INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

InfraRed Environmental Infrastructure GP Limited
   European Investments (Moron) 1 Limited
   European Investments (Moron) 2 Limited
   European Investments (Olivenza) 1 Limited
   European Investments (Olivenza) 2 Limited
Claimants

v.

Kingdom of Spain

Respondent

(ICSID Case No. ARB/14/12)

Revision Proceeding

DECISION ON CLAIMANTS’ OBJECTION UNDER ICSID RULE 41(5)
TO RESPONDENT’S APPLICATION FOR REVISION

The Tribunal
Professor William W. Park
Professor Pierre-Marie Dupuy
Mr. Stephen L. Drymer, President

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Mr. Bogdan-Alexandru Dobrota

Date: 8 March 2021
REPRESENTATION OF THE PARTIES

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European Investments (Olivenza) 1 Limited
European Investments (Olivenza) 2 Limited

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Ms. Gloria de la Guardia Limeres
Mr. Juan Antonio Quesada Navarro
Ms. Ana María Rodríguez Esquivias
Mr. Javier Comerón Herrero
Ms. María Eugenia Cediel Bruno
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I. INTRODUCTION

1. The present matter concerns an award rendered by this Tribunal on 2 August 2019 (the “Award”)1 and an Application for Revision of the Award dated 22 July 2020 (the “Application for Revision”)2 brought by Respondent under Article 51 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”).

2. Pursuant to the Award, the Tribunal found that Respondent breached Article 10 of the Energy Charter Treaty (the “ECT”), inter alia by violating a specific commitment of regulatory stability made to the owners of concentrated solar power plants developed in Spain, in which Claimants invested.3 The Tribunal ordered Respondent to pay Claimants compensation in the amount of € 28,200,000 plus pre-award and post-award interest.4

3. As discussed more fully below, in its Application for Revision Respondent argues that, in determining a threshold issue for establishing Claimants' liability in the present arbitration, the Tribunal relied on certain findings made in an arbitral award rendered in a separate case that was very recently annulled. That annulment, Respondent argues, constitutes a “fact of such a nature as decisively to affect the award” within the meaning of Article 51 of the ICSID Convention. According to Respondent, but for the Tribunal’s reliance on that other award, the Tribunal would have decided the threshold issue in this case in its favour and would have dismissed the entirety of Claimants’ claims. On these grounds, Respondent seeks the revision of the Award.

4. Claimants object to the Application for Revision, as a preliminary matter (the “Objection”), on the grounds that it is “manifestly without legal merits” within the meaning of Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Rules”).5

5. In their Objection, Claimants request that the Application for Revision be dismissed in limine litis. This is the issue addressed in the present Decision.

II. BACKGROUND

6. As noted, the issue of Claimants’ Objection arises against the backdrop of the broader dispute between the Parties that was addressed in the Award. The facts and issues

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1 Infrared Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award, 2 August 2019 (RL-0116) [“Award”].
2 Application for Revision of the Award, 22 July 2020 [“Application for Revision”].
3 See Award, op. cit., inter alia at paras. 410, 455, and 456.
4 Award (RL-0116), at p. 166, conclusion [2].
5 Objection under ICSID Rule 41(5): Spain’s Request for Revision of the Award is Manifestly Without Merit, 8 September 2020 [“Claimants’ Objection”].
pertaining to that dispute are described below in summary fashion, along with excerpts of the Award relevant to Claimants’ Objection.

A. THE PARTIES AND THEIR DISPUTE

7. Claimants – The Claimants in this arbitration are five (5) private limited companies established under the laws of the United Kingdom.

8. On or around 28 July 2011, Claimants invested a total of €31 million in two concentrated solar power (“CSP”) plants in Spain, known as Iberéólica Solar Morón, S.L. and Iberéólica Solar Olivenza 1, S.L. (the “CSP Plants”).

9. At that time, it was understood by all concerned that the costs required to design, install and operate CSP plants such as those in which Claimants invested were not recoverable solely from the revenues that could be generated by selling electricity on the open market. State economic incentives (in the nature of a special remuneration scheme for the electricity sold by the producers) were essential for the implementation of these technologies.

