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Excessive Costs and Recoverability of Cost Awards in Investment Arbitration

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Abstract

In the era of the backlash against investor-state dispute settlement, the costs of the proceedings have been a prime object of criticism. This article examines the issue of excessive costs and insufficient recoverability of cost awards in investment arbitration under four possible reform scenarios. First, the article deals with the issue of excessive costs. It analyses fees, the impact of the length of proceedings on costs, and the issue of insufficient resources to bring or defend against an investment claim. In so doing, it assesses the role of Third Party Funding and contingency and conditional fee arrangements. Second, the article examines the issue of insufficient recoverability of cost awards by discussing the unavailability of mechanisms to secure prompt payment of a costs award where there are insufficient resources or an unwillingness to pay. This includes consideration of the impact of TPF and of security for costs orders by investment tribunals.

Key Words
Apportionment of costs – Costs - Dismissal of frivolous claims - Expenses - Lawyers' fees – Investor-State Dispute Settlement (ISDS) - Recoverability of Cost Awards - Security for Costs - Third Party Funding

1. Introduction*

International arbitration between states and foreign investors is a sophisticated method of dispute resolution. It entails setting up an international tribunal, usually the intervention of an international institution that will administer the arbitration, the use of lawyers and experts capable of acting effectively before international arbitrators, the travelling of witnesses and others involved in the proceedings to hearings in countries different from the one where the facts of the dispute took place, etc. Thus, even if the proceedings are handled efficiently, and there is significant variations between cases, the associated costs are usually considerable. Yet, in the era of the backlash against investor-state dispute settlement (ISDS), the costs of the proceedings have been a prime object of criticism, consistently described by users as international arbitration's worst characteristic 'by a significant margin'.[1]

In relation to costs, concerns have also been raised, particularly by states, as to difficulties encountered in the recoverability of cost awards.[2] These concerns may not be completely unfounded. According to a survey conducted by the International Centre for Settlement of Investment Disputes (ICSID) in 2017,[3] on the one hand, from a total of 41 awards of costs and/or damages in favour of the claimant reported on by member states in survey responses, there were 0 reports of non-compliance with awards.[4] On the other hand, however, from a total of 34 awards of costs and/or damages in favour of the state reported on, non-compliance with awards was reported in 12 cases (with 4 reported cases where the compliance status was unknown).[5] While the sample is admittedly small and, as ICSID itself observed, most awards in favour of states are paid,[6] the fact that there were instances of non-compliance in around 35% of the awards in favour

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[1] See Queen Mary 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 7.

[2] See Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, Empirical Perspectives on Investment Arbitration: What do we know? Does it Matter?, (2020) 21 Journal of World Investment and Trade #.

[3] Survey for ICSID Member States on Compliance with ICSID Awards, https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf.

[4] Ibid, p. 4.

[5] Ibid.

[6] Ibid, p. 5.

of states suggests that the issue of recoverability of cost awards warrants consideration in any effort to improve ISDS.

This article examines the issues of excessive costs and insufficient recoverability of cost awards under four possible reform scenarios of ISDS, namely, (i) incremental changes to the existing rules and regulations, but with no significant structural reforms, referred to as 'investment arbitration improved' (IA improved); (ii) the introduction of an appellate mechanism to investment arbitration, referred to as 'investment arbitration + appellate mechanism' (IA + appeal); (iii) the creation of a multilateral investment court (MIC); and (iv) the termination of ISDS altogether, referred to as 'no ISDS' (with alternative domestic court and state-to-state sub-scenarios).[7]

First, the article deals with the issue of excessive costs.[8] It analyses fees, the impact of the length of proceedings on costs, and the issue of insufficient resources to bring or defend against an investment claim. In so doing, it assesses the role of Third Party Funding (TPF) and contingency and conditional fee arrangements. Second, the article examines the issue of insufficient recoverability of cost awards by discussing the unavailability of mechanisms to secure prompt payment of a costs award where there are insufficient resources or an unwillingness to pay. This includes consideration of the impact of TPF and of security for costs orders by investment tribunals.

2. Party Costs and Tribunal Costs

As noted above, a criticism levelled against investment arbitration is its high costs and the insufficient recoverability of such costs. Costs may be described as party costs (e.g. fees and

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[7] See Malcolm Langford, Daniel Behn, Gabrielle Kaufman-Kohler and Michele Potesta, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction', (2020) 21 Journal of World Investment and Trade #.

[8] The concerns refer to *excessive* or *unjustified* costs. Whether a cost is justified depends on a variety of factors intimately linked to the circumstances of each case (e.g. the importance and complexity of the matter). Some costs related to arbitration proceedings, even if high, may be necessary or justified. Thus, we have not assumed that all reductions in costs are necessarily desirable. See UNCITRAL Working Group III (ISDS Reform), 'Possible reform of investor-State dispute settlement (ISDS) — cost and duration' (31 August 2018) A/CN.9/WG.III/WP.153, para. 12, <http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/WP_153.pdf>, accessed 4 July 2019.

expenses of counsel, experts, and witnesses) and tribunal costs (e.g. fees and expenses of arbitrators and arbitral institutions, including secretariat services for *ad hoc* arbitrations).

According to a 2016 study of 2011-2015 awards, average claimant costs were 5,619,261.74 USD, average respondent costs were 4,954,461.27 USD,[9] and average ICSID tribunal costs were 882,668.19 USD.[10] The numbers point to party costs being considerably higher than tribunal costs, with the former being typically over 90% of the overall costs.

