

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MASDAR SOLAR & WIND COOPERATIEF U.A.
Claimant

v.

KINGDOM OF SPAIN
Respondent

(ICSID Case No. ARB/14/1)

**DECISION ON THE RESPONDENT'S REQUEST
FOR A SUPPLEMENTARY DECISION**

Members of the Tribunal

Mr. John Beechey CBE, President of the Tribunal

Mr. Gary Born, Arbitrator

Professor Brigitte Stern, Arbitrator

Secretary to the Tribunal

Ms. Luisa Fernanda Torres

Assistant to the Tribunal

Mr. Niccolò Landi

Date of Dispatch to the Parties: 29 November 2018

REPRESENTATION OF THE PARTIES

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Ms. Elena Oñoro Sainz
Ms. Amaia Rivas Kortazar
Ms. María José Ruiz Sánchez
Mr. Diego Santacruz Descartin
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I. THE PROCEEDINGS

1. On 29 June 2018, the Kingdom of Spain filed with ICSID a Request dated 28 June 2018 for a Supplementary Decision in respect of the Award rendered by the Tribunal on 16 May 2018 (the “Award”), together with Annexes I to III (the “Request”). The Request was registered by the ICSID Secretary-General on 5 July 2018. It was transmitted to the Members of the Tribunal that same day, in accordance with Rule 49(2)(d) of the ICSID Arbitration Rules.
2. The Request included an application by the Kingdom of Spain to stay enforcement of the Award (the “Application”).
3. Pursuant to Rule 49(3) of the ICSID Arbitration Rules, the Tribunal conveyed the following message to the Parties on 19 July 2018:

“The Tribunal invites the Claimant to reply to [the] Kingdom of Spain’s application to stay enforcement of the Award ‘until a decision pursuant to Article 49 of the ICSID Convention is rendered’ by Friday, 27 July 2018. The Claimant’s submission in reply to the supplementation issues is to be served by Friday, 14 September 2018.

In addition, the Parties are invited to confer and to seek to agree whether they envisage the filing of any further submissions after those identified above, and whether they anticipate a procedure other than that the Tribunal shall determine the issues on the documents. The Parties are asked to inform the Tribunal by Friday, 27 July 2018. The Tribunal is not persuaded that a further oral hearing is necessary.

The Tribunal considers, too, that it should be made clear to the Parties now that there was no Dissenting Opinion and hence there is none to be produced. The Award is complete as it stands and is a decision of the Tribunal. It is clear on the face of the Award to what extent it is unanimous and to what extent it is a decision of the Tribunal by a majority.”

4. On 26 July 2018, Claimant submitted its Reply to the Kingdom of Spain’s application for a Stay of Enforcement of the Award. On the same day, Claimant confirmed that (i) its Reply to the Request for Supplementary Decision would be filed by 14 September 2018, as directed by the Tribunal; (ii) it did not anticipate the need for any further written submissions; and (iii) it agreed that a further oral hearing would not be necessary.
5. On 26 July 2018, Respondent also confirmed its agreement that no further written submissions after the Claimant’s Reply to the Request for Supplementary Decision would be required, and that no oral hearing would be necessary.
6. The agreement of the Parties concerning the procedure to be adopted was recorded in Procedural Order No. 6, dated 30 July 2018.

7. On 24 August 2018, the Tribunal issued its “*Decision on the Respondent’s Application to Stay Enforcement of the Award*” by which it rejected the Application.
8. On 12 September 2018, Claimant filed its Observations on the Request (the “**Observations**”).

II. THE PARTIES’ POSITIONS

(a) Respondent’s Position

9. Respondent maintains that the Tribunal “*omitted to decide*” the following four “*key*” questions:

“(i) determination of whether EU Law applies to the facts and Merits of the Dispute; (ii) determination of the date of the [sic] Masdar’s investment in Spain; (iii) disclosure of the Dissenting Opinion on valuation method[;] and (iv) disclosure of the Damages Valuation Model.”¹

10. As to the first question, Respondent contends that EU law has to be applied not only to jurisdictional issues, but also to the merits of the dispute.² According to Respondent, the Parties agreed to the application of EU law to both the facts and the merits of the dispute.³

11. Respondent contends that the Tribunal:

“[D]id not solve whether EU Law had to be appl[ied] to the facts and Merits of the dispute regardless both parties to the dispute agreed that EU Law formed part of the relevant investment framework and therefore, it should be applied to the facts and merits of the dispute, especially to address the Claimant’s legitimate expectations;”⁴ and,

“has omitted to deal with an important question that has been submitted to it by both parties (Article 48(3) of the ICSID Convention), since it has only decided the application of the EU Law on the jurisdictional phase.”⁵

12. Respondent requests the Tribunal:

“[T]o supplement the Award by specifically addressing whether EU Law shall be applied to decide the facts and/or the merits of the dispute;”⁶ and,

“[i]f the answer is positive the Respondent respectfully requests the Tribunal to supplement the Award by specifically addressing how the

¹ Request, para 5.

