

PCA Case No. 2013-01

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT
BETWEEN THE KINGDOM OF THE NETHERLANDS AND
THE REPUBLIC OF POLAND ON ENCOURAGEMENT AND RECIPROCAL
PROTECTION OF INVESTMENTS SIGNED ON 7 SEPTEMBER 1992,
ENTERING INTO FORCE ON 1 FEBRUARY 1994 (THE "TREATY")**

-and-

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RULES OF
ARBITRATION AS REVISED IN 2010
(THE "UNCITRAL ARBITRATION RULES")**

BETWEEN:

**ENKEV BEHEER B.V.
(of The Netherlands)**

The Claimant

-and-

THE REPUBLIC OF POLAND

The Respondent

FINAL AWARD ON COSTS

The Tribunal:

**V.V. Veeder (Presiding Arbitrator);
Professor Albert Jan van den Berg; and
Professor Klaus Sachs**

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**EXTRACTS FROM THE TREATY,
THE UNCITRAL ARBITRATION RULES,
AND THE GERMAN ARBITRATION ACT**

A. THE TREATY

Article 8

- [A.1] 1. *Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between by the parties concerned.*
- [A.2] 2. *If such dispute cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal In this case the provisions of paragraphs 3-9 of Article 12 shall be applied mutatis mutandis. Nevertheless the President of the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm shall be invited to make the necessary appointments.*
- [A.3] 3. *In case both Contracting Parties have become members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of the Other States, disputes between either Contracting Party and the investor of the other Contracting Party under the first paragraph of the present Article shall be submitted for settlement by conciliation or arbitration to the International Centre for the Settlement of Investment Disputes.*

Article 12(9)

Each Party shall bear the cost of the arbitrator appointed by itself and its representation. The cost of the chairman as well as the other costs will be borne in equal parts by the Parties.

B. THE UNCITRAL ARBITRATION RULES

COSTS (Articles 40 to 43)

Article 40

1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
2. *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 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration 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 fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Article 41

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within

45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Article 42

1. 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.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Article 43

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

C. THE GERMAN ARBITRATION ACT

Article 1057 ZPO (In English Translation)

Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.

I. INTRODUCTION

A. *THE PARTIES*

1. The Claimant, Enkev Beheer B.V., is a private limited liability company with its corporate seat in the Netherlands. The Claimant is represented by Mr. R. Schellaars and Mr. M. Raas, Simmons & Simmons LLP, Claude Debussylaan 247, 1082 MC, Amsterdam, the Netherlands, and by Mr. A. Kozłowski, Norton Rose Fulbright LLP, Warsaw, Poland.
2. The Respondent is the Republic of Poland, acting by the Public Solicitor's Office. The Respondent is represented by Dr. D.A.M.H.W. Strik, Linklaters LLP, Zuidplein 180, 1077 XV Amsterdam, the Netherlands, and Dr. C.W. Wisniewski, Linklaters LLP, Warsaw Towers, Sienna 39, 00-121 Warsaw, Poland.

B. *THE PARTIES' DISPUTE*

3. The Parties' dispute arises out of the Claimant's investment in its Polish subsidiary, Enkev Polska S.A., a joint stock company with its corporate seat in Łódź, Poland ("Enkev Polska"). Enkev Polska owns certain industrial facilities in the centre of Łódź (the "Łódź Premises") and holds a perpetual usufruct right to the property under Polish law for the use of the land as real property for 99 years.¹
4. The Claimant contended that, in 2012, 2013 and currently in 2014 to date, the Respondent made and continues to make a series of threats to expropriate the Claimant's investment, and that this act of expropriation is underway, in such a way as to violate the Respondent's international responsibilities.² The Claimant attributed to the Respondent the conduct of its Ministry of Economy, that of the local city government in Łódź (the "City of Łódź"), and that of the Polish Information and Foreign Investment Agency ("PalIZ").
5. The Tribunal dismissed all the substantive claims made by the Claimant in the arbitration proceedings (including all claims for declarations, orders and compensation) by its First Partial

¹ Claimant's Request for Arbitration, dated 6 August 2012, ¶ 3.1; Claimant's Post-Hearing Brief, dated 5 July 2013, ¶ 1.27; Respondent's Counter-Memorial, dated 15 May 2013, ¶ 31.