A 2017 study found that average party costs were 6,019,000 USD for the claimant and 4,855,000 USD for the respondent, while average tribunal costs were 933,000 USD (with average ICSID costs at 920,000 USD and average UNCITRAL costs higher at 1,089,000 USD).[11] Just a few high cost awards can skew average costs.[12] In fact, a 2018 study concluded that in ICSID arbitration, 'US$3,625,147.30 is the median for claimant costs, and US$3,567,707.14 is the median for respondent costs'.[13] The median tribunal costs in ICSID arbitration were 876,815.94 USD.[14] The average fees for an ICSID annulment applicant were 1.36 million USD and 1.45 million USD for a respondent.[15] Finally, a study using data up to 1 February 2019 found that, on average, claimant's legal costs were 6,067,184 USD and respondent's legal costs were 5,223,974 USD, while tribunal costs were around 1 million USD. [16]

These figures show that investment arbitration involves significant costs. Such costs may be perfectly rational for the claimant-investor if the investment is large and the investor perceives there is no other effective remedy available, but this may not be the case for small or medium

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[9] Jeffery P. Commission, 'How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years' *Kluwer Arbitration Blog* (29 February 2016) <http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> accessed 4 July 2019.
[10] Ibid.
[11] Matthew Hodgson and Alistair Campbell, 'Damages and Costs in Investment Treaty Arbitration Revisited' *Allen & Overy* (14 December 2017) <http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf> accessed 4 July 2019.
[12] Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21 International Arbitration Law Review 4.
[13] Jeffery P. Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (OUP 2018) para. 10.17.
[14] Ibid, para. 10.18.
[15] Ibid, para. 10.20.
[16] See , citing to the figures in Daniel Behn and Ana Maria Daza, 'The Defense Burden in Investment Arbitration?' (2019) PluriCourts Working Paper.

companies.[17] For the respondent state, however, these costs are normally higher than if the dispute came before its national courts.

These figures also show that party costs are by far the largest portion of arbitration costs. While increased competition may reduce party costs somewhat, there is no evidence that these costs will be reduced significantly and generally in the short term. It would be wrong, though, to say that only the parties can control party costs. Such costs are also influenced by 'the manner in which the arbitration is conducted,'[18] where the role of the arbitral tribunal is fundamental, and more generally, through the way the arbitration process is structured. The latter issue is discussed below under the four reform scenarios.

2.1 Party Costs Under the Four Reform Scenarios

2.1.1 IA improved

The amount of fees and expenses of counsel, experts, and witnesses is generally not regulated in arbitration rules. Such fees are subject to private agreements and the market is a fairly open one, at least in the sense that in ISDS counsel -or experts, for that matter- does not need to be qualified in any specific jurisdiction (and actually does not even have to be a lawyer). Further, parties to ISDS tend to be reasonably sophisticated, at least for purposes of understanding their options when hiring counsel. Some regulation may still be desirable where claimants are small or medium companies or respondents are low-income countries -although access to an advisory centre providing advice at subsidized prices may be the best solution for these parties- or in certain specific cases such as contingency fee arrangements (which remain largely unregulated in international arbitral rules).[19]

Yet, measures aimed at reducing the proceedings' length or lawyers' work could effectively reduce party costs. First, such measures could include limiting the length of all parties' written

[17] See Gus Van Harten, Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants, Osgoode Legal Studies Research Paper Series, 2016, p. 10 (noting that a large majority of small investors 'spent more on ISDS costs than they received in ordered transfers'), https://pdfs.semanticscholar.org/0e4c/75092c2a38e04fac58c2a8c7ef3fdb5d6c2b.pdf.
[18] David W Rivkin and Samantha J Rowe, 'The Role of the Tribunal in Controlling Arbitral Costs' (2015) 81(2) The International Journal of Arbitration, Mediation and Dispute Management (CIArb) 116.
[19] For example, remuneration arrangements of witnesses or experts dependent on the outcome of the case, which are not totally unheard-of in ISDS, are controversial and potentially subject to regulation.

submissions by setting an adequate maximum number of pages that is significantly lower than the current norm.[20] Arbitral tribunals would mainly introduce page limits but arbitral institutions could also adopt practice guidelines suggesting limits for cases of average complexity. Second, tribunals could prevent/discourage extensive document discovery by rejecting discovery requests that are unwarranted or by providing for adverse burden of proof considerations,[21] or by always considering the discovery phase (if any) when apportioning costs. Neither arbitral tribunals nor institutions would take the document discovery phase for granted.[22] Institutions could exclude a discovery phase in template calendars provided to parties at the outset of proceedings. Rather, in each case tribunals could consult with the parties and decide whether a discovery phase is justified. Third, tribunals could discourage the submission of certain expert reports (e.g. international law experts, except in special circumstances), and any attendance of experts or witnesses at hearings that is not necessary in light of the issues that remain in dispute. Finally, tribunals could discourage the submission of legal authorities that are publicly available or of the same document by more than one party, unless the authenticity of a document is being challenged.

Another issue to address within this scenario is the apportionment of costs and dismissal of frivolous claims.[23] When costs are high, how they are apportioned between the parties is of the utmost importance.[24] ICSID and UNCITRAL case law does not, however, show a clear or uniform pattern on the approach taken on the apportionment of costs, i.e. whether it is 'losing

[20] Under the current Proposals for Amendment of the ICSID Rules, in the proposed expedited arbitrations the memorial and counter-memorial word limit is 200 pages and the reply and rejoinder limit is 100 pages. See ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules' Working Paper vol 3 (2018) 313. These page-limits -or perhaps ones slightly higher- appear apt for ordinary investment arbitrations, subject to appropriate adjustments if requested by any of the parties and found justified by the arbitral tribunal.

[21] See Yves Derains, 'Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint' (2006) ICC 2006 Special Supplement 87; Bernard Hanotiau, 'Document Production in International Arbitration: A tentative Definition of "Best Practices"' ICC 2006 Special Supplement 116; and Michele Curatola and Federica de Luca, 'Document Production in International Commercial Arbitration: A 'Trojan Horse' for Uncontrolled Costs' (2018) 15(4) Transnational Dispute Management 10.

[22] See Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) art. 2.5 <https://www.praguerules.com> accessed 4 July 2019. ICSID has recently clarified that the provision in the ICSID arbitration rules addressing document production 'does not mean that a document production phase must take place in every case'. See ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules' Working Paper 2 vol. 1 (2019) para. 237.