² *Ibidem*, para. 8.

³ *Ibidem*, para. 24.

⁴ *Ibidem*, para. 27.

⁵ *Ibidem*, para. 28.

⁶ *Ibidem*, para. 29.

application of EU Law (as applicable International Law or as a fact) affects the facts and/or the merits of the dispute, and in particular:

(i) How EU Law on State Aid affects to the Claimants' Legitimate Expectations on the maintenance for twenty five years of an immutable amount of incentives that constitute State Aid;

(ii) How EU Law on Environmental protection affects the Legitimate Expectations of the Claimant with regard to the possibility of obtaining the incentives for renewables for the electricity produced by burning gas.”⁷

13. Respondent contends that “*subsidies to renewables provided by Spain constitute State aid under EU Law*”⁸ and refers to the 2008 and the 2014 EU Commission Guidelines on State aid for environmental protection to which, according to Respondent, “*subsidies for renewables had to be subject.*”⁹ Respondent considers that this legislation is relevant to the assessment of Claimant’s legitimate expectations, so far as the application of the FIT pursuant to RD661/2007 is concerned.¹⁰ In addition, Respondent asserts that:

“[...] the Tribunal did not allow the Respondent to submit the final Decision of the EU Commission issued in November 2017 in the State Aid proceeding when the Respondent requested its permission to do so.”¹¹

14. Respondent suggests that on the basis of the terms of its Procedural Order No. 4, by which the Tribunal ordered Respondent to produce any document pertaining to “*Spain’s notification to the European Commission under Article 108(3) TFEU as to whether the above-referenced measures are in conformity with EU rules on state aid (the State Aid Notification),*” the Tribunal had “*accepted the materiality and relevance of these documents for the outcome of the case.*”¹²

15. With reference to the second question, Respondent affirms that both Parties agreed that the legitimate expectations of an investor and the specific commitments giving rise to them must be considered at the time when the relevant investment was made.¹³ According to Respondent, the Tribunal seems to have agreed with this position.¹⁴

16. Respondent asserts that the Tribunal:

⁷ *Ibidem*, para. 30.

⁸ *Ibidem*, para. 9.

⁹ *Ibidem*, para. 10.

¹⁰ *Ibidem*, para. 30(i).

¹¹ *Ibidem*, para. 22.

¹² *Ibidem*, para. 21.

¹³ *Ibidem*, paras. 31 and 34.

¹⁴ *Ibidem*, para. 41.

“[Did] *not solve the time in which the investment was made in order to assess legitimate expectations of the investor, a key issue disputed by the parties.*”¹⁵

And it submits that the Tribunal:

“[H]as omitted to deal with a question that is disputed and crucial for both parties and has been submitted to it [...]”¹⁶

17. Thus, Respondent requests the Tribunal:

“[T]o supplement the Award by specifically addressing the date in which the Claimant made its investment in order to assess its legitimate expectations.”¹⁷

18. On the third question, Respondent asserts that the application of the DCF method to calculate the *quantum* of damages:

“[H]as been a disputed issue between the parties that was submitted to the decision of the Arbitral Tribunal.”¹⁸

19. Respondent contends that the application of the DCF method is a “*contentious point between the arbitrators*” on the basis of the fact that the expression “*a/the majority of the Tribunal*” appears five times in Section VIII.C.(2) of the Award and thirty times more in the rest of the damages part of the Award.¹⁹

20. Respondent maintains that:

“*By omitting the dissenting opinion of one of the members of the Arbitral Tribunal regarding the applicability of the DCF method*”²⁰

the Tribunal has omitted to deal with the issue of the application of the DCF method.

21. Respondent, therefore, requests the Tribunal to supplement the Award:

“[B]y disclosing: (i) *what member of the Arbitral Tribunal has a Dissenting Opinion on the valuation method appropriate to value the renewable investments of the Claimant; and (ii) which were that member’s reasons to reject DCF as a valuation method.*”²¹

¹⁵ *Ibidem*, para. 42.

¹⁶ *Ibidem*, para. 31 at p. 10 (the numbering of the paragraph is inconsistent in the original version).

