The Arbitration Institute of the Stockholm Chamber of Commerce

SCC Case no. V 2015/063

NOVENERGIA II – ENERGY & ENVIRONMENT (SCA), SICAR (Luxembourg) ("Claimant") v. KINGDOM OF SPAIN ("Respondent") (jointly the "Parties")

PROCEDURAL ORDER NO. 17

9 April 2018

Reference is made to the Respondent's 13 March 2018 Request for Rectification, Clarification and Complement of the Final Award (the "**Request**"), to the Claimant's response to the Request dated 23 March 2018 (the "**Response**"), to the Respondent's 30 March 2018 letter, to the Claimant's response hereto of the same date, to the Respondent's further argumentation on this issue in its letter dated 2 April 2018, and finally, to the Claimant's comments on the request for correction dated 6 April 2018.

As the Parties are no doubt well aware, a fundamental principle of arbitration is that once the arbitral award has been rendered it becomes final and binding and vested with *res judicata* effect. At the same instance, the arbitral tribunal is considered to have completed its assignment and, as a consequence, the arbitral tribunal's jurisdiction over the dispute is terminated. In other words, upon rendering of the final award the arbitral tribunal becomes *functus officio* with no lingering power to determine any issues in dispute between the parties. Certain exceptions apply to this rule that provide an arbitral tribunal with limited post-award authority. The arbitral tribunal's post-award authority is determined by the rules and laws applicable at the seat of the arbitration – in this case the 2010 SCC Rules (the "**SCC Rules**") supplemented by the Swedish Arbitration Act (the "**SAA**"). The Tribunal here notes that the Respondent in its Request erroneously refers to the 2017 SCC Rules, which do not apply to this arbitration as those rules were not in force at the commencement of the arbitration.

Pursuant to Article 41 of the SCC Rules, an arbitral tribunal has post-award authority to "*correct any clerical, typographical or computational errors*" or "p*rovide interpretation of a specific point or part of the award*". This is supplemented by Article 32 of the SAA which provides an arbitral tribunal with

authority to "*correct or supplement*" the award if the "*arbitrators find that the award contains any obvious inaccuracy as a consequence of a typographical, computational, or other similar mistake by the arbitrators*". The same provision gives an arbitral tribunal the mandate to interpret a decision in the award or supplement the award "*if the arbitrators by oversight have failed to decide an issue which should have been dealt with in the award*".

The Respondent's Request must be analysed with reference to the limited authority that the above referenced rules give the Tribunal.

Request "A"

The Respondent requests the Tribunal to "*supplement or interpret*" the Final Award on the merits on six issues regarding the applicability and relevance of EU law and its relationship with the Energy Charter Treaty (the "**ECT**") provisions.

The Tribunal considers that the Final Award is adamantly clear on this issue and that there is nothing that needs further interpretation. The Tribunal notes that the Respondent itself does not assert that the Final Award is in any way obscure on this point. On the contrary, the Respondent demonstrates that it has correctly understood the meaning of the Tribunal's findings. Further, the Tribunal does not consider there to be any valid grounds for "*supplementing*" the Final Award on this point. The Tribunal has devoted several pages to the issue of EU law and its relationship with the ECT and the Tribunal has ruled on all relevant issues. It is an entirely different thing that the Respondent may not agree with the Tribunal's findings, but as follows from the applicable rules accounted for above, the Tribunal is not empowered to make a renewed assessment of the Respondent's case on the merits. The request is therefore dismissed.

Request "B"

The Respondent requests the Tribunal to "*supplement*" the Final Award in order to refer to the factual circumstances underlying the disputed regulatory measures and the balancing exercise conducted by the Tribunal when applying the Fair and Equitable ("**FET**") standard of the ECT. The Tribunal understands that the gist of the Respondent's complaint is that the Tribunal in its reasons

has not made account of all the factors that, according to the Respondent, constitute the other side of the balancing exercise under the FET standard. However, and as also noted by the Respondent in its Request, the Final Award does contain references to the circumstances relied upon by the Respondent, albeit not all of them in the reasons of the Final Award. The Respondent may rest assured that the Tribunal has considered all of the Respondent's arguments, but not necessarily agreed with them. The Tribunal has in its reasons included circumstances which it deems most relevant to exemplify the balancing exercise conducted under the FET standard and to reach its conclusions. The Respondent should also be made aware that the Tribunal is under no obligation to make account of all facts and circumstances in its award, but this does not imply that those facts and circumstances have not been considered.

