

EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

STATE GENERAL RESERVE FUND OF THE SULTANATE OF OMAN

Claimant

and

REPUBLIC OF BULGARIA

Respondent

ICSID Case No. ARB/15/43

AWARD

Members of the Tribunal

Prof. Vaughan Lowe Q.C., President

Mr. David R. Haigh Q.C., Arbitrator

Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

Date of dispatch to the Parties: 13 August 2019

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REPRESENTATION OF THE PARTIES

*Representing the State General Reserve Fund
of the Sultanate of Oman:*

Mr. Boris Kasolowsky
Mr. Robert Whitener
Mr. Carsten Wendler
Mr. Alexander Monro
Ms. Sarah Lemoine
Ms. Stuti Gadodia
Freshfields Bruckhaus Deringer LLP
Bockenheimer Anlage 44
60322 Frankfurt am Main
Germany

and

Mr. Noah Rubins
Freshfields Bruckhaus Deringer LLP
2 Rue Paul Cézanne
75008 Paris
France

and

Mr. Willibald Plessner
Freshfields Bruckhaus Deringer LLP
Seilergasse 16
1010 Vienna
Austria

Representing the Republic of Bulgaria:

Mr. Ivan Kondov
Ministry of Finance
of the Republic of Bulgaria
102 Rakovski Street
Sofia, 1040
Republic of Bulgaria

and

Mr. David Reed
Mr. Patricio Grané Labat
Mr. Dmitri Evseev
Mr. Monty Taylor
Mr. Timothy Smyth
Mr. Bart Wasiak
Arnold & Porter Kaye Scholer (UK) LLP
Tower 42, 25 Old Broad Street
London EC2N 1HQ
United Kingdom

and

Mr. Paolo DiRosa
Ms. Katelyn Horne
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001-3743
United States of America

and

Mr. Lazar Tomov
Ms. Sylvia Steeva
Ms. Yoana Yovnova
Tomov & Tomov
4, Svetoslav Terter Str.
1st floor
Sofia, 1124
Republic of Bulgaria

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Treaty between the Sultanate of Oman and the Republic of Bulgaria on the Promotion and Reciprocal Protection of Investments, which entered into force on 22 October 2014 (the “**BIT**” or “**Treaty**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the “**ICSID Convention**”).
2. The claimant is the State General Reserve Fund of the Sultanate of Oman (“**SGRF**” or the “**Claimant**”), a State-owned entity of the Sultanate of Oman.
3. The respondent is the Republic of Bulgaria (“**Bulgaria**” or the “**Respondent**”).
4. The Claimant and the Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute arises out of an alleged investment made by SGRF in [...] through SGRF’s wholly-owned [...] subsidiaries, [...].

II. PROCEDURAL HISTORY

6. On 28 September 2015, ICSID received a request for arbitration, dated 28 September 2015, from SGRF against Bulgaria, together with Exhibits C-1 through C-85, and Legal Authorities CL-1 through CL-3 (the “**Request**”).
7. On 22 October 2015, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

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8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties.
9. The Tribunal is composed of Prof. Vaughan Lowe Q.C., a national of the United Kingdom, President, appointed by agreement of the Parties; Mr. David R. Haigh Q.C., a national of Canada, appointed by Claimant; and Prof. Brigitte Stern, a national of France, appointed by Respondent.
10. On 16 February 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Sara Marzal Yetano, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 13 April 2016 by teleconference.
12. Following the first session, on 14 April 2016, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington D.C., United States of America. Procedural Order No. 1 also sets out a timetable for the jurisdictional/merits phase of the proceedings.
13. On 6 May 2016, Claimant filed a letter seeking permission from the Tribunal to make a request for the early production of certain documents. On 13 May 2016, Respondent filed a letter objecting to Claimant’s application. On 27 May 2016, the Tribunal decided to permit the document request to be made, in the form of a Redfern Schedule.