10. Respondent – The Respondent is the Kingdom of Spain. In the late 1990s and early 2000s, Spain pursued a vigorous policy to encourage renewable electricity production and to attract investments in renewable technologies, including in CSP plants. This policy furthered Spain’s international commitments and obligations set out, among others, in the directives of the European Union and the Kyoto Protocol.

11. In 1997, Spain enacted a legislative act, Act 54/1997 on the Electrical Power Section (the “EPA 1997”). The EPA 1997 created a special regime of remuneration available to certain renewable energy producers, including CSP plants (the “Special Regime”). Article 27 of the EPA 1997 provided that remuneration under the Special Regime would be available only for electricity produced “using facilities whose installed capacity does not exceed 50 MW.”

12. A series of ensuing regulations established and detailed the amounts, modalities and conditions of the remuneration available to producers under the Special Regime. Together with the EPA 1997, these regulations constituted a regulatory regime referred to in this arbitration as the “Original Regulatory Framework.”

13. As of 2012, less than one (1) year after Claimants made their investment, Respondent enacted a series of legislative and regulatory measures that abrogated the Original

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6 Award (RL-0116), at para. 7.
7 Award (RL-0116), at para. 4.
8 Award (RL-0116), at para. 3.
9 Award (RL-0116), at para. 20.
10 Award (RL-0116), at para. 14.
The Dispute – On 8 May 2014, Claimants filed with ICSID a Request for Arbitration. The Tribunal was constituted in November 2014. The Parties filed their written submissions on the merits and jurisdiction and engaged in document production and other pre-hearing steps between May 2015 and December 2016. The Hearing on the Merits was held in Paris, France, between 24 April 2017 and 28 April 2017. Post-hearing submissions were subsequently filed.

In their written and oral submissions, Claimants argued that, in abrogating the Original Regulatory Framework and enacting the disputed measures, Spain breached its obligations under Article 10 of the ECT, among others by:

- Defeating Claimants’ expectation of stability arising from a specific commitment of regulatory stability that Spain tendered to CSP producers;
- Defeating Claimants’ expectation of regulatory consistency by enacting a new regulatory framework that allegedly abrogated the fundamental tenets of the Original Regulatory Framework upon which Claimants relied when they tendered their investment.

Respondent deployed a battery of affirmative and reactive defences, among other things denying the existence and binding nature of the alleged specific commitment of stability, denying the alleged inconsistency of the regulatory measures at issue and challenging the due diligence verification that Claimants carried out prior to investing.

Respondent also argued that the two CSP Plants in which Claimants invested did not in fact qualify for remuneration under the Special Regime, since the “installed capacity” of each plant in fact exceeded 50 MW.

This latter issue was presented to, and accepted by, the Tribunal as a threshold issue as to the very admissibility of Claimants’ claims. A finding that the CSP Plants’ installed capacity exceeded 50MW would inexorably have led to a finding that Claimants’ claims based on expectations of remuneration under the Special Regime were inadmissible.

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11 Award (RL-0116), at paras. 68 and following.
12 Award (RL-0116), at paras. 96 to 187.
13 See Award (RL-0116), at para. 320.
14 See Award (RL-0116), at paras. 327 and following.
15 Award (RL-0116), at para. 321.
B. THE AWARD

19. Pursuant to the Award, the Tribunal disposed of the threshold issue regarding installed capacity and determined that the installed capacity of each of the two CSP Plants at issue was equal to or lower than 50 MW.\textsuperscript{16}

20. The Tribunal went on to determine that Claimants held a legitimate expectation of regulatory stability as regards certain elements of the Original Regulatory Framework and the remuneration under the Special Regime. The Tribunal found that the measures at issue defeated that expectation and that Spain was liable to compensate Claimants for the losses they suffered as a result.\textsuperscript{17}

21. These latter determinations are not at issue in the context of Respondent’s Application for Revision or Claimants’ Objection. The Application of Revision and the Objection relate strictly to the Tribunal’s determination of the installed capacity issue and the reasoning in support of that determination.

