

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V.

Claimants

and

Kingdom of the Netherlands

Respondent

ICSID Case No. ARB/21/22

**ORDER OF THE TRIBUNAL TAKING NOTE OF THE
DISCONTINUANCE OF THE PROCEEDINGS AND DECISION ON COSTS**

Members of the Tribunal

Ms. Tina Cicchetti, President of the Tribunal

Ms. Jean Kalicki, Arbitrator

Mr. D. Brian King, Arbitrator

Secretary of the Tribunal

Dr. Jonathan Chevry

Date of dispatch to the Parties: March 17, 2023

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I. PROCEDURAL HISTORY

1. On April 22, 2021, the International Centre for Settlement of Investment Disputes (“**ICSID**”) received a request for arbitration from (i) Uniper SE, a public limited liability company incorporated in Germany with its registered address in Düsseldorf, Germany (“**Uniper SE**”), (ii) Uniper Benelux Holding B.V., a Besloten Vennootschap (or limited liability) company incorporated under the laws of the Kingdom of the Netherlands (“**the Netherlands**”) with its registered address in Rotterdam, the Netherlands (“**Uniper Benelux Holding B.V.**”); and (iii) Uniper Benelux N.V., a Naamloze Vennootschap (or public) company incorporated under the laws of the Netherlands with its registered address in Rotterdam, the Netherlands (“**Uniper Benelux N.V.**”) (the “**Claimants**”) for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “**ICSID Convention**”) (the “**Request**”).
2. The Request was filed against the Kingdom of the Netherlands.
3. On April 30, 2021, the Acting Secretary-General registered the Request pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Institution Rules 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 the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
4. On December 2, 2021, the Tribunal was constituted pursuant to the Parties’ agreement on the constitution of the Tribunal and the relevant provisions of the ICSID Convention and Arbitration Rules. The Tribunal is composed of Ms. Tina Cicchetti, a national of Canada and Italy, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Mr. D. Brian King, a national of the United States of America, appointed by the Claimants; and Ms. Jean Kalicki, a national of the United States of America, appointed by the Respondent.

5. On December 3, 2021, the Claimants filed a Request for Provisional Measures (the “**Request for Provisional Measures**”). Each of the Parties further submitted observations on this Request for Provisional Measures, in accordance with the Tribunal’s instructions.
6. On February 3, 2022, the Tribunal held the First Session and a Hearing on the Claimants’ Request for Provisional Measures.
7. On February 17, 2022, the Tribunal issued a Decision on the Request for Provisional Measures, with reasons to follow.
8. On March 3, 2022, the Tribunal issued Procedural Order No. 1, which set out a Procedural Calendar for the proceedings.
9. On May 9, 2022, the Tribunal issued Procedural Order No. 2 regarding the Request for Provisional Measures.
10. On May 20, 2022, the Claimants filed their Memorial on the Merits.
11. On June 28, 2022, the Respondent filed a Request for Bifurcation (the “**Request for Bifurcation**”).
12. On July 12, 2022, the Claimants filed Observations on the Request for Bifurcation.
13. On July 26, 2022, the Tribunal issued a Decision on the Request for Bifurcation with reasons to follow; as a result, the objections to jurisdiction were joined to the merits of the dispute.

II. DISCONTINUANCE

14. On July 29, 2022, the Respondent informed the Tribunal that the Parties had conferred and agreed on an immediate suspension of the arbitration until September 2, 2022. Accordingly, the proceedings were suspended until September 2, 2022.

15. On September 2, 2022, the Parties jointly requested an extension of the stay of the proceedings until January 9, 2023.
16. On September 5, 2022, the Tribunal granted the Parties' request for continuation of the stay of the proceedings until January 9, 2023.
17. By letter of December 20, 2022, the Claimants formally requested the discontinuance of the proceedings pursuant to Rule 44 of the ICSID Arbitration Rules ("**Arbitration Rules**").
18. Rule 44 of the ICSID Arbitration Rules provides:

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.
19. By letter of December 26, 2022, in accordance with Rule 44 of the ICSID Arbitration Rules, the Tribunal ordered the Respondent to state by January 6, 2023, whether it opposed the discontinuance of the proceeding.
20. By letter of January 6, 2023, the Respondent confirmed that it did "not oppose [the discontinuance of the proceeding] and that it unconditionally consents to the discontinuance of the present proceedings with ICSID Case No. ARB/21/22."¹
21. As a result, in accordance with the Parties' request and pursuant to Rule 44 of the ICSID Arbitration Rules, the Tribunal hereby takes note of the discontinuance of the proceeding.

