



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica (ICSID Case No. ARB/13/2) – Award – 7 March 2017

Case Report by: Raúl Pereira Fleury**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against Costa Rica pursuant to the Costa Rica-Switzerland BIT ('BIT'), alleging that Costa Rica breached the fair and equitable treatment ("FET") standard contained in the BIT in relation to its investment in two Costa Rican enterprises (Tropigás and GNZ) engaged in the storage, packaging, distribution, and commercialization of liquefied petroleum gas (LPG). Following the jurisdictional phase of the proceedings whereby the Tribunal found it had jurisdiction, the Tribunal proceeded to hold the merits phase of the case, to determine if whether Costa Rica breached the FET standard under Article 4 of the BIT.

Main Issues: Breach of FET standard, repudiation of regulatory framework, legitimate expectations, arbitrariness, lack of transparency, lack of administrative due process, bad faith.

Tribunal: Alexis Mourre (President), Ricardo Ramírez (Arbitrator) and Andrés Jana (Arbitrator)

Claimant's Counsel: Luis Grifé Alonso, Guillermo Ramírez Pérez, and Ángel Espinosa García (México City, México)

Respondent's Counsel: Adriana González, Arianna Arce, Francinie Obando, and Marisol Montero (Ministry of Foreign Trade of Costa Rica); Alejandro Escobar and Ernesto Félix de Jesús (Baker Botts LLP, London)

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Digest:

1. Relevant Facts

Cervin Investissements S.A. (“Cervin”) and Rhone Investissements S.A. (“Rhone”) (the “Claimants”), are companies incorporated under the laws of Switzerland. The Respondent is the Republic of Costa Rica (the “Respondent” or “Costa Rica”) (¶¶1, 13). The underlying dispute is related to the Claimants’ shareholding in Tropigás and GNZ (¶20), two companies that act in the Costa Rican LPG market (¶89) and arose from the Respondent’s denial to modify the LPG tariffs in the years 2010, 2011, 2012, 2013, and 2014 (¶127).

In March 2009, Tropigás was fully acquired by Rhone and GNZ was wholly purchased by Cervin (¶6). The cumulative amount of both transactions was US\$ 20,578,336 (¶¶8-9). Later, in October 2011, GNZ acquired Tropigás and consequently, Claimants became joint owners of GNZ (¶10).

According to the Costa Rican LPG regulatory framework, in order to package and distribute LPG, a concession from the Ministry of Environment, Energy and Transportation must be obtained (hereinafter “MINAE”) (¶93), with the tariff being set by the Public Service Regulatory Authority (hereinafter “ARESEP”) (¶101). Tropigás has been acting in the LPG market since 1975, and GNZ since 1991 (¶97). The ARESEP may analyze the possibility that concession holders request a revision of the tariff margins, for which they must follow a specific process (¶122).

From 2010 to 2014, GNZ requested the ARESEP the revision of the LPG tariff margins but the ARESEP rejected all of the GNZ’s petitions and eventual appeals to such rejections (¶¶131-257). As a consequence, Claimants first consulted with Respondent in order to settle the conflict regarding certain provisions of the BIT, although these consultations were held, without success, in 2012 (¶16). Therefore, Claimants initiated ICSID arbitration proceedings on the ground that Respondent’s refusal to revise the tariffs was unreasonable and disproportionate and based in arbitrary and discretionary decisions, constituting a breach of the BIT provisions (¶259).

2. Procedural History

Claimants filed their Request for Arbitration on 19 February 2013, which was registered by ICSID on 11 March 2013 (¶¶24-25). The Tribunal was constituted on 14 August 2013 (¶26). The first session was held through a teleconference on 11 September 2013 (¶27). On 19 September 2013, the Tribunal issued Procedural Order No. 1, whereby it decided to bifurcate the proceedings, pursuant to the parties’ agreement (¶¶27-28). From 29 November 2013 to 13 June 2014, the parties submitted their memorials on jurisdiction (objections to jurisdiction, response to objections to jurisdiction, reply, rejoinder) (¶¶29-32), and on 1 July 2014, the Tribunal and parties held a hearing on the objections to jurisdiction raised by Respondent (¶¶33-34). On 15 December 2014, the Tribunal rendered its Decision on Jurisdiction upholding its jurisdiction to decide on Claimants’ FET claims (¶38).

