INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

STEAG GmbH

v.

Kingdom of Spain

(ICSID Case No. ARB/15/4)

SUPPLEMENTARY DECISION

Members of the Tribunal
Dr. Eduardo Zuleta-Jaramillo, President of the Tribunal
Dr. Pierre-Marie Dupuy, Arbitrator
Dr. Guido Santiago Tawil, Arbitrator

Secretary of the Tribunal
Ms. Ana Constanza Conover Blancas

February 10, 2021

STEAG GmbH v. Kingdom of Spain
(ICSID Case No. ARB/15/4)

SUPPLEMENTARY DECISION

I. PROCEDURAL BACKGROUND

1. On October 8, 2020, the Tribunal issued its "Decision on jurisdiction, liability, and instructions for the quantification of damages" (the "**Decision**"). In operative point 6 of the Decision, the Tribunal ordered:

> "By majority, to order the Parties (a) to submit to the Tribunal within ninety (90) days from the date of notification of this decision a jointly agreed calculation of the amount of compensation, which must follow the methodology outlined in paragraph 820 of this decision and take into account the criteria indicated in paragraph 821 of the present decision; (b) in case of total or partial disagreement on the final value of the compensation, to submit to the Tribunal within the aforementioned ninety (90) days the points of agreement and disagreement regarding the calculation of compensation."[1]

2. On December 30, 2020, the Parties requested an extension of the deadline for submitting the damages calculation until January 15, 2021. The Tribunal granted the extension via communication on December 30, 2020.

3. Upon expiration of the deadline, the Claimant submitted: (i) a Memorial titled "Calculation of the compensation due to Steag pursuant to the decision of October 8, 2020"; (ii) a Report titled "Implementation by Brattle of the parameters defined in the decision of October 8, 2020," in Spanish and English; and (iii) the updated financial model.

4. The Respondent, for its part, submitted the following documents: (i) a memorandum for the quantification of damages prepared by the expert team Accuracy, based on the Decision; (ii) an Excel file titled "Tribunal Results"; and (iii) the "Financial Damages Model" in Excel format.

5. On January 16, 2021, the Tribunal Secretary sent the aforementioned submissions to the Tribunal Members and the Parties.

6. On January 18, 2021, the Respondent submitted a "formal complaint" against the Claimant,[2] requesting that: *"the Additional Damages Memorial improperly submitted by the Claimant be deemed inadmissible and, alternatively, that the Respondent be granted permission to respond to the cited Memorial submitted by STEAG GmbH, considering in any case that any new*

[1] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 823(6).
[2] Respondent's Letter of January 18, 2021, p. 1

argument or data should be inadmissible in the record of this arbitration".[3]

7. On the same day, the Claimant responded to Spain's request and submitted a communication from Brattle regarding the contents of the Accuracy Report.

II. THE CLAIMANT'S DAMAGES MEMORIAL

8. The Tribunal begins by addressing Spain's complaint against Steag.

9. In its January 18 submission, the Respondent emphasizes that the Claimant submitted several damages calculation documents, despite paragraph 822 of the Decision instructing the parties to provide "*a document indicating the points of agreement and disagreement*".[4] The Claimant responded to this assertion, arguing that: *"[I]t is not that there was no possibility of submitting a memorial by the parties, but rather that submitting a memorial was the only possible way to comply with the instruction of the Arbitral Tribunal. The instruction of the Arbitral Tribunal was not that the parties' experts should prepare a memorandum calculating the damages, which is what Spain apparently understood.*"[5]

10. The Tribunal finds the debate over whether the Parties could submit one or multiple files, a document with or without annexes, or whether the submission had to be prepared by the Parties and/or their experts, to be inconclusive. What matters is the content of the submissions made by both Parties and not their form of submission. If there was any doubt about the form of the submission, the least the Parties could have done was consult the Tribunal.