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14. On 15 June 2016, following exchanges between the Parties, Claimant submitted a Redfern Schedule for the early document production request, which included Respondent's objections to each of the requested documents. On 23 June 2016, the Parties exchanged communications regarding certain allegedly inaccurate statements contained in the Redfern Schedule submitted by Claimant.
15. On 30 June 2016, the Tribunal issued Procedural Order No. 2, ordering Respondent to produce the documents identified in the "Tribunal's Decision" column in the Redfern Schedule.
16. On 7 July 2016, Respondent informed the Tribunal that it was unable to produce certain documents by the deadline set in Procedural Order No. 2. On 8 July 2016, Claimant sought a suspension of the deadline for the filing of the Memorial. On 11 July 2016, the Tribunal granted this request.
17. On 26 August 2016, the Parties submitted a joint letter which enclosed a draft procedural Order concerning the confidentiality of documents submitted or produced in the present arbitration. In the joint letter, the Parties requested the Tribunal to issue the draft Order to protect against the disclosure of documents produced or submitted in this arbitration proceeding, stating that the issuance of the Order would expedite the production of the relevant documents by Respondent to Claimant.
18. On 27 August 2016, the Tribunal issued Procedural Order No. 3 concerning confidentiality of documents, in accordance with the Parties' joint request.
19. On 27 September 2016, the Parties submitted a joint proposal to amend the procedural timetable. On 29 September 2016, the Tribunal confirmed the revised timetable.
20. Pursuant to the revised timetable, on 22 December 2016, Claimant submitted its Memorial on the Merits and on Jurisdiction ("**Memorial**"), together with Exhibits C-86 through C-257, Legal Authorities CL-4 through CL-104, the Witness Statement of [...], and the Expert Reports of [...].

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21. On 20 October 2017, the Parties submitted a joint letter requesting the Tribunal to adopt an enclosed draft procedural Order concerning further confidentiality protection for certain specific categories of documents, pursuant to paragraph 5d) of Procedural Order No. 3.
22. In accordance with the Parties' joint request, on 26 October 2017, the Tribunal issued Procedural Order No. 4 concerning further confidentiality protection for specific categories of documents.
23. On 31 October 2017, the Parties jointly requested the Tribunal to order the amendment of the procedural calendar, pursuant to section 6 of Procedural Order No. 1. On 1 November 2017, the Tribunal approved the request and transmitted to the Parties a revised procedural timetable reflecting their amendments.
24. On 1 November 2017, Respondent submitted its Counter-Memorial on the Merits and on Jurisdiction ("**Counter-Memorial**"), together with Exhibits R-1 through R-311, Legal Authorities RL-3 through RL-122, the Witness Statements of [...], and the Expert Reports of [...] (together with Appendices 1 & 2, and Exhibits [...] through [...]), [...] (together with Appendices 1 through 9, and Exhibits [...] through [...]), and [...] (together with Appendices 1.1-1.3, 4.2-4.17, 6.1-6.2, and 7.1-7.4, and Exhibits [...] through [...]).
25. On 16 November 2017, the Parties requested the Tribunal to order the amendment of the procedural calendar in connection with the document production phase of this arbitration. On 20 November 2017, the Tribunal approved the request and transmitted to the Parties a revised procedural timetable reflecting their amendments.
26. On 20 December 2017, the Parties submitted their Redfern Schedules containing their requests for production of documents. On 26 January 2018, the Tribunal issued Procedural Order No. 5 deciding on the production of documents.
27. On 4 January 2018, Mr. Haigh sent a communication informing the Parties that he had just become aware of the fact that the Respondent had submitted an expert report from [...] in support of its Counter-Memorial. Mr. Haigh disclosed that in a long-running

UNCITRAL arbitration he is acting as counsel to a Respondent State party which had engaged [...] as experts.

