

PCA CASE NO. 2010-17:

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN
THE REPUBLIC OF AUSTRIA AND THE CZECH AND SLOVAK FEDERAL
REPUBLIC CONCERNING THE PROMOTION AND PROTECTION OF
INVESTMENTS, DATED 15 OCTOBER 1990**

-and-

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, 15 DECEMBER 1976**

-between-

EUROPEAN AMERICAN INVESTMENT BANK AG (AUSTRIA)

(“Claimant”)

-and-

THE SLOVAK REPUBLIC

(“Respondent,” and together with the Claimant, the “Parties”)

AWARD ON COSTS

Arbitral Tribunal

Sir Christopher Greenwood (Presiding Arbitrator)
Professor Brigitte Stern
Dr. Dr. Alexander Petsche

Secretary to the Tribunal

Mr. Martin Doe

Registry

Permanent Court of Arbitration

20 August 2014

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I. INTRODUCTION

A. PARTIES

1. The Claimant in this arbitration is the European American Investment Bank Aktiengesellschaft (the “Claimant” or “Euram Bank”), a company established under the laws of Austria with its registered office at Palais Esterházy, Wallnerstrasse 4, 1010 Vienna, Austria. The Claimant is represented in these proceedings by:

Dr. Erhard Böhm, Specht Böhm Rechtsanwalt GmbH

Mr. Stanislav Durica, Ružička Csekcs.

2. The Respondent in this arbitration is the Slovak Republic (the “Respondent” or the “Slovak Republic” or “Slovakia”). The Respondent is represented in these proceedings by:

Ms. Andrea Holíková, Ministry of Finance of the Slovak Republic

Mr. Mark A. Clodfelter, Foley Hoag LLP

Mr. David A. Pawlak, David A Pawlak LLC

Mr. Constantinos Salonidis, Foley Hoag LLP

Ms. Diana Tsutieva, Foley Hoag LLP.

B. PROCEDURAL HISTORY

3. By Notice of Arbitration and Statement of Claim dated 23 November 2009, Euram Bank commenced arbitration proceedings against the Slovak Republic, pursuant to Article 8(2) of the Agreement between the Republic of Austria and the Czech and Slovak Federal Republic concerning the Promotion and Protection of Investments, dated 15 October 1990 (the “BIT”) and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 (“UNCITRAL Rules”).
4. The procedural history of the case is set out in detail in the Tribunal’s First Award on Jurisdiction of 22 October 2012 (the “First Award”) and Second Award on Jurisdiction of 4 June 2014 (the “Second Award”). Only those aspects relevant to the Tribunal’s decision on costs are repeated here.
5. In its Statement of Claim, Euram Bank claimed that changes in the law on health insurance in the Slovak Republic, adopted in 2007 and entering into force in 2008, had destroyed the value of its investment in a health insurance company called Chemická zdravotná poisťovňa Apollo (“Apollo”). Euram Bank maintained that this action amounted to expropriation (within the meaning of Article 4(1) of the BIT), as well as to a violation of the requirement of fair and equitable treatment in Article 2 of the BIT and of the provisions of Article 5 of the BIT

regarding transfers. The factual background and the claim are set out in detail in the First Award.

6. On 5 November 2010, the Respondent filed its Statement of Defence, which raised four objections to the jurisdiction of the Tribunal:
 - i.* that the arbitration provision of the BIT was no longer valid because Austria and the Slovak Republic were both Member States of the European Union (the “intra-EU BIT objection”);
 - ii.* that Euram Bank’s claims did not arise out of a qualifying investment (the “indirect investment objection”);
 - iii.* that the claims under Articles 2 and 4 of the BIT fell outside the scope of the arbitration provision contained in Article 8 of the BIT (the “Article 8 objection”); and
 - iv.* that the claims for alleged breach of Article 2 of the BIT did not comply with the prior notice requirement under the BIT (the “procedural objection”).

These objections are described in greater detail in paragraph 48 of the First Award.

7. The Tribunal ordered bifurcation of the proceedings, and a hearing on the Respondent’s jurisdictional objections was held on 19 and 20 December 2011 (“Phase 1”). While the Tribunal was considering its decision on the jurisdictional objections, the Respondent submitted, on 26 May 2012, a Supplementary Statement of Defence in which it raised further jurisdictional objections arising out of proceedings instituted by the Claimant in the District Court of Bratislava I:
 - i.* that, by the Claimant’s act of commencing proceedings in the District Court of Bratislava I and the Respondent’s filing of its substantive defence in that case, the Parties had constructively agreed to terminate the arbitration and submit their dispute to the jurisdiction of the Slovak courts (the “constructive agreement objection”);
 - ii.* that the filing of the Petition to Commence Proceedings in the District Court constituted a waiver of the right to arbitrate (the “first waiver objection”); and
 - iii.* that the Claimant’s conduct in the litigation before the Slovak courts, taken as a whole, constituted a waiver of the right to arbitrate (the “second waiver objection”).

These objections are described in greater detail in paragraphs 87-89 of the Second Award.