On 9 February 2015, the Tribunal issued Procedural Order No. 3 in which established the procedural calendar for the merits phase of the arbitration (¶42). On 2 June 2015, Claimant submitted its memorial on the merits, and on the “damages” section, Claimants referred to ARESEP resolution RIE-048-2015 and argued that as the effects of this resolution continued

to add to the damages sustained by Cervin and Rhone since 2010, the Tribunal should reserve a separate phase for the quantification of Claimants' damages (¶¶44-45). After an exchange of submissions with Respondent (¶¶46-49), the Tribunal rejected Claimants' request on this matter and ordered Claimants to submit its memorial on damages by 6 July 2015 (¶51). After a request for an extension, Claimants submitted its memorial on damages on 24 July 2015 and on 9 December 2015, Respondent submitted its statement of defense (¶¶56-57). On 15 January 2016, the parties submitted their document production requests pursuant to the Redfern Schedule (¶60). On 16 February 2016, the Tribunal received a request to suspend the proceedings from a third party, and after hearing the parties on this issue, it decided to continue with the arbitration (¶¶62-64). On 29 February 2016, Claimants submitted its reply on the merits and on 13 June 2016, Respondent submitted its rejoinder on the merits (¶74). The hearings on the merits were held from 11 to 15 July 2016, at the ICSID's headquarters in Washington, D.C. (¶80). On 20 September 2016, the parties submitted their post-hearing briefs, on 20 October their declarations on costs, and on 3 February 2017, the Tribunal concluded the proceedings (¶¶85-87).

3. Positions of the Parties

3.1 Claimant's Position

Claimants argued that the ARESEP decisions not to revise the LPG tariffs between 2010 and 2015 were unreasonable and disproportionate and based on arbitrary and discretionary decisions, constituting a violation of the BIT (¶259). Regarding the 2010 resolution, Claimants argued that the ARESEP arbitrarily granted a margin even lower to GNZ and Tropigás' operational costs, thereby violating the ARESEP Act (¶261).

Concerning the 2011 resolution, Claimants argued that the ARESEP did not analyze the explanation put forward by GNZ and did not base its decision on juridical grounds (¶270). In relation to a second 2011 resolution, Claimants argued that such decision simply incorporated the first 2011 decision, without making a separate analysis (¶280).

Regarding the 2012 and 2013 resolutions, Claimants argued that the supposed flaws in the information submitted by GNZ, as alleged by ARESEP, did not exist and, in any case, the ARESEP could still apply the Tariff Model and set the tariffs pursuant to its own calculations (¶¶282, 294).

Finally, in relation to the 2014 resolution, Claimants first argued that said resolution fell within the Tribunal's jurisdiction, because it was an act that came to Claimants' knowledge just before the submission of their memorial on the merits and, Claimants were therefore careful enough to at least mention that resolution, reserving their right to submit their claims on this regard. Claimants argued that these would be incidental or additional claims, pursuant to Article 46 of the ICSID Convention and Rule 40 of ICSID's Arbitration Rules (¶¶300-301).

Concerning the substance of the 2014 resolution, Claimants argued that the ARESEP made unjustified adjustments and cuts to the tariffs' margins, giving other companies (Gas Tomza and Súper Gas) higher margins (¶¶304-305). According to Claimants, this conduct shows ARESEP's inconsistency and arbitrariness in relation to its previous decisions (¶308).

For the foregoing reasons, Claimants argued that Respondent breached the FET standard contained in Article 4 of the BIT.

3.1.1 Applicable Standard

Claimant argued that the applicable standard to analyze the FET provision contained in the BIT was an autonomous standard, which differs from the minimum standard of treatment under customary international law, as Article 4 of the BIT does not contain an express reference to customary international law (¶313). Claimants indicated that, under the Vienna Convention on the Law of Treaties (VCLT), Article 4 of the BIT should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms in light of its object and purpose (¶314), and argued that the threshold to find a violation of the FET standard should be the one applied by the tribunal in *Saluka v. Czech Republic*: “in order to violate the [FET] standard, it may be sufficient that States’ conduct displays a relatively lower degree of inappropriateness.” (¶316).

Subsequently, Claimants proceeded to list the acts by Respondent that they considered to violate the BIT’s FET standard.

3.1.2 Deliberate repudiation of the regulatory framework’s principle

According to Claimants, Respondent’s rejection of all of their requests for the improvement of the margin, as well as the granting of insufficient margins, constituted a violation of the principles of cost service and financial balance enshrined in the regulatory framework (¶¶322-323). Claimants argued that none of Respondent’s resolutions maintained a logic and reasonable relation with the industry’s objective principles (¶324).

3.1.3 Frustration of GNZ and Tropigás’ legitimate expectations

Claimants argued that in 2010 and 2011, the ARESEP had announced, in public hearings, that margin increases would be applied. According to Claimants, said representations and manifestations by the ARESEP created in GNZ and Tropigás reasonable expectations that their requests would at least be partially admitted (¶¶325-328).

3.1.4 Arbitrariness and lack of transparency in the tariff resolutions

Concerning the arbitrariness of Respondent’s acts, Claimants argued that the ARESEP acted arbitrarily when it unilaterally and discretionally decided not to consider the information submitted by Tropigás in the 2010 and 2011 hearings. Claimants also argued that ARESEP arbitrarily decided to cut the profitability rate in 2010, a decision inconsistent with ARESEP’s resolution in 2014. In sum, Claimants contended that Respondent acted arbitrarily by imposing its own unreasonable tariff in 2010/2011, by refusing to make the necessary adjustment in 2012/2013, and by reducing the margin in force in 2014 (¶¶329-331).

In relation to the lack of transparency, Claimants argued that the ARESEP, in its resolutions, simply indicated that the costs were excessive or that the information provided contained flaws and inconsistencies, without giving any reasons or motivations to justify the criteria adopted, or referring to any legal rules. According to Claimants, these omissions constituted a lack of transparency on the part of ARESEP, thereby preventing Claimants to make the necessary modifications. In any case, Claimants argued that the ARESEP had all the information it needed to make its own calculations and establish the new tariffs, like it did in past occasions (¶¶332-337).

3.1.5 Violation of administrative due process

Claimants argued that the ARESEP violated the administrative due process by unduly delaying the resolution of the recourse against the 2011 resolution, issuing a decision only in September 2013. Claimants also argued that in its new decision, the ARESEP included a different new reasoning to improve its motivations, leaving Claimants defenseless because they based their recourses only on the previous resolution's motivations (¶¶338-340).

Claimants also argued that ARESEP's higher authorities failed to examine each and all of GNZ's complaints, without questioning any of the determinations made by the lower authorities (¶341).

3.1.6 Manifest lack of good faith

Claimant contended that during all the processes for tariff setting there was a manifest lack of good faith in Respondent. Particularly, Claimants argued that Respondent acted in bad faith: (i) when the Energy Services Secretariat ("DSE") manipulated the information so that the public opinion would believe that GNZ's tariff assessment was overvalued; (ii) when the ARESEP refused, in 2011, to use its methodology to revise the tariff, while in 2010 it did use said methodology, even though the information submitted by GNZ and Tropicigás were the same; (iii) when the ARESEP rejected the 2011 tariff request; (iv) when the ARESEP rejected, without reasoning, GNZ's tariff request in 2012; (v) when the ARESEP decided on GNZ's 2013 tariff request based on unfunded and inexistent reasons; (vi) when ARESEP's Board decided that the appeals to the 2012 and 2013 tariff process lacked relevance because a margin was already set for LPG packaging; and (vii) when in 2014, the ARESEP remedied the lack of information to set the tariff, acting inconsistently with its decisions in 2011, 2012, and 2013 (¶¶342-344).

3.1.7 Claim for damages

Claimants requested the Tribunal to grant damages based on the losses suffered as a consequence of the tariffs applied by the ARESEP and for lost profits resulting from ARESEP's denial to adjust the margins as requested, plus interest (¶349). Claimants argued that damages should be quantified taking into account principles of customary international law as applied by *The Factory at Chorzow* case and the Articles on Responsibility of States for Internationally Wrongful Acts (the "Articles on Responsibility of States") (¶¶346-347).

Moreover, Claimants argued that the calculation of the losses sustained should be made taking the cash-flow method (¶¶350-353), and consequently in order to quantify the lost profits, Claimants calculated the historic liters sold by GNZ and Tropicigás and their costs until 31 December 2014 and applied the margins requested to the ARESEP in each year (¶¶354-359).

Concerning the accrued interest, Claimants relied in Article 38(2) of the Articles on Responsibility of States and indicated that the Tribunal should apply an annual post-award compound interest at a rate of 11% equivalent to the Costa Rican sovereign bonds (¶¶360-361).

3.2 Respondent's position

Respondent argued that the ARESEP acted accordingly in setting the LPG tariffs and that Claimants failed to demonstrate the BIT's violation and damages (¶362).

3.2.1 The ARESEP acted accordingly in setting the LPG tariffs

In Respondent's view, the ARESEP acted properly in all the processes for tariff revision, motivating all of its decisions in the tariff resolutions and the tariff reports from the DSE (¶363).

For each of the resolutions, Respondent argued that the ARESEP explained the flaws and issues with GNZ and Tropigas' requests and that the methodology for the calculation was correctly applied (¶¶363-392). For Respondent, Claimants were simply "unsatisfied" with the result of applying the methodology, because they never objected to the legality of such methodology (¶392).

3.2.2 The 2014 Tariff Resolution do not fall within the Tribunal's jurisdiction

Respondent argued that the 2014 Tariff Resolution could not be considered as an additional claim under Article 46 of the ICSID Convention and Rule 40 of ICSID's Arbitration Rules, because such a claim did not comply with the requirement that it be directly related with the conflict and within the limits of the parties' consent (384). In this context, Respondent cited to ICSID Secretariat's explanatory notes of 1968 (¶385).

According to Respondent, the 2014 Tariff Resolution was different from the others and based on a different tariff request (¶386). Also, there was no controversy related to the 2014 Tariff Resolution because Claimants did not make any claim damages under international law for it (¶388).

3.2.3 Claimants failed to prove Respondent's breach of the FET standard

Respondent argued that Claimants failed to prove any breach by Respondent to the standards of protection contained in the BIT and, in any case, that Respondent has not breach its FET obligation (¶393).

According to Respondent, while Claimants referred to a number of acts that violated the FET standard, they nevertheless failed to explain precisely what those violations were, how they happened, and the applicable elements to analyze them. Claimants only listed the acts, without offering grounds to support the violations (¶¶394-395).

3.2.4 Respondent did not frustrate Claimants' legitimate expectations

Respondent argued that legitimate expectations can only arise from commitments or promises made by the State in order to induce the investor to make an investment. (¶398). In relation to ARESEP's declarations in the 2010 and 2011 public hearings, Respondent contended that said declarations took place after the investment was made and therefore, Claimants cannot rely on them. Respondent added that the tariff calculation made during these public hearings were solely for instructive purposes and citizen participation, and in no way had the purpose of setting a final tariff or anticipate one (¶400).

3.2.5 Respondent did not act arbitrarily or unreasonably

Respondent argued that the rejection of the tariffs requests *per se* did not constitute an arbitrary and unreasonable behavior, that not all errors in the application of domestic law represents an

arbitrary treatment under international law (quoting the *ELSI* case), and that investment tribunals cannot be used as appeal courts for administrative decisions (¶¶401-402). Respondent added that the arbitrary behavior must be particularly serious and represent a host State's complete indifference towards the rule of law (¶404).

3.2.6 Respondent respected the administrative due process

Respondent argued that due process is less stringent in administrative processes, asserting that the State complies with it by granting the investor the opportunity to be heard, considers the evidence submitted, explains the reasons of its decision, and makes available to the investors effective remedies that allows them to remedy the alleged defects in the administrative decisions (¶¶410-411).

Respondent added that due process under international law does not require Respondent to expressly rule on every argument by GNZ, but only to duly consider its claims (¶415).

3.2.7 Respondent acted transparently

According to Respondent, a host State acts transparently when its behavior is based on publicly available laws and regulations that remain invariable during the controversy and when the investor is allowed to resort to legal remedies to challenge eventual transparency defects (¶420). In this context, Respondent argued that during the 2010 and 2011 public hearings, the ARESEP explained the instructive nature of those hearings and the possibility of introducing changes (¶421).

3.2.8 Respondent acted in good faith

Respondent argued that bad faith implies a serious and manifest violation of international standards (quoting the *Saluka* case), a deliberate breach of a host State's obligations towards the investment (quoting the *Waste Management II* case), or the application of its laws and organisms for a purpose other than that for which it was created. (quoting the *Frontier v. Czech Rep.* case), and that as a matter of international law principles, bad faith cannot be presumed and neither is it enough with just invoking it (¶¶424-425). In this context, Respondent contended that all of ARESEP's resolutions were motivated, reasoned, and applied the correct methodology (¶426).

3.2.9 Claimants did not prove their claim for damages

Respondent concluded its arguments contending that Claimants' damages claims were not serious; Respondent's behavior did not cause damages; the pertinence of applying interest were not demonstrated; the claims for damages does not take into account the tariff methodology; and the information supplied by Claimants lack credibility (¶¶427-440).

4. Tribunal's analysis

4.1 Objection to the jurisdiction over the 2014 Tariff Resolution

The Tribunal found that it had jurisdiction over the 2014 Tariff Resolution. The Tribunal considered that, while the 2014 Tariff Request was after the Decision on Jurisdiction, Claimants referred to the 2014 Tariff Resolution in their Merits Memorial and developed their

arguments in their Merits Reply (¶446). In addition, the Tribunal considered that the 2014 Tariff Resolution complies with Articles 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules, because the 2014 Tariff Resolution falls within the same factual framework and context of the parties' conflict (¶447).

4.2 Applicable FET standard

The Tribunal started by establishing a clear difference between Article 1105 of NAFTA and Article 4.1 of the BIT, indicating that the former makes an express reference to the “minimum standard of treatment” and to “international law”, “including fair and equitable treatment and full protection and security,” and since Article 4.1 of the BIT did not mention a “minimum standard,” then there was no need to read into the BIT's FET provision the minimum standard of treatment (¶¶451-452).

Later, the Tribunal analyzed the meaning of the term “fair and equitable treatment” in light of the wording of Article 4.1 of the BIT, and relying on *MTD v. Chile*, concluded that a fair and equitable treatment implies that Contracting States treat foreign investments with justice and reason, as well as equity, and always taking into account the particular facts of each case (¶¶460-462). Furthermore, the Tribunal held that the breach of the FET standard of the BIT can be found through the frustration of legitimate expectations, arbitrariness, lack of transparency, bad faith, violation of administrative due process, and the deliberate repudiation of the principles of the regulatory framework (¶¶466-467).

The Tribunal concluded that its reasoning must be made according to international law, without turning into an administrative appeals court, and that a simple error in the interpretation or application of the regulatory framework is not enough to breach the FET standard (¶¶469-471).

4.3 Deliberate repudiation of the regulatory framework

The Tribunal considered that there could be some tension in the regulatory framework relating to the principles of financial balance and ponderation (¶494); however, this fact alone cannot be considered as a deliberate repudiation (¶499). Moreover, the Claimants did not challenge the interpretation made by the ARESEP of the regulatory framework in 2010 and 2014. The Tribunal considered that by not challenging the resolutions and without a local judicial resolution confirming the interpretation made by the ARESEP, the Tribunal could not find that the Respondent committed an international wrong (¶506). While the exhaustion of local remedies was not part of the FET standard, the Tribunal considered that a judicial decision over the administrative resolution can be an important element to determine whether the host State breached its international obligations and that there are situations in which, if the investor did not challenge the administrative decision locally, then the Tribunal cannot conclude that the Respondent acted arbitrarily or unfairly, because the Respondent was not put in a position in which it could rectify its actions (¶504).

4.4 Legitimate expectations and contradictory behaviour

The Tribunal started by establishing that the legitimate expectations protected under international law are those that investors have at the time of making the investment, based on the commitments or promises made by the State to attract said investment (quoting the *ECE v. Czech Republic*, PCA Case No. 2010-5; and *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8) and that such expectations must be legitimate and reasonable (¶509).

In this context, the Tribunal held that the public hearings in 2010 and 2011 could not constitute legitimate and reasonable expectations upon which Claimants based their investments because the investments were made after those public hearings took place (¶512). Neither the public hearings could constitute a contradictory behavior by the ARESEP. The only purpose was to inform the public about the administrative process to be followed in setting the tariffs, and not a promise to set specific margins (¶¶513-514).

4.5 Arbitrariness and lack of reasonability

Relying on the ICJ case *Elettronica Sicula S.p.A. (“ELSI”)*, the Tribunal defined arbitrariness as a conduct contrary to the law, justice, or reason, and based solely on caprice (¶¶522-523). The Tribunal explained that it is not enough that the State misapplied the regulatory framework or that its authorities engaged in questionable decisions under local law; instead, the investor must establish that there has been a deliberate repudiation of the aims and goals of a State’s policy (¶527).

Based on these principles, the Tribunal concluded that the Respondent’s actions in relation to all the Tariff Resolutions did not constitute arbitrary behavior. While some of the resolutions might have some errors in the application of law, inconsistencies, or lack of exhaustive motivation (¶¶544, 553, 556), they could not be considered as a breach of international law.