28. Pursuant to the Tribunal's invitation, on 10 January 2018, the Parties submitted observations on Mr. Haigh's letter. Claimant argued that Respondent should remove [...] from the case, or that he should withdraw voluntarily, failing which Claimant reserved its right to apply to the Tribunal for appropriate relief.
29. By letter of 15 January 2018, the Respondent declined to remove [...] from this case and said that [...] had expressed no intention of withdrawing.
30. On 16 January 2018, Claimant filed a letter applying for the disqualification of [...] in this arbitration. On 19 January 2018, Respondent filed a letter arguing that Claimant's application lacked merit and should be dismissed.
31. On 12 February 2018, Mr. Haigh sent a communication to the Parties including a copy of a decision concerning a challenge against him in a previous case which arose from a disclosure regarding his relationship with [...] in other arbitration proceedings.
32. Following the Tribunal's instructions, on 14 February 2018, the Parties submitted observations on Mr. Haigh's communication. In their respective letters, Claimant maintained its application for disqualification of Respondent's expert [...] and Respondent reiterated its request that the application be dismissed.
33. On 19 February 2018, the Tribunal issued its Decision on Claimant's Request to Disqualify Respondent's Expert on Damages. The Tribunal decided, by a majority, to "[decline] to order that [...] refrain from participating or rendering further assistance to Bulgaria in this arbitration."¹ The decision was adopted by a majority because the Tribunal decided unanimously that, in order to avoid any concern that Mr. Haigh was deciding upon a matter

¹ Decision on Claimant's Request to Disqualify Respondent's Expert on Damages, ¶ 36.

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in which he had an involvement, the decision on the application would be taken by Prof. Stern and Prof. Lowe alone.

34. Additionally, [...] was directed to submit a statement of any material contacts or relationships that he has had with Mr. Haigh. [...] statement was submitted on 2 March 2018.
35. On 28 May 2018, the Parties jointly proposed a revised timetable. On 29 May 2018, the Tribunal confirmed the revised timetable.
36. Pursuant to this revised timetable, on 25 June 2018, Claimant submitted its Reply on the Merits and on Jurisdiction (“**Reply**”), together with Exhibits C-258 through C-309, Legal Authorities CL-108 through CL-137, and the Second Expert Reports of [...].
37. On 8 November 2018, Respondent submitted its Rejoinder on the Merits and on Jurisdiction (“**Rejoinder**”), together with Exhibits R-316 through R-446, Legal Authorities RL-137 through RL-165, the Second Witness Statements of [...], and the Second Expert Reports of [...] (together with Exhibits [...]through [...]), [...] (together with Appendices 1 and 2, and Exhibits [...] and [...]), and [...] (together with Appendices 2A-B and 3A, and Exhibits [...]through [...]).
38. By letter dated 10 December 2018, Claimant notified the Tribunal that it “*withdraws ‘with prejudice’ its claims in this arbitration*” and that, accordingly, it was no longer necessary to hold the oral hearing which, in accordance with the revised timetable agreed by the Parties in May 2018, had been scheduled for January 2019 in Washington. However, Claimant maintained its request that it be awarded costs and requested the Tribunal to “*proceed to make a decision on costs and bring this arbitration to an end.*” To this effect, Claimant proposed that the Tribunal direct the Parties to make simultaneous written submissions on costs.
39. In response to this letter, on 14 December 2018, Respondent requested that the Tribunal proceed to issue a final award (and not a “decision”), setting out the Parties’ claims and defences and reflecting the fact that the Claimant has withdrawn its claims “*with*

