

**IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL
CONSTITUTED IN ACCORDANCE WITH THE 2017 ARBITRATION RULES
OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF
COMMERCE**

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**FESTORINO INVEST LIMITED,
FOSONTAL LIMITED,
PETRA SALESNY,
PETER DERENDINGER and
PETR ROJICEK
(Claimants)**

v.

**REPUBLIC OF POLAND
(Respondent)**

with the participation of

**THE EUROPEAN UNION
(Non-disputing treaty party)**

Correction and Interpretation of Award and Additional Award
Arbitration SCC V2018/098

30 July 2021

Arbitral Tribunal:
Mr. Bernardo M. Cremades (President)
Mr. Kaj Hober
Mr. Zachary Douglas QC

I. PROCEDURAL BACKGROUND

1. On 30 June 2021, the Tribunal issued its Award in this arbitration.
2. On 5 July 2021, the Tribunal notified the Parties that in the coming days, it would be issuing minor corrections to the Award pursuant to Article 47 of the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “**SCC Rules**”). The Parties were notified that such corrections would not affect the substantive decisions of the Award.
3. On 5 July 2021, Claimants sent a letter to the Tribunal requesting that it “provide explanations as to the basis of the costs awarded to the Respondent” pursuant to Article 47(1) of the SCC Rules.
4. On 8 July 2021, the Tribunal sent an email to the Parties in which it clarified that it perceived Claimants' 5 July 2021 letter as a request for interpretation pursuant to Article 47 of the SCC Rules. The Tribunal requested that Respondent provide comments on Claimants' request by 13 July 2021.
5. On 13 July 2021, Respondent provided its comments to Claimants' 5 July 2021 request for interpretation.
6. In its 13 July 2021 correspondence, Respondent also submitted a “request for interpretation and/or correction and/or supplementing the Award.” The Tribunal requested that Claimants provide its comments to Respondent's request by 16 July 2021.
7. On 14 July 2021, the Tribunal extended Claimants' deadline to 19 July 2021 for providing comments to Respondent's 13 July 2021 request. In doing so, the Tribunal also afforded Claimants the opportunity to provide further comments on their 5 July 2021 request for interpretation.
8. On 19 July 2021, Claimants sent a letter to the Tribunal and Respondent providing comments on their 5 July 2021 request for interpretation, as well as Respondent's 13 July 2021 “request for interpretation and/or correction and/or supplementing the Award.” In the same letter, Claimants submitted a request for an additional award pursuant to Article 48 of the SCC Rules.
9. On 22 July 2021, Respondent presented its comments on Claimants' 19 July 2021 request for an additional award.

II. INTERPRETATION

10. In their 5 July 2021 letter, Claimants request “*that the Tribunal provide explanations as to the basis of the costs awarded to the Respondent.*” Specifically, Claimants seek clarification as to how the Tribunal arrived at its decision on the allocation of costs despite Claimants having not received a copy of Respondent's Statement of Costs for the purpose of submitting comments. Claimants further requested interpretation on “*whether the Tribunal took into account the*

Respondent's disloyal behaviour regarding the advance payments covering the costs of the arbitration as requested in the Claimants' email of 24 August 2020."

11. In its 13 July 2021 response, Respondent stated that *"the statements of costs were to be submitted simultaneously in accordance with point 7.7 of the PO1, and Respondent submitted its Statement of Costs in accordance with this rule on 23 October 2020 to the Tribunal and the SCC."*
12. Respondent contends that if Claimants *"did not received Respondent's Statement of Costs in accordance with 7.7 of the PO1, they were reasonably expected to approach the Tribunal on this point and request explanations without delay in accordance with Article 36 of the SCC Rules."*¹
13. In their 19 July 2021 letter, Claimants contend that *"had [they] had the opportunity to express their views on the subject, they could have informed the Tribunal that, e.g., the 'branches of the Polish government, namely the Ministry of Climate and Environment and General Counsel to the Republic of Poland' (par. 776 of the Award) do not incur additional costs with regards to investment arbitrations,"* and that *"public officials, including the counsels to Respondent, get paid monthly salaries regardless of their involvement in any particular proceedings."*
14. Lastly, Claimants contend that Article 36 of the SCC Rules does not apply to Claimants' failure to comment on their lack of receipt of Respondent's Statement of Costs because Claimants had no way of knowing that Respondent had submitted any such statement. Instead, Claimants had assumed that the Respondent had waived its right to demand reimbursement of costs.
15. Pursuant to Article 47 of the SCC Rules, *"if the Arbitral Tribunal considers the request justified, it shall make the correction or provide the interpretation within 30 days of receiving the request."* The Tribunal, having considered Claimants' 5 July 2021 request justified, hereby provides the desired interpretation. In doing so, the Tribunal notes that it considers Respondent's 13 July 2021 correspondence as requests for correction and an additional award, which are addressed below (see Sections III and IV).