¹ Respondent's Request for Costs, p. 1.

III. COSTS

22. In its letter of January 6, 2023, the Respondent also requested that the Tribunal decide the issue of the allocation of costs between the Parties in the order taking note of the discontinuance (the “**Respondent’s Request for Costs**”). More specifically, the Respondent relied on Article 61(2) of the ICSID Convention and requested the Tribunal to order the Claimants to bear the costs of the arbitration, including the fees and expenses of the Tribunal, the charges of ICSID as well as the costs of the Respondent’s legal representation, up to the date of termination of the proceedings. For this purpose, the Respondent proposed to submit a written statement of its costs by January 20, 2023.
23. On January 10, 2023, the Tribunal invited the Claimants to provide their comments on the Respondent’s Request for Costs by January 17, 2023.
24. On January 12, 2023, the Claimants requested an extension of time to provide their comments on the Respondent’s Request for Costs. The Tribunal granted the extension on the same day.
25. On January 26, 2023, the Claimants provided their comments on the Respondent’s Request for Costs (the “**Claimants’ Comments**”).
26. On January 30, 2023, the Respondent requested leave to provide a response to the Claimants’ Comments.
27. On January 31, 2023, the Tribunal granted the Respondent’s request to file a response to the Claimants’ Comments. It also invited the Claimants to submit comments on the Respondent’s response, if any, by February 6, 2023.
28. On February 2, 2023, the Respondent filed its response to the Claimants’ Comments (the “**Respondent’s Response**”).
29. On February 6, 2023, the Claimants submitted their comments on the Respondent’s Response (the “**Claimants’ Additional Comments**”).

A. THE PARTIES' POSITIONS

30. The presentations of the Parties' positions in the sections below are not meant to serve as an exhaustive review of the Parties' submissions on the Respondent's Request for Costs, but rather as summaries of those arguments that are relevant to the Tribunal's analysis and findings. The Tribunal has carefully considered all the written statements made by the Parties and the authorities referred to by them.

(1) The Respondent's Position

a. The Tribunal has the authority to decide on the allocation of costs following a Discontinuance of Proceedings

31. The Respondent's main argument is that pursuant to Article 61(2) of the ICSID Convention, the Tribunal has the authority to decide the allocation of costs in an order taking note of the discontinuance of proceedings.²
32. Specifically, the Respondent emphasizes that multiple ICSID tribunals and committees have found that they had the authority to decide the allocation of costs in the case of a discontinuance of proceedings before the merits were decided.³ In particular, the Respondent refers to the order for the discontinuance of proceedings issued in *ATA v. Hashemite Kingdom of Jordan* ("*ATA v. Jordan*"),⁴ where the tribunal noted the possibility of issuing a decision on costs in the order.⁵
33. The Respondent contests the Claimants' argument that ICSID tribunals have decided on the allocation of costs only in cases where exceptional circumstances, such as abuse of rights and bad faith, justified doing so.⁶ In support of its view, the Respondent points to the orders in both *ATA v. Jordan* and *State General Reserve Fund of the Sultanate of*

² Respondent's Request for Costs, p. 2.

³ Respondent's Response, p. 1.

⁴ Respondent's Response, p. 1, referring to *ATA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Annulment, Order Taking Note of the Discontinuance of the Proceeding, July 11, 2011.

⁵ Respondent's Response, p. 1.

⁶ Respondent's Response, p. 1.