- prejudice.*” Bulgaria requested further that the award deal with the issue of costs pursuant to Article 61 of the ICSID Convention, by making an award of costs in Bulgaria’s favour.
40. Additionally, Respondent argued that, if Claimant were to be permitted to maintain certain arguments “*on the merits*” set out in its letter of 10 December 2018 in support of its costs request, then this would require the determination by the Tribunal of factual issues that are in dispute between the Parties. In the circumstances, Respondent should be afforded the opportunity to cross-examine the Claimant’s only witness, [...] on whose written testimony many of the Claimant’s contentions rest.
41. On 19 December 2018, Claimant submitted observations to Respondent’s letter, stating that it does not consider it necessary for the Tribunal to hold a hearing to allocate costs. In particular, Claimant noted that the Parties are in agreement that the arbitration should be brought to a close with a determination by the Tribunal as to the appropriate allocation of costs, and mentioned that it is requesting “*that the Tribunal exercise its broad discretion under Article 61 of the ICSID Convention to make a decision on costs based on its assessment of the reasonableness of each party’s procedural conduct in this arbitration.*”
42. By communication dated 21 December 2018, the Tribunal notified the Parties of its decision not to arrange at this stage a hearing on the question of costs and to proceed, at least initially, on the basis of written submissions. The Tribunal invited the Parties to make two rounds of simultaneous written submissions and specified that any request for a hearing on the question of the allocation of costs should be included, together with supporting reasons, in the second-round of written submission.
43. Pursuant to the Tribunal’s instructions, the Parties simultaneously filed their first submissions on costs on 31 January 2019 (“**First Submissions on Costs**”) and a second submission on costs on 28 February 2019 (“**Second Submissions on Costs**”).
44. The proceeding was closed on 3 June 2019.

45. Pursuant to the Tribunal’s instructions, the Respondent submitted an updated supplemental submission of costs on 10 June 2019 (“**Respondent’s Supplemental Submission on Costs**”).

III. FACTUAL BACKGROUND

46. [...]

47. [...]

48. [...]

IV. PARTIES’ CLAIMS AND REQUESTS FOR RELIEF

49. As was noted above,² Claimant withdrew its principal claims in this arbitration on 10 December 2018. Those claims were set out, and discussed in detail, in the written submissions of the Parties. The claims were defined by the terms of Claimant’s requests for relief.

50. [...]

51. [...]

52. [...]

53. [...]

² See ¶ 38 *supra*.

V. DECISION ON THE CLAIM

54. As was noted above, Claimant expressly withdrew its principal claims “*with prejudice*”, and Respondent requested that the Tribunal issue an Award dismissing all Claimant’s claims with prejudice.
55. The Tribunal notes that the Claimant has not objected to Respondent’s request and that, accordingly, both Parties agree that the Tribunal shall render an Award dismissing all of Claimant’s claims “*with prejudice*” and deciding on the only pending dispute between the Parties, *i.e.* the issue of costs, under Article 61 of the ICSID Convention.
56. The Tribunal is satisfied that it is competent and has jurisdiction to render the present Award under the ICSID Convention and the underlying BIT. The Tribunal accordingly considers it appropriate to proceed to issue a formal Award dismissing all of Claimant’s claims with prejudice, and here decides to do so for the reasons set out in this Section, in accordance with ICSID Arbitration Rule 47(1)(i).

VI. COSTS

A. CLAIMANT’S COST SUBMISSIONS

57. [...]
58. [...]
59. [...]
60. [...]
61. Claimant accordingly claimed its costs for the period 6 November 2015 to 31 March 2018, which it summarized as follows:

(i) USD 400,000.00, which corresponds to the advances on the fees and expenses of the Tribunal and administrative fees of ICSID made by SGRF;

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(ii) [...], which corresponds to the travel and other expenses incurred by SGRF's witness and its representatives;

(iii) [...], which corresponds to the fees and disbursements of SGRF's international counsel, Freshfields Bruckhaus Deringer LLP;

(iv) [...], which corresponds to the fees and disbursements of SGRF's Bulgarian counsel, [...];

(v) [...], which corresponds to the fees and expenses of SGRF's banking, accountancy, and quantum experts, [...];

(vi) [...], which corresponds to the fees of [...].

B. RESPONDENT'S COST SUBMISSIONS

62. [...]