¹⁷ *Ibidem*, para. 43.

¹⁸ *Ibidem*, para. 46.

¹⁹ *Ibidem*, para. 48.

²⁰ *Ibidem*, para. 50.

²¹ *Ibidem*, para. 51.

22. With reference to the fourth question, Respondent contends that Exhibit BQR-110²² does not evidence the adjustments, which are the subject of paragraphs 654(b), (c) and (d) of the Award. According to Respondent, in the evidentiary record of this arbitration there is no document which contains the said adjustments.²³

23. Respondent submits that:

“[H]ow the Tribunal has performed the task of ‘[A]pplying these adjusted assumptions to Brattle’s valuation model’, reducing the damages globally in EUR 67,5 million (from EUR 132 million to EUR 64,5 million), is unexplained, unreasoned, and unjustified. Indeed, it is a complete black box.”²⁴

24. Respondent states that the Tribunal’s omission directly affects Respondent’s right of defence:

“[A]s for instance, it is not possible to assess whether the Tribunal has incurred in any arithmetic error in its damages calculation.”²⁵

25. Respondent requests the Tribunal:

“[T]o supplement the award and provide the parties, as soon as possible, with the Excel file or valuation model which evidences: (i) the adjustment of para 654.(b); (ii) the adjustment of para 654.(c); and, (iii) the adjustment of para 654.(d).”²⁶ And,

“[T]o supplement the Award by reasoning all the steps followed to apply in the Brattle’s excel model BQR-110, the sole document referred by the Arbitral Tribunal as the basis of its findings: (i) the adjustment of para 654.(b); (ii) the adjustment of para 654.(c); and, (iii) the adjustment of para 654.(d).”²⁷

(b) Claimant’s Position

26. Claimant submits that the Tribunal has not omitted to deal with the questions identified by Respondent.²⁸

27. According to Claimant, Respondent’s Request amounts to a “backdoor attempt”: “to have the Tribunal reconsider the merits of the case,” in spite of the “narrow scope of supplementation” permitted under Article 49(2) of the ICSID Convention.²⁹

²² See Award, fn. 605.

²³ Request, para. 62

²⁴ *Ibidem*, para 63 (emphasis in original).

²⁵ *Ibidem*, para. 64.

²⁶ *Ibidem*, para. 66.

²⁷ *Ibidem*, para. 67.

²⁸ Observations, para. 2.

²⁹ *Ibidem*, para. 3.

28. Claimant states that the Request falls outside the scope of Article 49(2) of the ICSID Convention. Citing legal scholarship and decisions of ICSID tribunals in support of its position, Claimant argues: (i) that tribunals are not obliged to “*address in the award every argument put forward by the parties, provided they decide on the essential issues of the case;*”³⁰ and (ii) that the “*remedy of supplementation is very narrow in scope,*” being limited to “*inadvertent omissions and minor technical errors in the award.*”³¹

29. On the first question – *i.e.* the asserted failure of the Tribunal to determine whether EU law applies to the facts and the merits of the dispute – Claimant contends that, in the course of the arbitration, it argued:

“[T]hat the dispute had to be resolved under the ECT and public international law, not EU law;” and,

*“that there is no inconsistency between EU law and the ECT, and should there be any inconsistency, the latter would prevail.”*³²

30. Claimant maintains that Respondent’s argument that the Parties were in agreement that EU law applied to the present dispute is simply incorrect.³³

31. Claimants further argues that:

*“In this case, the Tribunal was called to decide the case under the ECT. Since the Tribunal found that there is no incompatibility between ECT and EU law, it was unnecessary to analyse EU law further.”*³⁴

32. As to the assessment of Claimant’s legitimate expectations in light of EU law on State aid and the EU Directives identified by Respondent in the Request, Claimant contends that:

*“Spain only referred to these documents in connection with the Claimant’s expectations regarding the use of gas, and not in the context of whether EU rules on State aid had any relevance to the assessment of the Claimant’s legitimate expectations;”*³⁵ and,

*“[...] during the course of the arbitration, the focus of the Respondent’s allegations regarding these Guidelines [the 2008 and the 2014 EU Commission Guidelines on State aid for environmental protection] was not legitimate expectations but on those Guidelines justifying the adoption of the Disputed Measures.”*³⁶

³⁰ *Ibidem*, para. 11.

³¹ *Ibidem*, para. 13.

³² *Ibidem*, para. 16.

³³ *Ibidem*, para. 17.

³⁴ *Ibidem*, para. 20.