11. After reviewing the submissions presented by the Parties in January 2021, the Tribunal finds that neither Party fully complied with the Tribunal's instructions set forth in the Decision. Both the Additional Damages Memorial and the Brattle Report, submitted by the Claimant, as well as the Accuracy Report, submitted by the Respondent, include new allegations regarding the damages calculation and apply different parameters than those established by the Tribunal in its Decision. Citing differences in interpretation of the October 2020 Decision, the Parties have presented arguments aimed at redefining, through different interpretative approaches, the parameters for the damages calculation.

12. The Tribunal's instruction to the Parties in paragraphs 821 and 822 of its Decision was clear. The Parties were to submit a jointly agreed calculation that took into account the criteria set out in

[3] Respondent's Letter of January 18, 2021, p. 5.
[4] Respondent's Letter of January 18, 2021, p. 3.
[5] Claimant's Letter of January 18, 2021, ¶ 8.

paragraph 821 of the Decision. If no agreement was reached, they were to indicate "*the points of agreement and disagreement regarding the amount of compensable losses*"[6]. The Tribunal requested a damages calculation based on defined parameters, not a reassessment or discussion of the general parameters for the damages calculation. Those parameters are solely those indicated in the October Decision. Due to their nature and content, the submissions presented by the Parties do not provide the Tribunal with the necessary information to definitively determine the amount of compensation. Furthermore, the Parties have reintroduced arguments on points that the Tribunal had already decided in previous procedural stages.

13. The Tribunal emphasizes that operative point 6 of the Decision does not provide an opportunity to re-litigate the damages issue or the criteria established for calculating compensable losses. The Tribunal reiterates that if its instructions were unclear to the Parties or their experts, or if there were differences in interpretation, the Parties should have communicated their doubts to the Tribunal in a timely manner. Instead, they chose to engage in an extended discussion on interpretations of the Decision and to submit calculations reflecting multiple scenarios arising from those interpretations.

14. In light of the foregoing, the Tribunal will accept the documents submitted by both Parties and will use them to identify which points of the October 8, 2020 Decision led to doubts or differing interpretations by the Parties. Once those points have been identified, the Tribunal will clarify the issues around which the Parties' discussion revolved, reaffirming the parameters set forth in the Decision.

III. THE PARTIES' DIFFERENCES REGARDING THE SCOPE OF THE INSTRUCTIONS FOR THE QUANTIFICATION OF DAMAGES

15. Based on the Parties' submissions, the Tribunal first observes that the Parties have no disputes regarding the following points: (i) the operational lifespan of the plant for the purposes of the damages calculation, which is 25 years;[7] and (ii) the exclusion of the tax gross-up from the damages calculation.[8]

16. The Parties' differences in interpretation relate to five issues, which the Tribunal will address below.

[6] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 822.
[7] Accuracy Report, ¶ 8(iii); Steag's Memorial, ¶ 3.
[8] Accuracy Report, ¶ 8(iv); Steag's Memorial, ¶ 3.

SUPPLEMENTARY DECISION

1. Applicable DCF Method

17. The Parties disagree on the applicable DCF method. Steag asserts that the relevant methodology corresponds to the DCF model used by Brattle's experts.[9]

18. In contrast, the Accuracy Report, submitted by the Respondent, claims that the Decision does not exclude additional discounts from the damages calculation beyond those initially contemplated by Brattle, specifically: (i) the preferred status of RREEF; (ii) regulatory risk premium; (iii) illiquidity discount; and (iv) additional minority discount on the market value of equity (in both the But For and actual scenarios).[10]

19. At the same time, the Respondent expresses disagreement over Brattle's experts introducing *"new data that was not previously included in the record, such as: (i) a new WACC discount rate of 2.7% (footnote 42); (ii) a new illiquidity rate of 5% for the actual scenario (paragraph 38, third point); or (iii) the updated regulatory risk in both scenarios (paragraph 38, second point)."*[11]

20. The Tribunal reiterates that the damages calculation must be based on the DCF method, as indicated in paragraphs 819 and 820 of the Decision. The DCF method was the approach used by the Claimant throughout the arbitration process and was deemed reasonable by the Tribunal, as stated in paragraph 820 of the Decision:

