

EXCERPTS

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

DECISION 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

Date of dispatch to the Parties: 13 July 2017

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 18 April 2017, the Arbitral Tribunal composed of Prof Hans van Houtte, Mr V.V. Veeder, and Mr Mauro Rubino-Sammartano rendered the Award in *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/15) (the “**Award**”). A Decision on Jurisdiction, Admissibility and Liability dated 21 April 2015 formed part of the Award.
2. In the Award, the Tribunal ordered the Respondent to pay to the Claimants: (1) [...] and [...] as compensation for violation of Article 4 of the BIT; (2) 100% of the Claimants’ legal costs, and the fees and expenses of witnesses presented by the Claimants other than Deloitte before April 2015 and [...] of the fees and expenses of Deloitte and the Claimants’ legal costs after April 2015, totaling [...] and [...]; (3) pre-award compound interest on the amount of compensation from the date of violation to the date of the Award; and (4) post-award compound interest on the amounts of both the compensation and legal costs from the date of the Award until full payment. The Award was accompanied by a Dissenting Opinion of Mr Mauro Rubino-Sammartano.
3. By a Request for Rectification dated 8 May 2017 (the “**Request**”) made pursuant to Article 49(2) of the ICSID Convention and ICSID Arbitration Rule 49, the Claimants asked the Tribunal “*to rectify the arithmetical or similar error[s] in the award, ... and clarify and rectify the text of the Award.*”²¹
4. Following receipt of the lodging fee, on 12 May 2017, the Secretary-General registered the Request pursuant to Rule 49(2)(a) of the ICSID Arbitration Rules. On the same date, the Secretary-General transmitted a copy of the notice of registration and of the Request to each Member of the Tribunal.
5. On 16 May 2017, the Tribunal invited the Respondent’s written observations on the Request. The Respondent filed its observations on 30 May 2017 (the “**Observations**”).
6. On 30 May 2017, the Claimants sought the opportunity to file further comments on the Respondent’s Observations, to which the Respondent objected. Before the Tribunal decided

¹ Request, para. 4.

on the request, on 31 May 2017, the Claimants stated in an email that they withdrew the request but nevertheless provided comments (including an amendment of one of the rectification requests) and a new table concerning their legal costs (see below, paragraph 21).

7. On 31 May 2017, the Tribunal admitted the Claimants' further comments of the same date (the "**Response**") and invited the Respondent to file a further reply by 6 June 2017. The Respondent filed its reply as scheduled (the "**Reply**"). In the Reply, the Respondent objected to the admissibility of a new document filed by the Claimants with their Response.
8. By letter of 12 June 2017, the Tribunal acknowledged receipt of the Parties' second round submissions and stated that it would decide on the admissibility of the new document attached to the Claimants' Response in the Decision on Rectification.

II. CLAIMANTS' POSITION

[...]

III. RESPONDENT'S POSITION

[...]

IV. ANALYSIS

50. Article 49(2) of the ICSID Convention provides, in relevant part, as follows:

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. ...

51. Arbitration Rule 49 provides that:

(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.

52. There is no dispute between the Parties that the Request was filed within the prescribed time limit and accompanied by the relevant lodging fee. It is also not disputed that rectification is a recourse available to the parties as a matter of right under Article 49(2) of the ICSID Convention.

53. However, the Parties disagree on whether or not the Request is admissible in view of the scope and purpose of Article 49 of the ICSID Convention and ICSID Arbitration Rule 49. They also disagree on the substance of the requested rectifications.

A. Standard for Rectification

54. Article 49 of the ICSID Convention prescribes narrow grounds on which an award may be rectified, namely when there is “*any clerical, arithmetical or similar error in the award.*” The Tribunal agrees with the standard for rectification set out in *Gold Reserve*:

[t]he purpose of the correction exception to the functus officio principle 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. An authoritative commentary confirms that the correction facility found in most arbitral rules is to be used to correct miscalculation or unintended errors of expression and that “that remedy cannot be used to alter the meaning of the decision.” Any purported correction that goes beyond the scope of the Tribunal’s limited mandate in this regard is likely to be subject to challenge.³