³⁵ *Ibidem*, para. 22.

³⁶ *Ibidem*, para. 23.

33. Claimant asserts that the Tribunal has “*implicitly*” addressed the issue whether Claimant had legitimate expectations that the RD661/2007 regime would continue to apply to its investment. In particular, Claimant argues that:

“The Tribunal did decide this question when it found that Spain’s commitments regarding the continued application of the RD 661/2007 regime were sufficiently specific to generate legitimate expectations.”³⁷

34. Claimant points out that the 2014 EU Commission Guidelines on State aid for environmental protection, the ruling in the *Elcogas* case³⁸ and any other EU documentation dated 2014 upon which Respondent seeks to rely could not have any relevance to the assessment of Claimant’s legitimate expectations “*as they were published years after Masdar’s relevant investments were made.*”³⁹

35. With reference to Respondent’s argument that in its assessment of Claimant’s legitimate expectations, the Tribunal had not taken into consideration Directive 2001/77/EC of 27 September 2001 and Directive 2009/28/EC of 23 April 2009, Claimant affirms that:

“It was [...] sufficient for the Tribunal to find that Spain committed to provide the ‘benefits’ under RD 661/2007 giving rise to legitimate expectations, including the right to produce electricity using 15% of natural gas.”⁴⁰

36. Claimant dismisses the proposition that it referred to these Directives as part of the relevant investment framework for the purposes of addressing legitimate expectations.⁴¹ While it accepts that it did indeed refer to the RE Directives of 2001 and 2009, it had done so in order to show the EU’s and the Member States’ commitments to encourage and develop RE power infrastructure, with the targets that were set forth in those directives. The Claimant also submitted that the RD 661/2007 regime was in line with those objectives and that EU law did not require Spain to adopt the Disputed Measures. The question was not whether those Directives gave rise to legitimate expectations, but whether:

“[...] RD 661/2007 and Spain’s actions did so. The Tribunal discharged this duty when finding that RD 661/2007 gave rise to legitimate expectations.”⁴²

37. According to Claimant, it is unclear how Respondent’s argument based on Claimant’s document request pertaining to “*Spain’s notification to the European Commission under Article 108(3) TFEU as to whether the above-referenced measures are in conformity with EU*

³⁷ *Ibidem*, para. 24.

³⁸ R-030, Order of the Court of Justice of the European Union Regarding The Pre-Judicial Question C- 275/13, ELCOGAS, 22 October 2014.

³⁹ Observations, para. 25.

⁴⁰ *Ibidem*, para. 26.

⁴¹ Request, para. 23.

⁴² Observations, para. 27.

*rules on state aid (the State Aid Notification)*⁴³ could amount to support Respondent's submission that the Tribunal omitted to decide a relevant question in the Award. In Claimant's submission, it could not and did not do so.

38. So far as the second question is concerned, Claimant says that Respondent's complaint that the Tribunal had failed to determine the date of Masdar's investment in Spain does not withstand scrutiny:

*"It is clear from the narrative provided in the Award that the Claimant made its investments in the CSP plants in phases over a period of time commencing in 2008 and through 2010."*⁴⁴

39. On the third question – *i.e.* the absence of a reasoned dissenting opinion on valuation method – Claimant, relying on Article 48(4) of the ICSID Convention, contends that an arbitrator cannot be compelled to produce a dissenting opinion and to provide a statement of his or her reasons. Nor, Claimant submits, is an arbitral tribunal obliged to identify the dissenting arbitrator.⁴⁵ Claimant refers to the Tribunal's observation in its Procedural Order No. 6 of 30 July 2018, by which it made clear that:

*"[...] there was no Dissenting Opinion and hence there is none to be produced. The Award is complete as it stands and is a decision of the Tribunal."*⁴⁶

40. Claimant notes, further, that the Tribunal had dealt with the question as to the appropriate method of calculation for determining the fair market value of Claimant's investments and it had explained why it had adopted the DCF method:

*"In paragraphs 567 to 574 of the Award, the Tribunal summarises the arguments made by both parties in this respect. In paragraphs 575 to 587 of the Award, the Tribunal articulates its reasons for preferring the DCF method over the Respondent's arguments for an asset-based valuation."*⁴⁷

41. With reference to the fourth question – *i.e.* the call for production of the Tribunal's damages valuation model and detail of its working calculations – Claimant argues first, that, as a matter of principle, Respondent's request for supplementation of the Tribunal's analysis of Exhibit BQR-110 and for the production of an excel spreadsheet with the valuation model goes beyond anything contemplated by Article 49(2) of the ICSID Convention. An ICSID tribunal is under no obligation to produce its valuation model.⁴⁸

⁴³ Request, para. 21.