8. On 22 October 2012, the Tribunal issued the First Award, in which it dismissed the intra-EU BIT objection and the indirect investment objection, but accepted the Article 8 objection and therefore concluded that “it lack[ed] jurisdiction over all aspects of the Claimant’s claim other than the claim under Article 5 of the BIT.”¹ The Tribunal also held that it was unnecessary to pronounce on the procedural objection and “reserve[d] the question of costs to the next phase of the proceedings.”²
9. On 4 June 2014, following a second jurisdictional phase including a second hearing on jurisdiction held on 16 September 2013 (“Phase 2”), the Tribunal issued the Second Award, in which it dismissed the constructive agreement objection and the first waiver objection, but accepted the second waiver objection “with the result that the Tribunal lacks jurisdiction over the claim under Article 5.”³
10. Section V of the Second Award addressed the issue of costs as follows:

In paragraph 459 of the First Award, the Tribunal reserved the question of costs for the next phase of the proceedings. Article 40 of the 1976 UNCITRAL Rules provides in relevant part:

1. Except as provided in paragraph 2, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

This provision gives the Tribunal considerable discretion regarding costs. In exercising that discretion, the Tribunal considers it appropriate to take account of the following considerations:

- (a) the Respondent has been successful in the second phase of the proceedings, with the result that there is no jurisdiction over any part of the claim;

¹ First Award, para. 460(5).

² First Award, para. 459.

³ Second Award, para. 267.

- (b) the Respondent was successful in the first phase of the proceedings in establishing that there was no jurisdiction regarding the claim under Articles 2 and 4 of the BIT;
- (c) the Claimant was successful in the first phase of the proceedings in defeating the Respondent's first jurisdictional objection (incompatibility of the BIT with EU law) and second jurisdictional objection (indirect investment).

Before taking a decision, however, the Tribunal wishes to receive details of the costs of legal representation and assistance borne by each Party and to receive brief submissions from each Party regarding the apportionment of costs. Accordingly, the Tribunal decides that:

- (a) each Party shall submit a detailed statement of the costs it has incurred, stated separately for each of the two phases of the proceedings, together with submissions of not more than five typed pages, not later than 27 June 2014;
- (b) each Party shall submit a response of not more than five typed pages to the other Party's filing under sub-paragraph (a), above, not later than 4 July.

11. By correspondence of 12 June 2014 and 13 June 2014, the Parties agreed and the Tribunal confirmed new deadlines for the Parties' costs submissions, namely, 11 July 2014 for the Parties' submissions on costs and 18 July 2014 for the Parties' responses on costs.
12. On 11 July 2014, the Parties exchanged their respective submissions on costs ("Claimant's Submission on Costs" and "Respondent's Submission on Costs").
13. On 18 July 2014, the Parties exchanged their respective response submissions on costs ("Claimant's Response on Costs" and "Respondent's Response on Costs").
14. The sole purpose of this Award is to decide on the allocation of costs.

II. COSTS INCURRED

A. THE COSTS OF THE TRIBUNAL

15. In Phase 1, the Parties deposited with the PCA a total of EUR 850,000.00 (EUR 425,000.00 each) to cover the costs of arbitration. In addition, the Claimant paid a further EUR 3,000 in appointing authority fees to the PCA for the first challenge to Professor Stern and the appointment of the presiding arbitrator (the fee for the second challenge to Professor Stern being paid from the Claimant's share of the deposit).
16. The costs of arbitration disbursed by the PCA for Phase 1 break down as follows:

Fees

Sir Christopher Greenwood	EUR 173,750.00
Dr. Dr. Alexander Petsche	EUR 223,500.00
Professor Brigitte Stern	EUR 203,250.00, plus EUR 39,837.00 VAT

Expenses

Court reporting	EUR 8,718.48
Hearing expenses (incl. catering, AV, IT, etc.)	EUR 12,483.60
Other expenses (incl. travel, courier, telecommunications, office supplies, bank charges, etc.)	EUR 19,988.78

PCA

Registry fees	EUR 100,105.00
Appointing authority fees	EUR 4,500.00
TOTAL	EUR 786,132.86

17. In Phase 2, the Parties deposited with the PCA an additional EUR 200,000.00 (EUR 100,000.00 each) to cover the costs of arbitration.

18. The costs of arbitration disbursed by the PCA for Phase 2 (including work on this Award on Costs) break down as follows:

Fees

Sir Christopher Greenwood	EUR 53,000.00
Dr. Dr. Alexander Petsche	EUR 70,500.00
Professor Brigitte Stern	EUR 48,000.00 plus EUR 9,480.00 VAT

Expenses

Court reporting	EUR 4,352.15
Hearing expenses (incl. catering, AV, IT, etc.)	EUR 5,874.70
Other expenses (incl. travel, courier, telecommunications, office supplies, bank charges, etc.)	EUR 5,201.44

PCA

Registry fees	EUR 49,420.00
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TOTAL	EUR 245,828.29
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19. The total costs of the arbitration disbursed by the PCA therefore amount to EUR 1,031,961.15. These costs include all those costs detailed in Article 38(a), (b), and (f) of the UNCITRAL Rules. There were no costs incurred under Article 38(d), as no witnesses attended either hearing.

B. THE COSTS INCURRED BY THE PARTIES

20. A summary of the costs claimed by the Parties for Phase 1 is as follows:

	Claimant⁴	Respondent⁵
Experts	EUR 108,480.00	EUR 16,084.52

⁴ Claimant's Submission on Costs, Section I(F).