Oman v. Republic of Bulgaria (“**SGRF v. Bulgaria**”), where ICSID tribunals found no evidence of abuse of rights or bad faith [but nonetheless allocated costs].⁷

b. The Respondent should not be left to bear the costs of the Proceedings

34. The Respondent contends that because of the proceedings, it has suffered a substantial expense which it should not be left to bear in light of the discontinuance requested by the Claimants.⁸
35. In support of its request for allocation of costs in circumstances where claims have been abandoned, the Respondent refers to several rulings in ICSID cases, including the awards in *Piero Foresti and Others v. Republic of South Africa* (“**Piero Foresti v. South Africa**”)⁹ and in *SGRF v. Bulgaria*,¹⁰ as well as to the discontinuance orders in *Quadrant Pacific Growth Fund L.P. and Another v. Republic of Costa Rica* (“**Quadrant Pacific v. Costa Rica**”)¹¹ and in *RSM Production Corporation v. Grenada I* (“**RSM v. Grenada I**”).¹² In particular, the Respondent relies on these cases to argue that tribunals have adopted the principle that one party cannot be left with having to support the costs of proceedings that are no longer being pursued by the other party.¹³ According to the Respondent, there is no reason in this case for the Tribunal to deviate from this principle.¹⁴

⁷ Respondent’s Response, p. 1, referring to *ATA v. Jordan*, Order Taking Note of the Discontinuance of the Proceeding, ¶ 30 and *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43, Award, August 13, 2019, ¶ 73.

⁸ Respondent’s Request for Costs, p. 3.

⁹ Respondent’s Request for Costs, p. 2, referring to *Piero Foresti and Others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, August 4, 2010, ¶ 132.

¹⁰ Respondent’s Request for Costs, pp. 2-3, referring to *SGRF v. Republic of Bulgaria*, Award, ¶ 76.

¹¹ Respondent’s Request for Costs, p. 3, referring to *Quadrant Pacific Growth Fund L.P. and Another v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, October 27, 2010, ¶ 71.

¹² Respondent’s Request for Costs, p. 3, referring to *RSM Production Corporation v. Grenada I*, ICSID Case No. ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, April 28, 2011, ¶ 65.

¹³ Respondent’s Request for Costs, pp. 2-3.

¹⁴ Respondent’s Response, p. 2.

36. The Respondent further submits that, pursuant to this principle, no assessment of relative success is necessary. The Respondent submits that, on any view, the Claimants are the unsuccessful party in this case due to their decision no longer to pursue their claims and the rejection of their request for provisional measures by the Tribunal.¹⁵
37. The Respondent argues that it would be unfair to be left to choose between opposing the Claimants' request for the discontinuance of proceedings or accepting to bear the costs of the abandoned proceedings, which it contends should never have been initiated in the first place.¹⁶

c. The Respondent reserves its rights to submit a statement on costs

38. The Respondent requests the Tribunal to "order Claimants to bear the costs of the arbitration, including the fees and expenses of the Tribunal, the charges of ICSID as well as the costs of the Netherlands' legal representation, up to the date of termination of the proceedings."¹⁷ In this respect, the Respondent notes that it remains available to submit a written statement of its costs to the Tribunal.¹⁸

(2) The Claimants' Position

a. The Tribunal does not have the power to award costs

39. The Claimants' primary position is that the Respondent's unconditional consent to the discontinuance of proceedings leaves the Tribunal without authority to render an order allocating costs, as it eliminates the possibility that an award will be rendered.¹⁹ The Claimants submit that in the context of a discontinuance, it is appropriate for the parties to resolve the issue of costs between them.²⁰ The Claimants further refer to *Giovanni*

¹⁵ Respondent's Response, p. 2.

¹⁶ Respondent's Response, p. 2.

¹⁷ Respondent's Request for Costs, p. 3.

¹⁸ Respondent's Request for Costs, p. 3.

¹⁹ Claimants' Comments, p. 1.

²⁰ Claimants' Comments, pp. 1-2, referring to Professor Schreuer's commentary on the ICSID Convention, Christoph Schreuer, *The ICSID Convention: A Commentary*, p. 1242.

Alemanni and others v. Argentine Republic (“*Alemanni v. Argentina*”) to emphasize that ICSID tribunals do not have the authority to decide on the allocation of costs in the context of a discontinuance.²¹

40. In this respect, the Claimants argue that an order of discontinuance is not an award, and hence Article 61(2) of the ICSID Convention is inapplicable to decide the allocation of costs.²² According to the Claimants, scholars’ commentary on ICSID Arbitration Rule 44 supports this by pointing out that an order of discontinuance would not normally contain a statement on costs pursuant to Article 61(2) of the Convention.²³

b. There are no exceptional circumstances to justify a costs award to be issued against the Claimants