² Claimant's Addendum to its Request for Arbitration, dated 29 November 2012, ¶¶ 2.14–2.15; Claimant's Statement of Claim, dated 2 April 2013, ¶¶ 2.5(F), 2.8(D), 2.9; Claimant's Statement of Reply, dated 24 May 2013, ¶¶ 1.4(C), 3.28; Hearing Transcript (13 June 2013), 3:20–25 to 4:1–3, 4:19–24, 33:13–18.

Award on 29 April 2014 and deferred its decision on legal and arbitration costs to this Final Award.³

II. PROCEDURAL HISTORY

6. As already indicated, this is the second award made by the Tribunal in these arbitration proceedings. This award should be read together with the First Partial Award, which contains a full account of the procedural history up to 29 April 2014 (being the date when the First Partial Award was issued to the Parties). In the following paragraphs, the Tribunal briefly describes the procedural history relevant to the Tribunal's decision on costs in this Final Award.
7. By a Request for Arbitration served on the Respondent on 6 August 2012, the Claimant commenced the arbitration pursuant to Article 8 of the Treaty between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, signed on 7 September 1992, entering into force on 1 February 1994 (the "Treaty"), and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 (the "UNCITRAL Arbitration Rules").
8. On 6 November 2012, the Claimant appointed Professor Albert Jan van den Berg as a Co-Arbitrator and the Respondent appointed Professor Klaus M. Sachs as a Co-Arbitrator. The two Co-Arbitrators appointed Mr. V.V. Veeder as Presiding Arbitrator on 30 November 2012.
9. The First Procedural Hearing was held on 23 January 2013 by telephone conference. The Parties agreed that the Permanent Court of Arbitration in The Hague, the Netherlands should act as the registry in the arbitration (the "Registry"). The Parties also agreed that the legal place (or seat) of the arbitration should be Berlin, Germany.
10. On 13 February 2013, the Tribunal and the Parties' legal representatives signed the Agreed Terms of Appointment. Section 12.1 set out that each Party would deposit €75,000 toward the initial deposit, pursuant to Article 43(1) of the UNCITRAL Arbitration Rules.
11. Section 13.1 of the Agreed Terms of Appointment provides:

³ Para. 383 of the First Partial Award.

Each member of the Tribunal shall be remunerated at the rate of EUR 500 per hour, plus VAT, if applicable, for all time spent in connection with the arbitration. Time spent on travel not working will be charged at 50% of this rate.

12. Pursuant to Section 13.2 of the Agreed Terms of Appointment, members of the Tribunal were to be reimbursed for all disbursements and charges reasonably incurred in connection with the arbitration, including but not limited to airfares, travel expenses, telephone, delivery, printing, storage and other expenses. As provided in Section 13.3, members of the Tribunal could submit to the Registry periodic bills in respect of their fees. Pursuant to Section 13.4, all payments to the Tribunal were to be made from the deposit administered by the Registry.
13. Pursuant to Section 8.1.5, the Registry could carry out administrative tasks on behalf of the Tribunal, which would be charged in accordance with the PCA Schedule on Fees. Pursuant to Section 8.1.6, the PCA's fees and expenses would be paid in the same manner as the Tribunal's fees and expenses.
14. On 7 May 2013, the PCA, writing on behalf of the Tribunal, requested a supplementary deposit of €150,000.00 from each Party (€300,000.00 in total) by 6 June 2013.
15. On 6 June 2013, the PCA acknowledged receipt of €150,000.00 from the Claimant, and on 11 June 2013, the PCA acknowledged receipt of €150,000.00 from the Respondent.
16. On 29 April 2014, the Tribunal issued its First Partial Award; and the PCA dispatched it to the Parties by email and courier. In this First Partial Award, the Tribunal decided (*inter alia*) as follows:
 - a) The Tribunal dismisses, on their merits, all the Claimant's pleaded claims in this arbitration (save costs);
 - b) Save as aforesaid, all claims made by both Parties are rejected (excepting costs); and
 - c) The Tribunal reserves in full its jurisdiction, powers and discretion regarding legal and arbitration costs, to be the subject of a further award.
17. On 5 May 2014, the Tribunal issued Procedural Order No. 10, instructing the Parties to provide written submissions as to costs by 23 May 2014, with a right to reply submissions to be made by 30 May 2014.
18. On 23 May 2014, the Parties submitted their respective costs applications.