⁵ Respondent's Submission on Costs, para. 10.

Legal fees (incl. VAT) and expenses (incl. translation, office, courier, and travel expenses)	EUR 1,107,419.92 ⁶	EUR 3,061,324.11 ⁷
Total	EUR 1,215,899.92	EUR 3,077,408.63

21. A summary of the costs claimed by the Parties for Phase 2 is as follows:

	Claimant⁸	Respondent⁹
Experts	EUR 68,735.32	EUR 41,220.00
Legal fees (incl. VAT) and expenses (incl. translation, office, courier, and travel expenses)	EUR 288,835.05 ¹⁰	EUR 2,114,671.06 ¹¹
Total	EUR 357,570.37	EUR 2,155,891.06

⁶ The Claimant claimed EUR 1,079,857.17 in legal fees (including VAT in the amount of EUR 179,976.19), plus EUR 16,413.69 in translation, office, and courier expenses and EUR 11,149.06 in travel expenses.

⁷ The Respondent claimed EUR 2,946,179.57 in legal fees (including VAT in the amount of EUR 590,522.93), plus EUR 115,144.54 in expenses.

⁸ Claimant's Submission on Costs, Section I(F).

⁹ Respondent's Submission on Costs, para. 10.

¹⁰ The Claimant claimed EUR 281,878.78 in legal fees (including VAT in the amount of EUR 46,979.79), plus EUR 1,193.45 in translation, office, and courier expenses and EUR 5,762.82 in travel expenses.

¹¹ The Respondent claimed EUR 2,037,889.02 in legal fees (including VAT in the amount of EUR 245,297.79), plus EUR 76,782.04 in expenses.

III. THE PARTIES' ARGUMENTS

A. APPLICABLE RULES AND PRACTICE

1. *The Claimant*

22. The Claimant submits that, while Article 40(1) of the UNCITRAL Rules establishes a presumption that the unsuccessful party should bear the costs of the arbitration, it nevertheless authorizes the Tribunal to apportion costs as it deems reasonable under the circumstances of the case.¹² By contrast, Article 40(2) of the UNCITRAL Rules contains no presumption and grants the Tribunal total discretion to apportion the costs of legal representation and assistance as it deems reasonable.¹³ The Claimant argues that, “ultimately, whether an apportionment is reasonable is a subjective inquiry”, but that certain criteria can be derived from practice, including (i) the parties’ degree of success on their claims and defences; (ii) the parties’ conduct during the arbitral proceedings; (iii) the nature of the parties to the dispute; and (iv) the nature of the dispute resolution mechanism.¹⁴ In particular, the Claimant points to what it describes as “[t]he prevailing view on costs apportionment in investment treaty arbitration [...] namely that parties to such proceedings shall in principle divide the costs of the arbitral tribunal evenly and bear their own costs of representation, save in cases of frivolous or bad faith claims.”¹⁵ The Claimant adds that, to the extent that the Tribunal chooses to deviate from this rule, “[a]n apportionment of costs in proportion to a party’s level of success is particularly appropriate in cases in which success is split,” and that “[i]n the absence of claims expressed in money, the amount of work done and time spent, as reflected in the Parties’ submissions, in the hearing time devoted to the objections, and the Tribunal’s time spent in deciding on them, may serve as an adequate surrogate and indicator of the importance and value of an objection.”¹⁶

2. *The Respondent*

23. The Respondent submits that only exceptional circumstances – which it alleges are not present in this case – can justify the derogation from what it describes as the “costs follow the event”

¹² Claimant’s Submission on Costs, para. 6.

¹³ Claimant’s Submission on Costs, para. 7.

¹⁴ Claimant’s Submission on Costs, para. 8.

¹⁵ Claimant’s Submission on Costs, para. 24; Claimant’s Response on Costs, para. 1, citing D. Caron & L. Caplan, *THE UNCITRAL RULES: A COMMENTARY*, 2ND ED. (2013), pp. 874-875, 890; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL/PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶¶ 340, 342.

¹⁶ Claimant’s Submission on Costs, paras. 10-11.

rule for arbitration costs as established by Article 40(1) of the UNCITRAL Rules.¹⁷ In addition, despite the absence of any presumption as to the allocation of the costs of legal representation under Article 40(2), the Respondent argues that “investment treaty-based UNCITRAL tribunals have consistently held that the prime factor in determining how *both* categories of costs shall be reasonably apportioned is the *same*, namely *success in the proceedings*”,¹⁸ and that success should be measured in accordance with “the impact of the Tribunal’s decision on the independent components of Claimant’s overall case.”¹⁹ The Respondent adds that UNCITRAL tribunals have also taken a party’s improper conduct during the proceedings, including the initiation of similar parallel proceedings, into account when allocating the costs of legal representation between the parties.²⁰

B. APPORTIONMENT OF COSTS FOR PHASE 1

1. The Claimant

24. The Claimant notes that it was successful in defeating the intra-EU BIT objection and the indirect investment objection. Since a preponderance of the Respondent’s written and oral submissions and some 64% of the First Award was devoted to these objections, the Claimant submits that it had a 60% success rate in Phase 1.²¹ Moreover, the Claimant argues that the Respondent raised these objections in disregard of “a clear line of adverse jurisprudence known to the Respondent”.²²
25. As regards the Respondent’s successful Article 8 objection, the Claimant asserts that the Respondent’s “success did not come easy” given the complex questions of Slovak law and

¹⁷ Respondent’s Response on Costs, para. 4, referring to *Canfor Corp. v. USA, Tembec et al. v. USA, and Terminal Forest Prods. Ltd. v. USA*, NAFTA/UNCITRAL, Joint Order on Costs and Termination, 19 July 2007, ¶ 139; *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic (Number1)*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 348.