41. The Claimants rely on *RSM v. Grenada I* and *Piero Foresti v. South Africa* to suggest that ICSID tribunals have made decisions on costs in the context of discontinuance proceedings in exceptional circumstances only.²⁴ The Claimants insist that in *Piero Foresti v. South Africa*, the tribunal made a decision on costs following a joint request by the parties.²⁵ With respect to *RSM v. Grenada I*, the Claimants point to the tribunal’s characterization of RSM’s abandonment of the annulment proceedings and repeated refusal to pay costs awards as exceptional circumstances.²⁶ The Claimants submit that, in contrast, the circumstances of the present case are not exceptional and thus do not justify a costs award to be issued against them.²⁷
42. The Claimants further argue that a finding of exceptional circumstances would only be warranted in case of bad faith or improper behaviour, as was the case in *Quadrant*

²¹ Claimants’ Comments, p. 2, referring to *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Order of the Tribunal Discontinuing the Proceedings, December 14, 2015, ¶ 26.

²² Claimants’ Comments, pp. 1-2.

²³ Claimants’ Comments, p. 2, referring to Commentary to ICSID Regulations and Rules 1968, Rule 44, Note D.

²⁴ Claimants’ Comments, p. 3.

²⁵ Claimants’ Comments, p. 3, referring to *Piero Foresti v. South Africa*, Award, ¶ 113.

²⁶ Claimants’ Comments, p. 3, referring to *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶¶ 60, 63 and 66.

²⁷ Claimants’ Comments, p. 3.

Pacific v. Costa Rica.²⁸ The Claimants affirm that they have not engaged in any such behaviour and note that the Respondent has not made this allegation.²⁹

c. The Claimants have requested a discontinuance of the proceedings despite the merit of their claims

43. In the Claimants' view, they have requested a discontinuance of the proceedings despite the merit of their claims and thus contest the Respondent's characterization of the claims as meritless.³⁰
44. The Claimants also argue that the Tribunal's expressed concern in Procedural Order No. 2 regarding the Respondent's pursuit of the German litigation illustrates that their request for provisional measures was successful.³¹
45. Furthermore, the Claimants contend that the Respondent's unsuccessful request for bifurcation of its intra-EU objection was a purposeful attempt to delay the proceedings and increased the costs of this arbitration.³²

d. The Respondent has misrepresented the ICSID authorities it relies upon

46. The Claimants allege that the Respondent has made incomplete references to ICSID cases regarding *Quadrant Pacific v. Costa Rica*, *RSM v. Grenada I* and *Piero Foresti v. South Africa*.³³ In these cases, the Claimants emphasize, the tribunals considered that cost orders did not normally form part of discontinuance orders.³⁴
47. The Claimants further contend that the Respondent is only able to cite one ICSID case in which the tribunal issued a decision on costs in a discontinuance order, namely *ATA*

²⁸ Claimants' Comments, p. 4, referring to *Quadrant Pacific v. Costa Rica*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, ¶ 67.

²⁹ Claimants' Comments, p. 4.

³⁰ Claimants' Comments, p. 4.

³¹ Claimants' Comments, pp. 4-5.

³² Claimants' Comments, p. 5.

³³ Claimants' Comments, pp. 2-3.

³⁴ Claimants' Comments, pp. 2-3.

v. Jordan, but has mischaracterized that case.³⁵ In particular, the Claimants note that the tribunal in *ATA v. Jordan* proceeded to the decision on costs following a joint request by the parties, whilst taking note of the exceptional nature of such a decision, as costs would usually be allocated only in an award.³⁶

48. The Claimants also suggest that the Respondent's reliance on *SGRF v. Bulgaria* is misguided, because the tribunal in that case issued a final award as opposed to an order of discontinuance. According to the Claimants, this explains why the tribunal referred to Article 61(2) of the ICSID Convention in its reasoning.³⁷

e. The Claimants should not bear the entirety of the costs of the proceedings

49. The Claimants contend that there exists no uncontested principle in international arbitration whereby a claimant that asks for the discontinuance of arbitral proceedings should bear the costs of the proceedings.³⁸
50. The Claimants allege that the Respondent's claim of unfairness regarding bearing its own costs of the proceedings is insincere and inconsistent with the Respondent's conduct throughout the proceedings.³⁹ In this respect, the Claimants note that the Respondent did not seek the early dismissal of the Claimants' claims under ICSID Arbitration Rule 41(5), but proceeded to attempt to attack the tribunal's jurisdiction before the German courts to delay the proceedings. According to the Claimants, such behaviour undermines any claim of unfairness to the Respondent.⁴⁰

³⁵ Claimants' Additional Comments, p. 1.