22. The discussion of the installed capacity issue covers six (6) pages and 22 paragraphs, addressing the Parties’ positions, the fact and technical evidence and relevant legal authorities.\textsuperscript{18} For ease of reference, key excerpts of that discussion are reproduced here:

“\textit{335. The technical experts seem largely in agreement with respect to the technical concepts at issue. In particular, both experts seem to agree on the definition of “gross installed capacity,” which is measured at the terminals of the generator inside the plant, and of “installed capacity,” which is measured at the nodes where the plant connects to the electricity grid. Both experts also seem to agree that the net installed capacity is generally lower than the gross installed capacity as a result of power used by the equipment inside the plant, which draws its electricity directly from the turbine.}

\textit{336. The available evidence suggests that the net output – i.e. the power as measured at the point of connection of the Morón and Olivenza plants to the grid – was 50 MWe or less. The reports by the Red Eléctrica de España confirms as much. In cross-examination, Respondent’s expert attempted to cast doubt on whether those measures were actually taken before or after the commissioning of the plants. But he did not deny that the figure listed in those reports “measures the electricity going into the grid. So (...) what is useful for actually the bill, is actually the electricity that goes into the network, not the actual power.” In his own report, Mr. Casanova appears to admit that the net output of the plants (i.e. “the electricity that goes into

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\textsuperscript{16} Award (RL-0116), at paras. 335 and following.
\textsuperscript{17} Award (RL-0116), at paras. 455 and 456.
\textsuperscript{18} Award (RL-0116), at pp. 94 to 99.
the network”) is lower than 50 MW, stating it is “generally around 49.8 MWe.”

337. On the evidence, the Tribunal cannot but accept that the net output of the plants is less than 50 MW. Claimants do not contest that the gross output (measured at the terminals of the generator) is slightly higher than 50 MW.

338. The question to be decided is whether the term “installed capacity” at Article 27(1) of the EPA of 1997 is properly interpreted as the net output or the gross output of the plants.

339. As did the tribunal in Eiser, the Tribunal relies on the capacity listed on the nameplate of the respective generators and on the CNMC’s own confirmation that the plants’ installed capacity is equal to or under 50 MW.

340. Even if the Tribunal were to engage in a textual and purposive interpretation of the term “installed capacity” at Article 27(1) of the EPA 1997, the result would be the same, considering, among others, the following factors:

- The plants are remunerated for their net output. Article 20 of RD 661/2007 is unequivocal in that regard;

- For the operator of the grid, the “net output” is the most relevant and important variable, far more so than the “gross output” measured at the terminals of the generator. In this regard, both experts were at unison. Mr. Casanova, Respondent’s expert testified as follows:

  “A. (Professor Casanova) Yes, the grid operator has to know what is the power being delivered to the grid by each plant. In the case of thermosolar plant, he would have to know whether, if a turbo-generator generates 50, and the final transformer of connection with the grid may be delivering 45/46, depending on the case, obviously he would have to know what that value is, because he has to organise his grid and he would have to know how far he can go tapping into the energy delivered from that particular plant.

  So the answer: yes. he has to know what is the energy per unit of time that is being delivered to the grid: 45 or 46, depending on the case.”

341. The Tribunal accords little weight to the excerpts of the Garrigues report and of the turnkey contracts invoked by Respondent for the following reasons:
The fact that the service provider guarantees a “nominal power” of 55 MW does not lead inexorably to the conclusion that the actual installed capacity is 55 MW, especially if “installed capacity” is to be interpreted as the net output of the plant measured at the nodes of connection to the grid. In this regard, both experts were in agreement that the power that the plant is able to generate must – in all cases – be higher than the measurement at the connection nod to satisfy the plant’s “ancillary consumption.” On this matter, Mr. Casanova testified as follows:

“THE PRESIDENT: It the net power of a CSP plant at the interconnection point of the grid is 50 megawatts, does it follow necessarily that the generator is able to generate between 10% and 15% more power than the megawatts of power delivered to the grid?

(…)

A. (Professor Casanova): Yes. I would say that it would have to generate more than 50 in order to overcome that ancillary consumption in the plant, yes.”

[Emphasis added]

342. The excerpt of the Garrigues report cited by Respondent seems to be based on an equivocation of the terms “installed capacity,” “gross output” and “nominal capacity.” It seems at best a speculation of a possible legal interpretation of the term “installed capacity” which – it is suggested – is not binding upon the Tribunal.”