[23] The issue of frivolous claims will be discussed at the 39th session of the United Nations Commission on International Trade Law Working Group III scheduled to be held from 30 March to 3 April 2020 in New York City.

[24] Susan N. Franck, Arbitration Costs: Myths and Realities in Investment treaty Arbitration (OUP 2019), p. 190.

party' pays, each party to pay its own costs and half of the arbitral tribunal costs, or some other form of adjusted costs order.[25] Thus, while it is often suggested that the modern trend in investment arbitration generally is to follow the 'loser pays' approach, a recent study shows that 'the loser-pays paradigm' is neither the dominant nor an emerging trend in investment arbitration.[26]

Each approach has its own advantages and disadvantages. For example, it may seem unfair for a prevailing party not to recover its costs. Yet it is often difficult to determine who is the winner and who the loser.[27] Further, a strict 'loser-pays' rule may deter frivolous claims but also some meritorious ones by parties concerned about facing hefty adverse costs awards. Thus, there seem to be good arguments militating in favour both of a 'loser-pays' approach and of not adopting a specific rule or presumption on costs. In the latter case, tribunals could be granted discretion to allocate costs in light of the circumstances of the case.[28] Nonetheless, arbitral rules could require tribunals to consider certain criteria in the exercise of such discretion and provide reasoning when distributing costs.[29] Under ICSID's most recent reform proposal, a tribunal allocating costs would consider:

> (a) the outcome of the proceeding or any part of it; (b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner; (c) the complexity of the issues; (d) the reasonableness of the costs claimed; and (e) all other relevant circumstances.[30]

While this kind of list provides tribunals enough leeway to consider any relevant circumstances, another factor that could be expressly mentioned is the reasonableness of the amount claimed. This could discourage unreasonably high claims,[31] even by parties having meritorious claims,

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[25] Ibid, pp. 192-193 fn. 76, 211-212, 217-218; Commission and Moloo (n. 13), para. 10.47. However, the majority of UNCITRAL tribunals (perhaps reflecting the difference in the applicable provisions on costs allocation) have applied some form of adjusted costs orders. See ibid, para. 10.48.

[26] Franck (n. 23), p. 217. However, a link has been found between outcomes and cost-shifting, with a 'preference for shifting costs for winning investors'. Ibid, p. 218.

[27] Arthur W. Rovine, 'Chapter 40: Allocation of Costs in Recent ICSID Awards' in David D Caron and others (eds.), *Practising Virtue: Inside International Arbitration* (OUP 2015), p. 659.

[28] Franck (n. 243), pp. 327-336. See also ibid, pp. 183, 197, 220.

[29] See ibid, p. 660.

[30] ICSID Secretariat (n. 221), pp. 226-227.

[31] See Franck (n. 243), pp. 172-173 ('*The mean investor success rate for all cases—which included cases where respondents both won and lost— was 18%, and the median was 2%. For every US$1 claimed, investors were awarded roughly between 2– 18¢. [...] Investors' mean relative success was 35% and median relative success was*

since there is some evidence showing a stable relationship between a claim and compensation awarded at around 39% in cases where the investor won on the merits.[32] Aside from arbitral rules, further guidance on costs could be included in investment treaties.

Finally, if tribunals were required to provide early costs guidance on how the outcome of interim decisions or even certain conducts by the parties will impact cost allocation, they 'could create incentives for efficient and productive behaviour.'[33] Even if not communicated to the parties, in certain cases arbitral tribunals could be encouraged (through institutional or procedural rules or even treaty provisions) to distribute costs as regards specific procedural instances early on in the proceedings. While this alternative would not serve the purpose of providing guidance to the parties during the subsequent phases of the arbitration, it would at least ensure that arbitral tribunals take into account such procedural phases in the final costs distribution.

2.1.2 IA + appeal

In principle, replacing *ad hoc* annulment committees or set aside proceedings with a standing appellate body should not necessarily impact party costs. The impact this reform scenario could have on party costs depends on the design of the appellate mechanism, including the level of review, e.g. *de novo* review or review limited to legal issues. If counsel have to plead the case anew, costs could be higher. If counsel plead only legal issues, costs may be similar to under the current system.

However, an appeal may amend the award and there may be no need for or no possibility of resubmission to a new arbitration, which would significantly reduce costs. Further, in the long run it is likely that an appellate mechanism would increase consistency. If certain issues need little or no discussion because the appellate body has adopted a clear position, this may significantly reduce costs related to the time counsel spends addressing fundamental issues. It

28.7%. In other words, even where investors won, they obtained awards for roughly 30– 35¢ for every dollar claimed.').

[32] See Langford, Behn and Létourneau-Tremblay (n 2) ('*Between 1990 and 2004, the ratio was 44%; fell to 36% for the period 2005 through 2010; and hovered around 36% between 2011 and 1 August 2017. The overall rate across all periods is 39%. These figures are consistent with the 2018 World Investment Report: successful claimants were awarded about 40% of the amount claimed. Similarly, Nottage and Ubilava find that the overall average in their dataset works out to an average amount awarded that is 35% of the average claimed amount*.')

[33] Franck (n. 23), p. 202.

may also mean that certain witnesses or experts would no longer be necessary, further reducing counsel's work.

2.1.3 MIC

According to the European Union, a MIC would significantly reduce counsel costs in the following ways: *first*, time and counsel cost would not be spent choosing arbitrators, saving up to 8 months in the appointment process in an average arbitration.[34] *Second*, significantly less time and money would be spent on challenges. A permanent mechanism would largely remove the need for such challenges.[35]

Additionally, a MIC could issue procedural rules and develop practices limiting the extent to which parties resort to experts. For example, a MIC could signal that certain experts are not generally considered relevant, or frequently appoint experts itself,[36] thereby reducing the role of party-appointed experts. Additionally, the possible reduction of counsel fees through increased consistency, discussed in the previous section, would also apply here.