¹⁸ Respondent’s Submission on Costs, paras. 4-5 (emphasis in original); Respondent’s Response on Costs, para. 5, referring to *Nova Scotia Power Inc. v. Venezuela*, PCA/UNCITRAL, Award on Costs, 30 August 2010, ¶¶ 30-31; *Methanex Corp. v. USA*, Final Award, 3 August 2005, Part V, ¶¶ 5, 10; *Int’l Thunderbird Gaming Corp. v. Mexico*, Award, 26 January 2006, ¶ 213; *Alps Finance and Trade AG v. Slovakia*, Award, 5 March 2011, ¶¶ 263-267.

¹⁹ Respondent’s Response on Costs, para. 8.

²⁰ Respondent’s Submission on Costs, paras. 6-7, citing D. Caron *et al.*, *THE UNCITRAL RULES: A COMMENTARY* (2006), pp. 952-953, citing in turn *CME Czech Republic B.V. v. Czech Republic*, Partial Award, 13 September 2001, ¶ 621; *Nova Scotia Power Inc. v. Venezuela*, PCA/UNCITRAL, Award on Costs, 30 August 2010, ¶¶ 31, 33-37; *Alps Finance and Trade AG v. Slovakia*, Award, 5 March 2011, ¶¶ 263-266.

²¹ Claimant’s Submission on Costs, para. 13. The Claimant states that this translates into a 20% compensation rate. *See id.* n. 7 (“Mathematically: compensation rate = success rate (60) x 2 (120) – 100 = 20”).

²² Claimant’s Submission on Costs, para. 14, referring, in respect of the intra-EU BIT objection, to *Binder v. Czech Republic*, *Easter Sugar v. Czech Republic*, and *Eureko v. Slovak Republic*, all of which had previously rejected similar objections.

treaty interpretation involved.²³ The Claimant’s unsuccessful argument based on the MFN provision also “concerned unsettled matters of international law,” which other tribunals have found to be sufficient grounds to decline to award costs against the unsuccessful party.²⁴ The above-mentioned factors, the Claimant submits, justify that it be awarded no less than 30% of its costs in Phase 1.²⁵ The Claimant adds that its unsuccessful challenges to Professor Stern were made in good faith and, in any case, involved a negligible amount of the Parties’ overall time and costs.²⁶

26. The Claimant rejects the assertion that it imposed additional costs on the Respondent in this phase. The Claimant asserts that it was transparent about why it considered it necessary to advance one position in the court litigation and another in the arbitration.²⁷ The Claimant also contends that “[a]micus submissions are becoming a standard in investment treaty arbitration” and that its request to allow Austria to intervene did not cause delay in the arbitration.²⁸

2. The Respondent

27. The Respondent argues that it should be considered substantially successful in Phase 1, since its Article 8 objection effectively defeated the claims raised under Articles 2 and 4 of the BIT, leaving only a tentative claim under Article 5 that was subject to further jurisdictional objections in Phase 2.²⁹ The Respondent also notes that it defeated the two challenges to Professor Stern.³⁰
28. As regards the jurisdictional objections on which the Claimant prevailed (namely, the intra-EU BIT objection and the indirect investment objection), the Respondent notes that the Tribunal itself recognized that previous awards had failed to grapple with important aspects of the intra-EU BIT objection, and argues that the indirect investment objection was reasonable on the basis of the precedent in *HICEE v. Slovak Republic*.³¹ Moreover, these objections could be no more

²³ Claimant’s Submission on Costs, para. 16.

²⁴ Claimant’s Submission on Costs, para. 17; Claimant’s Response on Costs, para. 12, noting that the decision in *Austrian Airlines v. Slovak Republic* was subject to a strong dissent by Judge Charles Brower and was not wholly accepted by the Tribunal in this case.

²⁵ Claimant’s Submission on Costs, para. 18.

²⁶ Claimant’s Response on Costs, para. 9.

²⁷ Claimant’s Response on Costs, para. 13.

²⁸ Claimant’s Response on Costs, para. 15.

²⁹ Respondent’s Submission on Costs, p. 2; Respondent’s Response on Costs, paras. 8-9, referring to Second Award on Jurisdiction, ¶¶ 252.

³⁰ Respondent’s Submission on Costs, p. 2.