³⁶ Claimants' Additional Comments, pp. 1-2, referring to *ATA v. Jordan*, Order Taking Note of the Discontinuance of the Proceeding, ¶ 24.

³⁷ Claimants' Additional Comments, p. 2.

³⁸ Claimants' Additional Comments, p. 2.

³⁹ Claimants' Additional Comments, pp. 2-3.

⁴⁰ Claimants' Additional Comments, pp. 2-3.

51. Finally, the Claimants highlight that they have sought the discontinuance of the proceedings due to the impact of the war in Ukraine on their business, and it would thus not be unfair for the Respondent to bear its own costs of the proceedings.⁴¹

f. The Claimants reserve their right to make further submissions

52. The Claimants request that the Tribunal:⁴²
- (a) Reject the Respondent's Request for Costs; and
 - (b) Issue an order on discontinuance pursuant to ICSID Arbitration Rule 44.
53. The Claimants reserve their right to make additional submissions should the Tribunal proceed to a decision on costs.⁴³

B. THE TRIBUNAL'S REASONING AND DECISION ON THE ISSUE OF COSTS

54. The Tribunal notes that this case is still at its early stages. Until the Parties agreed to suspend the proceedings in July 2022, the arbitration had been progressing in accordance with the procedural calendar for the case, and the Claimants had filed their first substantive pleading in the case. The Tribunal made certain procedural decisions, but no decisions on either jurisdiction or the merits had been reached.
55. The formal request for discontinuance has been made by the Claimants in fulfilment of a request made by the German government as part of its bailout of Uniper SE, as a result of which the German government acquired more than 99% of Uniper SE (the "**Transaction**"). These proceedings were suspended by agreement of the Parties immediately following the announcement of the Transaction so that no further costs were incurred pending its finalization. Immediately following the finalization of the

⁴¹ Claimants' Additional Comments, pp. 2-3.

⁴² Claimants' Comments, p. 5; Claimants' Additional Comments, p. 3.

⁴³ Claimants' Comments, p. 5; Claimants' Additional Comments, p. 3.

Transaction, the Claimants made their formal request for discontinuance, as had been anticipated when the Parties agreed to suspend the proceedings until early January 2023.

56. The Respondent has confirmed its unconditional consent to the discontinuance of the proceedings and separately requested that the Tribunal decide the issue of allocation of costs between the Parties, relying on Article 61(2) of the ICSID Convention. The Respondent does not allege that the Claimants have engaged in any improper conduct. Instead, it seeks an allocation of costs on the principle that one party cannot be left with having to support the costs of proceedings that are no longer being pursued by the other party, particularly as it takes the position that “these proceedings should not have been commenced (for jurisdictional, admissibility and merits reasons)”.⁴⁴
57. As noted by the Claimants, the effect of the consent to discontinuance is that an award will not be issued in these proceedings. The first question for the Tribunal is whether it can decide the allocation of costs pursuant to Article 61(2) of the ICSID Convention in an order taking note of the discontinuance.
58. 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.
59. It is common ground between the Parties that there is no agreement between them as to who should bear the expenses of the arbitration proceedings. Absent such agreement, Article 61(2) requires the tribunal to assess such expenses and decide their allocation. However, the final sentence of Article 61(2) provides that “[s]uch decision shall form part of the award.” In the Tribunal’s view, a proper reading of Article 61(2) leads to the

⁴⁴ Respondent’s Request for Costs, p. 3.

conclusion that this article only applies when a tribunal makes an award. Thus, this article is not triggered in the event of a discontinuance.