A. Respondent's Fees

1. Tribunal's Interpretation of Cost Allocation Decision

16. In the Award, dated 30 June 2021, the Tribunal ruled in favour of the Respondent in all aspects of the merits of this dispute. As noted in paragraph 769 of the Award, *"Concerning the merits, the Claimants' case ultimately failed in its entirety, as the Tribunal has dismissed all the claims for violations of the ECT. This is the fundamental result of this arbitration . . ."*

¹ Article 36 of the SCC Rules states: "A party who, during the arbitration, fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure."

17. The Award continued, noting in paragraph 770 that “[a]s a result, the Tribunal concludes that the Claimants should bear a more significant share of the costs and fees associated with this arbitration than the Respondent.”
18. Ultimately, as a result of Respondent prevailing on the merits, the Tribunal concluded in paragraph 771 of the Award “that the Claimants should bear a more significant share of the costs and fees associated with this arbitration than the Respondent.”
19. After determining that the Claimants should bear a more significant share of the costs and fees associated with this arbitration, the Tribunal was tasked with determining such a reasonable amount. With respect to fees, considering the finding that “Claimants’ case ultimately failed in its entirety,” the Tribunal determined that it was appropriate for Claimants to bear their own fees and a portion of Respondent’s.²
20. In their case on the merits, Claimants ultimately sought PLN 373,264,471.38, plus interest.³ This amount did not include requests regarding costs or fees incurred during the arbitration. This arbitration lasted more than 2 years, with fairly extensive factual and legal exhibits produced by the Parties concerning complex, often very technical issues. This also necessitated the submission and analysis of numerous expert reports.
21. The Tribunal aimed for an award on fees that reflected one party prevailing entirely on the merits in a case of this size, while also taking into account all other appropriate factors, including the failed jurisdictional challenges and relevant party behaviour.
22. In its Statement of Costs, Respondent sought reimbursement of PLN 6,611,245.73.⁴ This included PLN 1,296,584.54 attributed to the General Counsel to the Republic of Poland and PLN 5,314,661.23 attributed to the Ministry of Climate and Environment.⁵ All costs incurred with respect to the retaining of Respondent’s experts were included in the PLN 5,314,661.23 attributed to the Ministry of Climate and Environment.⁶ The costs attributed to the General Counsel to the Republic of Poland consisted of the value of the legal representation provided in the arbitration.
23. In its Statement of Costs, Respondent contended that “[t]he value of work in the investment arbitrations is assessed by the General Counsel on hourly-rate basis. The hourly rate applied by the General Counsel amounts to PLN 300 (approx. 70 EUR).”⁷ Claimants contend in their 19 July 2021 letter that Polish public officials, including counsel to Respondent, get paid monthly salaries and thus do not incur

² Award, ¶ 770-776.

³ Claimants’ Post-Hearing Brief, ¶ 138.

⁴ Respondent’s Statement of Costs, p. 10 (a copy of Respondent’s Statement of Costs is hereby attached to this Correction, Interpretation and Additional Award as Annex A).

⁵ Respondent’s Statement of Costs, pp. 9-10.

⁶ Respondent’s Statement of Costs, pp. 7-8.

⁷ Respondent’s Statement of Costs, p. 2.

additional costs with regards to investment arbitrations, seemingly making the argument that counsel to Respondent necessarily cannot seek reimbursement of fees for time spent on the arbitration.