³¹ Respondent’s Response on Costs, paras. 12-13, referring to First Award, ¶¶ 164, 269-270.

unreasonable than the Claimant's arguments on the Article 8 objection in spite of the decision in *Austrian Airlines v. Slovak Republic*.³²

29. The Respondent contends that the Claimant also imposed additional costs on the Respondent by,

twice challenging Professor Stern, with the second challenge causing the postponement of the 2011 hearing; and requesting an *amicus* submission from Austria, which added to the complexity of the proceedings.³³

C. APPORTIONMENT OF COSTS FOR PHASE 2

1. *The Claimant*

30. The Claimant notes that, although the Respondent prevailed, "it was by no means a clear-cut victory." The "submissions on each issue [were] considerable in both quality and volume; and the detail and rigour of the second Award on Jurisdiction evidence enough that Claimant was not fighting a battle it was bound to lose right [from] the outset."³⁴ Moreover, the Tribunal dismissed two of the Respondent's three alternative formulations of its objections in this phase, including the constructive agreement objection and the first waiver objection.³⁵
31. As regards the conduct criticized by the Respondent, the Claimant submits that its request for a full translation of Swedish court decisions was justified, and notes that the Respondent had never itself pleaded that the Claimant should have informed the Bratislava court of the First Award.³⁶ With respect to its objection to the Respondent's Rejoinder, the Claimant asserts that it is the Respondent who should be faulted for having submitted a Rejoinder that exceeded the bounds of what could reasonably have been expected at that stage of the proceedings. According to the Claimant, the Respondent's actions in this regard violated the Claimant's due process rights, led the Tribunal to dismiss a section of it of its own initiative, and necessitated the postponement of the second hearing on jurisdiction.³⁷

³² Respondent's Submission on Costs, p. 3; Respondent's Response on Costs, para. 14.

³³ Respondent's Submission on Costs, p. 3.

³⁴ Claimant's Submission on Costs, para. 19.

³⁵ Claimant's Submission on Costs, paras. 20-22.

³⁶ Claimant's Submission on Costs, para. 23; Claimant's Response on Costs, paras. 16-17.

³⁷ Claimant's Response on Costs, para. 18, referring to Procedural Order No. 6, 30 May 2013.

2. The Respondent

32. The Respondent highlights that it successfully established that its jurisdictional objections were admissible and that the Tribunal lacked jurisdiction over the Claimant's remaining Article 5 claim.³⁸ It claims that neither the complexity and quality of the Claimant's arguments nor the possibility that the Claimant might have prevailed in this phase "detract from the circumstance of Respondent's success".³⁹
33. The Respondent also argues that the Claimant imposed additional costs on the Respondent through its conduct in Phase 2.

According to the Respondent, the Claimant also unnecessarily called for full translations of all Swedish court decisions – and unduly objected to the Respondent's Rejoinder and requested the postponement of the second hearing on jurisdiction – only to then submit a Rebuttal that exceeded its permitted scope.⁴¹

D. THE DISPARITY BETWEEN THE PARTIES' COST CLAIMS

1. The Claimant

34. The Claimant submits that the Respondent's costs for legal representation and assistance in both phases are disproportionate and unreasonable: the Respondent's costs are two and a half times those of the Claimant for Phase 1 and six times those of the Claimant for Phase 2.⁴² Moreover, "[t]aking into account how much more time intensive phase one was, this allocation [for Phase 2] simply does not fit."⁴³ The Claimant also insists that the Slovak Republic is exempt from VAT and thus rejects the Respondent's claim for Slovak VAT.⁴⁴

³⁸ Respondent's Submission on Costs, para. 8(1)(b).

³⁹ Respondent's Response on Costs, para. 16. *See also id.* at paras. 17-18, discussing *Apotex Inc. v. United States*, UNCITRAL, Award on Jurisdiction and Admissibility (Jun. 14, 2013) ¶¶ 340-342.

⁴¹ Respondent's Submission on Costs, pp. 4-5, referring to Procedural Order No. 7, 11 June 2013; Procedural Order No. 9, 20 August 2013.

⁴² Claimant's Response on Costs, paras. 19-20.

⁴³ Claimant's Response on Costs, para. 19.

⁴⁴ Claimant's Response on Costs, para. 21 (giving three reasons that the Respondent is not subject to VAT: (1) the invoices are generated by US-based entities; (2) acting in an investor-State arbitration is not a commercial activity; and (3) and import-VAT is not applicable to legal services).

2. The Respondent

35. The Respondent submits that “[the] disparity between the amounts expended by Respondent and claimed by Claimant should come as no surprise. Claimant itself acknowledged throughout these proceedings the rigor of the Republic’s defense.”⁴⁵ The Respondent adds that it “was entitled to undertake each and every reasonable effort, and to defend the claims vigorously”, in order “to defend fundamental policy choices that had been settled upon through the democratic process.”⁴⁶

E. THE RELIEF REQUESTED BY THE PARTIES

36. The Claimant requests that the Tribunal decide as follows:

award to it 30% (or more, in the discretion of the Tribunal) of all of its costs for the first phase of the jurisdictional proceedings; in any event, award no costs to the Respondent for any of the phases.⁴⁷

37. The Respondent requests that the Tribunal decide as follows:

render an award pursuant to Article 40(1) and 40(2) of the UNCITRAL Rules ordering that [the Claimant] bear the costs of the expended portion of the Slovak Republic’s deposits of €525,000 (in addition to the return of the unexpended portion), the costs of experts in the amount of €57,304.52, and Respondent’s costs for legal representation and assistance in the amount of €5,175,995.17, as well as interest thereon from the date of the award until paid in full.⁴⁸

⁴⁵ Respondent’s Response on Costs, para. 23.