60. The Tribunal notes that this reading is consistent with that of other tribunals and committees, in particular the decision in *Alemanni v. Argentina*, where the tribunal considered the provision on its own, as the parties had presented no submissions on the tribunal's powers to make the requested costs award.⁴⁵
61. The Claimants submit that this should be the end of the analysis: the Respondent has requested an allocation of costs pursuant to Article 61(2) of the ICSID Convention; Article 61(2) only applies in the event of an award; the effect of consenting to the discontinuance of proceedings is that no award will be issued; *ergo*, the Tribunal is without power to include an allocation of costs in an order taking note of discontinuance. However, the Respondent also refers to and relies on cases where tribunals (or annulment committees) have allocated costs where proceedings have been discontinued, on the basis of the principle that respondent States should not be left to bear the costs of defending against claims that are no longer pursued. The Tribunal now turns to these cases.
62. In *Piero Foresti v. South Africa* and *SGRF v. Bulgaria*, the decisions of the tribunals allocating costs are found in awards, which are within the ambit of Article 61(2) and do not give rise to the same concerns as to the tribunal's power to allocate costs in the context of a discontinuance. They need not be considered further.
63. In *Quadrant Pacific v. Costa Rica*, the tribunal allocated costs in an order taking note of discontinuance pursuant to Article 14(3)(d) of the ICSID Administrative and

⁴⁵ *Giovanni Alemanni and others v. Argentine Republic*, Order of the Tribunal Discontinuing the Proceedings, ¶ 21. The Tribunal notes that this interpretation is also consistent with the comments of the ICSID Secretariat in the context of the ICSID Rules Amendment Project. In ICSID Working Paper No. 2, the ICSID Secretariat noted at ¶ 344 (page 228) that:

"Comments were received suggesting that Tribunals should allocate costs in orders taking note of the discontinuance of a proceeding. This has not been incorporated since it would not be enforceable under the Convention."

Financial Regulations and Rule 51 of the Arbitration AF Rules. In doing so, the tribunal stated:

It is not common practice, however, to include a decision on costs in [a procedural order taking note of the discontinuance], since this decision is normally included as part of an arbitral award. Indeed, because an order providing for the discontinuance of proceedings does not amount to an arbitral award, it is appropriate for the parties to settle between themselves the costs incurred prior to the discontinuance.⁴⁶ (Footnotes omitted)

64. The *Quadrant Pacific* tribunal went on to conclude that the Arbitration AF Rules gave it the authority and discretion to decide the question of costs, and that there was nothing in the Rules that precluded the tribunal from deciding on the allocation of the advance payments and costs of the truncated proceeding.⁴⁷ It proceeded to allocate costs, not on the basis of success or failure, but rather “on the basis of other factors, such [as] in a case where a party’s bad faith, lack of cooperation, dilatory or otherwise improper conduct justifies that the costs of the proceedings be assessed against such party,” noting that in its view the case before it was such a case.⁴⁸ Thus, the *Quadrant Pacific* tribunal allocated costs not on the basis of Article 61(2) of the ICSID Convention, but on the basis of the discretion it determined it had under the Arbitration AF Rules and to address factors that are not present in the current case.
65. In *RSM v. Grenada I*, the *ad hoc* committee allocated costs in an order taking note of discontinuance pursuant to Article 14(3)(d) of the ICSID Administrative and Financial Regulations. The parties in that case agreed that the tribunal had the discretionary authority to allocate costs.⁴⁹ In addition, the respondent in that case relied not on Article 61(2), but on Article 45(2) of the ICSID Convention, Rule 42 of the ICSID Arbitration Rules and on the tribunal’s inherent powers to allocate costs in the event of

⁴⁶ *Quadrant Pacific v. Costa Rica*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, ¶ 64.

⁴⁷ *Quadrant Pacific v. Costa Rica*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, ¶ 66.

⁴⁸ *Quadrant Pacific v. Costa Rica*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, ¶¶ 67.

⁴⁹ *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶ 27.

discontinuance.⁵⁰ The committee did refer to Article 61(2) of the ICSID Convention as conferring the power to assess and allocate the expenses but confirmed that its power to make an award of costs was not contested by the applicant.⁵¹ It went on to note “that orders for costs are not normally made on the discontinuance of proceedings” but that “in view of the exceptional circumstances” of that case, it considered it appropriate to award the respondent its fees and expenses.⁵² The committee stated its agreement with the *Quadrant Pacific* tribunal’s view that an allocation of costs could be made “on the basis of other factors, such [as] in a case where a party’s bad faith, lack of cooperation, dilatory or otherwise improper conduct” so justifies it.⁵³ The *ad hoc* committee reviewed the applicant’s conduct and determined that it justified an allocation of costs against it.