19. On 30 May 2014, each Party submitted a response to the opposing Party's costs application.
20. On 12 June 2014, the Tribunal formally inquired of the Parties if they had any further proof to offer or witnesses to be heard or submissions to make.
21. On 13 June 2014, the Respondent provided proof of its previously submitted costs (invoices).
22. Thereafter, also on 13 June 2014, the Tribunal declared "the hearings closed" under Article 31(1) of the UNCITRAL Arbitration Rules as at the date of this Final Award.

III. ASSESSMENT OF COSTS

A. *THE COSTS OF THE TRIBUNAL AND THE PCA AS THE REGISTRY*

23. The Tribunal addresses first the costs of the arbitration, comprising the fees and expenses of the three members of the Tribunal, together with the fees and expenses of the Registry, within the meaning of Article 38(a), (b), (c) and (f) of the UNCITRAL Arbitration Rules. For ease of reference, these are here called the "arbitration costs".
24. As already indicated above, the Claimant and the Respondent each deposited an amount of €225,000.00 as an advance toward the costs of the arbitration, totalling €450,000.00.
25. Article 40 of the UNCITRAL Arbitration Rules provides (in relevant part):
 1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
 2. *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 41;*
 - (b) *The reasonable travel and other expenses incurred by the arbitrators;*
 - (c) *The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
 - ...
 - (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.*

26. In accordance with Articles 38(a) and 39 of the UNCITRAL Arbitration Rules, together with the Agreed Terms of Appointment, the Tribunal fixes its fees (including any value-added tax, "VAT", as applicable) as follows:

V.V. Veeder:	€117,500.00 (no VAT being chargeable);
Albert Jan van den Berg:	€97,026.47 (no VAT being chargeable);
Klaus Sachs:	€74,000.00 (plus €14,067.44 VAT).

In determining the amount of its members' fees, the Tribunal has taken full account of Article 41(1) of the UNCITRAL Arbitration Rules, pursuant to which "[t]he fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case".

27. In accordance with Article 40(2)(b) of the UNCITRAL Arbitration Rules, the Tribunal has incurred the following expenses:

V.V. Veeder:	€3,110.07;
Albert Jan van den Berg:	€1,458.63;
Klaus Sachs:	€3,773.15.

28. Further pursuant to Article 40(2)(b), the Tribunal and the Registry have incurred other costs in an amount of €106,452.07. This amount comprises the fees of the Registry (€58,366.56); administrative expenses (€3,446.42); court reporter and transcription fees (€13,643.35); interpretation costs (€8,622.91); catering expenses (€4,163.60); IT service fees (€3,124.00); audio-visual equipment rental charges (€8,075.00); courier expenses (€751.78); hearing facilities (€4,719.00); supplies (€370.30); bank fees and currency translation (€16.50); and costs of telephone conferences (€1,152.65).
29. In accordance with Article 40(2)(c) of the UNCITRAL Arbitration Rules, the fees of the Tribunal's expert (€24,788.83) and of the surveyors (€1,178.83) total €25,967.66.
30. Accordingly, the total amount of arbitration costs is assessed by the Tribunal in the sum of €443,355.49.

B. THE PARTIES' COSTS OF LEGAL REPRESENTATION

31. The Tribunal next addresses the Parties' "costs for legal representation and assistance", within the meaning of Article 40(2)(e) of the UNCITRAL Arbitration Rules. The Tribunal includes here also costs of witnesses as provided by both sides. For ease of reference, these are here called the Parties' "legal costs". The scope of these legal costs is disputed by the Parties as described below.
32. The Claimant quantified the fees and expenses of its counsel from Simmons & Simmons and Norton Rose Fulbright as amounting to €1,137,287.02. It quantifies its expert costs as €29,673.00. It also lists the fees incurred by Party representatives and others in the preparation of the case as €165,162.00. Finally, it lists additional travel and translation costs as €23,517.00. Taken together, the Claimant's costs amount to €1,355,639.02.
33. The Respondent submitted a cost statement pursuant to which its legal costs amount to €691,980.58, including its expert costs and Party representative costs, as well as its witness costs.
34. Being broadly comparable in amount, if and to the extent relevant, the Tribunal would see no reason to decide that any of these costs would not be "reasonable" within the meaning of Article 40(2)(e) of the UNCITRAL Arbitration Rules.

