

**PCA CASE NO. 2018-37
IN THE ARBITRATION MATTER UNDER THE
ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW 1976**

**PROFESSOR CHRISTIAN DOUTREMEPUICH &
MR ANTOINE DOUTREMEPUICH**

Claimants

VS.

THE REPUBLIC OF MAURITIUS

Respondent

RESPONDENT'S COST SUBMISSION

24 July 2019

Before:

Professor Maxi Scherer (President)

Professor Olivier Caprasse

Professor Jan Paulsson

LALIVE

INTRODUCTION

- 1 The Republic of Mauritius makes this Submission on Costs in accordance with the Parties' agreement, as recorded in the Tribunal's letter of 27 June 2019.
- 2 For the reasons set out below, the Respondent requests an award on costs in its favour in the amounts of **USD 458,875.96 and EUR 225,000**, together with interest at the rate of LIBOR + 2% as from the date of the Award until payment.
- 3 **Section 1** sets out the Respondent's costs by way of a schedule as agreed between the Parties. As also agreed, the Respondent does not submit the relevant documentation evidencing the costs incurred, but will do so if the Claimants or the Tribunal so require.
- 4 In **Section 2**, the Respondent sets out its submission on the allocation of costs in its favour in this case.
- 5 The Respondent's prayer for relief on costs is set out in **Section 3**.

1 THE RESPONDENT'S SCHEDULE OF COSTS

1.1 Summary of the Respondent's costs

- 6 The Respondent has incurred the following costs in connection with this arbitration:

	Description	Amount (USD)	Amount (EUR)
a.	PCA fees/Tribunal fees and expenses		225,000.00
b.	LALIVE legal fees	421,885.32	
c.	LALIVE expenses	33,516.64	
d.	Mauritius in-house expenses	3,474.00	
	TOTAL	458,875.96	225,000.00

- 7 These categories of costs are broken down below and supporting documentation is available upon request.

1.2 PCA/Tribunal Fees

- 8 The Respondent has paid **EUR 225,000** to the PCA as an advance on the costs of the arbitration, in two instalments of EUR 100,000 and EUR 125,000 paid on 15 August 2018 and 14 May 2019 respectively.

1.3 LALIVE's legal fees and expenses

LALIVE Invoice No.	Invoice Date	Invoice Period	Legal Fees (USD)	Sundry Expenses (USD)	Expenses (USD) ¹	Total (USD)
1801027	19.06.2018	01.04.2018-31.05.2018	28,507.40	570.15	104.94	29,182.49
1801446	20.08.2018	01.06.2019-31.07.2018	13,205.70	264.11	220.26	13,690.07
1801580	07.09.2018	01.08.2018-31.08.2018	5,082.50	101.65	58.56	5,242.71
1801819	11.10.2018	01.09.2018-30.09.2018	9,824.60	196.49	58.67	10,079.76
1802088	12.11.2018	01.10.2018-31.10.2018	4,315.00	86.30	120.35	4,521.65
1802357	14.12.2018	01.11.2018-30.11.2018	30,083.90	781.68	9,915.98	40,781.56
1802461	31.12.2018	01.12.2018-31.12.2018	1,179.12	23.12	95.34	1,297.58
1900418	15.03.2019	01.02.2019-28.02.2019	27,473.70	549.47	60.71	28,083.88
1900632	08.04.2019	01.03.2019-31.03.2019	90,350.60	1,807.01	119.48	92,277.09
1900813	07.05.2019	01.04.2019-30.04.2019	4,056.40	81.13	948.93	5,086.46
1901067	07.06.2019	01.05.2019-31.05.2019	43,560.60	871.21	121.34	44,553.15

¹ All expense amounts were converted to USD for the purpose of billing, regardless of the currency in which the expense was originally incurred.

LALIVE Invoice No.	Invoice Date	Invoice Period	Legal Fees (USD)	Sundry Expenses (USD)	Expenses (USD) ¹	Total (USD)
1901310	08.07.2019	01.06.2019-30.06.2019	152,153.50	3,043.07	13,079.59	168,276.16
1901433	24.07.2019	01.07.2019-24.07.2019	12,092.30	237.10	N/A	12,092.30
TOTAL (USD)			421,885.32	8,612.49	24,904.15	455,164.86

- 9 Sundry expenses such as telephone, photocopying, printing, stationary and research costs were invoiced at a flat rate of 2% of legal fees.
- 10 The expenses incurred by the Respondent include:
- a) courier services (associate with the filing of submissions) and other miscellaneous expenses; and
 - b) travel and accommodation costs of the Respondent's legal team and the Respondent's representative, Mr Ramloll, for the Hearing in The Hague namely:
 - i) USD 7,042.46 in flights for the Respondent's legal team: and
 - ii) USD 6,056.65 in accommodation, meals, taxi and other costs for he Respondent's legal team and Mr Ramloll.