2.1.4 No ISDS

With respect to domestic courts, in many domestic jurisdictions party costs are lower than in investment arbitration. However, this depends on the proceedings' length. If domestic proceedings are lengthier than investment arbitrations of similar complexity, due to additional avenues to challenge the court decision, domestic proceedings may end up being more costly.[37]

State-to-state arbitration is usually structured similarly to investor-state arbitrations (i.e. a three-member *ad hoc* tribunal, secretariat services, written and oral proceedings, etc.). Hence, the

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[34] Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, UN doc. A/CN.9/WG.III/WP.159/Add.1, para. 52.
[35] Ibid, para. 53.
[36] ICSID is proposing a new rule to regulate the selection, appointment, and role of experts. See ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules' Working Paper vol 1 (2018) 6; ibid, vol. 3, p. 204. See also Prague Rules, art. 6. A permanent tribunal could make more frequent use of tribunal-appointed experts than current *ad hoc* tribunals by, for example, setting up rosters of pre-approved experts (thereby reducing time and costs).
[37] For more on this issue, please see Section VIII.3) of the the report of working group 2 of the ISDS Academic Academic Forum, dealing with duration of ISDS proceedings: published as Anna De Luca, Crina Baltag, Daniel Behn, Holger Hestermeyer, Gregory Shaffer, Jonathan Bonnitcha, José Manuel Alvarez-Zarate, Loukas Mistelis, Malcolm Langford, Clara López Rodríguez, Simon Weber, 'Duration of ISDS Proceedings', (2020) 21 Journal of World Investment and Trade #.

arbitration itself may involve similar costs. Aside from the arbitration phase, state-to-state arbitral proceedings generally do not provide for a subsequent annulment phase and thus the associated costs are not incurred. However, state-to-state arbitration may require prior exhaustion of local remedies, [38] resulting in higher party costs overall than in ISDS.

2.2 Tribunal Costs Under the Four Reform Scenarios

While arbitration itself is criticised for high costs, when considering this section one should keep in mind that tribunal costs are between 7.7% and 7.9% of arbitration costs.

2.2.1 IA improved

According to the figures set out in the introductory section, tribunal costs in UNCITRAL arbitration are higher (albeit not significantly) than those in ICSID arbitration. In part, this is likely because the ICSID Rules impose a cap on arbitrator fees, while the UNCITRAL Arbitration Rules do not. Therefore, non-ICSID investment arbitration could be improved by having an external body fixing uniform arbitrators' fees, rather than the arbitrators themselves (as in UNCITRAL arbitration).

Another way to lower tribunal costs would be to provide for one-member tribunals. While such tribunals are possible under the current rules, agreement of the parties is necessary and in the absence of agreement a three-member tribunal is the default. ICSID's proposed expedited arbitration would be conducted before a sole arbitrator,[39] unless the parties notify the Secretariat of a different agreement within 30 days from registration of the request for arbitration.[40] A similar default rule could apply to all investment arbitrations –not just expedited arbitrations– where the amount claimed is below a certain threshold.

Institutions could also issue non-binding guidelines as to arbitrators' fees. For example, stating what is, in principle, a reasonable proportion of the president's fees for drafting the award relative to the other arbitrators' fees. The guidelines could also provide for consultations between the

[38] In principle, the exhaustion of local remedies will be required when the state has been injured indirectly (i.e., through a national). See Draft Articles on Diplomatic Protection with commentaries (adopted in 2006), p. 45.
[39] See ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules' Working Paper 3 vol. 1 (2019), p. 159.
[40] See ICSID Secretariat (n. 21), p. 298.

institution and the arbitrators on the fees charged as the case progresses (which in practice sometimes do take place, but without any guiding principles). Final awards could always include the amount of fees and expenses incurred by each arbitrator.

2.2.2 IA + appeal

The cost of an appellate mechanism would depend on its design and overall architecture. For example, whether it would be a standing appellate body or a roster, the number of members, the arbitrators' salary or hourly fee (as applicable), and any retainer fee (if applicable).[41]

In terms of the amount of arbitrator hours necessary to deal with a dispute, an enlarged scope of review *vis-à-vis* current annulment or set-aside proceedings could, in theory, entail more hours. However, this may be more than offset by, *inter alia*, the increased consistency of an appellate mechanism, for reasons similar to the ones discussed above in relation to party costs, and the power of the appellate body to modify awards (making the resubmission of the dispute to a new tribunal unnecessary or unavailable).

2.2.3 MIC

The considerations discussed in the two preceding sections are also relevant here. Further, to the extent members of the MIC would receive a fixed salary, it is foreseeable that such salaries would be lower than if the judges were paid on an hourly basis (as is currently the case with arbitrators). Of course, this assumes that the MIC would, in due course, have a reasonably busy caseload. The European Union is of the same view, claiming that adjudicators in a standing mechanism would not have incentives that may impact on costs, as their remuneration would not be linked to the time spent on a particular case, likely leading to better case management. For example, arbitrators would more likely suggest a reasonable length of hearings and avoid post-hearing briefs unless the issues in dispute justify them.[42]

[41] A retainer fee may not be necessary if the number of cases being heard by the appellate body requires its members to serve on a permanent basis and thus receive the full salary.
[42] Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union and its Member States, UN doc. A/CN.9/WG.III/WP.159/Add.1, para. 54.

2.2.4 No ISDS

Tribunal costs in national jurisdictions may be lower than in ISDS, but this requires a case-by-case comparison. Further, in national jurisdictions where tribunal costs are determined as a percentage of the amount claimed, such costs may be higher than if the case were submitted to ISDS. Regarding state-to-state arbitration, in principle, there is no difference as to arbitrators' fees *vis-à-vis* ISDS.