63. [...]

64. [...]

65. [...]

66. In Respondent's Second Submission on Costs, Respondent requested the Tribunal to:

(a) Issue an Award dismissing with prejudice all of the Claimant's claims;

(b) Order the Claimant to pay [...] ³ to cover the costs of the proceeding and [...] ⁴ and [...] to cover the legal fees and expenses incurred by Bulgaria during this proceeding, plus interest on that amount at the fixed rate of 2.95% compounded annually from the date of the Award to the date of full payment; and

(c) Order the Claimant to pay any additional costs, including legal fees and expenses incurred by Bulgaria after 31 January 2019 but

³ Pursuant to footnote 73 of Respondent's Second Submission on Costs: "Bulgaria understands that as of 18 January 2019, there was an available balance of [...]. See Email from ICSID to the Parties, 18 January 2019. To the extent that Bulgaria is reimbursed for any unused funds, it will not seek to recover that amount."

⁴ According to footnote 74 of Respondent's Second Submission on Costs, this figure only reflects the costs incurred by Bulgaria through 31 January 2019.

*before the Tribunal renders its Award, plus interest at the rate specified in subparagraph (b) above.*⁵ (original footnotes omitted, emphasis in original)

67. As mentioned above, on 10 June 2019, Respondent submitted a Supplemental Submission on Costs, which included the costs accrued from 1 February 2019 onwards and the following revised request for relief to the Tribunal:

- a. *Issue an Award dismissing with prejudice all of the Claimant's claims; and*
- b. *Order the Claimant to pay [...]to cover the costs of the proceeding, as well as [...]to cover the legal fees and expenses incurred by Bulgaria during this proceeding, plus interest on that amount at the fixed rate of 2.95% compounded annually from the date of the Award to the date of full payment.*

C. THE TRIBUNAL'S DECISION ON COSTS

68. 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.

69. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

70. The Tribunal has considered the Parties' respective submissions. In deciding upon the allocation of costs in circumstances where the claim is completely withdrawn before any hearing in the case, it has not made any determinations on questions at issue in the case. Its decision is based on the assumption that each Party has presented its case in good faith, believing the facts alleged to be true.

⁵ Respondent's Second Submission on Costs, ¶ 52.

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71. The Parties referred to a number of arbitral decisions addressing the question of the allocation of costs, including *Accession Mezzanine Capital v. Hungary*, *Quadrant Pacific Growth Fund v. Costa Rica*, *Foresti v. South Africa*, *PNG v. Papua New Guinea*, and *Burlington v. Ecuador*.⁶ The references imply that both Parties wish the Tribunal to exercise its discretion in conformity with the approach generally adopted in investment arbitrations, as exemplified by such awards.
72. The Tribunal considers that the basic principle that is generally accepted and applied in relation to the allocation of costs in investment arbitrations in accordance with Convention Article 61 is that the tribunal has a discretion in respect to the allocation of costs, to be exercised taking into account all of the circumstances of the instant case, and in particular the outcome of the parties' respective claims, defences, and applications in the case. The reasonableness of the parties' costs is also to be taken into account in determining precisely how much each party is to recover.
73. In the present case the Tribunal, as was noted above, does not suppose that either Party acted in bad faith at any stage of the proceedings. The very late decision of Claimant to withdraw its claims with prejudice is certainly a salient feature of the proceedings; but the Tribunal considers that the timing of this decision is of less importance than the fact of the withdrawal of the claim.
74. It is a wise and important step for parties to reappraise their position repeatedly during the long process leading to the rendering of an arbitral award, and to examine the scope for an adjustment of their claims and defences. Decisions on costs should not be used to deter or punish such reappraisals. On the other hand, the fundamental principle underlying all awards is that parties are to be recompensed and "made whole" when they are unlawfully