1.4 The Respondent's additional in-house expenses

- 11 The only in-house expense not included in Section 1.3 above is the cost of Mr Ramloll's flights from Mauritius to The Hague and back for the Hearing, in the amount of MUR 124,732, *i.e.* **USD 3,474.**

2 THE RESPONDENT IS ENTITLED TO BE REIMBURSED ALL OF ITS REASONABLE COSTS

2.1 The successful party is entitled to costs

12 These proceedings have been conducted in accordance with the 1976
UNCITRAL Arbitration Rules (the “**UNCITRAL Rules**”).

13 Article 40(1) of the UNCITRAL Rules provides:

“Except as provided in paragraph 2, the costs of 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.”

14 The rule therefore is that, in principle, the unsuccessful party must bear the costs of arbitration, although the arbitral tribunal may depart from the rule if the circumstances so require.² There are no such circumstances in this case.

15 Arbitral tribunals operating under the UNCITRAL Rules have generally followed the rule set out in Article 40(1) when dismissing claims for lack of jurisdiction.³ Thus, for instance, in *European Investment Bank v. The*

² *European Investment Bank AG v. The Slovak Republic*, Award on Costs, PCA Case No. 2010-17, 20 August 2014, at **Exhibit RLA-58**, p. 18 (para. 46).

³ See e.g. *Nova Scotia Power Incorporated v. The Bolivarian Republic of Venezuela*, Award, UNCITRAL/PCA, 30 August 2010, at **Exhibit RLA-59**, p. 7 *et seq.* (paras. 18-20) (“Accordingly, pursuant to the UNCITRAL Rules, the successful party should, ‘in principle’ not bear the costs of the arbitration. Such principle should only be ignored if the Tribunal considers the apportionment between the parties to be reasonable. The Tribunal observes that the Award on Jurisdiction concludes that the Arbitral Tribunal did not have jurisdiction over the Claimant’s claims. This Preliminary Proceeding had therefore a winning party: Venezuela. The Tribunal therefore sees no ground to conclude that it would be reasonable for the Parties to share the costs of the arbitration. Consequently, the Claimant, as the unsuccessful party, shall bear the entire cost of this arbitration” (free translation from Spanish)); *Frontier Petroleum v. Czech Republic*, Final Award, UNCITRAL/PCA, 12 November 2010, at **Exhibit RLA-60**, p. 189 (para. 542); *Alps Finance and Trade AG v. Slovak Republic*, Award [redacted], UNCITRAL, 5 March 2011, at **Exhibit RLA-61**, p. 82 (para. 263); *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, PCA Case. No. 2010-9, 10 February 2012, at **Exhibit RLA-**

Slovak Republic, the tribunal considered that the rejection of some of the respondent's jurisdictional objections was not sufficient to depart from the rule that the claimant should bear the costs of the arbitration since the case was still dismissed for lack jurisdiction.⁴

- 16 The costs of "legal representation and assistance" are addressed in Article 40(2) of the UNCITRAL Rules, which provides:

"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."

- 17 Article 40(2) thus provides a wider discretion for arbitral tribunals than Article 40(1). However, in the context of jurisdictional decisions like the present one, investment treaty tribunals have had no difficulty awarding successful respondents the reimbursement of all or part of their costs of legal representation.⁵ This is eminently reasonable as the dismissal of a case on jurisdiction implies that the claimant should not have initiated the proceedings in the first place and thus that all costs and fees incurred by the State in this connection should have been avoided.

62, p. 112 (para. 338); *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction and Admissibility, UNCITRAL, 14 June 2013, at **Exhibit RLA-63**, p. 112 (para. 340); *Achmea B.V. v. Slovak Republic*, Award on Jurisdiction and Admissibility, PCA Case. No. 2013-12, 20 May 2014, at **Exhibit RLA-64**, p. 84 (para. 288); *ST-AD v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case. No. 2011-06, 18 July 2013, at **Exhibit RLA-65**, p. 107 (para. 427);

⁴ *European Investment Bank AG v. The Slovak Republic*, Award on Costs, PCA Case No. 2010-17, 20 August 2014, at **Exhibit RLA-58**, p. 18 *et seq.* (paras. 47-48).

⁵ See *e.g.*, *Nova Scotia Power Incorporated v. The Bolivarian Republic of Venezuela*, Award, UNCITRAL/PCA, 30 August 2010, at **Exhibit RLA-59**, p. 12 (para. 38) after having taken note that the increasing trend in investment arbitration was to award the successful party the reimbursement of its costs (*Ibid*, p.9 *et seq.* (para. 27)); *Achmea B.V. v. Slovak Republic*, Award on Jurisdiction and Admissibility, PCA Case. No. 2013-12, 20 May 2014, at **Exhibit RLA-64**, p. 84 (para. 289); *ST-AD v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case. No. 2011-06, 18 July 2013, at **Exhibit RLA-65**, p. 107 (para. 429).