> "820: In the Tribunal's view, the use of the DCF method in this case is reasonable since it concerns an operational plant whose cash flows can be determined and projected. The Claimant is correct in explaining that the framework for establishing cash flows for the But For scenario is not speculative, as it is based on the criteria of the RRO, which guaranteed a minimum cash flow."[12]

21. In reaching the above decision, the Tribunal analyzed the valuation methods proposed by each Party and the adjustments suggested by Accuracy to the DCF method used by Brattle. The Tribunal recalls that Accuracy not only questioned Brattle's DCF-based calculation but also the general suitability of the DCF method for estimating damages in this arbitration. The Tribunal chose the DCF method proposed by Brattle and rejected Accuracy's suggested discounts, as it found that

[9] Steag's Memorial, ¶¶ 24-30.
[10] Accuracy Report, ¶¶ 12 et seq.
[11] Respondent's Letter of January 18, 2021, p. 5 (original emphasis omitted).
[12] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 820.

Accuracy had not sufficiently justified their inclusion, whereas Brattle had adequately substantiated the reasons for excluding them: (i) the preferred status of RREEF; (ii) the regulatory risk premium; (iii) the illiquidity discount; and (iv) the additional minority discount on the market value of equity (in both the But For and actual scenarios).

22. Paragraph 821 of the Decision states that: *"[w]hile, in principle, the damages calculation using the DCF method and the comparison of a hypothetical scenario (But For, under the RRO (Original Regulatory Regime)) with the actual scenario (NRR (New Regulatory Regime)) is logical and consistent with the case's circumstances, this does not mean that the Tribunal agrees with the conclusions and scenarios in The Brattle Group's damages report. In particular, the Tribunal considers that the damages assessment must take into account and be based on the elements discussed in this decision, namely […]*" (emphasis added).[13] The Tribunal was clear in adopting the DCF method used by Brattle while instructing the adjustment of calculations based on the parameters expressly set forth in the Decision. These parameters were enumerated clearly and explicitly. The Tribunal understands that this list is exhaustive. Contrary to Accuracy's assertion,[14] paragraph 821 of the Decision does not allow for the introduction of additional discount criteria or parameters beyond those explicitly listed in that paragraph.

23. The Tribunal reiterates that the method used by the Claimant must be applied, with the adjustments expressly indicated in paragraph 821 of the Decision, and no additional adjustments. The October 8, 2020 Decision defines the parameters for the damages calculation in a definitive, exhaustive, and conclusive manner.

2. Inclusion or Exclusion of "Historical Losses"

24. The Claimant interprets the Tribunal's Decision to mean that June 20, 2014, is not the starting date for calculating damages, but that the calculation must incorporate losses incurred before that date.[15] The Claimant asserts that *"June 20, 2014, is the valuation date, and the logical consequence is that damages suffered by Steag before June 20, 2014, must be included, as they stem from the retroactive implementation — starting in July 2013 — of the measures deemed compensable, which were ultimately consolidated on June 20, 2014, when the losses became irrecoverable."*.[16] Thus, according to the Claimant, the damages calculation must include historical losses.[17]

[13] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 821.
[14] Accuracy Report, ¶ 13.
[15] Steag's Memorial, ¶¶ 31-39.
[16] Steag's Memorial, ¶ 39.
[17] Steag's Memorial, ¶ 35.

25. The Respondent, for its part, maintains that the calculation must exclude "*any historical damage prior to June 20, 2014, except for that related to the investor's contribution to the loss.*"[18]

26. The Tribunal begins by emphasizing that the October 2020 Decision was clear in stating that: *"The amount of compensable loss must be calculated from the moment when Spain's internationally wrongful conduct had an economic impact on the Arenales Solar project."*[19] Specifically, the Tribunal stated:

> "The Tribunal agrees with the Claimant that the moment when Steag's investment suffered irreversible economic harm was June 20, 2014 […] *It was at that moment, and not before, that the parameters of the NRR were concretely defined. Quantifying damages before June 20, 2014, would require using an artificial and retrospective valuation method. The economic effects of the NRR did not occur, nor were they determinable in a precise and certain manner, before that date"* (emphasis added).[20]

27. It is evident that the Decision excluded "*historical losses"*. The Tribunal reiterates that the calculations should not reflect the historical loss.