⁴⁴ Observations, para. 34.

⁴⁵ *Ibidem*, para. 38.

⁴⁶ *Ibidem*, para. 40.

⁴⁷ *Ibidem*, para. 39.

⁴⁸ *Ibidem*, paras. 43 and 44.

42. Specifically, Claimant submits that Respondent’s request that the Tribunal supplement the Award “*by reasoning all the steps followed to apply in the Brattle’s excel model BQR-110*”⁴⁹ exceeds the limits of Article 49(2) of the ICSID Convention.⁵⁰
43. Claimant rejects Respondent’s criticism that the Tribunal’s damage calculation is “*unexplained, unreasoned, and unjustified.*”⁵¹ Claimant, noting the decisions in *MINE v. Guinea* and *Eiser v. Spain*,⁵² contends that the Tribunal, acting within its discretion:

*“[P]erformed an in-depth analysis of the assumptions that served as the basis of the Claimant’s DCF calculation, also indicating the assumptions it ultimately adopted in order to reach the conclusion that amount of damages that should be awarded was €64.5 million. Therefore, the Tribunal discharged its duties under Article 48(3) in its damages assessment.”*⁵³

44. Claimant refutes Respondent’s assertion that it is not possible to extract the figure of EUR 64.5 million from the valuation model provided in Exhibit BQR-110. It identifies the four salient adjustments made to the model by the Tribunal⁵⁴ and it describes how the Tribunal adjustments must be applied to the excel spreadsheet under Exhibit BQR-110. On the basis of that exercise, Claimant concludes that:

*“[...] contrary to Spain’s position in the Request, it is possible to reach the figure of €64.5 million in damages [...].”*⁵⁵

45. In light of the above, Claimant requests the Tribunal to:

- “(a) *deny Spain’s Request in its entirety; and*
- (b) *order Spain to assume all of the fees and costs of the Request [...].*”⁵⁶

III. ANALYSIS

46. Article 49(2) of the ICSID Convention and ICSID Arbitration Rule 49 are the relevant provisions which govern supplementary decisions and rectification of errors. Article 49(2) of the ICSID Convention provides:

“The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and

⁴⁹ Request, para. 67.

⁵⁰ Observations, para. 45.

⁵¹ Request, para 63 (emphasis in original).

⁵² Observations, paras. 47 and 48.

⁵³ *Ibidem*, para. 48.

⁵⁴ *Ibidem*, para. 53.

⁵⁵ *Ibidem*, para. 60.

⁵⁶ *Ibidem*, para. 61.

shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.”

47. The procedure governing the submission, receipt and processing of requests for a supplementary decision or for rectification of an award is set out in ICSID Arbitration Rule 49 which provides:

“(1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:

- (a) identify the award to which it relates;*
- (b) indicate the date of the request;*
- (c) state in detail:*
 - (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and*
 - (ii) any error in the award which the requesting party seeks to have rectified; and*
- (d) be accompanied by a fee for lodging the request.*

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

- (a) register the request;*
- (b) notify the parties of the registration;*
- (c) transmit to the other party a copy of the request and of any accompanying documentation; and*
- (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.*

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rules 46-48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.”

48. The nature and purpose of the supplementation procedure provided for by Article 49(2) of the ICSID Convention, was considered in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*.⁵⁷ In *Vivendi*, the *Ad Hoc* Committee made clear that:

“[I]t is important to state that that procedure, and any supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification. Those sorts of proceedings are simply not provided for in the ICSID system.”

In *Wena Hotels Limited v. Arab Republic of Egypt*,⁵⁸ the *Ad Hoc* Committee concluded that:

“A proceeding under Article 49(2) would not allow the Tribunal to go further than to decide upon the question it had omitted to deal with.”

In *Içkale İnşaat Limited Şirketi v. Turkmenistan*,⁵⁹ the tribunal stated that:

“According to Article 49(2) of the ICSID Convention, the Tribunal ‘may [...] decide any question which it had omitted to decide in the award’ in a supplementary decision. Such a decision ‘shall become part of the award and shall be notified to the parties in the same manner as the award.’ The language used in Article 49(2) (‘may’) suggests that the tribunal may decide, in its discretion, whether a supplementary decision is required or indeed appropriate. This is the position adopted by other ICSID tribunals.”

49. The ambit of the Article 49(2) procedure has been the subject of considerable commentary. For example:

⁵⁷ CL-0252, *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the *Ad Hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, 28 May 2003, para. 11.