24. The fact that Polish government lawyers are paid fixed salaries and do not bill the Respondent in the same manner as a private law firm was a fact both readily apparent to the Tribunal, as such is the normal operation of government lawyers generally, and clarified by Respondent, which again noted that the *value* of the counsel work “*is assessed by the General Counsel on hourly-rate basis.*”⁸
25. Respondent valued the work of its lawyers at PLN 300 per hour.⁹ The Tribunal considered this rate exceptionally reasonable in the context of legal representation in a large-scale investment arbitration.
26. In its assessment of a proper allocation of fees, the Tribunal was thus presented with a request of PLN 6,611,245.73, which included legal representation at a rate determined to be very reasonable by the Tribunal, expert fees amounting to PLN 3,592,503.66, as well as other miscellaneous costs associated with Respondent’s presentation of its case.¹⁰ The Tribunal also took note of the fact that the total amount requested by Respondent was approximately 61% of the total being requested by Claimants (i.e., PLN 6,611,245.73 requested by Respondent vs. EUR 2,367,526.50 (approx. PLN 10,857,142.71) requested by Claimants).
27. In light of this, the Tribunal sought to arrive at a sum appropriate to reflect the outcome of this arbitration. The Tribunal determined that in a case of this size, duration and complexity, having prevailed on every element of the merits of the dispute, it was appropriate and reasonable to award Respondent PLN 1,296,584.50 of the PLN 6,611,245.73 it sought.
28. In doing so, the Tribunal did not rule that it was appropriate to order that Respondent be reimbursed for the legal fees incurred by counsel for Respondent and not for the costs associated with retaining its experts. Instead, as noted in paragraph 776 of the Award, the Tribunal concluded that awarding Responding the amount incurred by the General Counsel to the Republic of Poland represented a fair and reasonable sum considering the outcome of the dispute.
29. The Tribunal confirms that in arriving at what it deemed a fair allocation of fees and costs, it properly considered all relevant factors, including the conduct of the Parties, even though those factors were not explicitly mentioned in the Award. As the Award noted in its discussion of costs, the Tribunal’s determination of cost allocation was guided by the outcome of the arbitration, both with respect to jurisdiction and the merits.¹¹ No discussion of a Party’s conduct was provided for

⁸ Respondent’s Statement of Costs, p. 2.

⁹ Respondent’s Statement of Costs, p. 2.

¹⁰ Respondent’s Statement of Costs, pp. 3-10.

¹¹ Award, ¶¶ 761-777.

in the Award because the Tribunal did not consider that, in all the circumstances, these factors were critical to the allocation of costs in this case.

2. Respondent's Statement of Costs

30. On 15 July 2020, the Tribunal requested that the Parties submit their Statements of Costs "*by Friday 23 October.*"
31. On 23 October 2020, Claimants submitted their Statement of Costs directly to Respondent, the Tribunal and the SCC.
32. Also on 23 October 2020, Respondent submitted its Statement of Costs. Respondent's Statement of Costs was sent only to the Tribunal and the SCC, as Respondent determined that the cost submissions were "simultaneous submissions" guided by paragraph 7.7 of Procedural Order No. 1, which provides for such submissions to be sent only to the Tribunal and the SCC.
33. The Tribunal acknowledges that at the time of receiving the Parties' cost statements, it failed to note the discrepancy in how each Party submitted their respective statement (i.e., that Claimants had copied Respondent, but Respondent had not copied Claimants).
34. The Tribunal confirms that Respondent submitted its Statement of Costs in a timely fashion (i.e., on the 23 October 2020 deadline). The Tribunal also confirms that between 23 October 2020 and 5 July 2021, Claimants made no mention of the fact that they did not receive any Statement of Costs from Respondent (Article 36 of the SCC Rules). The Tribunal further confirms that the Parties in this arbitration did not enter into any agreement whereby each side was to be afforded an opportunity to comment on the other side's requests for costs.

III. CORRECTIONS

35. On 5 July 2021, the Tribunal emailed the Parties and noted that "*in the coming days, the Tribunal will issue a Correction to the Award pursuant to Article 47 of the SCC Rules to address some minor, formal matters. None of the corrections are substantive and thus will not alter the decisions of the Tribunal.*"
36. Before the Tribunal issued such corrections, Respondent submitted its 13 July "request for interpretation and/or correction and/or supplementing the Award." While the Respondent's "requests" are not properly labelled as falling under interpretation, correction or supplementation, in reviewing Respondent's 13 July email, the Tribunal understands it to constitute requests for corrections and an additional award pursuant to Articles 47 and 48 of the SCC Rules (See Section IV).
37. Respondent's first request concerns specification in the operative part of the award the amount owed to Respondent as a result of the Tribunal's ruling that that Claimants are to bear all costs of the arbitration. Specifically, Respondent contends that because Respondent paid PLN 1,548,422.21 as its half of the Advance on

Costs, and the Tribunal ruled that Claimants are to bear all costs of the arbitration, that the Tribunal should specify in the operative part of the Award that Claimants are ordered to hereby pay Respondent PLN 1,548,422.21 to reimburse it for its share of the Advance on Costs.