55. The Respondent has referred to a number of ICSID Decisions on Rectification which appear to state that rectification may only be made with regard to a *minor* error. First, as noted by the Respondent, the ICSID Convention and ICSID Arbitration Rules do not expressly set out such a limitation. Second, none of the Decisions suggest that a mathematical error cannot be rectified if the error in calculation is significant compared to the amount awarded.
56. In the Tribunal’s view, an obvious mistake is discernible through the ease with which the error may be identified and remedied. In other words, it is not the impact on the outcome of the Award that is determinative. For example, an omission which leads to a five figure number instead of a six figure number would amount to a rectifiable error if such an error were obvious from the face of the Award. However, the rectification must not affect the merits of the Decision, and must not lead to a complex exercise to retrace or clarify the parties’ arguments and evidence on the text to be rectified. The purpose

³ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) (“*Gold Reserve*”), Decision Regarding the Claimant’s and the Respondent’s Requests for Corrections, 15 December 2014, para. 38. Whilst this was a Decision under Article 56 of the Additional Facility (Arbitration Rules), the provision is similar to that under the ICSID Convention.

of a rectification proceeding is not to correct any errors made by the parties, but rather those of the tribunal (even where a party may have contributed in part to the tribunal's own error).

57. By way of example, tribunals and *ad hoc* committees have made the following rectifications:

- In several cases, the tribunal or *ad hoc* committee has corrected an error in the listing of the names of the Parties' representatives.⁴
- In *Railroad Development Corporation*, the Tribunal corrected an arithmetical error in the calculation of net present value pursuant to the applicable discount rate, where it was "*evident that the Tribunal misapplied the discount rate.*"⁵
- In *Compania del Desarrollo de Santa Elena, S.A.*, the Rectification Decision corrected an error in a sentence of an award stating that that the memorial had *not* been accompanied by supporting documentation when it had been accompanied by supporting documentation (i.e., the word '*not*' was deleted from the relevant sentence). The rectification decision in that case also changed a name used in error in the identification of a witness.⁶
- In *Vivendi*, the tribunal substituted "Claimant" for "Respondent" and deleted the words "and neither party disputes" from its summary of a point of law, noting that

⁴ In *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No ARB/03/4), Rectification of the Decision on Annulment of the *ad hoc* Committee, 30 November 2007, the *ad hoc* committee corrected the incorrect listing of an independent co-counsel as a member of another law firm. The *ad hoc* committee in *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No ARB/02/7), Rectification of the Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 13 August 2007, similarly corrected the title page of an annulment decision to include the name of counsel that had been omitted in error. Finally, in *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Rectification of Award, 19 May 2006, the rectification addressed a counsel's name omitted from the page of the award listing the parties' representatives.

⁵ *Railroad Development Corporation (RDC) v. Republic of Guatemala* (ICSID Case No. ARB/07/23) ("*Railroad Development Corporation*"), Decision regarding the Claimant's Request for a Supplementary Decision and Rectification of the Award, 18 January 2013, para. 43.

⁶ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1) ("*Compañía del Desarrollo de Santa Elena, S.A.*"), Rectification of Award, 8 June 2000.

Respondent had, in fact, argued the points in question and had not formally abandoned those arguments.⁷

B. Admissibility of New Documents

58. Consistent with the limited scope of a rectification request under Article 49(2) of the ICSID Convention, the Tribunal is of the view that no new documents may be filed by the parties in the rectification proceedings. If new evidence or demonstrative aids are necessary to show an error in the award, the above standard for rectification of an obvious mistake is likely not met. In the instant case, the Tribunal therefore upholds the objection of Respondent and decides not to admit the Claimants' new table attached to the Response of 31 May 2017.

C. Arithmetical Error Relating to the Compensation for Breach of Article 4 of the BIT

59. The following analysis reflects the view and decision of the majority of the Tribunal.

60. It is clear from the face of the Award that the Claimants' investment consisted of the share price paid and other capital invested by the Claimants. The share price was [...] (paragraph 127 of the Award) and the other capital invested amounted to [...] and [...] (paragraph 130 of the Award). As stated in paragraph 130 of the Award, these amounts were to be added. The "capital invested" should have thus amounted to [...]and [...]. However, by error, the purchase price of the shares was omitted from subsequent calculations.

61. As a result, at paragraph 232 of the Award, the correct USD amount should have been 50% of [...]. This arithmetical error thus led to an omission of the amount of [...]for the loss of opportunity.⁸

⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) ("*Vivendi*"), Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, 28 May 2003.

⁸ The Claimants state in the Request (paragraphs 14, 18, 19) that [...]of the share price of [...] would amount to [...]. However, the Tribunal notes that such amount should be increased by [...] to [...].