⁴⁶ Respondent’s Response on Costs, para. 23.

⁴⁷ Claimant’s Submission on Costs, para. 25.

⁴⁸ Respondent’s Submission on Costs, p. 5; Respondent’s Response on Costs, para. 24.

IV. THE TRIBUNAL'S ANALYSIS

A. APPLICABLE RULES AND PRACTICE

38. Article 38 of the UNCITRAL Rules provides that “[t]he arbitral tribunal shall fix the costs of arbitration in its award” and defines the “costs of arbitration” as follows:

The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

39. Article 40 of the UNCITRAL Rules then sets forth the relevant rules as to the allocation of costs. Article 40 provides in relevant part:

1. Except as provided in paragraph 2, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

40. As already noted by the Tribunal in its Second Award, Article 40 gives the Tribunal considerable discretion regarding costs. There is, however, a clear distinction between the first and second paragraphs of Article 40. The former lays down a general principle that the unsuccessful party should bear the entirety of the costs to which that paragraph applies (i.e. all

the costs listed in Article 38 except for the costs of legal assistance and representation of the parties under Article 38(e)). A tribunal may depart from that principle if, in the light of all the circumstances of the case, it considers it reasonable to do so, but the starting point is an assumption that “costs follow the event”. By contrast, the second paragraph of Article 40, which applies to the costs of legal assistance and representation, contains no general principle to serve as a starting point. The Tribunal does not accept that it should approach the question of apportionment of costs under the second paragraph on the basis that costs should follow the event unless there is a compelling reason to decide otherwise, for that would be to assimilate the second paragraph to the first in spite of the clear difference in language. Nor can the Tribunal accept that it should approach an application for apportionment of costs under the second paragraph on the basis that each party should normally be expected to bear its own costs unless there is a compelling reason to decide otherwise. That would be to read into the second paragraph a presumption that is not there; had it been the intention of those who drafted Article 40 to apply such a presumption, the drafting of the first paragraph strongly suggests that they would have included express language to that effect.

41. Nevertheless, while the starting point for the exercise of the Tribunal’s discretion is different under the two paragraphs of Article 40, the factors which the Tribunal must take into account in the exercise of that discretion are very similar. The Tribunal agrees with the Respondent that the parties’ relative degree of success is the principal consideration. This arises from the basic principle that the successful party “has in effect been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself.”⁴⁹
42. As stated in the Second Award, the Tribunal regards as relevant both the overall result as well as each Party’s success in respect of discrete aspects of its case. The party who is successful overall should in principle be made whole, but not necessarily in respect of independent claims, jurisdictional objections, or procedural applications, on which it was not successful and which have contributed to the overall costs of the arbitration in a significant and measurable way. The latter principle is especially appropriate in the apportionment of the cost of legal representation and assistance. Consequently, the Tribunal is inclined to look primarily at the overall result when allocating the costs of arbitration in accordance with Article 40(1), but to look more closely also at the Parties’ respective success on the various claims, jurisdictional objections, and procedural applications that materially impacted upon the Parties’ legal costs when apportioning these under Article 40(2). The Tribunal considers that this difference in approach under the two paragraphs of Article 40 follows from the difference between the starting point under each paragraph.

⁴⁹ *SD Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Final Award on Costs, 30 December 2002, ¶ 15.

43. Success is not, however, the only relevant criterion. The conduct of each party is a material consideration, particularly where it has led to costs being unnecessarily incurred. Thus, if a party advanced a claim (or a jurisdictional objection) that was manifestly untenable or frivolous, that would be a highly pertinent consideration. Time-wasting tactics, failure to meet deadlines, and other procedural misconduct are also relevant.
44. Moreover, unlike those costs governed by the first paragraph of Article 40, the costs of each party's legal assistance and representation are determined by the choices made by that party and are not controlled by the tribunal. Article 38(e) thus makes clear that the costs of legal assistance and representation constitute costs of the arbitration "only to the extent that the arbitral tribunal determines that the *amount* of such costs is reasonable" (emphasis added).

B. ARTICLE 40(1): COSTS OF THE TRIBUNAL

45. The costs of the Tribunal are set out at paragraphs 15-19, above.
46. The outcome of the Respondent's jurisdictional challenges is that the Respondent has succeeded in establishing that the Tribunal lacks jurisdiction over any part of the Claimant's claims. The starting point under Article 40(1) is, therefore, the principle that the Claimant, as the unsuccessful party, should bear the costs covered by this provision. The question is whether, taking into account all the circumstances of the case, it would be reasonable to depart from that general principle.
47. The Tribunal has carefully considered the Claimant's arguments that departure from the general principle is warranted, but it is not persuaded by them. It is true that the first phase of the proceedings resulted in a decision that rejected the Respondent's first two jurisdictional objections and upheld – albeit subject to the outcome of the (ultimately successful) additional challenge – jurisdiction in respect of the Article 5 claim. However, as stated in paragraph 42, above, it is the overall success of a party which is the principal consideration under Article 40(1) and the Respondent has achieved that overall success. Moreover, even if one considers the two phases of the proceedings separately, the Respondent must be considered to have emerged more successfully from the first phase than did the Claimant. The argument on which it succeeded in the first phase established that the Tribunal lacked jurisdiction over the claims under Articles 2 and 4 of the BIT. Those claims had occupied a far more prominent position in the Claimant's case than had the only claim which survived the first phase. In the second phase, the Respondent was entirely successful.
48. Nor does the Tribunal consider that the Respondent can be faulted for having brought the first two jurisdictional objections. Neither objection can properly be characterized as frivolous.