3. Relationship between the reduction in compensable loss due to contribution to the loss and the regulatory risk premium

28. The Claimant and Brattle argue that the discount ordered by the Tribunal, based on Steag's contribution to the loss, reflects regulatory risk and should replace the discount that Brattle had already applied for regulatory risk.[21]

29. The Accuracy Report, submitted by the Respondent, asserts that the 25% discount should be applied to the total damages calculated as of June 20, 2014, after all relevant discounts and exclusions have been applied[22]

30. The Tribunal highlights that the reduction in damages ordered due to Steag's contribution to the loss is not a regulatory risk premium or a reduction due to regulatory risk. Rather, it is a reduction based on Article 39 of the Articles on State Responsibility, as explained

[18] Accuracy Report, ¶ 8(ii).
[19] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 753.
[20] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8,2020), ¶ 755.
[21] Steag's Memorial, ¶¶ 74-91; Brattle Report, ¶¶ 42 et seq.
[22] Accuracy Report, ¶ 36.

in the Decision.[23] It is not regulatory risk but Steag's conduct that justifies this discount. This is evident from the wording of the Decision:

> "The Tribunal, having analyzed all the circumstances of the case and within the scope of its discretion, finds that Steag's contribution to the loss can be quantified at 25%. *This percentage reflects Steag's factual partial contribution to the total amount of the damage while also recognizing the severity of Spain's conduct as the primary cause of the harm suffered.* Consequently, once the total amount of damages suffered by the investor is determined, the Tribunal will proceed to reduce the compensable amount in the indicated proportion" (emphasis added).[24]

31. In light of the above, the 25% discount should be understood as an additional reduction to the discounts applied under the DCF method to account for the inherent regulatory risk of the operation.

4. Effect of the exclusion of the TVPEE and the premium for gas-generated energy on the calculation of compensable loss

32. The Accuracy Report states that: *"[t]he elimination of the effect of any of the First Measures must be implemented by incorporating each of these measures into the But For scenario throughout the entire considered useful life (in this case, 25 years). That is, since the measure is legitimate, it would be part of the counterfactual scenario. Thus, if only that measure had been approved, the Actual and But For scenarios would coincide, and there would be no damages. Any other way of implementing a First Measure as legitimate (considering them time-limited, for example) leads to damages, which would be inconsistent."* [25]

33. The Claimant, on the other hand, explains that the elimination of the premium for gas-generated energy was in effect only from December 2012 to June 2013, and the impact of the TVPEE (Tax on the Value of Electricity Production) was neutralized by the NRR.[26] Therefore, the effect of the TVPEE and the elimination of the premium for gas-generated energy can only be deducted for the period during which they had an impact, that is, until July 2013 (and not throughout the entire useful life of the plant).[27] The Brattle Report emphasizes that: "*[s]ince Arenales began production after July 2013, even assuming that Spain does not assume any responsibility for either the*

[23] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶¶ 760, et seq.
[24] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 796.
[25] Accuracy Report, ¶ 23. See also ¶¶ 22-26.
[26] Steag's Memorial, ¶¶ 41, 45-51.
[27] Steag's Memorial, ¶¶ 41, 45-51

approval of the TVPEE or the elimination of the FIT for generating electricity using gas in the case of solar thermal power plants using gas, there is no impact in the damages analysis."[28] Steag refers to this approach as the "Temporal Approach," in contrast to the "Permanent Approach" adopted by Accuracy's experts.[29]

34. The Claimant itself acknowledges that this element represents a change in the methodology it used during the arbitration process:

> "Steag considers it appropriate to clarify, before delving into the reasons why it is correct to calculate the compensation from the perspective of the duration of the measures, that in the summary calculation of the various elements of damages submitted to the Tribunal on March 15, 2019, the parties adopted the Permanent Approach. This approach was adopted on March 15, 2019, with the aim of graphically simplifying the impact of the various elements under discussion at that time. However, that position would be inconsistent with the actual economic effects of the NRR and the fact that the elimination of the possibility of receiving a premium for gas combustion was legally in force for only seven months" (emphasis added).[30]

