the

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<sup>53</sup> *Ibid.*, ¶¶ 6-10.

<sup>54</sup> *Ibid.*, ¶ 20 (emphasis omitted).

lodging fee, and direct expenses, which amount to (in USD):<sup>55</sup>

Arbitrators' fees and expenses	
Ms. Anne Hoffmann	21,039.56
Mr. Oscar Garibaldi	9,020.00
Prof. Andrea Giardina	12,500.00
ICSID's administrative fees (incl. the lodging fee)	52,000.00
Direct expenses (estimated)	1,256.76
Total	95,816.32

67. Moreover, the Respondent shall bear the Claimant's experts' fees and expenses.
68. With regard to the legal fees claimed by the Claimant, the Tribunal is not persuaded that those are proportionate when considering the very discrete and narrow nature of the issue that is the subject of the Claimant's Request. The stark contrast between the legal fees of both Parties further aggravates the Tribunal's doubts regarding the proportionality of the Claimant's legal fees. Consequently, the Tribunal has concluded that the Claimant shall be entitled to the reimbursement of two thirds of its legal fees, *i.e.*, JPY 8,230,953.33. The remainder of the legal fees claimed shall be borne by the Claimant itself.
69. In summary, the Respondent shall pay the Claimant USD 95,816.32 and JPY 8,435,421.33. The Claimant shall bear the remaining amount of the fees it claims. The Respondent shall bear the fees and costs it incurred in relation to the Claimant's Request.
70. Finally, the Tribunal notes that both Parties have requested the payment of interest on any costs and fees awarded, without specifying the rate of interest or the precise date as of which interest shall be payable. In those circumstances, the Tribunal considers it appropriate to award interest at the same rate as set out in the Award, *i.e.*, calculated by reference to a 2-year Spanish sovereign bond in the manner clarified in paragraph 71.1 of

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<sup>55</sup> The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

this Decision, payable from the date of this Decision until payment.

## **VI. DECISION**

71. For the reasons set forth above, the Tribunal decides as follows:

1. Declares that any negative rate on the two-year Spanish bond that is relevant to calculating the interest due on payment of the Award amount should be treated as a rate of zero when calculating the applicable interest;
2. Amends paragraph 137 and paragraph 158, sub-paragraphs 1 and 2, adding the following sentence:  
  
“Any negative values of a 2-year Spanish sovereign bond applicable to the calculation of the interest should be treated as carrying a nil value for the purposes of calculating the applicable interest.”
3. Orders the Respondent to pay the Claimant the amount of USD 95,816.76 and JPY 8,435,421.33 in respect of the overall costs of this rectification proceeding, including two thirds of legal fees, plus interest calculated by reference to a 2-year Spanish sovereign bond, payable from the date of this Decision until payment thereof; and
4. Dismisses all other claims.



Oscar M. Garibaldi

Arbitrator

Date: 15 May 2023

Andrea Giardina

Arbitrator

Date:

Anne K. Hoffmann  
President of the Tribunal

Date:





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Oscar M. Garibaldi  
Arbitrator

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Andrea Giardina  
Arbitrator

Date:

Date: 15 May 2023

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Anne K. Hoffmann  
President of the Tribunal

Date:

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Oscar M. Garibaldi  
Arbitrator

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Andrea Giardina  
Arbitrator

Date:

Date:



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Anne K. Hoffmann  
President of the Tribunal

Date: 15 May 2023