Although unsuccessful, neither fell into the category of an objection so untenable that it was obviously doomed to fail.

49. As for the Respondent's procedural conduct, while the Tribunal held in the Second Award that the Respondent was guilty of undue delay in raising one aspect of its waiver objection, that did not affect the overall outcome of the case and, in any event, has to be considered in the context of a number of criticisms which the Tribunal made of the Claimant's conduct of the proceedings.
50. The Tribunal therefore concludes that the Claimant should bear the entire costs incurred by the Tribunal. Those costs amounted to EUR 1,031,961.15 as set out in paragraph 19, above. The Parties' deposits amounted to EUR 1,050,000 (in equal shares) and the Claimant paid an additional EUR 3000 in appointing authority fees directly to the PCA, leaving an unexpended balance of EUR 21,038.85. That balance will be returned in equal shares (EUR 10,519.43) to each Party.⁵⁰ The Claimant is, therefore, required to reimburse the Respondent EUR 514,480.58 for the costs met from the Respondent's share of the deposit.
51. Article 40(1) is also applicable to costs under Article 38(c), namely "the costs of expert advice and assistance required by the arbitral tribunal". This heading includes the costs of experts retained by the parties. The Tribunal considers that the costs of the experts retained by the Parties were reasonable and that the expert reports were of assistance. It follows that these costs fall within Article 38(c) and, in accordance with the principle set out above, the Claimant should reimburse the Respondent for the costs of the experts for whom the Respondent paid. The total costs of experts paid by the Respondent amount to EUR 57,304.52.
52. Accordingly, the Tribunal concludes, in the exercise of its powers under Article 40(1) of the UNCITRAL Rules, that the Claimant shall reimburse the Respondent EUR 571,785.10.

C. ARTICLE 40(2): COSTS OF LEGAL ASSISTANCE AND REPRESENTATION

53. Turning to the costs of legal representation and assistance incurred by each Party, the Tribunal begins by recalling that its powers under Article 40(2) are not constrained by the same general principle which applies under Article 40(1). While the overall success of the Respondent in its jurisdictional objections is certainly a relevant factor, that overall result is considerably tempered by the mixed success of the Parties on the various jurisdictional objections raised during the first phase of the proceedings. The Tribunal does not believe that any of the arguments put forward by either side were unreasonable. However, the Respondent's two

⁵⁰ D. Caron & L. Caplan, *THE UNCITRAL RULES: A COMMENTARY*, 2ND ED. (2013), p. 900 ("The unexpended portions of these deposits, when no longer required, must be returned to the parties in amounts proportional to the relative percentage of contribution").

unsuccessful objections, and in particular the intra-EU BIT objection, occupied a very considerable portion of the Parties' written and oral submissions. The Tribunal does not accept the Claimant's argument that it had a preponderance of success in the first phase of the proceedings. While it succeeded on two of the jurisdictional objections, it failed on the third and, as a result, the jurisdiction of the Tribunal was reduced to its Article 5 claim. Nevertheless, the Tribunal considers it right to take into account the amount of time and, correspondingly of costs, taken up by the intra-EU BIT objection and the indirect investment objection in the first phase of the proceedings.

54. The Respondent's success in the second phase was also tempered by the fact that it failed on two of the three arguments that it advanced, although this mixed result is less significant than that in the first phase of the proceedings, as the waiver arguments were not entirely separate from one another in the way that the intra-EU BIT objection was separate from the other objections considered in the first phase.
55. For these reasons, the Tribunal considers that it would be reasonable for the Claimant to meet part, but certainly not all, of the Respondent's costs of legal assistance and representation.
56. The Tribunal has also considered whether the conduct of the Parties was such as to affect the amount which the Claimant should pay to the Respondent but has concluded that the misconduct of which each Party accused the other was not sufficient, where it was established, to make a significant difference for the purpose of apportionment of costs.
57. The most serious issue in this respect is the lack of candour shown by the Claimant in relation to its decision to pursue proceedings in the Bratislava Court at the same time that it was pursuing its arbitration claim. The Claimant instituted those proceedings on 22 November 2010, a little more than two weeks after the Respondent had filed its Statement of Defence and Request for Bifurcation, at a time when the Tribunal was still considering that request (the Claimant having sought an extension of time to respond to it). As the Tribunal made clear (in paragraph 119 of the Second Award), had the Claimant informed the Tribunal and the Respondent that it had commenced proceedings in the Bratislava Court, it would have made it possible for the Respondent to amend its Statement of Defence and to raise the commencement of those proceedings as an additional jurisdictional objection. However, the Second Award makes clear that the Respondent's objection based on the proceedings in the Bratislava Court succeeded because the Claimant's subsequent conduct of the litigation in Bratislava amounted to a waiver of its right to arbitrate. It cannot, therefore, be said that the Claimant's failure to inform the Tribunal in November 2010 that it had commenced proceedings in the Bratislava Court ultimately increased legal costs. Similarly, although the Claimant's failure to keep the

Bratislava Court informed of developments in the arbitration formed part of the context that led the Tribunal to accept the Respondent's second waiver objection, it did not increase the costs of Phase 2.