35. The Tribunal notes that Steag followed the so-called "Permanent Approach" throughout the process. Even in its separate economic impact analysis of the measures, it stated that: "*[t]he calculations presented are based on various assumptions*. *The main assumption is that the Measures impact the entire useful life of the Arenales Plant (e.g., the TVPEE has effects throughout the entire useful life of the Arenales Plant and, therefore, the But For scenario would reflect the affected revenues throughout the entire life with or without TVPEE)*" (emphasis added).[31]

36. Steag further explained:

> "[…] [T]his is under the assumption that these Measures have effects from the time they are adopted until the end of the Plant's life. The impact of these Measures is much smaller if they are considered to comply with the ECT and, therefore, are temporally limited until the date of the definitive regulatory change in July 2013. Such a calculation is not presented in this addendum as it is considered methodologically incorrect, given that the 2013 regulatory

[28] Brattle Report, ¶ 25. See also Steag's Memorial, ¶ 52.
[29] Steag's Memorial, ¶¶ 41-42.
[30] Steag's Memorial, ¶ 43.
[31] Separate Economic Impact of the Measures (Steag), ¶ 4.

> change perpetuates the effect of these Measures in terms of eliminating the advantages offered by the regulatory framework under RD 661/2007" (emphasis added).[32]

37. The Respondent is correct in asserting that: "*STEAG GmbH is attempting to change what its own expert team maintained during the hearing regarding certain aspects related to the compensation amount, trying to reformulate arguments in a completely inadmissible manner. Thus, contrary to the separate impact that Brattle assessed for the TVPEE throughout the entire arbitration process in case the Tribunal correctly decided that it was a measure outside its jurisdiction — explaining that the tax would apply in the But For scenario throughout the entire plant's life, with an impact of about 13 million euros (from the original 79 million down to 66 million) — the Claimant now suggests that the tax should only be considered applicable for a few months due to its temporary nature. This, besides being a new argument, contradicts what The Brattle Group stated in the Hearing before the Tribunal […] and is therefore completely inadmissible.*".[33]

38. The Tribunal reiterates that the October 8, 2020, Decision definitively resolves the parameters for calculating damages. Steag cannot seek to reconsider the parameters it itself presented to the Tribunal and that the Tribunal deemed reasonable. Consequently, the "Permanent Approach" must be applied.

5. Impact of the 2020 Divestment

39. The Parties have taken different approaches to account for the 2020 divestment in the damage calculation.

40. According to the Claimant:

> "[T]here are only two ways to analyze the impact of the 2020 transaction to ensure that the content of the Decision remains consistent, given that it establishes that Steag's damage valuation must be carried out as of June 20, 2014:
>
> The first alternative is to assume that a transaction occurring in 2020 is irrelevant to the calculation of compensation as of June 20, 2014. This means that no changes would be introduced in either the But For or the Actual scenario, and consequently, the damages calculation as of June 20, 2014,

[32] Separate Economic Impact of the Measures (Steag), ¶ 15.
[33] Respondent's Letter of January 18, 2021, p. 4 (original emphasis omitted).

> would remain unchanged. This is a simpler approach that maintains consistency with the damage calculation methodology.
>
> The second alternative to maintaining consistency in the damage valuation methodology is to reflect the impact of the 2020 transaction in both the But For and Actual scenarios, so that both scenarios can be compared to determine a new damage figure. This involves determining the equivalent of the transaction in the But For scenario in 2020, when the RRO was still in effect, using the available 2020 information (which originates from the transaction itself). Brattle has factored the effects of Steag's sale into its damage calculation."[34]

41. In other words, for Steag, due to the temporal difference between the damage valuation date (June 2014) and the divestment date (February 2020), there are two possibilities: (i) either the 2020 transaction is not considered in the damage calculation; or (ii) it is included in both scenarios (Actual and But For).[35] The Claimant expresses a preference for the second option and suggests adjusting both the But For and Actual scenarios so that they can be compared.[36] According to Steag, if the effects of the transaction are included in the Actual scenario but not in the But For scenario, an inconsistency arises because the transaction amount corresponds to the "macroeconomic conditions" of 2020.[37]