⁵⁸ CL-0025, *Wena Hotels v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, 5 February 2002, para. 101.

⁵⁹ CL-0259, *Içkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Request for Supplementary Decision and Rectification of the Award, 4 October 2016 (“*Içkale*”), para. 102. The *Içkale* tribunal mentioned as an example *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant’s Request for Supplementation and Rectification of Award, 18 January 2013, para. 39 (“*The Tribunal observes that the Parties are in agreement that the Tribunal has discretion as to whether or not to supplement an award under the terms of Article 49(2) of the ICSID Convention. The term ‘may’ leaves no doubt that this is the case when the Tribunal has omitted to decide a question submitted to it.*”) See, CL-0259, *Içkale*, fn. 214.

*“[...] the procedure of self-correction under Art. 49(2) will be useful only in the case of inadvertent omissions of a technical character but not in the case of a considered omission affecting a fundamental aspect of the tribunal’s reasoning.”*⁶⁰

*“[...] case law on Art. 49(2) confirms the limited relevance of the remedy of supplementation. It is useful for unintentional omissions of technical nature. [...] It is not a sufficient remedy for a failure to address major facts and arguments [that] go to the core of the tribunal’s decision.”*⁶¹

*“The remedy offered by Art. 49(2) will be useful only in cases of inadvertent omissions of a technical character. [...] Art. 49(2) will not be useful in cases of a failure to address major facts and arguments which go to the core of the tribunal’s decision.”*⁶²

*“[This remedy] is intended to provide a simple, inexpensive process for dealing with minor technical and clerical mistakes in the award, such as calculation errors or typos.”*⁶³

*“[...] supplementation and correction deal with minor technical and clerical mistakes in the award [...] This remedy is designed for inadvertent omissions and minor technical errors. It is not designed for a substantive review of the decision. Rather, it enables the tribunal to correct mistakes that may have occurred in the award’s drafting in a simple way [...] the time limits for a request for revision or annulment do not start to run until a decision on a request for rectification or annulment has been rendered.”*⁶⁴

50. The Tribunal has provided the Parties with an opportunity to file observations pursuant to ICSID Arbitration Rule 49(3) and it has applied ICSID Arbitration Rules 46-48, *mutatis mutandis*, in preparing this decision, as required by ICSID Arbitration Rule 49(4).
51. Within the context of its Article 49(2) Request, Respondent contends that the Tribunal has omitted to deal with the four “*questions*” that it has identified and defined in its Request and in respect of which, the Parties’ submissions are set out in summary form above.
52. On the basis of a careful review of the Parties’ submissions and supporting materials and of the content of its Award, the Tribunal concludes that there is no basis to supplement the Award in accordance with the provisions of Article 49(2) and that Respondent’s Request

⁶⁰ SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *The ICSID Convention: A Commentary*, 2009, p. 860.

⁶¹ SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *cit.*, p. 864.

⁶² SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *cit.*, p. 1014.

⁶³ HEISKANEN and HALONEN, *Post-Award Remedies*, in Giorgetti (Ed.), *Litigating International Investment Disputes: A Practitioner’s Guide*, Brill/Nijhoff, 2014, p. 523.

⁶⁴ DONG, United Nations Conference on Trade and Development, Course on Dispute Settlement, International Centre for Settlement of Investment Disputes, 2.8 Post-Award Remedies and Procedures, pp. 1-7-8, available at http://unctad.org/en/Docs/edmmisc232_en.pdf.

should be denied. In any event, Respondent's Request raises matters which go well beyond those properly within the ambit of an Article 49(2) request. The Tribunal sets out its reasoning below.

(a) Respondent's First Question

53. Respondent requests the Tribunal to supplement the Award "*by specifically addressing whether EU Law shall be applied to decide the facts and/or the merits of the dispute.*"⁶⁵

54. At paragraph 340 of the Award, the Tribunal stated that:

"To conclude, EU law is not incompatible with the provision for investor-State arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention. The two legal orders can be applied together as regards the Parties' arbitration agreement and this arbitration, because only the ECT deals with investor-State arbitration; and nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention."

55. In accordance with its mandate, the Tribunal decided the merits of the case on the basis of the ECT. The Tribunal concluded that Respondent failed to accord fair and equitable treatment to Claimant on the basis of Article 10(1) of the ECT. In light of the fact that the ECT is the applicable law and that the Tribunal decided the case accordingly and that, in any event, the Tribunal found no incompatibility between the ECT and EU law, there was no need to investigate the application of EU law to the facts and/or to the merits of the dispute.