2.3 Conclusions on costs generally

Party costs are considerably higher than tribunal costs. Hence, the crucial issue to tackle is party costs. Yet confronting these costs head-on is not easy, not least because costs incurred in counsel and expert fees are directly agreed by each party and thus in some ways outside the arbitral process itself. In addition, high party costs are often driven by the complexity of a case and the conduct of the parties. Further, in some cases there may be a tension between significantly reducing lawyer fees and reducing costs, since the involvement of less experienced counsel in international arbitration may sometimes result in more lengthy and thus more costly arbitral proceedings.[43]

However, several measures are available to reduce costs in the four scenarios. Such measures include, for example, establishing limits to the number and length of written submissions, discouraging extensive document discovery or the submissions of certain expert reports and publicly available legal authorities, and developing criteria for apportioning costs that would penalize unjustified inefficiencies or misbehaviours by the parties. Generally speaking, any reform proposal that will likely result in more consistency in the case law would also likely result in a reduction of costs.[44]

3. Length of Proceedings and Costs

[43] Philipp Habegger, 'Chapter 18, Part V: Saving Time and Costs in Arbitration' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2018), p. 2598.
[44] See UNCITRAL (n. 8), para. 13: '[p]articular attention was drawn to the lack of predictability as a cause for increased cost and duration.'

Excessive costs in international arbitration are inevitably linked to the length of proceedings.[45] The correlation between duration and costs can be explained, in the simplest form, as: the longer the proceedings, the higher the costs.[46] A lack of efficiency and the associated costs have become an ever-growing criticism of international arbitration.[47] In respect of investment arbitration, this debate on efficiency is a somewhat recent concern,[48] likely due to the excessive duration of many investment arbitration proceedings. For example, in 2015 such proceedings under the ICSID Arbitration Rules lasted 39 months on average.[49]

Efficiency concerns can also be identified in the perception of ISDS users. A 2014 survey found that 95% of all ISDS respondents considered the duration of arbitral proceedings and the availability of arbitrators to be issues of concern, 85% were concerned about time spent by arbitrators to issue their awards, and 75% were in favour of limiting document disclosure.[50]

The literature shows that the essential improvement of cost-efficiency by minimising time requires streamlining proceedings,[51] through a holistic, multi-faceted approach involving all stakeholders, including States (when negotiating international investment agreements (IIAs), the parties and counsel,[52] arbitrators, and arbitral institutions.[53]

Within this approach, the principal issue is the characteristics of the ISDS system that can affect time-cost efficiency. These fall within three categories:

[45] Working Group 2 of the ISDS Academic Forum addresses the issue of excessive duration of ISDS proceedings. Accordingly, this section is focused on cost implications of the length of proceedings only.
[46] ICC Commission Report, 'Controlling Time and Costs in Arbitration' (2018), p. 6.
[47] Queen Mary University of London and White & Case, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) 3; and IBA Arbitration Subcommittee on Investment Treaty Arbitration, 'Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration' (2018), p. 36.
[48] Lars Markert, 'Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach'(2018) 4 Transnational Dispute Management 2; and IBA Arbitration Subcommittee (n. 476).
[49] ICSID, 'Annual Report 2015' (2015) 31 <https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf> accessed 4 July 2019.
[50] IBA Subcommittee on Investment Treaty Arbitration, 'Report on the Subcommittee's Investment Treaty Arbitration Survey' (2016) Q44; and IBA Arbitration Subcommittee (n. 476).
[51] Franck (n. 243), pp. 317-336.
[52] The focus here is on the design of the ISDS system. Specific party concerns, such as the choice of counsel or the role of in-house counsel, fall beyond the scope of this article.
[53] Markert (n. 487).

1) Systemic issues involving the structure and wording of arbitration clauses in IIAs and contracts,[54] as well as the tools in arbitration rules or guidance notes or communications. International organizations' soft law instruments, such as guidance notes, rules, recommendations or papers, also play a role at the systemic level.
2) Structural issues involving the structure of the arbitration from filing of the request for arbitration to the rendering of the award and any post-award proceedings. The structure is heavily influenced by the framework in the arbitration rules chosen by the parties and, where flexibility is allowed, the procedural choices parties make.[55]
3) Arbitral tribunal issues involving the way an arbitral tribunal is composed and the powers bestowed upon it.

What follows is an open list of actions in respect of each category, to achieve an optimized time-cost efficiency of the arbitral proceedings.

3.1 Systemic Solutions

As regards the *arbitration clause*, whether in a contract or an IIA, a clearly written and sophisticated arbitration clause can improve the efficiency of proceeding. Simple and clear arbitration clauses avoid uncertainty and disputes over the meaning and effect of the clause, the arbitral tribunal's jurisdiction and the process of appointing arbitrators.[56] Measures to optimize arbitration clauses include introducing settlement provisions,[57] prescribing document-only proceedings for claims less than a set amount and a full proceeding for claims for more than such amount,[58] and the increased use of model arbitration clauses issued by recognized arbitral institutions.

[54] Habegger (n. 432), pp. 2595-2614.
[55] The parties and their counsel may make choices affecting the procedure of the arbitration (e.g., bifurcating the proceedings, filing arbitrator challenges, using technology such as green filings, limiting written submissions and/or document production, etc.).
[56] Habegger (n. 543).
[57] IBA Arbitration Subcommittee (n. 476), p. 47.
[58] Markert (n. 487), p. 34.

Arbitral institutions can amend their rules to provide for more efficient proceedings, thus decreasing duration and costs. For example, irrespective of the default position under their rules, arbitral institutions may actively inform the parties of the benefits of a sole arbitrator or nominating a younger, lesser known arbitrator.[59] They may also inform the parties of other ADR mechanisms,[60] or amend their rules to allow parties to re-evaluate the possibility of early settlement at distinct points during the arbitration.