42. Based on this calculation, the Claimant finds that the damage would increase by 7 million euros:

> "Brattle calculates that the value of Steag's participation in Arenales in the But For scenario as of June 20, 2014, if it had exited the Arenales project in February 2020, would have been €12,400,000, while at the same time, the €9,422,027 that Steag obtained in the Actual scenario in February 2020 had a value of €5,400,000 as of June 20, 2014. The difference between both results amounts to €7,000,000 in additional damage suffered by Steag, as calculated by Brattle, which is the proper assessment of the 2020 transaction's impact on the damage valuation[.]"[38]

[34] Steag's Memorial, ¶ 61.
[35] Steag's Memorial, ¶ 61; Brattle Report, ¶ 33.
[36] Steag's Memorial, ¶¶ 61-62.
[37] Steag's Memorial, ¶¶ 63, et seq.
[38] Steag's Memorial, ¶¶ 70-71.

43. The Accuracy Report, submitted by the Respondent, argues that the amount Steag obtained in the 2020 transaction should be deducted from the total damages as of June 20, 2014[39] Alternatively, Accuracy examines how to account for the temporal difference between the damage valuation date (June 20, 2014) and the divestment date (February 2020).[40] In that case, the damage sum should be capitalized from June 20, 2014, to the date of the decision (October 8, 2020), reflecting the time value of money between these dates.[41] Accuracy further states that: *"[S]ince the damages amount as of June 20, 2014, if any, will be a certain figure once the final award is rendered, the appropriate capitalization factor should be Spain's risk-free rate, which both experts have proposed to calculate pre-award interest in this case (i.e., the yield on Spanish government bonds)."*[42]

44. The October 8, 2020, Decision states: *"The Tribunal must then deduct from the compensable loss amount the sum that Steag received for its participation in Arenales Solar"* (emphasis added)[43] The Tribunal acknowledges that calculating the economic impact of the divestment transaction requires that the deduction be made on comparable values, meaning that the differences between the reference date for damage quantification and the date of the divestment must be taken into account and adjusted according to the parameters set out in the Decision.

45. The Parties and their experts must, therefore, calculate damages based on this approach.

IV. DECISION

46. In light of the foregoing considerations, the Tribunal orders:

    1. Each Party shall submit any additional questions regarding the parameters for the damage calculation within a maximum period of fifteen (15) calendar days from the date of notification of this Supplementary Decision. Only questions related to the points identified in this Supplementary Decision will be admissible, and the Tribunal will not accept new arguments under the pretext of submitting questions.

[39] Accuracy Report, ¶¶ 29 and 34
[40] Accuracy Report, ¶¶ 30-31.
[41] Accuracy Report, ¶¶ 30-31 y 34.
[42] Accuracy Report, ¶ 32.
[43] Decision on jurisdiction, liability, and instructions on the quantification of damages (October 8, 2020), ¶ 799.

SUPPLEMENTARY DECISION

2. The Parties shall submit to the Tribunal, within forty-five (45) calendar days from the date of notification of this Supplementary Decision, a jointly agreed calculation of the compensation amount. This calculation must follow the methodology set out in paragraph 820 of the October 8, 2020, Decision and take into account the criteria specified in paragraph 821 of that Decision, as well as the clarifications contained in this Supplementary Decision.

3. In the event of a total or partial disagreement on the final compensation amount, each Party must submit to the Tribunal, within the aforementioned forty-five (45) calendar days from the notification date of this Supplementary Decision, their respective damage calculation, strictly adhering to the specified parameters and without including additional arguments.

Prof. Pierre-Marie Dupuy
Arbitrator
Date: February 10, 2021

Prof. Guido Santiago Tawil
Arbitrator
Date: February 10, 2021

Dr. Eduardo Zuleta
President of the Tribunal
Date: February 10, 2021