56. Subject to the condition that the Tribunal agreed to supplement the Award by addressing whether EU law applied to decide the facts and/or the merits of the dispute ("*If the answer is positive [...]*"), Respondent further requested the Tribunal to deal with two sub-questions pertaining to the impact of EU law on State aid and on environmental protection on Claimant's legitimate expectations.⁶⁶ For the reasons stated in the previous paragraph, that condition has not been satisfied and it is not necessary to consider these matters further.

(b) Respondent's Second Question

57. Respondent requests the Tribunal to supplement the Award "*by specifically addressing the date in which the Claimant made its investment in order to assess its legitimate expectations.*"⁶⁷ The Award contains a comprehensive, clear and self-explanatory chronology of the events constituting and surrounding the making of Claimant's investment at paragraphs 89 to 99 of the Award. As Claimant notes at paragraph 34 of its Observations:

"It is clear from the narrative provided in the Award that the Claimant made its investments in the CSP plants in phases over a period of time

⁶⁵ Request, para. 29.

⁶⁶ *Ibidem*, para. 30.

⁶⁷ *Ibidem*, para. 43.

commencing in 2008 and through 2010. The Award makes it clear that at all relevant times the Claimant had a legitimate expectation to the continued application of the RD 661/2007 regime as a result of: (a) its 'substantial due diligence'; and (b) the specific commitments made by the Respondent to qualifying investments (including the three CSP Plants in which the Claimant invested). Notably, the Award expressly indicates that RD 661/2007 – the regime that was in place at the time Masdar invested – included a very specific unilateral offer from the State and it was because of these specific commitment that Masdar's expectations to the continued application of the RD 661/2007 economic regime were legitimate."

58. That is an analysis with which the Tribunal concurs. In the Award, the Tribunal assessed Claimant's legitimate expectations as to the continuing application of RD 661/2007.⁶⁸ The Tribunal does not accept that it failed to address the question as to when Claimant made its investment.

(c) Respondent's Third Question

59. Respondent requests the Tribunal to supplement the Award by disclosing (i) which arbitrator dissented from the majority's decision on the appropriate valuation method for calculating Claimant's damages and (ii) his/her reasons for not concurring with the other arbitrators.
60. In its communication to the Parties dated 19 July 2018, the Tribunal made clear that:

"[T]here was no Dissenting Opinion and hence there is none to be produced. The Award is complete as it stands and is a decision of the Tribunal. It is clear on the face of the Award to what extent it is unanimous and to what extent it is a decision of the Tribunal by a majority."

61. The Tribunal's position is in line with Articles 48(1) (which authorises decisions by a majority vote) and 48(4) of the ICSID Convention (which allows arbitrators to attach individual opinions to the award).⁶⁹ In any case, it has to be remembered that an arbitrator who does not concur with the majority is not obliged to issue a dissenting opinion or to state the reasons for his/her disagreement in the award. In fact, it is a "right" and not an obligation of the dissenting arbitrator to issue a separate or a dissenting opinion, if he or she deems it appropriate.⁷⁰

⁶⁸ Award, paras. 496-499 and 512-521.

⁶⁹ See also Rule 47(3) of ICSID Arbitration Rules: "Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent." (Emphasis added).

⁷⁰ TITI, *Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion*, LAPE 17 (2018), p. 198: "The ICSID Convention is rare among investment arbitration rules to expressly recognize the right of the arbitrator to attach his or her personal opinion to the award." SCHREUER, MALINTOPPI, REINISCH & SINCLAIR, *The ICSID Convention: A Commentary*, 2001, p. 816: "The text [of Article 48(4) of the ICSID Convention] is permissive. It leaves an individual member of a tribunal with several options. [...] A member voting against the majority opinion, has three possibilities. The first is to simply vote against without offering an explanation. The second is to offer a statement of dissent without offering a full opinion. The third is to write a detailed and fully reasoned dissenting opinion."

62. Accordingly, no supplementation of the kind requested by Respondent is either necessary or appropriate under Article 49(2).