3.2 Structural Solutions

3.2.1 Pre-constitution of the arbitral tribunal

The simplest way to reduce arbitration time and costs is to avoid it altogether through *early settlement promotion*. To promote claim settlement procedures, parties must be informed of any mechanism available to them as soon as the arbitral institution becomes involved in the dispute.[61] Alternatively, another way of encouraging early settlement is resorting to the Calderbank settlement process. A Calderbank settlement offer is 'without prejudice save as to costs' and, therefore, where a winning party refuses an earlier settlement offer made by the losing party, the losing party may produce the existence and terms of that settlement offer to the arbitrator for the purpose of determining costs. If the prevailing party's award of damages is less than the earlier, rejected settlement offer, then the losing party may receive costs from the winning party.[62]

In the case of *unmeritorious claims*, time and costs could be saved if arbitral institutions could establish a system by which such unmeritorious claims could be dismissed at an early stage of the proceedings; for example, through a procedure involving the dismissal of a claim at the time of registration for manifest lack of legal merit. In the case of ICSID arbitration, Article 36.3 of the ICSID Convention grants the Secretary-General the power to dismiss claims before the

[59] IBA Arbitration Subcommittee (n. 476), p. 38. This approach could also address the concern raised at UNCITRAL Working Group III sessions regarding repeat appointments by a limited number of arbitrators. See, for example, UNCITRAL Working Group III 36th session held at Viena (29 October-2 November 2018), Doc. A/CN.9/WG.III/WP.152, paras 18-20; and 36th session held at Viena (14 October-18 October 2019), Doc. A/CN.9/WG.III/WP.169, paras. 17, 37, 59

[60] Ibid, pp. 43-47.

[61] Ibid, pp. 43-44.

[62] Adam J Weiss and others, 'Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements' 34(2) Journal of International Arbitration (Kluwer Law International 2017), pp. 257-274.

constitution of the arbitral tribunal, if the dispute is manifestly outside the jurisdiction of the ICSID.

In the past few years, emergency arbitrator procedures have been incorporated into several arbitration rules as a means of promoting time-cost efficiency. Such procedures allow parties to request provisional measures before the constitution of the arbitral tribunal to facilitate and expedite the future proceeding.[63] Under the ICC Arbitration Rules, for example, parties can obtain urgent, temporary relief through an emergency arbitrator procedure.[64] The emergency arbitrator's order may be revisited later by the arbitral tribunal. Another example is the emergency arbitrator procedure under the Stockholm Chamber of Commerce (SCC) Rules, where an emergency arbitrator is appointed within 24 hours and must make a decision no later than five days from the date the application is referred to them.[65]

Finally, expedited procedures may also reduce the duration and costs of proceedings in some cases.[66] For example, the ICC has Expedited Procedure Rules for proceedings under USD 2 million,[67] but parties may agree to opt out. A similar arrangement is being proposed by ICSID. Under the Expedited Procedure Rules, the ICC Court appoints a sole arbitrator notwithstanding any contrary provision of the arbitration agreement. This type of procedure imposes shorter time frames to hold a case management conference and for issuance of the award, permits document-only proceedings and/or limits the length and scope of submissions and evidence.

3.2.2 Post-constitution of the Arbitral Tribunal

If the ***dismissal of unmeritorious claims*** is not possible before the constitution of the arbitral tribunal, there are mechanisms to do so afterwards.[68] The creation of adequate structures to deal

[63] Markert (n. 487), pp. 10-16; e.g., 2017 SCC Rules, Appendix II; SIAC IA Rules, art. 27.4 and Schedule 1; CIETAC IIA Rules, art. 40.1 and Appendix II.
[64] ICC Arbitration Rules (entered into force 1 January 2012 and revised 1 March 2017) (ICC Rules) art. 29 and Appendix V.
[65] SSC Arbitration Rules (entered into force 1 January 2017) (SCC Rules) Appendix II, arts. 4.1 and 8.1.
[66] IBA Arbitration Subcommittee (n. 476), pp. 51-52.
[67] ICC Rules, art. 30 and Appendix VI.
[68] E.g., ICSID Convention Arbitration Rules (entered into force 10 April 2006) (ICSID Rules) art. 41.5; SCC Rules, art. 39; SIAC Investment Arbitration Rules (entered into force 1 January 2017) (SIAC IA Rules) art. 25.1; and CIETAC IIA Rules (entered into force 1 January 2015) (CIETAC IIA Rules) art. 26. See also Markert (n. 487), pp. 16-22.

with either legally, factually, or jurisdictionally meritless claims is, however, advisable.[69] Several institutions offer a procedure for early dismissal of claims on an expedited basis after the constitution of the arbitral tribunal.[70] Under ICSID Arbitration Rule 41.5 a party may file a preliminary objection within 30 days of the constitution of the arbitral tribunal, which must be resolved at the latest at the first session, within 60 days of the constitution of the tribunal.

Initial reactions to the 2006 introduction of ICSID Arbitration Rule 41.5 allowing for summary dismissal of claims manifestly without legal merit were mixed.[71] However, more recent assessments appear more favourable.[72] It is expected that, as the case law on this rule develops, the criteria for the application of similar provisions will become more firmly established, thereby allaying fears of unjustified summary dismissals. Notwithstanding this, it would be desirable for states to provide further guidance on the conditions for the application of summary dismissal provisions. For example, by clarifying whether they apply to jurisdiction/admissibility, merits issues, or both. These clarifications could be included in arbitral rules or in IIAs themselves.

The use of *Case Management Conferences* (CMCs) may contribute to time-cost efficient arbitral proceedings by narrowing the issues and contested facts. Some authors suggest that at least one CMC should be mandatory,[73] as is ICSID's latest proposal. To improve CMCs' efficacy, parties should consider whether to hold the conference without a physical meeting. The client representatives and witnesses should also be kept informed of the input required from them to comply with the timetable.[74] However, arbitral tribunals should avoid turning CMCs into a further opportunity for parties to argue their case by clearly establishing the purpose and scope beforehand and actively preventing the parties from departing from the intended purpose. Otherwise, CMCs could end up broadening, not narrowing, the issues the tribunal would have to decide.

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[69] IBA Arbitration Subcommittee (n. 46), pp. 41-42.
[70] ICC Rules; SIAC Rules (entered into force 1 August 2016) (SIAC Rules) art. 29.1; SCC Rules, art. 39; CPTPP Rules (entered into force 30 December 2018) art 1, which incorporates TPP Rules, art. 9.23.4.
[71] Markert (n 487), p. 18.
[72] Ibid, p. 22.
[73] Franck (n. 510), and ICSID Secretariat (n. 221), p. 165.
[74] Habegger (n. 432), p. 2601.