⁶ *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Award, 17 April 2015 (CL-142); *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/08/1), Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Allocation of Costs, 27 October 2010 (CL-138); *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Award, 4 August 2010 (RL-166); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea* (ICSID Case No. ARB/13/33), Award, 5 May 2015 (CL-139); and *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Reconsideration and Award, 7 February 2017 (RL-112).

injured. The award to a successful party of its costs incurred in vindicating its rights is essentially a part of the reparation for the consequences flowing naturally and (where the existence of the dispute is properly notified) foreseeably from the initial wrong. That is the essence of the “loser pays” or “costs follow the event” principle, although it is important to recall that it is a principle and not a rule: its application in any particular case may be affected significantly by factors specific to that case.

75. Where the principal claims in a case are withdrawn there is no winner and no loser in the way that there is in a case that proceeds to an adjudication on the merits. There is, however, a presumption that parties have acted lawfully unless the contrary is established: the respondent’s position must be deemed to emerge untarnished after a claim is withdrawn. Moreover, the respondent in such circumstances has been obliged to participate in a procedure in order to maintain the defences that were made known to the claimant at the outset of the arbitration procedure.
76. The Tribunal considers it appropriate to apply the principle adopted in the *Foresti* case, that “*while claimants in investment arbitrations are in principle entitled to the costs necessarily incurred in the vindication of their legal rights, they cannot expect to leave respondent States to carry the costs of defending claims that are abandoned.*”⁷ Further, it sees no circumstances in the present case that warrant a departure from that principle. In particular, it does not consider that the costs of the pursuit of the proceedings during the period prior to the disclosure of [...] should be borne by Respondent: it does not consider that Respondent’s conduct in not disclosing [...] earlier was improper or an abuse of the arbitration process.
77. The Tribunal, by a majority, therefore decides that Claimant should in principle bear all of the costs of the arbitration, subject to consideration of the reasonableness of Respondent’s costs.

⁷ *Foresti v. South Africa* (RL-166), ¶ 132.

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78. Having considered the detailed submissions of the Parties concerning the amounts of the costs claimed, the Tribunal does not find the claims unreasonable in the context of an international investment arbitration.
79. The Tribunal, by a majority, therefore decides that Claimant should bear all of the costs of the arbitration, as well as Respondent's costs as claimed by Respondent. Those costs include reimbursement of the Respondent's share of the advance payments made during the proceeding to cover the costs of the arbitration (Claimant's having paid its own share), as well as claimed interest.
80. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):⁸

Arbitrators' fees and expenses	
Prof. Vaughan Lowe	USD 42,656.25
Mr. David R. Haigh	USD 32,111.92
Prof. Brigitte Stern	USD 75,046.50
ICSID's administrative fees	USD 148,000.00
Direct expenses (estimated) ⁹	USD 726.87
Total	<u>USD 298,541.54</u>

81. The above arbitration costs have been paid out of the advances made by the Parties in equal parts.¹⁰ As a result, each Party's share of the costs of arbitration amounts to [...].
82. Accordingly, the Tribunal orders Claimant to pay Respondent [...] for the expended portion of Respondent's advances to ICSID and [...] to cover Respondent's legal fees and

⁸ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

⁹ This amount includes estimated charges relating to the dispatch of this Award (courier, printing and copying).

¹⁰ The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

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expenses, plus interest on those amounts at the fixed rate of 2.95% compounded annually from the date of the Award to the date of full payment.

VII. AWARD

83. For the reasons set forth above, the Tribunal decides as follows:

- (1) To dismiss with prejudice all of the claims made in this arbitration by SGRF; and
- (2) By a majority, that SGRF shall pay the Republic of Bulgaria [...], plus interest on those amounts at the fixed rate of 2.95% compounded annually from the date of the Award to the date of full payment.

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Mr. David R. Haigh Q.C.
Arbitrator

Date:

Prof. Brigitte Stern
Arbitrator

Date:

Prof. Vaughan Lowe Q.C.
President of the Tribunal

Date: