

PCA CASE No. 2018-18

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE
KINGDOM OF THE NETHERLANDS AND THE CZECH REPUBLIC FOR THE
ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS,
DATED 29 APRIL 1991**

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

FYNERDALE HOLDINGS B.V.

(the “Claimant”)

- and -

THE CZECH REPUBLIC

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

AWARD ON COSTS

The Arbitral Tribunal

Professor Dr. Dr. h.c. Rüdiger Wolfrum (President of the Arbitral Tribunal)

Dr. Wolfgang Kühn

Professor Laurence Boisson de Chazournes

Registry

The Permanent Court of Arbitration

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List of Defined Terms

Tribunal Costs	Costs pursuant to Article 38(a) to (c) of the UNCITRAL Rules
Award	Award issued by the Tribunal on 29 April 2021
Claimant	Fynerdale Holdings B.V.
Claimant's Submission on Costs	Submission on Costs filed by the Claimant on 3 June 2021
Claimant's Second Submission on Costs	Comments on Respondent's Submission on Costs filed by Claimant on 17 June 2021
Costs of Arbitration	Tribunal Costs and Costs of Legal Representation collectively
Costs of Legal Representation	Costs pursuant to Article 38(e) of the UNCITRAL Rules
Notice of Arbitration	Notice of Arbitration of 19 December 2017
Respondent	The Czech Republic
Respondent's Submission on Costs	Submission on Costs filed by the Respondent on 3 June 2021
Respondent's Second Submission on Costs	Reply to the Claimant's Submission on Costs filed by Respondent on 17 June 2021
Separate Opinion	Separate Opinion of Dr. Wolfgang Kühn, dated 29 April 2021
Parties	Claimant together with Respondent
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976

I. INTRODUCTION

1. The Claimant in this arbitration is Fynerdale Holdings B.V., a company established and registered in the Netherlands, with a correspondence address at No. 11 L-Ufficcji, Misrah 28 ta' Frar 1883, Birkirkarara BKR 1501, Malta (“**Fynerdale**” or “**Claimant**”). The Claimant is represented in these proceedings by Ms. [REDACTED] and Ms. [REDACTED] of NautaDutilh N.V., Beethovenstraat 400, 1082 PR Amsterdam, the Netherlands.
2. The Respondent in this arbitration is the Czech Republic, a sovereign State (“**Czech Republic**” or “**Respondent**”; together with the Claimant, the “**Parties**”). The Respondent is represented in these proceedings by [REDACTED] and [REDACTED] of Zeiler Floyd Zadkovich, Stubenbastei 2, 1010 Vienna, Austria; and by H.E. Mr. Ondřej Landa, Deputy Minister of Legal Affairs and Property of the State, Mr. Jaroslav Kudrna, Ms. Anna Bilanová, Ms. Kateřina Heroutová, Ms. Martina Matejová, Mr. Martin Nováček of the Ministry of Finance of the Czech Republic, Letenská 15, 118 10 Prague, Czech Republic.
3. The present arbitration was commenced on 19 December 2017, when the Claimant served a Notice of Arbitration (the “**Notice of Arbitration**”) on the Respondent, invoking Article 8 of the Treaty and the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 (the “**UNCITRAL Rules**”). The Claimant, requested, *inter alia*, damages provisionally quantified at CZK 2,438,178,229.
4. On 29 April 2021 the Tribunal issued an Award (the “**Award**”), in which it concluded:

The argument that Article 8 of the Treaty is incompatible with EU law and automatically inapplicable is therefore unsustainable. Accordingly, the Tribunal dismisses the Respondent’s submission that the Tribunal lacks jurisdiction in consequence of the principle set out in Article 30 VCLT.¹

The Tribunal also concluded that:

the Tribunal denies jurisdiction on the basis that the origin and the legality of the investment has not been established. The Tribunal accordingly considers it unnecessary to entertain the arguments exchanged between the Parties as to whether the Claimant was in control of the investments allegedly made in the Czech Republic.²

5. The operative part of the Award reads as follows:

For the reasons set out above, the Tribunal,

¹ Award, para. 307.

² Award, para. 575.

1. Unanimously, *rejects* the Respondent's objection that the Tribunal lacks jurisdiction over the present dispute on the basis that the arbitration agreement contained in Treaty is incompatible with European law and thus invalid;
 2. By majority, *finds* that the Tribunal does not have jurisdiction over the present dispute on the basis that the legality of the investment is not established;
 3. Unanimously, *reserves* its decision on costs for an award on costs, to be issued after the receipt of costs submissions from the Parties.
6. The present, final Award on Costs concerns the Tribunal's decision on costs.

II. PROCEDURAL HISTORY

7. The procedural history up to the issuance of the Award on 29 April 2021 is summarized in detail in that Award. The Tribunal therefore recalls only certain key developments since 30 April 2021.
8. On 30 April 2021, the Tribunal invited the Parties to consult with each other with a view to agreeing on a mutually acceptable procedural timetable for the exchange of costs submissions.
9. On 13 May 2021, the Respondent informed the Tribunal that the Parties had agreed to file their submissions on costs by 3 June 2021, with a right of reply by 17 June 2021.
10. On 3 June 2021 the Claimant submitted its Submission on Costs (the "**Claimant's Submission on Costs**"). On the same day, the Respondent filed its Submission on Costs (the "**Respondent's Submission on Costs**").
11. On 17 June 2021 the Claimant submitted its comments on the Respondent's Submission on Costs (the "**Claimant's Second Submission on Costs**"). On the same day, the Respondent filed its reply to the Claimant's Submission on Costs (the "**Respondent's Second Submission on Costs**").

III. COSTS OF ARBITRATION

12. The relevant provisions regarding the Tribunal's decision in relation to the cost of arbitration are to be found in Articles 38 to 40 of the UNCITRAL Rules.
13. In the following, the costs enumerated in Article 38(a) to (c) are referred to as "**Tribunal Costs**", while the costs of legal representation and assistance enumerated in Article 38(e) are referred to as "**Costs of Legal Representation**". The Tribunal Costs and the Costs of Legal Representation are collectively referred to as the "**Costs of Arbitration**".

A. TRIBUNAL COSTS

14. Article 38 of the UNCITRAL Rules defines Tribunal Costs as follows:

- (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;

15. The Tribunal fixes hereby the Tribunal Costs as follows:
16. The fees of Professor Dr. Dr. h.c. Rüdiger Wolfrum amount to EUR [REDACTED].
17. The fees of Dr. Wolfgang Kühn amount to EUR [REDACTED]. In addition, Dr. Kühn charged value added tax in an amount of EUR [REDACTED].
18. The fees of Professor Laurence Boisson de Chazournes amount to EUR [REDACTED].
19. Pursuant to the Terms of Appointment, the PCA was designated to serve as registry in these proceedings. The PCA's fees for its services in this arbitration amount to EUR 150,698.50.
20. The expenses, including the costs of arbitrator travel and accommodation in the context of the Hearing, audio-visual services at the Hearing, catering costs for the Parties and the Tribunal at the Hearing, court reporting fees, bank charges, telecommunication charges, courier costs, and all other expenses relating to the arbitration amount to EUR 52,185.59.
21. Based on the above figures, the Tribunal Costs, comprising the items enumerated in Article 38(a) to (c) of the UNCITRAL Rules, amount to EUR 652,369.42.
22. In accordance with Article 41 of the UNCITRAL Rules, a tribunal may request the parties to make deposits as advances towards its costs. In these proceedings, the Parties have deposited with the PCA a total of EUR 800,000.
23. All of the Tribunal Costs above were paid from the deposit. The unexpended balance of the deposit of EUR 147,630.58 shall be returned to the Parties in equal shares.

B. COSTS OF LEGAL REPRESENTATION

24. Both Parties seek to recover their Costs of Legal Representation from the other Party. The Claimant claims a total of EUR 481,380.44 as Costs of Legal Representation,³ and the Respondent claims CZK 8,685,763.90 and EUR 164,978.64 as Costs of Legal Representation.⁴

³ Claimant's Submission on Costs, para. 11.

⁴ Respondent's Second Submission on Costs, paras 14-15.

25. The Parties have not objected to the amounts charged by the opposing Party's external lawyers or experts. The Respondent observes that the Claimant's costs are slightly higher than its own costs; hence "assuming that the Claimant considers its costs reasonable, it would certainly consider the Respondent's lower costs reasonable as well".⁵
26. However, the Claimant argues that the reimbursement of in-house fees of Czech Government lawyers amounting to CZK 200,000⁶ [*NB*: approximately EUR 7,800] should be denied since these costs form part of the "normal operating costs" of the Czech Republic and do not fall within the ambit of the Costs of Arbitration pursuant to Article 38 of the UNCITRAL Rules.⁷ The Claimant submits that if such costs were to be considered as recoverable, they should be reasonable in amount⁸ and substantiated, which it considers is not the case.⁹ For its part, the Respondent explains that "[b]ased on a conservative estimate, the lawyers at the Czech Ministry of Finance have spent at least at total of 500 hours preparing the facts of the case and assisting with handling and preparing evidence (witnesses and documents). The amount claimed for in-house fees is based on a modest hourly rate of CZK 400,-".¹⁰
27. Pursuant to Article 38(e) of the UNCITRAL Rules, Costs of Legal Representation form part of the Costs of Arbitration only insofar as "the arbitral tribunal determines that the amount of such costs is reasonable". In the present case, the Tribunal observes that the Costs of Legal Representation incurred by both Parties are within a comparable range. Moreover, the amounts claimed are well below the reported average costs in investor-State proceedings. While the Tribunal is conscious of the fact that the present proceedings have not progressed beyond the stage of preliminary objections, those preliminary objections raised a number of complex questions of law and fact that required careful briefing by counsel, supported by forensic experts. Moreover, the Parties addressed a range of procedural applications to the Tribunal, notably in relation to document production, which required competent legal advice. In light of all this, the Tribunal determines that the amounts claimed by both Parties are reasonable.
28. The Tribunal finds, however, that the Costs of Legal Representation of the Respondent shall not include the fees claimed by the Respondent in respect of in-house lawyers of the Czech

⁵ Respondent's Second Submission on Costs, para. 11.

⁶ Claimant's Second Submission on Costs, para. 2.

⁷ Claimant's Second Submission on Costs, para. 2.

⁸ Claimant's Second Submission on Costs, para. 3.

⁹ Claimant's Second Submission on Costs, para. 4.

¹⁰ Respondent's Submission on Costs, para. 8.

Government. The amounts claimed are modest, and the Respondent's estimate of the number of hours that its officials may have spent on the case (500 hours) is certainly not implausible. In the present case, however, the Tribunal considers that the Respondent has not (i) established a proper basis for its claim (for example, by recording the time spent by its officials in time sheets) and (ii) sufficiently substantiated its contention that the estimated 500 hours were spent specifically on the legal representation of the Czech Republic in the present arbitration (as opposed to overseeing the work of outside counsel or the general operations of the Ministry). Accordingly, the amount of CZK 200,000 shall not be taken into account in assessing the Respondent's Costs of Legal Representation.

IV. ALLOCATION OF COSTS

29. In accordance with Article 40 of the UNCITRAL Rules, the Tribunal shall allocate the costs of arbitration in accordance with the following principles:

1. 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.
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.
3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.
4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

A. THE CLAIMANT'S POSITION

30. The Claimant submits that the Costs of Arbitration should be borne by the Respondent on the basis that: (i) the Respondent's jurisdictional objection concerning the application of Article 8 of the Treaty was unanimously dismissed by the Tribunal¹¹ and (ii) the Tribunal did not unanimously agree to deny jurisdiction, as is evidenced by the Separate Opinion of Dr. Kühn ("**Separate Opinion**").¹²

31. Although the Claimant acknowledges the principle that the unsuccessful party bears the costs, it underscores that pursuant to Articles 40(1) and Article 40(2) of the UNCITRAL Rules, the

¹¹ Claimant's Submission on Costs, para. 8.

¹² Claimant's Submission on Costs, para. 9.

Tribunal has discretion to apportion the Tribunal Costs and Costs of Legal Representation between the Parties if it determines that such apportionment is appropriate, taking into account the circumstances of the case.¹³ Arguing that the Tribunal can take into account the degree to which the Parties prevailed with their respective arguments, the Claimant maintains that the Respondent's Article 8 Treaty objection to jurisdiction, which was dismissed by the Tribunal, required a considerable amount of time, for preparing the written submissions, responding to the European Commission's *amicus curiae* brief, and addressing it at the hearing.¹⁴

B. THE RESPONDENT'S POSITION

32. The Respondent argues that, since it has “fully prevailed” in the Award, it should be fully reimbursed its share of the Tribunal Costs as well as reasonable Costs of Legal Representation.¹⁵ It argues that the primary principle under the applicable rules is the “loser pays” principle, and that the Tribunal is only tasked with determining the extent of the reimbursement of the reasonable costs.¹⁶ In response to the Claimant's submissions, the Respondent argues that “[a]ny reimbursement of the costs of legal representation and assistance by the successful party to the unsuccessful party is impermissible under the applicable rules”.¹⁷
33. The Respondent adds that since the Claimant was found to have breached international public policy by engaging in money laundering (an allegation that is contested by the Claimant), it “cannot stand” that the Respondent should not be reimbursed the costs it incurred by defending itself against claims based on investments made in violation of criminal law.¹⁸
34. Lastly, the Respondent denies that the number of jurisdictional objections raised and the Separate Opinion have any bearing on the allocation of the Costs of Arbitration.¹⁹ In particular, “the mere fact that the Respondent was successful with regard to one of its arguments and not the other two

¹³ Claimant's Submission on Costs, paras. 4-5.

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

¹⁵ Respondent's Submission on Costs, para. 1; Respondent's Second Submission on Costs, para. 2.