58. There is no reason to hold the Claimant responsible for the increased procedural costs arising from the invitation to Austria, the Czech Republic, and the European Commission to make *amicus curiae* submissions to the Tribunal. While such invitation was prompted by a request from the Claimant, the Tribunal invited these submissions on the basis that they would usefully contribute to the Tribunal's own analysis of the intra-EU BIT objection. Moreover, the Claimant had only requested that Austria be invited to make an *amicus curiae* submission. It was the Respondent's (albeit subsidiary) request that the European Commission and the Czech Republic also be invited to make *amicus curiae* submissions.
59. While it is true that, in the second phase of the proceedings, the Respondent submitted a Rejoinder that exceeded the bounds of what could reasonably have been expected at that stage and thus caused the postponement of the second hearing on jurisdiction,⁵¹ the Claimant thereafter submitted a Rebuttal that also exceeded the scope allowed by the Tribunal.⁵² In addition, full translations of Swedish legal authorities were explicitly requested "[i]n order for the Tribunal to be able to assess for itself the cases that are cited by the Parties' experts on Swedish law" and not only for the Parties' benefit.⁵³ The allegations regarding the translations are thus irrelevant to the issue of apportionment of costs.
60. The Tribunal therefore concludes that, in the exercise of its discretion under Article 40(2) of the UNCITRAL Rules, it should direct the Claimant to reimburse the Respondent for a portion of its costs of legal assistance and representation such as will reflect both the overall success of the Respondent and its failure on some important and time-consuming jurisdictional objections.
61. In determining what amount would be reasonable, the Tribunal is compelled, however, to observe that the amounts claimed by the Respondent are far in excess of those costs incurred by the Claimant. While acknowledging the various legitimate reasons that one party's costs may differ from another's, the magnitude of the difference is impossible to ignore in this case. Of particular importance, since it was in this phase that the Respondent achieved the more complete success, the disparity is most marked in respect of the second phase of the proceedings. The Respondent's net legal fees for Phase 2 are more than seven times those of the Claimant. Moreover, the Respondent's costs for legal representation in Phase 2 are

⁵¹ Procedural Order No. 6, 30 May 2013.

⁵² Procedural Order No. 9, 20 August 2013.

⁵³ Procedural Order No. 7, 11 June 2013.

approximately two thirds of what it claims in respect of Phase 1. By contrast, the Claimant's costs in Phase 2 are less than one third of those incurred in Phase 1. The Tribunal's costs in Phase 2 are also less than one third of those incurred in Phase 1.

62. The issues in the second phase of the case were comparatively limited in scope and the written and oral arguments far shorter than those in the first phase. Moreover, the Tribunal repeatedly expressed its expectation, most notably during the conference calls of 28 January 2013 and 29 May 2013, that the objections to be decided in Phase 2 could and should be dealt with more quickly and efficiently as compared to Phase 1. The Respondent's invocation of its need "to defend fundamental policy choices that had been settled upon through the democratic process" is unavailing as a justification for this disparity, especially since those "policy choices" pertain to the merits of the dispute between the Parties, which the Respondent has never been required to litigate given its success on jurisdiction. Therefore, while the Respondent was entitled to defend its interests vigorously, it would not be reasonable to require the Claimant to bear more than a portion of these costs under the circumstances.
63. In the light of the foregoing, Tribunal considers that it is reasonable to direct that the Claimant shall pay to the Respondent the sum of EUR 1,000,000.00 in relation to the costs of legal assistance and representation. The Tribunal considers that this sum represents a reasonable proportion of those costs which were reasonably incurred, taking account of the factors set out above.

V. DISPOSITIF

64. In view of the foregoing, the Tribunal decides as follows:

- i.* Under Article 40(1) of the UNCITRAL Rules, the Claimant shall reimburse the Respondent in the amount of EUR 571,785.10 in respect of the costs of arbitration under Article 38(a), (b), (c), and (f) of the UNCITRAL Rules, plus interest at six-month LIBOR plus 2%, compounded bi-annually, from the date of this Award until full payment is made by the Claimant.
- ii.* Under Article 40(2) of the UNCITRAL Rules, the Claimant shall contribute to the Respondent's costs of legal assistance and representation under Article 38(c) of the UNCITRAL Rules, the amount of EUR 1,000,000.00, plus interest at a rate of six-month LIBOR plus 2%, compounded bi-annually, from the date of this Award until full payment is made by the Claimant.

Done this 20th day of August 2014.

Place of Arbitration: Stockholm, Sweden.

Dr. Dr. Alexander Petsche

Professor Brigitte Stern

Sir Christopher Greenwood CMG QC
Presiding Arbitrator