4.6 Lack of transparency

The Tribunal first expressed that, while the BIT made no specific reference to the term, States are obliged to provide a reasonable level of transparency in their acts and in the applicable legal framework, as part of the FET standard (¶573). The Tribunal considered that ARESEP’s resolutions were motivated enough and the fact that in each tariff resolution the ARESEP included new requirements did not constitute lack of transparency (¶¶575-652).

4.7 Lack of administrative due process

The Tribunal indicated, quoting *ADC v. Hungary* (ICSID Case No. ARB/03/16), that a State’s due process obligation implies basic legal mechanisms such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute. In general, it must grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard (¶654). For the Tribunal, the lack of due process breaches the FET standard when it leads to a result that offends judicial propriety (¶655).

The Tribunal first noted that Claimants challenged the 2011 Tariff Resolution on 9 June 2011, and the ARESEP decided on the challenge on 30 September 2013, while the General Public Administration Act gave the ARESEP 8 days to decide such challenges (¶¶659-660). The Tribunal decided that the gravity of such delay was shocking and constituted a violation of the FET standard (¶663), and that the fact that the ARESEP was going through an institutional reform was not enough to justify a delay of more than two years (¶662).

Regarding Claimants’ argument that the ARESEP failed to address all of Claimants’ claims, the Tribunal held that, under international law, the administrative authority is not required to decide on each and every claim, but to duly consider the requests for relief and motivate its decisions (¶666). In relation to the argument of inclusion of new arguments and improvement

of motivation of the challenged decisions, the Tribunal held that such circumstances did not constitute a violation of Costa Rican law (¶¶672-673).

4.8 *Bad faith*

The Tribunal first indicated, quoting *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22) and *Waste Management II* (ICSID Case No. ARB(AF)/003/3), that acting in good faith is a central element in the FET standard (¶686). However, the Tribunal noted that Claimants' bad faith arguments were based on their other alleged FET violations, such as arbitrariness, lack of transparency, repudiation of the regulatory framework, and lack of administrative due process, arguments that were already decided by the Tribunal (¶687).

Yet, the Claimants also made generic bad faith arguments. Here the Tribunal held that it is not enough for the Claimants to allege that Respondent behaved with malice, hidden purposes, or for political interests. They had the obligation to sufficiently prove such bad faith behaviors (¶695). The Tribunal concluded that Claimants failed to prove that Respondent acted in bad faith (¶697).

4.9 *Damages*

The Tribunal analyzed whether Respondent's delay to decide on Claimants' challenge to the 2011 Tariff Resolution (*i.e.* the only FET breach found) caused any damages to Claimants. The Tribunal held that it did not, that Claimants failed to prove that the delay caused them any damages (¶¶699, 703).

The Tribunal first noted that Claimants' did not provide any explanation about the damage caused by the delay (¶701). It also noted that, even with delay, Respondent did resolve Claimants' challenge, which was against GNZ; and that Claimant did not produce any evidence to prove that the decision would be different if resolved on time. The Tribunal also indicated that the delay did not prevent Claimants from submitting another tariff request at any given moment (¶702).

5. **Costs**

The Tribunal noted that, according to Art. 61(2) of the ICSID Convention, absent an agreement between the parties, the arbitrators have discretion to determine costs and how they shall be paid by the parties (¶713). The Tribunal decided to apply the principle according to which the losing party shall indemnify the winning party for its reasonable costs (¶716).

The Tribunal first explained that Claimants failed in their claims, so they were not entitled to recover costs (¶717), and that Respondent prevailed on the merits and partially on jurisdiction, clarifying that some of the claims reached the merits phase, that a breach of the FET was found (albeit no damages were found), and that Claimants' claims were not frivolous (¶718).

In this context, the Tribunal held that Respondent should borne 50% of its arbitration costs and 50% of its legal representation costs. Claimants were required to pay for their own arbitration and legal representation costs, plus Respondent's 50% arbitration and 50% legal representation costs (¶719).

Concerning interest, the Tribunal applied an annual LIBOR rate plus 3% from the date of the award (¶¶723-724).

6. Tribunal's decision

The Tribunal decided as follows: (i) Costa Rica violated the FET standard; (ii) Claimants did not prove that the excessive delay in deciding the challenge to the 2011 Tariff Resolution caused any damage to GNZ; (iii) All other FET claims by Claimants were rejected; (iv) Claimants must partially cover Respondent's costs at an amount of US\$ 1,045,487.24; and (v) the amount indicated before shall accrue interest, from the date of the award, at an annual rate of LIBOR plus 3%, until it is paid in full (¶726).