IV. THE ALLOCATION OF COSTS

35. The Tribunal here addresses how arbitration and legal costs are to be allocated (or "apportioned") between the Parties.

A. THE CLAIMANT'S CASE

36. The Claimant requests that the Tribunal make an order on costs in accordance with Article 12(9) of the Treaty such that each side will bear the costs of its legal representation as well as the costs of its arbitrator, and that the costs of the Chairman and other costs be shared equally.⁴ The Claimant submits that, despite the fact that its claims on the merits were dismissed by the

⁴ Claimant's Cost Submission, para. 4.4.

Tribunal in the First Partial Award, it pursued its claims in good faith under the applicable treaty and should not be penalized by having to bear the costs of the arbitration in full as a result.⁵

37. At the outset of its costs submission, the Claimant argues that “[t]he present position of the Enkev group of companies is very distressing” and “[t]his applies to both Enkev Beheer B.V. [...] and Enkev Polska itself”.⁶ The Claimant refers to “[r]ecent statements in the Polish press, regarding impending expropriation”.⁷ Further, the Claimant emphasises that it has not sought third-party funding for this arbitration⁸ and, thus, “[a]n award deviating from the parties’ agreement as set out in [the Agreed Terms of Appointment] and the contents of articles 8 and 12 of the Treaty has great and highly detrimental consequences to Enkev”.⁹
38. In the Claimant’s submission, the Parties to this arbitration have opted out from the “loser pays” principle as mandated by the Treaty and as seen in their correspondence. The German Arbitration Act, also applicable here, “enables the parties to deviate from a default rule that cost follow the event”.¹⁰ The Claimant highlights Section 5.2 of the Agreed Terms of Appointment which states that the Parties agree that Article 42(1) of the UNCITRAL Arbitration Rules, providing that the unsuccessful party shall bear the costs of the arbitration, “shall not apply” to these proceedings.
39. The Claimant contends that Article 12(9) of the Treaty should be interpreted as it was in *Eureka v. Poland*, where the tribunal allocated the costs to the losing party, but in a subsequent supplementary award corrected its previous decision in light of Article 12(9) of the Treaty to the effect that eventually each Party bore its own costs and the remaining costs were split in equal parts.¹¹
40. With respect to which costs qualify as “cost[s] . . . of representation” pursuant to Article 12(9), the Claimant argues that this phrase, which it assimilates to Article 40(e) of the UNCITRAL

⁵ Claimant’s Cost Submission, para. 1.2(E).

⁶ Claimant’s Cost Submission, para. 1.2(A).

⁷ Claimant’s Cost Submission, para. 1.2(B).

⁸ Claimant’s Cost Submission, para. 1.2(D).

⁹ Claimant’s Cost Submission, para. 1.2(C).

¹⁰ Claimant’s Cost Submission, para. 2.7.

¹¹ Claimant’s Cost Submission, para. 2.12.

Arbitration Rules, covers costs that Enkev's employees incurred acting as witnesses in the context of the hearing.¹²

41. In addressing the Respondent's costs application, the Claimant dismisses the Respondent's argument that the Claimant's claims were premature, submitting that on 28 May 2014 Enkev Polska was told that an expropriation decision with immediate effect would be issued and delivered to Enkev that day. The Claimant also dismisses the Respondent's criticisms about the Claimant's requests for interim relief.¹³
42. The Claimant also takes issue with the Respondent's presentation of its costs, arguing that the Respondent has not substantiated its costs with necessary evidence.
43. The Claimant contends in the alternative that if the Tribunal does not allocate all the costs claimed by the Respondent to the Respondent, those costs should be borne in equal parts by the Parties.