¹⁶ Respondent's Second Submission on Costs, paras. 5-6.

¹⁷ Respondent's Second Submission on Costs, para. 5.

¹⁸ Respondent's Second Submission on Costs, para. 7.

¹⁹ Respondent's Second Submission on Costs, paras. 8-10.

is irrelevant for the allocation of the costs”.²⁰ What is decisive is that the Claimant’s case was fully dismissed on jurisdiction due to the Respondent’s successful objection.²¹

C. THE TRIBUNAL’S ANALYSIS

35. The Tribunal’s analysis proceeds from the principle that “the costs of arbitration shall in principle be borne by the unsuccessful party”. The UNCITRAL Rules do not define, however, what constitutes “success” within the meaning of Article 40. This is a matter to be determined by the Tribunal in the light of the specific case before it.
36. It is evident that the Claimant has not succeeded with its case. It has not persuaded the Tribunal that the Tribunal has jurisdiction over the dispute between the Parties, and accordingly no decision by the Tribunal will be made on the substance of its claims. Moreover, the Respondent’s objection related to the legality of the Claimant’s investment was substantial and involved the consideration of documentary, witness and expert evidence.
37. At the same time, the Tribunal is cognizant of the fact that the Respondent did not succeed with its “intra-EU” objection. While that fact does not affect the outcome of the case, it cannot be said that the Claimant was the “unsuccessful party” in every respect. A large proportion of the Parties’ pleadings as well as an *amicus curiae* submission from the European Commission related specifically to the “intra-EU” objection. The Tribunal, for its part, dedicated a substantial part of its Award to that objection.
38. The Tribunal thus concludes that it is appropriate for the Claimants to bear the greater part, but not all, of the costs of arbitration. Specifically, the Tribunal determines that apportionment in the following proportions is reasonable, taking into account the circumstances of the case:
- (a) As regards the Tribunal Costs pursuant to Articles 38(a) to (c) of the UNCITRAL Rules, the Claimant will bear two thirds and the Respondent will bear one third of these costs;
 - (b) As regards the Costs of Legal Representation pursuant to Article 38(e) of the UNCITRAL Rules, the Claimant will bear its own costs; the Respondent will bear one half of its own costs and will be entitled to recover one half of its costs²² from the Claimant.

²⁰ Respondent’s Second Submission on Costs, paras. 9.

²¹ Respondent’s Second Submission on Costs, paras. 8-10.

²² As determined in para. 28, the amount of CZK 200,000 shall not be taken into account in assessing the Respondent’s Costs of Legal Representation.

39. Accordingly, the Respondent is entitled to recover from the Claimant the amount of EUR 108,728.24, CZK 4,242,881.95 and EUR 82,489.32.
40. The Tribunal notes, finally, that neither Party has requested an award of interest. Accordingly, the Tribunal makes no orders in this respect.

V. DISPOSITIF

For the reasons set out above, the Tribunal, unanimously, decides:

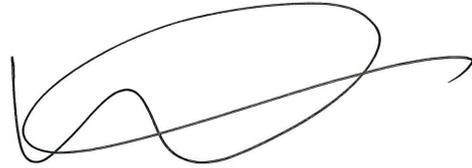
- 1. The Tribunal Costs pursuant to Article 38(a) to (c) of the UNCITRAL Rules are fixed as EUR 652,369.42;**
- 2. Two thirds of the Tribunal Costs pursuant to Articles 38(a) to (c) of the UNCITRAL Rules shall be borne by the Claimant and one third by the Respondent; accordingly, the Claimant shall promptly pay to the Respondent the amount of EUR 108,728.24;**
- 3. The Costs of Legal Representation claimed by the Parties pursuant to Article 38(e) of the UNCITRAL Rules are reasonable; however the amount of CZK 200,000 shall not be taken into account in assessing the Respondent's Costs of Legal Representation;**
- 4. The Respondent is entitled to recover one half of its Costs of Legal Representation pursuant to Article 38(e) of the UNCITRAL Rules; accordingly, the Claimant shall promptly pay to the Respondent the amount of CZK 4,242,881.95 and EUR 82,489.32;**
- 5. All other claims are dismissed.**

Place of Arbitration: The Hague, the Netherlands

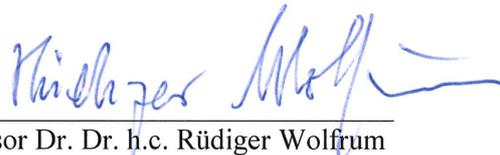
Date of Award: 16 August 2021



Dr. Wolfgang Kühn



Professor Laurence Boisson de Chazournes



Professor Dr. Dr. h.c. Rüdiger Wolfrum
Presiding Arbitrator