Moreover, the Tribunal considers that Request B is also a request to have the Final Award revised on its merits. As such, Request B goes beyond the scope of the Tribunal's authority. Furthermore, the Tribunal has not found in Request B that the Respondent has convincingly pointed out any issues that are obscure or unclear and that would therefore otherwise require interpretation, or to any specific clerical or computational error that should be corrected. The request is therefore dismissed.

Request "C"

The Respondent requests a correction of alleged errors in the damages calculation in the Final Award. To further prove its point, the Respondent has submitted another expert report on damages from Accuracy containing new, alternative, calculations which, according to the Respondent, would be more consistent with the Tribunal's findings on jurisdiction and merits than the result which the Tribunal has arrived at in the Final Award. The Claimant has on 6 April 2018 commented on the merits of the alleged errors and availed itself of the opportunity to file a reply expert report from Compass Lexecon.

It is clear from the Request that the Respondent does not agree with the Tribunal's assessment of the damages flowing from the Respondent's breaches of the ECT, however, the Respondent fails to point to any clerical or computational errors or miscalculations committed by the Tribunal that may be within its authority to correct. The Tribunal also notes that the arguments and figures now raised by the Respondent in its Request, suggesting that the but-for scenario relied upon by the Claimant and adopted by the Tribunal in the Final Award is erroneous, have not been presented before. This is

despite the fact that the Respondent has had ample opportunity during the arbitration proceedings to do so. It is clearly beyond the scope of the Tribunal's mandate to correct any damages calculation based on a re-evaluation of the substantive issues or evidence in dispute, and much less so to consider and base such evaluation on new arguments and evidence presented after the Final Award has been rendered. In the Tribunal's opinion, this is what Respondent's Request C sets out to do. Respondent's Request C is therefore dismissed.

The Tribunal nonetheless wishes to point out that it has not, in its view, in any way misunderstood or assessed the evidence presented to it on damages erroneously. The Tribunal remains of the opinion that its assessment of the damages awarded to Claimant is correct. The findings of the Tribunal with respect to the but-for scenario it has chosen to apply is consistent with its findings on the Claimant's legitimate expectations.

With respect to the Respondent's allegation according to which the Tribunal has applied pre-award and post-award interest at 1,5%, whereas in Claimant's expert quantification of damages, a 7,3% interest rate had been included, the Tribunal sees no contradiction. The Tribunal fixed 15 September 2016 as the damages valuation date and then ordered the Respondent to pay interest at the 1,5% interest rate starting from that valuation date onward (see the Final Award at § 860, point (e)). Accordingly, it is incorrect to suggest that the Tribunal has mixed up the two interest rates. On the contrary, the Tribunal has clearly separated the interest on the late payment of damages starting from the date as of which damages were ultimately computed, namely 15 September 2016. Applying a different interest rate on late payment falls fully within the Tribunal's discretion.

The Tribunal takes note of the Respondent's allegation (in footnote 42 of the Request) that the Tribunal has proceeded on this issue in "*blatant disregard of the principles of right to be heard*" and in "*contradiction of due process*" as the Respondent was allegedly not given an opportunity to respond to the Claimant's calculations and denied the possibility to submit an expert report. The Tribunal further notes the Respondent's allegations in its letter dated 2 April 2018 pursuant to which:

"*The referred Decision implies a serious harm of the due process in prejudice of the Respondent´s right of Defense. The March 31 2018 Decision supposes the arbitrary and baseless reopening of a precluded procedural step for the exclusive benefit of the Claimant*."

