

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**UAB E ENERGIJA (LITHUANIA)**

Claimant

and

**REPUBLIC OF LATVIA**

Respondent

**ICSID Case No. ARB/12/33**

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**DISSENTING OPINION ON COSTS**

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Prof. Dr. August Reinisch, Arbitrator

*Date: 22 December 2017*

## **DISSENTING OPINION ON COSTS**

1. It is with much regret that I feel compelled to dissent from the majority's decision on costs, having failed to convince my esteemed co-arbitrators that the present case is not the proper occasion to apply a cost shifting.
2. As I will explain briefly, my dissent does not result from the view that departing from the traditional investment arbitration practice to have each Party bear its own costs and to split the costs of the proceedings in equal parts would be generally inappropriate. Rather, it stems from the fact that even acknowledging the increased use of the "costs follow the event" rule in investment arbitration practice, any resulting full or partial cost shifting should be based on a number of criteria and give proper weight to the outcome of arbitral proceedings in their entirety.
3. Since my co-arbitrators and I seem to agree on the use of such a flexible principle of cost allocation, I all the more regret that we were unable to arrive at the same result in applying it.
4. As outlined in the Award, the Claimant's prayer for relief with respect to its costs is set out in paragraphs 442 and 443 of the Award. The Claimant sought reimbursement of costs in the total amount of EUR 3,083,279.25, including a success fee, or, alternatively, of costs in the amount of EUR 1,688,928.85, without a success fee.
5. The Respondent's prayer for relief with respect to its costs is set out in paragraphs 447 and 448 of the Award. The Respondent requested reimbursement of costs in an amount of no less than EUR 166,555.28.
6. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.
7. Article 61(2) and further provisions in Articles 28 and 47(j) of the ICSID Arbitration Rules give no clear guidance as to the manner in which costs should be allocated as

between the Parties and thus endows the Tribunal with wide discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the parties as it deems appropriate.<sup>1</sup>

8. This wide discretion enjoyed by ICSID tribunals contrasts with the general rule in international commercial arbitration exemplified under the 2010 UNCITRAL Arbitration Rules according to which the costs of the arbitration shall "in principle" be borne by the unsuccessful party.<sup>2</sup>
9. In fact, in past ICSID practice, most tribunals have simply "split the costs" by deciding that each party should bear its own costs and that the costs of the tribunals and the Centre should be borne in equal shares by the parties. This public international law approach to allocating costs between the parties, often also referred to as the "American" rule because of its use in US domestic litigation, clearly prevailed until a few years ago.<sup>3</sup>

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<sup>1</sup> See e.g. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 362 ("Article 61(2) does not prescribe a particular test for tribunals to assess costs, nor does it place any restrictions on a tribunal's ability to do so. In light of this, the Tribunal understands the power granted under this Article to be broad, allowing the Tribunal discretion in making its determination."); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 560 ("[...] The Tribunal considers that Article 61(2) of the ICSID Convention gives it the power to award costs (defined to include legal fees, out of pocket expenses as well as costs of the arbitration) and the discretion to decide at what level to do so. [...]"); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 316 ("Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. [...]").

<sup>2</sup> Art. 42(1) UNCITRAL Arbitration Rules 2010 ("The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. 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.").

<sup>3</sup> See e.g. *Malaysian Historical Salvors SDN BHD v. Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, para. 150 ("The Tribunal is aware that, while it can order the losing party to pay all costs, it is common ICSID practice for each party to bear its own legal costs and for the arbitration costs to be divided equally regardless of the outcome of the arbitration."); *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 125 ("The claims were not frivolous, and they were pursued in good faith and with all due expedition. The claims were, equally, defended in good faith and with due expedition. Both sides agreed to the separation of the jurisdictional issue, and this proved a sensible and economical step. The Tribunal does not consider that there is any reason to depart from the normal practice in such cases, according to which each Party shall bear its own costs, and the costs of the Tribunal shall be divided equally between the Parties."); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 322 ("The Tribunal notes that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails. See, as one example, *Metalclad v. Mexico* (5 ICSID Rep. 209 NAFTA/ICSID (AF), 2000), in which the claimant prevailed but still had to bear its own costs. The same approach of splitting all costs evenly was adopted in cases in which the State was the winning party. See as examples, *Tradex v. Albania* (5 ICSID Rep. 43 ICSID, 1999), and the NAFTA case *ADF v. United States* (6 ICSID Rep. 449, 536-237 (NAFTA/ICSID) (AF), 2003) in which the losing investors were not ordered to pay the costs of the winner, but rather each party had to pay its own legal costs and to share the costs of the arbitration."); para. 324 ("Even in very ICSID recent cases, there are examples of tribunals splitting the costs equally or in a manner not corresponding to the outcome of the case. Thus, in the 2008 case of *Duke Energy Electroquil Partners (United States) and Electroquil S.A. (Ecuador) v. Republic of Ecuador* (ICSID Case No. ARB/04/19 (2008)) small

10. More recently also ICSID tribunals have awarded costs (or parts of the costs) to the successful party in investment cases.<sup>4</sup> This may involve the costs of the proceedings and also the costs of a party's legal representation. Such an approach, following the so-called "loser pays" principle or "costs follow the event" or "English" rule, intends to put the prevailing party in a position as if it would not have had to incur the costs of pursuing a claim or defending against it.<sup>5</sup>
11. In this situation, and absent a clear indication in the ICSID Convention and Arbitration Rules, it would be incorrect, however, to consider that one approach clearly prevailed over the other. Rather, tribunals remain vested with the broad discretion inherent in Article 61(2) of the ICSID Convention.
12. The practice of ICSID tribunals also demonstrates that, in order to exercise such discretion in a rational way, they have taken into account a number of factors<sup>6</sup> to justify their cost decisions:

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sums of money were awarded to the claimants. While in another 2008 case, *Duke Energy International Peru Investments No. 1 Ltd (Bermuda) v. Peru* (ARB/03/28 (2008)), Claimant won a significant sum; nevertheless, the costs were divided equally. In the 2008 case *Biwater Gauff v. Tanzania* (ARB/05/22(2008)), the claimants won their claim as to liability but were unable to establish their damages. The Tribunal held that each party was to bear its own legal costs, and the costs of the arbitration were to be shared between the parties equally. In the December 2008 case of *TSA Spectrum de Argentina v. Argentina* (ARB/05/5 (2008)), the Tribunal decided that the costs of the arbitration were to be shared equally with each side to bear its own costs."); para. 325 ("But the investment arbitration tradition of dividing the costs evenly may be changing, although it is a bit early to know whether a different approach is evolving. [...]").

<sup>4</sup> See e.g. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 338; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 316; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 152; *ADC Affiliate Limited and ADC & ADMC Management Limited. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 542; *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 692.

<sup>5</sup> See e.g. *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 563 ("[...] The present Tribunal is of the view that a rule under which costs follow the event serves the purposes of compensating the successful party for its necessary legal fees and expenses, of discouraging unmeritorious actions and also of providing a disincentive to over-litigation. [...]").; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, para. 466 ("There is no rule in ICSID arbitration that 'costs follow the event', nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings. However, in the exercise of its discretion to allocate costs, the Tribunal has the authority to award all or part of a party's costs of the arbitration and its legal fees and expenses. Taking into account all factors in this case, the Tribunal has decided partially to apply this principle.").

<sup>6</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 620 ("In the Tribunal's view, the apportionment of costs requires an analysis of all of the circumstances of the case, including to what extent a party has contributed to the costs of the arbitration and whether that contribution was reasonable and justified. This analysis should start by considering whether a party has prevailed on its claims, and if it has prevailed only in part, whether the rejected claims were reasonable or frivolous. It should also take into account the procedural conduct of the parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily. The Tribunal notes that both Parties appear to be in agreement with these main principles: each Party considers itself to be the prevailing party, and as such seeks

13. First, when assessing the outcome of the proceedings it is necessary to look at the overall outcome of the case and not merely on whether a claimant prevailed on a specific claim. This includes both the jurisdictional and admissibility aspects as well as the merits of a case. Equally, the quantum of the ultimate decision has to be put in relation to the compensation or damages originally claimed in order to assess the relative “success” of the parties.
14. Second, investment tribunals are empowered to take into account the behavior of parties instituting proceedings. This includes issues of *bona fides*, for example, the question whether claims are brought in good faith or reflect harassing litigation, but also whether claims are fraudulently instituted<sup>7</sup> or whether investments are structured for the sole purpose of instituting investment arbitration.<sup>8</sup> ICSID tribunals have been quite explicit in awarding costs against a party in case of abuse of process<sup>9</sup> and frivolous

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the recovery of all of its costs. In addition, each Party considers that the other party’s conduct justifies a full award of costs in its favor.” [Footnotes omitted]; *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 584 (“In reaching its decision on costs in this case, the Tribunal has in particular considered the following circumstances. First, the outcome of the case is ultimately favorable to the Respondent, as the Tribunal has decided that all of the Claimant’s claims are inadmissible. Second, the Tribunal has also found that the Claimant’s pursuit of the claims in this arbitration amounts to an abuse of rights. These two reasons justify that at least a significant proportion of the overall costs be borne by the Claimant. At the same time, the Claimant has prevailed on the Respondent’s objections on *ratione personae* and *ratione materiae* jurisdiction. Considering the length of the submissions and the time devoted at the Hearing to those two objections, the costs incurred in relation to these two objections were certainly significant. While these objections were not frivolous and the Respondent was entitled to raise them, they were ultimately rejected, and it is thus fair that the outcome of such objections be taken into consideration in the Tribunal’s decision on cost allocation.”).

<sup>7</sup> See e.g. *Europe Cement Investment & Trade SA v. Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award, 13 August 2009, para. 185 (“In the circumstances of this case, where the Tribunal has reached the conclusion that the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims.”); *Cementownia “Nowa Huta” SA v. Republic of Turkey*, ICSID Case No ARB(AF)/06/2, Award, 17 September 2009, para. 178 (“In the circumstances of this case, the Arbitral Tribunal intends to employ this principle [“costs follow the event”] for the following reasons: - The Claimant has filed a fraudulent claim; - The Claimant has failed on all its requests for relief; - The Claimant has delayed the present arbitration proceeding and therefore raised its costs; [...].”).

<sup>8</sup> See e.g. *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 151 (“[...] In the circumstances of this case, the Tribunal intends to employ this principle [“costs follow the event”]. The Tribunal has concluded not only that the Claimant’s claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT and, consequently, of the ICSID Convention. It is also to be noted that the Claimant filed a request for provisional measures which was rejected in its entirety by the Tribunal and which added to the costs of the proceeding. The Respondent has been forced to go through the process and should not be penalized by having to pay for its defense.”).

<sup>9</sup> *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 201 (“The Tribunal is of the view that a finding of abuse of process justifies an award of costs against the unsuccessful party. Thus, the Claimants shall pay for the entirety of the costs of the proceedings, i.e. for the costs of the Arbitral Tribunal and for the costs of the proceeding. [...].”).

proceedings.<sup>10</sup> Likewise, the good faith of a host state should be taken into account when assessing its action even though it may be qualified as a breach of investment standards.<sup>11</sup>

15. Third, ICSID tribunals are empowered to take into account the behavior of the parties during the proceedings.<sup>12</sup> This may include poor and inefficient pleadings, in applying various forms of abusive, harassing or delaying tactics or in engaging in various other forms of inappropriate litigation techniques. The absence of such party behavior clearly points towards abstaining from any cost shifting.<sup>13</sup>
16. Further, tribunals should take into account a number of additional factors, such as the reasonableness of the costs claimed, in particular, in relation to the size, complexity, and significance of the case, but also in relation to the costs claimed by the other party. Similarly, the question whether a dispute leads to a “clear-cut” case or whether the outcome was indeed “close” should be a factor in whether or not to allocate costs.
17. On the basis of these general considerations, I consider that in the present case the following elements are relevant to the exercise of the Tribunal’s discretion: (i) the