(d) Respondent's Fourth Question

63. Respondent contends that Exhibit BQR-110⁷¹ does not evidence the adjustments of paras 654(b), (c) and (d) of the Award and that the Tribunal's damage calculation is "unexplained, unreasoned, and unjustified."⁷²
64. In paragraphs 564 to 655 of the Award, the Tribunal has explained in detail both the reasons which led it to apply the DCF method to its valuation and the assumptions adopted by the Tribunal to conclude that the amount of damages to be paid by Respondent amounted to some EUR 64.5 million. In the course of this valuation exercise, the Tribunal took into consideration all of the arguments advanced by the Parties and their experts; in light of the facts of the case, the Tribunal applied some assumptions and adjustments, which are clearly identified in the Award.⁷³
65. With reference to Respondent's request that the Tribunal supplement the Award "*by reasoning all the steps followed to apply in the Brattle's excel model BQR-110,*"⁷⁴ the Tribunal notes, first, as a matter of principle, that there is no obligation upon a tribunal to provide a detailed point by point justification of every step that it has taken in the course of a valuation such as this. Support for this proposition is to be found in numerous ICSID decisions and in the Decision of the tribunal on the Request for Correction, Supplementary Decision and Interpretation in *ADM v. Mexico*, which was faced with an interpretation of Article 57 of the ICSID (Additional Facility) Rules – a provision akin to Article 49(2) of the ICSID Convention.⁷⁵ Second, and in any event, as Claimant has pointed out at paragraphs 54 to 59 of its Observations, the implementation of the adjustments adopted by the Tribunal in the valuation model by reference to Exhibit BQR 110 is a straightforward task.

⁷¹ See Award, fn. 605.

⁷² Request, para 63 (emphasis in original).

⁷³ Award, paras. 600-652.

⁷⁴ Request, para 67.

⁷⁵ See **CL-249**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 473: "*in a case of such scope and complexity damages cannot be determined with mechanical precision*"; **CL-250**, *Maritime International Nominees Establishment (MINE) v Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, 14 December 1989, para. 5.09: "*[i]n the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*"; and **CL-255**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Decision on the Request for Correction, Supplementary Decision and Interpretation, 10 July 2008, para. 33: "*[i]f, at the other extreme, the 'questions' to be decided in this case were the precise mathematical weight to be accorded to every factor affecting the calculation of damages, then few awards would be immune from allegation of infra petita.*"

(e) The Tribunal's Conclusion

66. In light of the above, the Tribunal concludes that Respondent's Request establishes no basis upon which a case may be made that the Award should be supplemented and/or rectified pursuant to Article 49(2) of the ICSID Convention. The Request must therefore be dismissed.

IV. COSTS

67. Claimant requests that the Tribunal:

*"[...] (b) order Spain to assume all fees and costs of the Request, including the costs of the Claimant's legal representation and other costs incurred by the Claimant in connection with the Request."*⁷⁶

68. Having considered the Parties' positions, and taking account of the Tribunal's decision, which resulted in the dismissal of Respondent's Request, the Tribunal determines that each Party shall bear its own legal and other expenses ("**Costs of the Parties**") incurred in connection with the Request; but that Respondent shall pay the entirety of the Tribunal's fees and expenses and the administrative expenses of ICSID (*i.e.* the "**Costs of the Proceeding**") incurred in connection with the Request. The Costs of the Proceeding incurred in connection with the Request amount to USD 75,501.06 and have been paid out of the advances made by the Parties to ICSID in equal parts.⁷⁷ As a result, each Party's share of the Costs of the Proceeding relating to the Request amounts to USD 37,750.53. Accordingly, the Tribunal orders Respondent to pay Claimant USD 37,750.53 for the expended portion of Claimant's advances to ICSID in connection with the Request.

V. DECISION

69. For the reasons set out above, the Tribunal decides as follows:

- (a) The Respondent's Request for a Supplementary Decision is denied.
- (b) Each Party shall bear its legal and other expenses incurred in connection with the Respondent's Request for a Supplementary Decision.
- (c) The fees and expenses of the members of the Tribunal and the administrative expenses of ICSID incurred in connection with the Respondent's Request for a Supplementary Decision which amount to USD 75,501.06 shall be borne by Respondent. Accordingly, the Tribunal orders Respondent to pay Claimant USD 37,750.53 for the expended portion of Claimant's advances to ICSID in connection with the Request.

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⁷⁶ Observations, para. 61.

⁷⁷ That total amount is composed of: Arbitrators' Fees and Expenses (USD 30,187.99) + ICSID's Administrative Fees (USD 42,000) + Direct Expenses (USD 3,313.07). The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain
(ICSID Case No. ARB/14/1)

Brigitte Stern

MB

Professor Brigitte Stern

Mr. Gary Born

Arbitrator

Arbitrator

Date: **NOV 08 2018**

Date: **NOV 27 2018**

J. Beechey

Mr. John Beechey, CBE

President

Date: **NOV 16 2018**