38. The Tribunal finds the request that the amount of reimbursement be specified in the operative part of the Award to be reasonable as it does not alter any aspect of the Award but merely provides clarification. However, after consultation with the SCC, the Tribunal does not find the amount noted by Respondent to be the amount applicable, nor does not find it appropriate to order that such payment be made in PLN.
39. Respondent noted in its 13 July 2021 correspondence that its half of the Advance on Costs was PLN 1,548,422.21 (an equivalent of EUR 355,159). While Respondent is correct in that its half of the Advance of Costs amounted to EUR 355,159, Respondent is set to receive EUR 14,185.25 from the SCC following the settlement of account. This amount represents what will be half of the remaining Advance on Costs. Therefore, Respondent would need to be reimbursed EUR 340,973.75 to cover the entirety of the Advance on Costs paid.
40. With respect to the proper currency, the SCC has confirmed that, despite Respondent's contention in its 13 July 2021 email, its share of the Advance on Costs was paid in EUR, not PLN. Accordingly, the Tribunal finds it appropriate to order such reimbursement be paid in EUR.
41. Next, the Respondent requests that the Tribunal specify in the operative part of the Award that the Claimants are jointly and severally liable to reimburse Respondent for the portion of fees ordered by the Tribunal (i.e., PLN 1,296,584.50). The Respondent notes that the Tribunal made such a specification in paragraph 771 of the Award with respect to the costs of the arbitration but failed to do so with respect to legal fees.
42. The Tribunal acknowledges that this language should have been applied to both the costs of arbitration and the reimbursement of Respondent's fees, and not only to the costs of arbitration.
43. Next, Respondent requests that the Tribunal correct the list of Respondent's legal team as contained in paragraph 20 of the Award by adding two additional names that were inadvertently omitted from the Award. The Tribunal finds this correction appropriate.
44. Lastly, the Respondent notes the inadvertent use of "emergency" in paragraphs 19 and 20 of the Award. The Tribunal confirms that before receiving Respondent's 13 July 2021 request, it had noticed these typos and had planned to address them. Accordingly, the Tribunal finds this request reasonable.
45. Pursuant to Article 47 of the SCC Rules, the following corrections are hereby ordered. It should be noted that such corrections consist of those requested and

accepted by Respondent, as well as necessary corrections noted and now applied by the Tribunal.

46. The Title on the cover page of the Award shall now read: “IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE 2017 ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE.”
47. The word “emergency” shall be omitted from paragraph 19.
48. The word “emergency” shall be omitted from paragraph 20.
49. The following names and emails shall be added to paragraph 20:
- Ms. Damroka Kościelak (Damroka.Kocielak@prokuratoria.gov.pl)
 - Mr. Jaroslaw Zasada (Jaroslaw.Zasada@prokuratoria.gov.pl)
50. The last sentence of paragraph 777 shall now read: “The Tribunal finds this percentage reasonable.”
51. Paragraph 778.4 of the Award shall now read as follows:
- “ORDERS Claimants to bear all costs of the arbitration. Claimants are jointly and severally liable to pay such costs, which are as follows:
- The Fee of Chairperson Bernardo M. Cremades, which amounts to EUR 255,170 and compensation for expenses EUR 735, in total EUR 255,905, plus VAT of EUR 63,976.25.
 - The Fee of Co-Arbitrator Kaj Hobér, which amounts to EUR 127,585, plus VAT of EUR 31,896.25.
 - The Fee of Co-Arbitrator Zachary Douglas QC, which amounts to EUR 127,585.
 - The Administrative Fee of the SCC, which amounts to EUR 60,000, plus VAT of EUR 15,000.”
52. Paragraph 778.5 of the Award shall now read as follows:
- “ORDERS Claimants to pay Respondent the amount of EUR 340,973.75 to reimburse Respondent for 50% of the costs of the arbitration.”
53. A new paragraph, paragraph 778.6, is hereby added, which shall read as follows:
- “ORDERS Claimants to pay Respondent the amount of PLN 1,296,584.50 to reimburse Respondent for the legal fees incurred by the General Counsel to the

Republic of Poland, with 5% interest per annum accruing from the date of this award. Claimants are jointly and severally liable to pay such costs.”

54. A new paragraph, paragraph 778.7, is hereby added, which shall read: “A party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with Stockholm District Court within three months from the date when the party received this award.”
55. On the signature page on page 149, “Place of arbitration” shall now read “Seat of arbitration.”