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<sup>10</sup> *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paras. 153-154 (“In light of the Tribunal’s finding that the Claimant’s claim was brought before the Centre on the basis of a transaction that did not correspond to an arrangement that was meant to deploy any legal consequences other than on paper and, as a result, plainly could not fulfil the requirements of an investment within the meaning of Article 25(1) of the ICSID Convention and Article 1(b) of the Netherlands-Turkey BIT, the Tribunal considers it appropriate that the Claimant bear in full his legal fees and expenses, as well as the arbitration costs [...]. For the same reasons, the Tribunal also considers it appropriate that the Claimant bear the Respondent’s legal fees and expenses. A party pursuing a claim which is clearly outside the scope of the Centre’s jurisdiction should not be encouraged, and should bear the risk of paying the full costs of such frivolous proceedings. [...].”).

<sup>11</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 621 (“In the Tribunal’s view, after a consideration of all the relevant circumstances, the principles above may be adjusted to take into account that the respondent is a sovereign State. In particular, it considers that, even if a tribunal finds that a State has breached its international obligations vis-à-vis an investor, consideration must be given to the State’s motives and good faith. In particular, where the actions of a State have been guided by its good faith understanding of the public interest and the State could reasonably doubt that it was breaching its international obligations, the Tribunal may consider it appropriate to apportion costs in a manner that alleviates the burden on the respondent State. These considerations apply to situations in which the State is the respondent, not the claimant.”).

<sup>12</sup> See e.g. *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 562 (“In this regard [allocating costs], the Tribunal has considered, among other things, the following factors: [...] the conduct of the Parties during the proceedings;”).

<sup>13</sup> See e.g. *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 959 *et seq.* (“Furthermore, none of the facts that would clearly justify cost allocation (such as bad faith, abusive or unreasonable argument, or obstructions tactics) was present in this arbitration. To the contrary, each side presented valid arguments in support of its respective case and acted fairly and professionally. In particular, the extensive pleadings of both Parties greatly assisted the Tribunal in its task. [...] Having considered all these circumstances, the Tribunal considers that each Party should bear its own costs and the Parties should equally share the ICSID costs. [...].”).

Claimant succeeded with its claim for a breach of Article 3(1) of the BIT, but its claim for breach of Article 4(1) of the BIT as well as all other claims was dismissed; *(ii)* the Claimant's success on its FET claim was not a clear-cut case, as demonstrated by the Tribunal's thorough analysis above, since most of the alleged violations of Article 3(1) of the BIT did not amount to such breaches; *(iii)* the Claimant succeeded with its claim for damages only to an extent of approximately 16% of the amounts originally claimed (cf. EUR 1,585,000.00 awarded with EUR 9,820,000.00 claimed at Cl. Mem., para. 370); *(iv)* the Parties did not engage in any practices demonstrating a lack of good faith when instituting the present proceedings nor did either of them apply any subsequent abusive, harassing or delaying tactics during the proceedings; *(v)* the Claimant unusually claimed a success fee for its legal counsel resulting in a total fee claim that exceeded the Respondent's almost 20 times, even the costs without success fee (of EUR 1,688,928.85) exceeded the Respondent's claimed costs (of EUR 166,555.28) by a factor of 10.

18. In these circumstances and considering that the claims were not frivolous, were pursued and defended in good faith and with all due expedition, led to an outcome that only partially resulted in the Claimant prevailing, albeit at a disproportionately higher cost of litigation, I do not consider that there is any reason to depart from the traditional practice in ICSID cases that each Party shall bear its own costs.
19. I would thus consider it appropriate that the Parties bear their own costs and should each pay half of the costs and expenses incurred by the Tribunal and of the charges of the Centre with regard to the present arbitration proceedings.



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Prof. Dr. August Reinisch  
Arbitrator