66. Accordingly, *RSM v. Grenada I* can similarly be distinguished from the current case.
67. In *ATA v. Jordan*, the *ad hoc* committee allocated costs in an order taking note of discontinuance pursuant to ICSID Arbitration Rule 44 in circumstances where the parties consented to the termination of the proceedings but both parties requested that the committee exercise its discretion to allocate the costs in its favour. The *ad hoc* committee noted that “[s]uch a decision is normally taken in an award, as specified in Article 61(2) of the Convention” but, citing *Quadrant Pacific v. Costa Rica* and *RSM v. Grenada I*, stated that it could be done in the order taking note of the discontinuance.⁵⁴ Importantly, the *ad hoc* committee noted that “in the present case, both Parties ask the Committee to proceed this way.”⁵⁵ The *ad hoc* committee went on to exercise its discretion to allocate costs, noting that there was no general rule applicable to the allocation of costs in cases of discontinuance; instead, “[t]he decision must be taken on

⁵⁰ *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶ 21.

⁵¹ *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶ 57.

⁵² *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶ 60.

⁵³ *RSM v. Grenada I*, Order of the Committee Discontinuing the Proceeding and Decision on Costs, ¶ 61, referring to *Quadrant Pacific v. Costa Rica*, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, ¶ 67.

⁵⁴ *ATA v. Jordan*, Order Taking Note of the Discontinuance of the Proceeding, ¶ 24.

⁵⁵ *Ibid.* Emphasis added.

a case by case basis.”⁵⁶ It reviewed the procedural history of the case and noted that the respondent took positions that unnecessarily increased the costs of the proceeding, which it determined in “equity and fairness” required the respondent to contribute to the applicant’s costs.⁵⁷

68. Thus, there are at least two features that distinguish *ATA v. Jordan* from the present case. First, in the present case, there is no agreement between the Parties that the Tribunal has the discretion to allocate costs upon discontinuance. Second, in the Tribunal’s view, there has been no behaviour by any Party that would in fairness require an allocation of costs.
69. In the Tribunal’s view, the cases discussed above do not support the proposition that tribunals should allocate costs upon discontinuance on the basis of a general principle that a respondent should not bear the costs of claims that have been abandoned. The general view that emerges from the cases is that the best practice is for the parties to agree upon the allocation of costs in the event of discontinuance. In fact, in the absence of agreement, tribunals have been circumspect in stating that there is no general principle as to costs in such circumstances and that any decision should be made on a case by case basis. Accordingly, the Tribunal declines the Respondent’s invitation to allocate costs on the basis of a general principle that a respondent should not bear the cost of discontinued claims, as no such principle has been established.
70. When tribunals have decided to exercise their discretion to allocate costs upon discontinuance, they have done so in exceptional circumstances only. The scope of this discretion is unclear, as tribunals that have exercised it have generally done so in situations where the parties have agreed, implicitly or explicitly, that such a power existed. In the Tribunal’s view, this is not an appropriate case to consider the scope of this discretion as there is neither agreement between the Parties nor any exceptional circumstances to consider.

⁵⁶ *ATA v. Jordan*, Order Taking Note of the Discontinuance of the Proceeding, ¶ 27.

⁵⁷ *ATA v. Jordan*, Order Taking Note of the Discontinuance of the Proceeding, ¶ 35.

71. Further, and in any event, taking all considerations into account, the Tribunal determines that it would not be appropriate to entertain any shifting of costs in the particular circumstances of this case.

IV. ORDER

72. Based on the foregoing, the Tribunal orders as follows:
- a. The arbitral proceedings initiated by Uniper SE, Uniper Benelux Holding B.V., and Uniper Benelux N.V., the Claimants, against the Kingdom of the Netherlands, Respondent, in ICSID Case No. ARB/21/22 are discontinued on the day of adoption of the present Order in accordance with ICSID Arbitration Rule 44.
 - b. The Respondent's Request for Costs is dismissed.

Jean Kalicki
Arbitrator

Date: March 17, 2023

D. Brian King
Arbitrator

Date: March 17, 2023

Tina Cicchetti
President of the Tribunal
Date: March 17, 2023