[References omitted; Emphasis in the original]

III. RESPONDENT’S APPLICATION FOR REVISION

23. On 22 July 2020, Respondent filed its Application for Revision.

24. Respondent requests the revision of the Award under Article 51(1) of the ICSID Convention, which provides as follows:

“Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was

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19 Award (RL-0116), at paras. 335 to 341.
rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.

(...)

[Emphasis added]

25. Respondent submits that on 11 June 2020, the award rendered in the matter Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain (the “Eiser Award”)20 was annulled for reasons of improper constitution of the tribunal and a serious departure from a fundamental rule of procedure.21

26. Respondent argues that the annulment of the Eiser Award is a decisive fact for the outcome of the Award in this case, within the meaning of Article 51 of the ICSID Convention.

27. It argues that the Eiser Award was the “sole and exclusive basis” of the Tribunal’s determination of the installed capacity issue.22

28. Given the grounds for annulment of the Eiser Award, Respondent further submits that everything that is based on the Eiser Award is “fruit of a poisonous tree.”23

29. By Respondent’s account, because the Eiser Award is the “exclusive” basis for the Tribunal’s determination of the installed capacity issue, the Tribunal would not have determined the installed capacity issue as it did if it knew that the Eiser tribunal had been improperly constituted and that the findings of that tribunal were “null and void … vanished from the legal world as [if] it had never existed.”24

30. Respondent says that in the absence of the Eiser Award the Tribunal in this case would have concluded that Claimants were not entitled to remuneration under the Special Regime to begin with and so could have held no legitimate expectations in that regard.

31. In particular, Respondent submits that in the absence of the Eiser Award the Tribunal would have weighed differently the evidence on the issue of installed capacity and would have ultimately favoured the evidence adduced by Respondent. As Respondent argues:

“28. Had the Tribunal [known] that the Eiser Award was issued by a Tribunal unduly constituted and with a serious departure of the essential rules of the

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20 Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017 (RL-0179) [“Eiser”].
21 See Application for Revision, at para. 3; see also Annulment Proceeding in Eiser Infrastructure and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain’s Application for Annulment, 11 June 2020 (RL-0147).
22 See Application for Revision, at paras. 19 and 20, para. 24, paras. 31 and 37(ii).
23 Application for Revision, at para. 30.
24 Application for Revision, at paras. 28 to 31.
procedure, the InfraRed Tribunal would have undoubtedly reached a different conclusion.

(…)

34. The impact that this Application should produce and the change that the Application is seeking in the Award is clear: once the Eiser Award has been annulled the InfraRed Award Section VI.A must be dramatically changed. After the revision procedure a decision has to be taken revising the InfraRed Award. That revision of the Section VI.A will imply that the Tribunal will decide on the installed capacity on the basis of the evidence on the record without sidelining any of them and not on the basis of the Eiser Award.

35. With this new assessment of the evidence without considering the Eiser Award, gained improperly as we currently know, the outcome will be clear: through a misrepresentation on the installed capacity InfraRed benefitted of a privileged regime of subsidies it was not legally entitled to.

36. As a result of this outcome on the Section VI.A, the rest of the Award must be modified: in accordance with the general principles of law of the civilized nations, no protection may be given to InfraRed and, subsidiarily, no entitlement and no legitimate expectations they may have when they unduly acceded to the privileged regime of subsidies they were not legally entitled to.”

[References omitted; Emphasis added]

IV. CLAIMANTS’ OBJECTION AND THE PARTIES’ POSITIONS

32. On 8 September 2020, Claimants filed their Objection under ICSID Rule 41(5), which provides as follows:

“Rule 41
Preliminary Objections

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. (…)”

[Emphasis added]

25 Application for Revision, at paras. 28, 35 and 36.
33. On 30 September 2020, Spain filed its Response to Claimants’ Objection (the “Response”).

34. Oral argument was heard during a hearing that took place (by videoconference) on 12 November 2020. The first session was also held on that date.

A. CLAIMANTS’ POSITION

35. Claimants argue that the Application for Revision is “manifestly without legal merit” and should be summarily dismissed for several reasons.

36. First, Claimants submit that it manifestly appears, on the face of the Award and without the need for further inquiry, that the Tribunal did not rely on the Eiser Award to determine the installed capacity issue. Claimants submit that the Eiser Award was not a basis at all for the Tribunal’s determination, still less the “exclusive” or “sole” or “main” basis.26

37. Claimants argue that the Tribunal’s reference to the Eiser Award was “nothing more than a reference in passing to the similar finding reached in another case.”27 They submit that it manifestly appears from the Award that the Tribunal did not grant the Eiser Award any precedential or stare decisis value.28

38. Second, Claimants contend that it manifestly appears from the face of the Award that the Tribunal would have reached the exact same conclusion on the installed capacity issue even if it had not considered the Eiser Award.

39. Claimants refer to the evidence assessed by the Tribunal to reach its determination on the installed capacity issue, which includes the reports and oral testimony of the Parties’ technical experts, the inscriptions on the name plates of the CSP Plants’ generators, as well as a report issued by the Kingdom’s grid operator, the Red Eléctrica de España.29

40. Claimants argue that the Tribunal also based its determination of the installed capacity issue on a separate line of reasoning that does not even reference (let alone consider or rely upon) the Eiser Award and which is rather based on a purposive and textual interpretation of Article 27 of the EPA 1997.30

41. Finally, Claimants submit that Respondent seeks entirely inadmissible relief in its Application for Revision. They argue that Respondent’s request for a declaration by the Tribunal that Claimants “improperly and unduly acceded a privileged regime of subsidies there were not entitled to” concerns a novel and impermissible claim that was not raised

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26 See Claimants’ Objection, at paras. 17 and 18; see also Claimants’ Statement on Rule 41(5) Objection, presented at the hearing of Claimants’ Objection, on 12 November 2020 (“Claimants’ Statement”), at pp. 12 and following.

27 See Claimants’ Objection, at para. 23.

28 See Claimants’ Objection, at para. 23.

29 See Claimants’ Objection, at paras. 26 and 27.

30 See Claimants’ Statement at p. 16; see also Claimants’ Objection, at para. 28.
in the initial arbitration and that Respondent is estopped from raising in the context of the Application for Revision.\(^{31}\)

**B. RESPONDENT’S POSITION**

42. Respondent is of the view that an objection under ICSID Rule 41(5) is not available where the requirements to initiate the Application for Revision have been *prima facie* satisfied.\(^{32}\) Respondent appears to argue that the mere allegation, as set out in its Application for Revision, that the annulment of the Eiser Award is of such nature as to “decisively affect” the Award is sufficient to undermine Claimants’ Objection.\(^{33}\)

43. Moreover, by Respondent’s account, the Tribunal’s reliance on the Eiser Award appears from the very language used in the Award, in particular at para. 339: “As did the tribunal in Eiser, the Tribunal relies on the capacity listed on the nameplate of the respective generators and on the CNMC’s own confirmation that the plants’ installed capacity is equal to or under 50 MW.” (Emphasis added)\(^{34}\)

44. Respondent argues that the Tribunal does not explain why it chose to rely on the nameplates of the generators or on the report of the Spanish grid operator. According to the Respondent, it must therefore be assumed that the Tribunal relied on the Eiser Award.\(^{35}\) By the same token, Respondent asserts, the Tribunal’s remarks on the difference between gross output and net output as well as the Tribunal’s comments on the credibility and usefulness of the technical experts’ opinions are also affected by an unstated reliance on the Eiser Award.\(^{36}\)

45. Respondent further argues that the reasons provided by the Tribunal to justify its determination of the installed capacity issue belie an analysis identical to the one carried out by the Eiser tribunal, that is, an analysis based on the inscriptions on the nameplates of the generators and on the report by the Spanish grid operator.\(^{37}\)

46. Arguably modulating somewhat the position initially asserted in its Application for Revision, in its Response to Claimants’ Objection, Respondent argues that the Eiser Award was a “decisive” factor in the Tribunal’s determination of the installed capacity issue, if not the “only” factor, such that the Award should be revised for being, it says, based “exclusively or mainly” on Eiser.\(^{38}\)

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31 Claimants’ Statement, at pp. 19 and 20.
32 Kingdom of Spain’s Argument, Rule 41(5) Application, 12 November 2020, presented at the hearing of Claimants’ Objection (“Respondent’s Statement”), at pp. 5 and 6.
33 Respondent’s Statement at p. 5: “By definition cannot be wrong or valid premise. Either there is a premise or there is not (tertium non datur). (…) Whether or not the request for review is estimated is a different matter from the fulfillment of the requirement to initiate the Revision proceeding.”
34 Respondent’s Response, at para. 23.
35 Respondent’s Response, at para. 53.
36 Respondent’s Response at paras. 58 and 59.
38 Respondent’s Response, at paras. 50 and following. Underlining added.
“86. In accordance with all the aforementioned, the Kingdom of Spain respectfully requests the Tribunal:

(…)

(c) The Award be revised under Article 51 of the ICSID Convention as its Section VI.A was exclusively or mainly based on the annulled Eiser Award;”

47. Respondent contends that this case is similar to what it refers to as the “Volkswagen fraud cases.” It claims that, as in those cases, Claimants wilfully misrepresented the installed capacity figures on the nameplates of the CSP Plants’ generators in order to qualify for remuneration under the Special Regime.

48. Respondent asserts that an analysis of the merits of its Application for Revision is necessary to assess “how deep the impact of the annulment of the Eiser Award is on the subsequent InfraRed one.”

V. ANALYSIS

49. The Tribunal will first out set out the legal principles governing Claimants’ Objection before addressing the merits of the Objection.

A. THE LEGAL PRINCIPLES

50. ICSID Rule 41(5) provides that “a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.” [Emphasis added]

51. If the objection is upheld, the Tribunal dismisses the claim in limine litis.

52. The legal principles governing the determination of objections brought under ICSID Rule 41(5) are uncontroversial as between the Parties and can be succinctly summarized.

53. The standard that the objecting party must meet to obtain the dismissal of the claim at such an early stage is a high one.

54. To prevail on such an objection, the objecting party must establish its objection clearly and obviously, with relative ease and despatch. The complexity of the claim impugned and of the legal issues associated with that claim are not reasons per se to dismiss the

39 Respondent’s Response, at para. 86.
41 ICSID Rule 41(5).
42 MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia, ICSID Case No. ARB/13/32, Decision on Respondent’s Application under ICSID Arbitration Rule 41(5) (”CL(Rev)-08”).
objection, but the objecting party will only prevail if the absence of legal merit is clear and obvious.\textsuperscript{43}

55. In ruling on an objection under ICSID Rule 41(5), the Tribunal must take the facts alleged by the claimant (here, the claimant or applicant in the context of the Application for Revision, \textit{i.e.}, the Respondent) as proven, without inquiring into the credibility or plausibility of a disputed factual allegation, unless such allegations are “\textit{manifestly incredible, frivolous, vexatious or inaccurate or made in bad faith}.”\textsuperscript{44}

56. One further, terminological, note is apposite. As mentioned, Article 51(1) of the ICSID Convention provides \textit{inter alia} that revision of an award may be sought “\textit{on the ground of discovery of some fact of such a nature as decisively to affect the award} …”.

57. The term “decisive” is susceptible of various definitions and usages. It may mean “having the power or quality of \textit{deciding}” (as in: \textit{The council president cast the decisive vote}). It may also mean “resolute, determined” (as in: \textit{A decisive leader}); or again, “unmistakable, unquestionable” (as in: \textit{A decisive superiority}). Depending on its meaning, synonyms may include: deciding, conclusive, definitive, purposeful, resolved, compelling, effective, strong.\textsuperscript{45}

58. The Tribunal does not consider that there is any uncertainty as regards the meaning of the term as used in Article 51(1) of the ICSID Convention. Nor indeed is there any disagreement between the Parties in this respect or any difference between them as regards their use of the term. As used here, the term “decisive” means \textit{conclusive} or \textit{determinative}. A “fact of such a nature as decisively to affect the award” is a fact of such a nature as to affect the award conclusively or determinatively.

59. As will be seen, the outcome of the present case as determined in the Award is the same notwithstanding the “fact” presented (the Eiser annulment) in the Application for Revision.

\textbf{B. \textit{Discussion}}

60. As discussed above, Respondent’s Application for Revision is based on the contention that the annulment of the Eiser Award constitutes a fact of such nature as “decisively to affect the award” in the present arbitration – specifically, the Tribunal’s determination of

\textsuperscript{43} \textit{Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan}, ICSID Case No. ARB/07/25, Decision on the Respondent’s objection under Rule 41(5) of the ICSID Rules, (“\textit{CL(Rev)-04}”) “[\textit{Trans-Global}]”.

\textsuperscript{44} \textit{Trans-Global}, (\textit{CL(Rev)-04}) at para. 105: “[A]s regards the word “\textit{manifestly},” the Tribunal requires the Respondent’s Objection to meet the test of clarity, certainty and obviousness discussed above. As regards the phrase “\textit{without legal merit}” … [I]n applying Rule 41(5), the Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant’s claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation. The Tribunal does not accept, however, that a tribunal should otherwise weigh the credibility or plausibility of a disputed factual allegation. Lastly, in applying Article 41 (5) to the particular case, the Tribunal accepts, of course, that it must apply these two wordings together.”

\textsuperscript{45} See, for example: \url{https://www.merriam-webster.com/dictionary/decisive} (last consulted 7 December 2020).
the installed capacity issue – within the meaning of Article 51(1) of the ICSID Convention. It is this contention that is the target of Claimants’ Objection.

61. Under Article 51(1) of the ICSID Convention, the “decisive” effect of the new fact invoked in support of an application for revision is a legal standard that the applicant must meet if it is to prevail on its application.

62. The only issue facing the Tribunal for the purpose of determining Claimants’ Objection can therefore be stated as follows: Is it manifest (as Claimants contend) that the Eiser Award did not decisively affect the Tribunal’s determination of the installed capacity issue?

63. In the light of the legal principles governing the application of ICSID Rule 41(5), this issue can be subdivided:

   i. Is it manifest that the Tribunal’s determination of the installed capacity issue was not “exclusively” or “mainly” based on the Eiser Award?

   ii. Is it manifest that, in the absence of the Eiser Award, – the Tribunal would have reached the same conclusion as it did on the issue of installed capacity?

   iii. Are the conclusions sought by Respondent pursuant to its Application for Revision of the Award manifestly inadmissible?

64. For the following reasons, the Tribunal is unanimously of the view that questions i. and ii. must be answered in the affirmative, and that there is no need to decide question iii. On that basis, explained below, Claimants’ Objection is granted and Respondent’s Application for Revision is dismissed in limine litis.

65. The determination of the installed capacity issue in the Award is based on an interpretation of the term “installed capacity” at Article 27 of the EPA 1997.

66. In their submissions in the arbitration, the Parties proposed two competing interpretations of that term: according to Claimants, “installed capacity” in Article 27 of the EPA 1997 means the net power output of the unit in question; in Respondent’s submission, it means gross power output.

67. It is manifest – clear and obvious – on the face of the Award that the interpretative exercise adopted to determine the installed capacity issue proceeds along two parallel, lines of reasoning:

   (i) consideration of the inscription on the nameplates of the CSP Plants’ generators and of the CNMC’s own conclusions regarding the plants’ installed capacity; and

   (ii) a purposive and textual interpretation of Article 27 of the EPA 1997 that is shaped by a variety of considerations, such as the method of remuneration under the Special Regime, the importance that the Kingdom’s grid operator
accords to the question of gross vs. net output, and the many factors addressed in the evidence of the Parties’ technical experts.

68. Each of these lines of reasoning stands on its own. Each gives rise to the same result. And the Eiser Award is not a basis for the determination of the installed capacity issue under either.

69. Under the first line of reasoning, the Award manifestly does not rely on Eiser for its articulation of the conceptual and legal basis for the determination of installed capacity issue, but rather on the inscription on the nameplates of the Plants’ generators and on the CNMC’s own conclusion in this regard.

70. The words “As did the tribunal in Eiser …” at paragraph 339 of the Award merely note the similarity as between the Tribunal’s reasoning in the present arbitration and that of the tribunal in Eiser. The paragraph states explicitly in this respect that “[a]s did the tribunal in Eiser, the Tribunal relies on the capacity listed on the nameplate of the respective generators and on the CNMC’s own confirmation that the plants’ installed capacity is equal to or under 50 MW.” (Emphasis added)

71. Even a casual reader will note that paragraph 339 does not say or mean, “Because the Tribunal in Eiser…”, which would have been the formulation commending itself had the Award in fact relied on Eiser in this respect.

72. Perhaps more importantly – and fatally for Respondent’s allegations – the second line of reasoning, which is based on a textual and purposive interpretation of Article 27 of the EPA 1997, manifestly does not mention, cite or refer to Eiser in any way. The reason why this is so is also clear and obvious: unlike the Tribunal in the present arbitration, the Eiser tribunal did not engage in such an interpretative exercise.

73. For these reasons, even on the most generous reading of Respondent’s position, the annulment of the Eiser Award not only manifestly does not affect the Award or reasoning and conclusion regarding the installed capacity issue as suggested by Respondent, but manifestly cannot do so.46

74. This determination obtains whether one considers Respondent’s submissions in its Application for Revision and its Response to Claimants’ Objection to be submissions of law or of fact. Under either line of reasoning in the Award, Spain’s suggestion that the Eiser Award was either the “exclusive” or the “main” basis for the Tribunal’s determination of the installed capacity issue is “manifestly incredible [and] inaccurate.”

75. In sum, even if the Eiser Award “had never existed,” to borrow Respondent’s phrasing, even if all reference to that case were expunged from the record of the present arbitration, including the Award, it is manifest that both the reasoning and the conclusions

46 See Eiser (RL-0179), at paras. 336 to 345.
with respect to the installed capacity issue as articulated in the Award would remain unaffected.

VI. COSTS

76. Claimants ask that the Tribunal order Spain to bear all costs resulting from the revision proceedings commenced by Respondent, “including attorneys’ fees and disbursements as well as all associated costs of ICSID and this reconstituted Tribunal.”

77. For its part, Respondent asks that the Claimants be ordered to pay “the full costs of these proceedings (Arbitration and Revision), including the fees and expenses of counsel for the Kingdom of Spain.”

78. In the exercise of its authority under Article 61(2) of the Convention to decide how and by which party the cost of the proceeding is to be paid, the Tribunal takes as its first consideration Respondent’s obvious right to apply for revision of the Award. By the same token, the Tribunal cannot ignore the outcome of Respondent’s Application for Revision, which is dismissed herein in limine litis for being manifestly without legal merit.

79. In the circumstances, the Tribunal considers it just and reasonable that each party bear its own expenses incurred in connection with the revision proceedings, and that Respondent bear the entirety of the costs, fees and expenses of ICSID and of the members of the Tribunal in relation to those proceedings (which include Spain’s Application for Revision and Claimants’ Objection).

80. Those costs, fees and expenses, which have been paid out of the advances made by the Parties in equal parts, are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Arbitrators’ fees and expenses</td>
<td>US$ 41,980.00</td>
</tr>
<tr>
<td>(b) Assistant to the Tribunal</td>
<td>US$ 5,018.00</td>
</tr>
<tr>
<td>(c) ICSID’s administrative fees</td>
<td>US$ 42,000.00</td>
</tr>
<tr>
<td>(d) Direct expenses</td>
<td>US$ 9,362.15</td>
</tr>
<tr>
<td><strong>TOTAL</strong>:</td>
<td><strong>US$ 98,360.15</strong></td>
</tr>
</tbody>
</table>

47 Claimants’ Objection, at para. 40.b.(2).
48 Spain’s Response, at para. 86(d).
49 ICSID will provide a detailed final statement of the case account to the Parties. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.
VII. DECISION

81. For all of the foregoing reasons, the Tribunal decides and orders:

(1) Respondent’s Application for Revision is dismissed in limine litis for being manifestly without legal merit;

(2) Respondent shall pay the entirety of the costs, fees and expenses of ICSID and of the members of the Tribunal in relation to the revision proceedings, and shall accordingly reimburse Claimants the sum of US$ 49,180.08 within 30 days of the date hereof.
Prof. Pierre-Marie Dupuy
Arbitrator

Prof. William W. Park
Arbitrator

Date: 8 March 2021

Mr. Stephen L. Drymer
President of the Tribunal
Prof. Pierre-Marie Dupuy  
Arbitrator

Prof. William W. Park  
Arbitrator

Mr. Stephen L. Drymer  
President of the Tribunal

Date: 8 March 2021