62. At paragraph 337(1), the USD amount again omitted, by error, to include the share purchase price [...]and 50% of that amount for the loss of opportunity ([...]). As a result, this arithmetical error led to an omission of the amount of [...] in total, and the correct figure should have amounted to [...].
63. In these circumstances, as to the Claimants' first request, it is manifestly clear that the Tribunal made an arithmetical error in omitting to include the share price in the calculations at paragraphs 232 and 337(1) of the Award. The Tribunal's intention to include the share purchase price in the calculations is obvious from paragraphs 127 and 130 of the Award. The Tribunal must therefore rectify the Award accordingly, as requested by the Claimants.

D. Arithmetical Error in the Calculation of Legal Costs and Other Expenses

64. In the Award, the Tribunal noted that Article 61(2) of the ICSID Convention confers wide discretion on a tribunal to allocate the costs of an arbitration between the parties as it deems appropriate. On that basis, the Tribunal granted the Claimants 100% of their legal costs in the first phase of the proceeding (i.e. before April 2015), excluding the fees and expenses of Deloitte. These pre-April 2015 costs were calculated based on an Annex to the Claimants' Submission on Costs, as noted in footnote 322 of the Award.⁹ In particular, the Tribunal relied on summary table in the Annex which contained the amounts of invoices for the relevant period. Based on the table in the Annex, the pre-2015 legal costs amounted to [...].
65. The Request sought the rectification of the Claimants' legal costs, namely that such costs be increased from to [...]. In their Response, the Claimants revised the amount, stating that the Claimants' legal costs for the first phase should instead be [...], (a reduction of [...]from the figure contained in the Request). Although the Tribunal has not admitted the updated table

⁹ The relevant footnote provided that "*This figure [...] has been determined on the basis of the invoices included in the Annex to the Claimants' Submissions on Costs dated 28 July 2016 which pre-date 21 April 2015, including outstanding invoices which relate to services provided during the first phase of the arbitration (i.e., Sect 2.1 invoice nos. G/1-G/7 and Section 4.1 invoice nos. 1-3), but excluding the [...]invoices listed in Section 3.*" The Tribunal notes that the text in parentheses "*(i.e., Sect 2.1 invoice nos. G/1-G/7 and Section 4.1 invoice nos. 1-3)*" refers to only those invoices which were outstanding but related to services performed in the first phase. The text in parentheses does not refer to the already incurred expenses in the relevant time period listed in Sections 2.2, 2.3, 4.1, 4.2, 4.3, 4.4 and 4.5.

provided by the Claimants (see above paragraph 58), the Tribunal understands that such document, described as a “Revised Detail of Costs” has been supplied to support the Claimants’ revised calculation, and further notes that the Claimants have during this phase identified errors within their own Cost Submission.¹⁰

66. It appears from the above that the Claimants’ Submission on Costs contained some inconsistencies between the table in the Annex and the invoices which were attached, and that this is the primary reason which led to a difference in the amount arrived at in the Award and in the Claimants’ Response. In addition, the Claimants’ submissions during this phase acknowledge inconsistencies within the Claimants’ cost submissions. Further inconsistencies arose during this rectification proceeding, as demonstrated by the adjustment in the Claimants’ own calculations in their Response. The Tribunal assumes that this is the reason why the Claimants filed an amended table.
67. The Tribunal considers that it was entitled to rely on the cost submission filed by the Claimants; including the table of costs which formed the basis of the amount sought by the Claimants. A consequent correction of the total invoice amounts as listed in the table would result in a compensation *ultra petita*. In view of that, and the fact that the Tribunal would need to correct an error that was based on a party’s error and not its own error, the Tribunal considers that the request for rectification does not meet the standard set out above under the ICSID Convention and ICSID Arbitration Rules. The Tribunal would need to investigate further the Claimants’ own calculations during the rectification phase and rely on new documentation to address such calculations. This is not the correction of a simple arithmetical error but a more complex exercise into the evidence filed compared to other figures filed. This does thus not amount to a clerical, arithmetical or similar error by the Tribunal made in the Award.
68. The Claimants’ second request to rectify the figure in paragraph 333 of the Award is therefore rejected. The Tribunal also rejects the request to rectify the list in parenthesis of footnote 322 of the Award.

¹⁰ Request, footnotes 5 and 6.