Setting up norms that guide decisions on bifurcation of proceedings may also be an effective mechanism to save time and costs, Recent studies show that bifurcated cases take 1 to 1.5 years longer to complete than a non-bifurcated case.[75] As such, the parties and the tribunal should assess whether bifurcation is warranted considering its possible impact on time and costs. Yet it should not be assumed that bifurcation, particularly between jurisdiction and the merits, will in every case extend the proceedings. Particularly when one or more of the jurisdictional objections are separable from the merits debate and *prima facie* have merit, a complete or partial bifurcation between the jurisdictional and merits phases may actually save time.

An obvious solution to improve time-cost efficiency is to establish stricter time limits throughout proceedings. Some arbitration rules already include short time limits.[76] For example, 35 days to respond to the notice of arbitration under the SIAC IA Rules. As ICSID is proposing, in order to promote parties' compliance with time limits new rules could provide that, after the expiry of a time limit, party activities shall be disregarded unless there are special circumstances justifying the delay.[77] The limit for this is, of course, guaranteeing each party's right of defense and to fully present its case. Accordingly, it should be considered that the claimant would typically have several months to prepare the notice of arbitration, whilst the respondent would only be in a position to respond once the request is received (even if they had some knowledge of the dispute prior).

A *more precise regulation of multiple parties* in multiparty and multicontract arbitrations inevitably would simplify the complexity and length of such proceedings. Therefore, the conditions that regulate joinders, multiparty, and multicontract arbitrations must set clear conditions[78] and allow speedy resolution procedures to avoid wasting time and money by making claims that are without merit or are against parties not within the tribunal's jurisdiction.[79]

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[75] Daniel Behn, Tarald Berge and Malcolm Langfordothers, 'Explaining Delays in International Investment Arbitration', PluriCourts Working Paper; February 2019 and ICSID, 'Annual Report 2018' (2018).
[76] For example, SIAC IA Rules, art. 4.1 and CIETAC IIA Rules, art. 9.1.
[77] Franck (n. 51).
[78] For example, UNCITRAL Arbitration Rules (as revised in 2010) (UNCITRAL Rules) art. 17.5; and ICC Rules, arts. 7-10.
[79] ICC Commission Report (n. 465), p. 15.

3.2.3 Written submissions

More detailed first submissions could facilitate the framing of the issues in dispute at an early stage of the proceedings. A more detailed notice of arbitration and/or statement of claim may produce greater procedural efficiency by front-loading the proceedings and introducing greater clarity about the respective arguments of the parties.[80] This approach has been adopted in the UNCITRAL Rules, which even allow the claimant to elect to treat his notice of arbitration as the statement of claim.[81] This is also being considered by ICSID.

As already discussed, limiting the length and number of submissions could also significantly impact time and cost of the arbitration proceeding, especially in the second round, to help parties focus on the key issues and reduce repetition.[82] These limitations may depend on the type of proceeding.[83] Post-hearing submissions should also be minimized and limited to issues raised at the hearing or specific questions of the arbitral tribunal.[84]

Regarding evidence production, at the outset, arbitral tribunals should consider whether a document production phase (discovery) is necessary. If so, the tribunal should always encourage counsel to produce evidence concisely. A key aspect in this regard is the timing of discovery. In principle, it should be scheduled after the parties have exchanged a first round of briefs to narrow production to the most essential elements.[85] Moreover, the arbitral tribunal should consider the burden of proof so as to deny requests by a party that is not required to provide evidence on a given issue.[86]

Aside from bifurcation, other procedural events that most significantly lengthen proceedings include arbitrator challenges, replacements, and dissenting opinions.[87] Consequently, in order to

[80] Markert (n. 487), p. 25.
[81] UNCITRAL Rules, art. 20. See also ICC Commission (n. 46), p. 11.
[82] ICC Commission Report (n. 465), pp. 11-12.
[83] For bold proposals, see Joerg Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings' (2013) 29(3) Arbitration International 456.
[84] IBA Arbitration Subcommittee (n. 476), p. 49.
[85] Curatola and de Luca (n. 210).
[86] Idem.
[87] See Langford, Behn, and Létourneau-Tremblay (n 2) #..

reduce the time-cost inefficiencies of these events, a straightforward procedure with short time limits is necessary.[88]

3.3 Arbitral Tribunal's Solutions

Arbitration rules could expressly state that arbitrators have a right and obligation to use the Arbitral Tribunal's procedural discretion to conduct the arbitration in a cost-effective manner and avoid delays.

As regards arbitrator selection, the procedure for appointing arbitrators must be swift and minimize the possibility that a recalcitrant party slows down the arbitration through guerrilla tactics (e.g. filing tactical arbitrator challenges). Some studies show that the constitution of an ICSID arbitral tribunal takes 5 to 9 months from the registration of the arbitration request.[89] The UNCITRAL Rules are not free of inefficiencies either.[90] However, the IBA Report proposes amending institutional rules to sanction parties who cause undue delay in selecting an arbitrator.[91]

Appointing a sole arbitrator must also be considered whenever possible.[92] This obviously directly reduces arbitrator costs and may also increase availability of arbitrators[93] and reduce the time it takes to start the arbitration and render the award. Although a three-member tribunal is common in investment arbitration, the *Pantechniki v. Albania* case is a good example of such a time and cost reduction[94] because the sole arbitrator concluded the proceedings within two years and rendered a 29 page award.[95]

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[88] In contrast to the ISDS four-month average, both CETA and the EU-Vietnam FTA reduce the time to issue a decision on such challenges to 45 days.
[89] IBA Arbitration Subcommittee (n. 476), p. 37.
[90] Ibid, p. 38.
[91] Margaret Moses, 'The Growth of Arbitrator Power to Control Counsel Conduct' (2014) Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2014/11/12/the-growth-of-arbitrator-power-to-control-counsel-conduct> accessed 15 December 2017. See also LCIA Arbitration Rules (entered into force 1 October 2014) (LCIA Rules), art. 18.6.
[92] IBA Arbitration Subcommittee (n. 476), p. 38.
[93] Ibid, pp. 40-41.
[94] *Pantechniki S.A. Contractors and Engineers v Republic of Albania* ICSID Case No ARB/07/21, Award (1 July 2009).
[95] Markert (n. 487), p. 33.