IV. ADDITIONAL AWARD

56. Both Parties have made requests for an additional award.

A. *Claimants’ Request*

57. In their letter of 19 July 2021, the Claimants request that the Tribunal render an additional award deciding on the Claimants’ motion provided for in their email of 24 August 2020.
58. The motion that Claimants refer to concerns a request that Respondent be required to reimburse Claimants for 50% of the costs incurred in organizing the hearing, which Claimants communicated as USD 63,022.99. The Tribunal notes that in its Statement of Costs, Claimants contended that this amount should be considered as “Costs of Arbitration.”¹² In this respect, the Award ruled that Claimants should bear all of the costs of this arbitration.¹³
59. In their communications of 13 July 2021 and 22 July 2021, Respondent contends that the costs of organizing the hearing should be considered costs incurred by a party (Article 50 of the SCC Rules) as opposed to costs of the arbitration (Article 49 of the SCC Rules). Respondent highlights that the Award concluded that Claimants should bear all of the costs of the arbitration and partially the costs incurred by Respondent.¹⁴ Respondent also contends that the Tribunal already decided that the costs incurred by Claimants are borne by Claimants themselves.
60. The Tribunal does not consider the hearing costs as a separate issue that needs to be ruled upon independently of the other costs and fees incurred in this arbitration. The Tribunal did not provide a breakdown in the Award of the various costs incurred in this arbitration, including costs of organizing the hearing, because such a breakdown was unnecessary to articulate the allocation determined by the Tribunal. The Parties disagree as to the proper characterization of the costs of organizing the hearing, but such a disagreement is inconsequential here, as the Tribunal has determined the amounts owed to Respondent within the Tribunal’s rulings on costs and fees. Further, to the extent that Claimants’ request for

¹² Claimants’ Statement of Costs, ¶ 8.

¹³ Award, ¶ 771.

¹⁴ Respondent’s 22 July 2021 email (citing Award, ¶ 771).

reimbursement for the costs of the organization of the hearing could be considered a separate claim, which the Tribunal disagrees with for the reasons stated above, paragraphs 778.2 and 778.3 of the Award make clear that such claims were denied.

61. Accordingly, the Tribunal rejects Claimants' 19 July 2021 request for an additional award.

B. Respondent's Request

62. In its correspondence of 13 July 2021, Respondent "*respectfully requests that the Arbitral Tribunal correct the Award by making the record of the amount paid by the Ministry of Climate and Environment for the Advance on Costs in the amount of 1 548 422,21 PLN and interpret/correct the Award or make an additional award to the effect that in Section VIII of the Award Claimants are ordered to jointly and severally pay the amount of 1 548 422,21 PLN to the Republic of Poland represented by the Ministry of Climate and Environment with 5% interest per annum accruing from the date of this award.*"
63. The Award ruled that Claimants should bear all of the costs of this arbitration.¹⁵ The Award also noted that both Parties had requested that any amount awarded in this arbitration be subject to interest.¹⁶
64. While the Award explicitly noted that interest would accrue on the amount Claimants were ordered to pay Respondent to reimburse Respondent for certain legal fees incurred, it failed to address Respondent's request that such interest should also accrue for the amount Claimants were ordered to pay Respondent for costs of the arbitration.
65. Because the Award ultimately did not address Respondent's request that interest apply to the ordered reimbursement of costs of the arbitration, the Tribunal interprets Respondent's request as one for an additional award pursuant to Article 48 of the SCC Rules.
66. As both Parties requested that any amount awarded in this arbitration be subject to interest, the Tribunal determines that subjecting this ordered payment to interest is appropriate.
67. For the reasons stated above, the Arbitral Tribunal:
- 67.1. ORDERS that the EUR 340,973.75 Claimants have been ordered to pay Respondent to reimburse Respondent for 50% of the costs of the arbitration be subject to 5% interest per annum accruing from the date of this additional award. Claimants are jointly and severally liable to pay such costs.

¹⁵ Award, ¶ 771.

¹⁶ Award, ¶ 777; Statement of Claim, ¶ 318; Respondent's Statement of Costs, ¶ 2; Statement of Defence, ¶ 727.

Seat of arbitration: Stockholm, Sweden

Date: 30th July 2021

Signatures:



Kaj Hobér
Arbitrator

Zachary Douglas, QC
Arbitrator


Bernardo M. Cremades
President

Seat of arbitration: Stockholm, Sweden

Date: 30th July 2021

Signatures:

Kaj Hobér
Arbitrator



Zachary Douglas, QC
Arbitrator

Bernardo M. Cremades
President


Seat of arbitration: Stockholm, Sweden

Date: 30 July 2021

Signatures:

Kaj Hobér
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Arbitrator



Bernardo M. Cremades
President