E. Clerical Error with Regard to VAT

69. As to the Claimants' third request, paragraph 309 of the Award describes the statement of costs which was submitted by the Claimants on 27 August 2014 following the hearing on jurisdiction, admissibility and liability:

In their cost submission relating to the proceedings concerning jurisdiction, admissibility and the merits dated 27 August 2014, the Claimants stated that they had advanced [...] to ICSID and incurred [...] on account of their legal and other fees and expenses. They also claimed Italian VAT 22% on that amount, however, this request was dropped in their cost submission of 28 July 2016.

The Claimants request that the Tribunal remove the last sentence of above paragraph (i.e. "They also claimed Italian VAT 22% on that amount, however, this request was dropped in their cost submission of 28 July 2016") on the basis that the Claimants' claim for VAT was not dropped in their July 2016 cost submission (or otherwise).

70. The Tribunal notes that the August 2014 cost submission filed by the Claimants separately listed VAT as a category of costs which the Claimant sought to recover, and in this way expressly stated that VAT was being requested. In contrast, the Claimants' August 2016 submission on costs did not explicitly address VAT or separately list VAT as a category of the Claimants' fees and expenses. The Tribunal notes, however, that a number of the invoice amounts which were listed in summary table in the Annex to the submission were inclusive of VAT as the Claimants have emphasized during the rectification proceeding (the Claimants have also noted during this proceeding that some of the fee amounts listed in the Claimants' table omitted VAT).
71. In the August 2014 cost submission, the Claimants claimed Italian VAT 22% on the amount of costs requested, however, in their Cost Submission of 28 July 2016 Claimants did not maintain a claim for VAT under a specific heading, nor did they systematically include VAT in the claimed amounts. Therefore, it is not obvious that the Tribunal made an error in the Award regarding the VAT claimed, and the Tribunal therefore rejects this third request by the Claimants.

F. Clarification of Compound Interest

72. The Claimants ask that the Tribunal reword paragraph 337(4) in the operative part of the Award to include the following text in brackets: “*Orders the Respondent to pay to the Claimants compound interest on the amounts established in the sub-paragraphs 1 [as they result by the application of interests in accordance with sub-paragraph 3 above] and 2. above; interest shall accrue...*” (emphasis added). At the same time, the Claimants state that it is self-evident that paragraph 337(4) of the Award refers to the amount under paragraph 337(1), as increased by accrued pre-award compound interest under paragraph 337(3).
73. The Respondent states that the meaning of the operative part of the Award is clear and cannot support the Claimants’ fourth request.
74. The Claimants have not specified any error in paragraph 337(4) of the Award. The Tribunal agrees with the Respondent that the change requested by the Claimants is not a “rectification” within the meaning of Arbitration Rule 49. The requested amendment to paragraph 337(4) of the Award is an attempt to “clarify” its meaning and not to rectify its wording. The Claimants’ fourth request is therefore denied.

V. COSTS

75. The Respondent has requested that the Tribunal award the costs incurred by it in connection with this rectification proceeding. The Claimants have not claimed costs in the Request or the Response.
76. In accordance with ICSID Arbitration Rules 47(1)(j) and 49(5), this Decision is to contain the Tribunal’s determination concerning the cost of the proceeding.
77. The costs and expenses of the original arbitration proceeding led to a depletion of the available funds in this case. The Tribunal does not wish to prolong these rectification proceedings by requesting additional advances from the Parties. The Tribunal has therefore decided to waive its fees in this rectification proceeding. No other costs are charged to the Parties.
78. Taking into account the Tribunal’s decision, which resulted in one arithmetical rectification to the Award, and the rejection of other rectifications, the Tribunal determines that each Party

shall bear its own legal and other costs. There are no costs charged to the Parties for the costs of the rectification proceeding and therefore no costs to be allocated.

VI. DECISION

79. In view of the foregoing, the Tribunal decides:

1. By majority, to rectify the Award as follows:
 - a. The amount in paragraph 232 line 10 ([...]) shall be deleted and replaced by [...].
 - b. The amount in paragraph 232 line 11 ([...]) shall be deleted and replaced by [...].
 - c. The amount in paragraph 337(1) first line ([...]) shall be deleted and replaced by [...].
2. To reject the remaining three requests for rectification.
3. That each Party shall bear its own legal and other costs.

SIGNED BY THE TRIBUNAL:

[signed]

Hans van Houtte
President of the Tribunal

Date:

[signed]

V.V. Veeder
Arbitrator

Date:

[signed]

Mauro Rubino-Sammartano
Arbitrator

Date:

A dissenting opinion by Arbitrator Mauro Rubino-Sammartano is attached hereto, as required by ICSID Arbitration Rules 47(3) and 49(4).