B. THE RESPONDENT'S CASE

44. The Respondent requests the Tribunal to order that the costs of the Respondent's representation and those of the arbitration shall be fully borne by the Claimant.¹⁴
45. The Respondent justifies its position based on the following five circumstances. First, the Tribunal decided in the First Partial Award that the Respondent's case has prevailed. Second, the Tribunal held that the claims dismissed were "at best premature".¹⁵ The claims were premature "not only in terms of an unauthorized omission of the cooling-of period but also due to the absence of any expropriation measure taken by the Respondent".¹⁶ Third, the Claimant did not take into account the six-month waiting period. Fourth, in the Respondent's view, the Claimant filed two unnecessary requests for interim relief. Finally, the Claimant unsuccessfully attempted to reopen the hearings in January 2014.
46. The Respondent comments that it is difficult to respond to the Claimant's costs application because "it is not apparent from the Claimant's Cost Submission what request precisely is made

¹² Claimant's Cost Submission, paras. 4.17-4.21.

¹³ Claimant's Comments on Respondent's Cost Claims, para. 3.1(B).

¹⁴ Respondent's Cost Claims, page 1.

¹⁵ Respondent's Cost Claims, page 2.

¹⁶ Respondent's Comment on Claimant's Cost Submission, para. 1.1(i).

by Enkev Beheer with respect to the cost allocation".¹⁷ According to the Respondent, the Claimant's reference in its costs application to the events taking place after the issuance of the First Partial Award is an attempt to reargue its case.

47. In the Respondent's submission, the costs of the Respondent's representation and those of the arbitration should be borne in full by the Claimant owing to, what was in the Respondent's view, the Claimant's misconduct in these proceedings resulting primarily from filing a premature claim.¹⁸ The Respondent relies on the NAFTA case *Ethyl Corporation v. Canada*, in which the tribunal held that the claimant should bear the costs of the proceedings on jurisdiction because the investor had not respected the waiting period specified in the treaty.
48. According to the Respondent, the Claimant's good faith is "not obvious". The Respondent observed that on 5 May 2014 the Government of Poland received notice of a new treaty dispute brought on behalf of Enkev Beheer and Enkev Polska.¹⁹ According to the Respondent, the subject matter of the new dispute is identical to that in the present case.
49. The Respondent maintains in the alternative that all costs identified in the Claimant's cost submission should be borne by the Claimant. The Respondent takes issue with the Claimant's representation of certain costs as "legal costs", in particular the "internal management costs" of individuals listed as Party representatives or witnesses, which the Respondent argues fall within the "other costs" provision of Article 40(2)(e) and are not subject to allocation between the Parties. The same is true, according to the Respondent, for the costs of translation services or travel of the Claimant's counsel and representatives.

C. DECISION OF THE TRIBUNAL

50. The Tribunal's powers to apportion costs between the Parties in these arbitration proceedings are determined by reference to the terms of the Parties' arbitration agreement. Those terms are contained in the relevant parts of the Treaty (as invoked by the Claimant's Request for Arbitration dated 6 August 2012), the UNCITRAL Arbitration Rules of 2010 (as agreed by the Parties) and the Terms of Appointment of 13 February 2013 (as also agreed by the Parties).

¹⁷ Respondent's Comments on Claimant's Cost Submission, page 1.

¹⁸ Respondent's Comments on Claimant's Cost Submission, para. 1.1.

¹⁹ Exhibit RC-1.

