INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MARCO GAVAZZI AND STEFANO GAVAZZI

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/12/25

DISSENTING OPINION ON RECTIFICATION

Members of the Tribunal
Hans van Houtte, President
V.V. Veeder, Arbitrator
Mauro Rubino-Sammartano, Arbitrator

Secretary of the Tribunal
Martina Polasek

Assisting Legal Counsel
Celeste Mowatt

DISSENTING OPINION

The application for rectification draws the Tribunal's attention to the fact that, if one strictly applies logic to the various passages of its reasoning, the application should succeed.

The Respondents' argument that only a minor arithmetical error might be rectified is not convincing by itself even if a limitation of rectification to minor errors has been affirmed by other ICSID Tribunals, quoted by Respondent such as *Enron et all.* v. *Argentine Republic* and *Perenco* v. *Ecuador,* since even an arithmetical error which is not minor might have to be rectified if it betrays the intention of the Tribunal.

However, I take the view that the Tribunal should not limit itself to the literal meaning of the passages of our reasons which have been pointed out to us in the application for rectification, but rather make a further analysis, focusing on the scope of a rectification which is to correct its decision only if the Tribunal has failed "to write what was intended".

In order to look for its intention, in my opinion the Tribunal must go back to the operative party of the decision and to the reasons which it has given for it.

The Tribunal has agreed that the Claimants had to be compensated and has discussed what amount should be granted to them. It has also agreed with *Lemire* v. *Ukraine* that "evaluation is not an exact science" and with article 74.3 of the Unidroit Principles that "where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the Court".

At this point, exactly since it was not possible to establish that amount with a sufficient degree of certainty, because the precise amount of each possible component was not available, it was to me first to establish the range of the amount which Claimants should receive. In my view, such range should not have exceeded […] regardless of the methodology applied to calculate the compensation. I have agreed on the amount of […] as compensation, stated in the operative part of the decision. I would have not agreed on the much higher amount of […] which, as Respondent suggests, is about 30% more than the amount which has been granted in the operative part of the decision.

The question then to me is whether the Tribunal may limit itself to a control in logic of the single words which have been used in giving its reasons (even if the result is much different from what - at least to me - was intended), or whether it must give priority to the intention shown in the operative part.

If the Tribunal gives priority to the latter, in my opinion it may not allow the application.

In any event, I see a contradiction between two parts of the decision on this issue.

On the one hand the Tribunal has ordered the payment of an amount which does not include the purchase price, but on the other hand that item has been mentioned in the reasons amongst its components.

Which of these two parts of the decision should prevail ? The conclusions or the reasons given for it ? If there should be a rectification, the operative part in my opinion should prevail on the reasons and the part of the decision to be rectified would then be the reasons.

However, to me, this is a matter of interpretation of that contradiction and not just a rectification of an arithmetical error, as the applicant cleverly has tried to present it.

Also on these alternative grounds, in my opinion the application must fail.

From Chambers, Milan, ___ June 2017

[signed]
Mauro Rubino-Sammartano