2.2 The Respondent should be awarded its full costs

18 In the present case, an award of the arbitration and legal costs in the Respondent's favour is fully justified and indeed required. The Respondent has been dragged into these proceedings without any justification whatsoever: not only was this arbitration initiated on the basis of a Treaty – the France-Mauritius BIT – that does not even include an investor-State dispute resolution provision in the first place, but also the Claimants never made a protected investment under the Treaty. In brief, the Claimants' claims manifestly lack any basis in the France-Mauritius BIT.

19 Conversely, to use the words of the *Apotex Inc. v. USA* tribunal, the Respondent in this case

“has raised entirely appropriate objections, and on the basis of the Tribunal's findings, **ought never to have been embroiled in this process**. In all the circumstances, [there is] **no justification for the Respondent to bear any of the costs it has (reasonably) incurred.**”⁶

20 Put another way, like in *AFT v. Slovak Republic*, there is simply “no reason why the Respondent should bear **any part of the arbitration costs** in a case where **it was bound to withstand a claim which had been wrongly brought before an incompetent forum**”.⁷

21 As to the quantum of its costs, the Respondent submits that it is entirely reasonable when considering the issues of legal principle at stake in this arbitration. The Respondent has also ensured that its participation in these proceedings has been conducted in the most cost-efficient way possible.

22 The Respondent notes that the funds allocated to its defence in this arbitration could, and should, have been used elsewhere for the benefit of the Mauritian tax payers. Accordingly, the Respondent should also be

⁶ *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction and Admissibility, UNCITRAL, 14 June 2013, at **Exhibit RLA-63**, p. 113 (para. 342) (emphasis added).

⁷ *Alps Finance and Trade AG v. Slovak Republic*, Award [redacted], UNCITRAL, 5 March 2011, at **Exhibit RLA-61**, p. 83 (para. 268) (emphasis added).

compensated for the lost opportunity through the payment of interest, accruing from the date of each invoice, or at least from the date of the Award, until payment by the Claimants.

- 23 A rate of six-month LIBOR + 2%, as applied by many other treaty tribunals,⁸ would be appropriate in the circumstances. The Respondent requests that interest be compounded semi-annually.

3 PRAYER FOR RELIEF ON COSTS

- 24 As stated in its earlier pleadings,⁹ the Respondent requests that the Tribunal order the Claimants to compensate the Respondent for its costs incurred in connection with the proceedings, including in-house and third-party costs, legal fees, the administrative charges of the PCA and the fees and expenses of the Tribunal.
- 25 For the reasons set out above, the Respondent requests that the Tribunal order the Claimants to pay:
- a) Compensation to the Respondent in an amount of **USD 458,875.96** and **EUR 225,000**; and
 - b) Interest thereon at a rate of 6-month USD LIBOR + 2% per year, as from the date of the Award, and compounded semi-annually.

⁸ *European Investment Bank AG v. The Slovak Republic*, Award on Costs, PCA Case No. 2010-17, 20 August 2014, at **Exhibit RLA-58**, p. 23 (para. 64); *Achmea B.V. v. Slovak Republic*, Award on Jurisdiction and Admissibility, PCA Case. No. 2013-12, 20 May 2014, at **Exhibit RLA-64**, p. 84 (para. 290). The Respondent would however seek a rate of 6-month USD LIBOR + 2 %, instead of 6-month EUR LIBOR + 2 % like in these awards, because (i) the Respondent's cost claim is essentially labelled in USD, and (ii) 6-month EUR LIBOR is currently negative.

⁹ Respondent's Memorial, p. 39; Respondent's Reply on Jurisdiction, p. 41.

Respectfully submitted,

24 July 2019

For and on behalf of the Respondent,

The Republic of Mauritius

Counsel for the Respondent



Veijo Heiskanen
Domitille Baizeau
Eléonore Caroit
Augustin Barrier

ANNEX 1: LIST OF LEGAL AUTHORITIES

List of Respondent's legal authorities

- RLA-58 *European Investment Bank AG v. The Slovak Republic*, Award on Costs, PCA Case No. 2010-17, 20 August 2014
- RLA-59 *Nova Scotia Power Incorporated v. The Bolivarian Republic of Venezuela*, Award, UNCITRAL/PCA, 30 August 2010
- RLA-60 *Frontier Petroleum v. Czech Republic*, Final Award, UNCITRAL/PCA, 12 November 2010
- RLA-61 *Alps Finance and Trade AG v. Slovak Republic*, Award [redacted], UNCITRAL, 5 March 2011
- RLA-62 *ICS Inspection and Control Services Limited v. The Argentine Republic*, Award on Jurisdiction, PCA Case. No. 2010-9, 10 February 2012
- RLA-63 *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction and Admissibility, UNCITRAL, 14 June 2013
- RLA-64 *Achmea B.V. v. Slovak Republic*, Award on Jurisdiction and Admissibility, PCA Case. No. 2013-12, 20 May 2014
- RLA-65 *ST-AD v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case. No. 2011-06, 18 July 2013