51. As recorded above, the Treaty contains an express provision on costs, namely Article 12(9) of the Treaty (to be read with Article 8(2) of the Treaty). Article 12(9) provides, as applied to these arbitration proceedings, that the Claimant shall bear the cost of the Co-Arbitrator appointed by the Claimant (Professor Albert Jan van den Berg) and that the Respondent shall bear the cost of the Arbitrator named by the Respondent (Professor Klaus Sachs). It also provides that the Claimant and the Respondent shall bear their own cost of representation.
52. As regards the cost of the Presiding Arbitrator (V.V. Veeder), Article 12(9) provides that such cost shall be borne by the Claimant and the Respondent in equal parts. As regards other costs, Article 12(9) provides that these costs shall also be borne by the Claimant and the Respondent in equal parts.
53. It is necessary for the Tribunal to consider whether the effect of Article 12(9) of the Treaty, was modified (i) by further agreement of the Parties or (ii) by operation of law.
54. As regards the former, the Tribunal considers that the UNCITRAL Arbitration Rules and the Terms of Appointment agreed by the Parties do not derogate from Article 12(9) of the Treaty. By Paragraph 5.1 of the Terms of Appointment, the Parties agreed that, in the event of any discrepancies between the provisions of the Treaty and the UNCITRAL Rules, the provisions of the Treaty shall prevail over the provisions of the UNCITRAL Rules. By Paragraph 5.2 of the Terms of Appointment, the Parties also agreed that Article 42(1) of the UNCITRAL Arbitration Rules shall not apply in these arbitration proceedings. As recorded verbatim above, Article 42(1) of the UNCITRAL Rules provides that the costs of the arbitration shall in principle be borne by the unsuccessful party and that the arbitral tribunal may apportion costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
55. Accordingly, by virtue of the Parties' express agreement, Article 42(1) has been excluded from the terms of the Parties' arbitration agreement. Further, if it were a term, Article 42(1) of the UNCITRAL Arbitration Rules (together with its cross-reference to Article 40) would constitute a discrepancy with Article 12(9) of the Treaty; and, accordingly, Article 12(9) would prevail over Article 42(1).
56. As regards German law, here applicable as the *lex loci arbitri*, Article 1057 ZPO provides that parties may agree upon their own system for the apportionment of arbitration costs. The Tribunal determines that the Parties have done so, with Article 12(9) of the Treaty.

57. In these circumstances, the Tribunal decides that the powers of the Tribunal regarding the apportionment of costs are circumscribed by Article 12(9) of the Treaty and that no such powers can be exercised by reference to Article 42(1) of the UNCITRAL Rules or any other provision inconsistent with Article 12(9) of the Treaty.
58. Applying Article 12(9) of the Treaty, the Tribunal decides that: (i) the Claimant and the Respondent shall each bear (without recourse to the other) the costs (i.e. the fees and expenses) of the Co-Arbitrator appointed by them respectively and also all their own costs of representation in the arbitration; and (ii) as regards the cost of the Presiding Arbitrator (i.e. his fees and expenses) and the other costs recorded by the PCA in the total sum of €253,029.80, these arbitration costs shall be borne by the Claimant and the Respondent in equal parts. (The relevant figures regarding these different categories of costs are listed in the preceding parts of this Final Award).
59. The end-result as regards those costs described under sub-paragraphs (i) and (ii) above, as calculated under Article 12(9) of the Treaty and taking into account the total advances of €450,000 paid by the Parties (as also recorded above) is as follows:
- (i) The total costs payable by the Claimant are €126,514.90 (excluding all costs described under sub-paragraph (i) above);
 - (ii) The total costs payable by the Respondent are €126,514.90 (also excluding all costs described under sub-paragraph (i) above);
 - (iii) The total costs paid out of the deposit by the PCA on behalf of the Claimant and the Respondent respectively are €98,485.10 and €91,840.59; and
 - (iv) The PCA shall reimburse the Respondent the remaining amount of its deposit, namely €6,644.51. (The Respondent shall indicate in writing to the Registry its bank details for this purpose by 20 June 2014).

V. THE OPERATIVE PART

60. For the reasons set out earlier in this Award, the Tribunal finally decides as follows:

- (1) The total costs payable by the Claimant are €126,514.90;**
- (2) The total costs payable by the Respondent are €126,514.90;**
- (3) The total costs paid out of the deposit by the PCA on behalf of the Claimant and the Respondent respectively are €98,485.10 and €91,840.59;**
- (4) The PCA shall reimburse the Respondent the remaining amount of its deposit, €6,644.51. The Respondent will indicate to the PCA its bank details for this purpose by 20 June 2014; and**
- (5) Save as here expressly decided, all other claims for costs made by both the Claimant and the Respondent are dismissed.**

Place of Arbitration: Berlin, Germany

Date: 13 June 2014

The Tribunal:

V.V. Veeder: *V.V. Veeder*

Professor Albert Jan van den Berg:

Dr. Klaus Sachs:

K. Sachs

1-13-14