On this issue, the Tribunal reminds the Respondent that it was the Respondent that first filed an additional expert report on damages with its Request in which is sought to reopen the determination

of damages already awarded. This Tribunal is indeed very mindful of the principle of contradiction and due process and therefore found it important and proper to provide the Claimant the opportunity to present its views on the alternative damages calculation presented by the Respondent - an opportunity which the Claimant availed itself of. The Tribunal takes further note of the fact that the Respondent has during the duration of this arbitration filed two extensive expert reports on damages, had its experts give detailed presentations of their calculations at the Hearing, had the possibility to comment on the opposing party's expert reports, conducted cross-examination of the opposing party's expert at the Hearing and responded to specific questions from the Tribunal subsequent to the Hearing relating to the damages calculations. In the Tribunal's opinion, the Respondent has had a reasonable opportunity to present its case on damages and the Tribunal has by no means disregarded the principles of contradiction and due process in this respect, or in any other parts of the handling of this arbitration. The Tribunal specifically recalls that the Respondent on 23 November 2017, a few weeks before the Final Award was supposed to be rendered, filed an unsolicited submission on the impact of the EC Decision which the Tribunal, against the Claimant's objection, allowed. This necessitated another request for extension of time for rendering of the Final Award and an adjustment of the procedural timetable.

The above explanation provided by the Tribunal clearly demonstrates that the Respondent's claim of a "*blatant disregard of the principles of right to be heard and in contradiction of due process*" is a claim that is not in accordance with the facts and one that has no legal basis. It must be added that the March 31 2018 Decision by no means supposes "*the arbitrary and baseless reopening of a procedural step*". As it has been shown in the previous paragraph, it was the Respondent's Request which sought to reopen the determination of the damages already awarded.

Request "D"

Under this request the Respondent applies for a "*rectification or clarification*" of § 688 of the Final Award based on the reference to the damages in the Charanne case. However, the Respondent has apparently misread the Final Award in this respect as it is incorrect to suggest that that the Tribunal has wrongly applied the principles laid down in Charanne on damages in this case. The Tribunal's short reference to Charanne was only to the general criteria laid down in this case, but then, naturally, the Tribunal determined the quantum of damages based on its own independent reasoning

with due regard to the specific circumstance in this case, without taking any particular inspiration from the findings of the Charanne tribunal.

The Tribunal considers the Final Award to be clear in its reasoning also in this regard and since the Respondent has not pointed to anything that constitute grounds for rectification or clarification Respondent's Request D is dismissed.

Request "E"

Pursuant to Request E, the Respondent petitions the Tribunal to clarify or interpret § 695 of the Final Award regarding the issue whether the essential characteristics of the regulatory framework relied upon by investors in making long-term investments were abolished. According to the Tribunal, this request amounts to a further appeal on the merits which goes beyond the Tribunal's post-award authority as explained above. In addition, the Tribunal does not consider that § 695 is in any way unclear and in need of clarification or interpretation. The request is therefore dismissed. Further, the Tribunal notes that Request E appears to be based on the Respondent's misunderstanding of the relevance of the Tribunals language when summarizing the Respondent's position (see in particular pp. 19-20 of the Request). When the Tribunal quotes the Respondent's statements in the Final Award, it only records the Respondent's own views, whereas the Tribunal's views are those stated in its own analysis and reasons, which were made after having thoroughly considered the Parties' respective positions.

The Tribunal has noted the Claimant's Requests for Relief under Section VI of its 6 April 2018 comments, and in particular its request to be compensated for the costs incurred in addressing the Respondent's Request. The Tribunal further notes that the Respondent has not advanced a corresponding request for compensation of costs. The Tribunal has in its Final Award with reference to Article 44 of the SCC Rules determined the costs to be compensated in this arbitration. Applications for corrections or interpretations imply a supplemental activity that both the Parties and the Tribunal have accepted to take place subsequent to the rendering of the Final Award as part of the overall proceedings. In light of this the Tribunal finds no basis for awarding further costs in this arbitration and the Claimant's request in this respect is consequently dismissed.

All other requests are considered and dismissed.

Stockholm, 9 April 2018

Johan Sidklev

On behalf of the Tribunal