

## DISSENT REGARDING COSTS

1. My colleagues wrote, at paragraph 327 of the Award, that “In the instant case, and generally,” their “preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration. That is, there should be an allocation of costs that reflects in some measure the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party.” No explanation is provided as to why this is their preferred approach, either in this case or generally.

2. With the greatest respect for the views of my learned colleagues on the Tribunal, I find that I cannot accept the idea that, in the instant case, Claimant should pay to Respondent US\$6 million of Respondent’s expenses solely because Claimant lost the case on the merits. In my judgment, the key reasons why the parties should bear their own costs are found in paragraph 328 of the Award, a statement upon which all of the Tribunal members agree:

*328. [i]n the Tribunal's judgment, the instant dispute was fairly brought by Claimant and good faith was evidenced by each side. The disputing parties presented their cases well, both the written submissions and the oral presentations at the hearings. There were many difficult and close issues of fact and law requiring resolution by the Tribunal. Certain legal issues were sharply disputed by the legal experts named by each side. Although ultimately Claimant is the losing party, Respondent has failed on the issue of attribution.*

3. In my view, the considerations mentioned in the foregoing paragraph make all the difference in assessing whether the losing party should pay costs to the winning side. There are also other factors to be considered not found in paragraph 328.

4. Each side bearing its own costs has been an ICSID tradition. As the Tribunal correctly notes at paragraph 322 of the Award, “the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international law 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.” The Tribunal provides many examples, and many more could be given.<sup>1</sup>

5. It is also true, however, that some recent ICSID cases have shown a certain tendency to move in the direction of commercial arbitration in assessing costs, though it is too soon to know whether a different approach may be taking hold (*see* Award, paragraphs. 325-326). Again, many more examples could be cited.<sup>2</sup>

6. The key factors adduced by the Tribunal in paragraph 328 of the Award all have significant meanings for deciding the question of costs. In light of the determinations made by the Tribunal, as expressed in paragraph 328, there is a question whether there is a sufficient or any reason in this case to depart from the approach of each side bearing its own costs. The

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<sup>1</sup> As the Tribunal pointed out at para. 326 of the Award, in the 2006 case of *Thunderbird v. Mexico* (NAFTA/UNCITRAL, 2006), a NAFTA case, the Tribunal majority said that the same approach as to costs should apply to international investment arbitrations as to international commercial arbitrations. The costs were allocated on a 75:25 per cent basis against the losing party. Thomas Walde, in a Separate Opinion, said that the allocation of most of the costs against the losing party was a “significant departure from established jurisprudence.” (at para. 126.)

<sup>2</sup> Commercial arbitration rules authorize the tribunal to apportion expenses between or among the successful and unsuccessful parties. *See, e.g.*, the ICC Rules of Arbitration, at Article 31 (3), which provides that “The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.” Investor-state rules do as well. Article 61 (2) of the ICSID Convention provides that “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.”

Tribunal agrees that the case was brought in good faith. There was no abusive process here. This must mean that the Claimant honestly and reasonably believed, rightly or wrongly, that it had a sound factual and legal case against the Respondent. There were no extravagant or unreasonable claims. I cannot see any indication that the Tribunal believes otherwise.

7. The Tribunal held further that each side “presented their cases well.” Again, this must mean no abusive process or procedure, no unfair treatment by the Claimant of the Respondent's side, and no unfair treatment of the Tribunal. In other words, each side acted in responsible fashion throughout. There was no improper activity.

8. Of major importance in this context is the Tribunal's statement that “[t]here were many difficult and close issues of fact and law requiring resolution by the Tribunal. Certain legal issues were sharply disputed by the legal experts named by each side.” I would add here that many of the difficult and close issues of fact and law in this case were crucial issues of fact and law. Surely this is a compelling reason for a decision requiring each side to bear its own costs.

9. In addition to the factors adduced in paragraph 328 of the Award, I would add financial resources. In many investor-state cases, the state has more in the way of financial resources than the investor. That is not always the situation, but is often so, and is certainly true in this case. Should that make a difference? I think it should, when added to the other factors.

10. I note that the Tribunal majority on the costs question has stated its “preferred approach,” both in this case and generally, without providing any reasons why its approach is or should be preferred, or why it reached the conclusion that Claimant should pay US\$6 million of Respondent's costs in the instant case. In my view, given the factors set forth in paragraph 328

of the Award, and their significance, it is incumbent upon the Tribunal majority to provide at least some reasons for their decision on costs, or at least some reasons why they prefer one approach over another.

11. I appreciate that the Tribunal has discretion in awarding and allocating costs, but to exercise that discretion in a fashion that flies in the face of the factors adduced in paragraph 328, and their meanings, simply on the ground that Claimant lost a close case, and to do so without explanation, leaves me with the sense that Claimant is being treated unfairly.

12. There are underlying reasons for all rules of law and for all policy approaches. Indeed, it is impossible to fully understand and correctly apply and interpret any rule of law or policy approach, no matter how simple or complex, unless the underlying reason for the rule or policy is understood as well. There may well be good underlying reasons for applying the loser pays doctrine even in a close case brought in good faith, despite the factors identified in paragraph 328 of the Award. But it is not possible to discern those underlying reasons in the majority's costs decision.

13. Apart from general doctrine in this area, it is also not possible to discern the reasons for the majority's costs decision in this case. In my view, the majority's decision on costs and preferred approach on costs goes in one direction while the key policy variables underlying paragraph 328 move in precisely the opposite direction. I believe the Claimant should have received an explanation or a statement of reasons on this issue, just as on any other issue in the case.

14. For the foregoing reasons, and with the greatest respect for my colleagues, I dissent from their decision as to costs.

[*signed*]

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Mr. Arthur W. Rovine

Arbitrator

October 2, 2009

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