When selecting arbitrators, parties and institutions must also consider their availability and ability to manage the procedure swiftly.[96] The 2018 IBA Report proposes requiring disclosure from arbitrators regarding their availability to ensure that they are not agreeing to matters for which they do not have availability.[97] For example, arbitrators could be required to disclose their commitments for the next 18 months or have to inform the arbitral institution once they reach a certain number of cases.

Arbitrators could also be required to issue a written commitment to dedicate as much time as needed to deliver the award after the proceedings close.[98] Finally, arbitral institutions could provide concrete guidelines as to what is a reasonable number of 'active' cases that an arbitrator can handle effectively at one time, distinguishing between arbitrators who only do arbitrator work and others that perform other activities (academia, counsel work, etc.).

An arbitral tribunal that takes a proactive approach in the arbitration proceedings by means of its case management power is likely to achieve greater time-cost efficiency. By adopting a proactive role, the arbitral tribunal can drastically reduce inefficiencies. Recent amendments to several arbitration rules reflect this idea by vesting final authority in the arbitral tribunal to conduct arbitral proceedings as it sees fit.[99] In line with this, ICSID proposes to include a general duty in the ICSID arbitration rules that '[t]he Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.'[100] As mentioned above, the new rules also require arbitrators to provide a statement of availability.

An arbitral tribunal can be proactive by, for example, rejecting evidence introduced in an untimely manner or unsolicited submissions (except under exceptional circumstances) and providing clear directions on discovery. They can also inform the parties that discovery costs will be allocated separately. Arbitrators must also take a proactive role to streamline the CMCs by suggesting ways the parties can save costs. This could include the use of technology and green

[96] ICC Commission Report (n. 46), p. 7.
[97] IBA Arbitration Subcommittee (n. 476), pp. 40-41.
[98] Ibid, p. 50.
[99] Rivkin (n. 18), pp. 116-130.
[100] ICSID Secretariat (n. 221), p. 83.

filings,[101] suggesting single written submissions and post-hearing briefs and/or limiting the filing of witness statements and expert reports.

A proactive arbitral tribunal could also adopt a 'town-elder plus' model to control time-cost efficiency. This model empowers arbitrators to establish and inform the parties of the minimum procedures necessary for the resolution of the case.[102] An example of such practice by arbitrators may regard an arbitration's confidentiality order, whose scope is commonly disputed by opposing parties. In such a case, instead of requesting the parties in a Redfern-style schedule to set forth their respective positions on what specific provisions should be included, the tribunal may direct the parties to a preferred model confidentiality order as a starting point and order that the parties limit their comments to specific provisions that remain in dispute.

An arbitral tribunal should also take a proactive role in dealing with party misbehaviour. When the arbitral tribunal is proactively managing the case to control time and cost, it should never allow a party to unjustifiably contradict its actions by, for example, using strategies and tactics to prolong the proceedings, overcomplicate them, or make them more burdensome so that the opponent would abandon the case or come to a settlement before a final award is rendered. The use of cost-shifting sanctions[103] to punish misconduct may enhance the arbitral tribunal's ability to conduct the proceeding efficiently.

When allocating costs, international arbitrators are currently considering any bad-faith or dilatory behaviours of the parties, which is in line with concerns regarding costs.[104] Therefore, a simple way to reduce time-cost inefficiencies is to warn the parties that such behaviour will be a determinant. The allocation of costs could also take account of meritless claims or untimely evidence or pleadings.[105] As a supplementary measure, an enforceable code of ethics, applicable

[101] David Earnest and others, 'Four Ways to Sharpen the Sword of Efficiency in International Arbitration' (2013) Young ICCA Group Paper, pp. 25-30.
[102] Weiss (n. 621), pp. 257-274.
[103] Mohesen Mohebbi and Mojtaba Asgharian, 'The Role of Arbitrators in Effective Time and Cost Reduction' (2018) 15(4) Transnational Dispute Management 8-9. See also Oliver E Browne and Robert Price, 'Saving Time and Money by Sanctioning Bad Behavior' 15(4) Transnational Dispute Management.
[104] Mercedes Romero and Nicolás Sierra, 'Costs in International Arbitration: The continual search for cost-efficient arbitrations' (2016) 26 Spain Arbitration Review 31-38.
[105] IBA Arbitration Subcommittee (n. 476), pp. 43, 50.

to all persons involved in the proceedings and with effects on cost allocation, could increase efficacy while also improving overall time-cost efficiency of proceedings.[106] Arbitral tribunals could also take advantage of their cost allocation power earlier in the proceeding by using interim decisions on costs to provide clear and transparent guidance about the principles upon which they will exercise their mandate to address costs.[107]

As regards the reduction of time taken to render the award, arbitrators' fees may be reduced for each month of delay.[108] Another feasible costs-saving measure would be to request the parties' assistance in writing the final award by drafting summaries of their positions on the main issues that can be incorporated,[109] or to request arbitral tribunals to reduce the sections of the award devoted to describing the parties' positions. In general, lengthy descriptions of the parties' position should be avoided as unnecessary. The award should be limited to what is necessary to address the relief sought and the main legal arguments of the parties.[110]

In order to facilitate arbitrators issuing awards in a timely manner, there are other measures that could also be considered. For example, at the end of the hearing arbitrators could establish a deadline for submitting post-hearing briefs (that address only relevant issues) and for the rendering of the award. Requiring the tribunal to commit to and notify the parties of a schedule for deliberations and delivery of the final awards would be most helpful, as it would imply that, should arbitrators not be able to meet the self-imposed deadline, they would have to inform the parties.[111] In fact, recent procedural orders entered in three ICSID cases demonstrate how arbitral tribunals have started committing to schedules for drafting awards, including providing regular

[106] Patricia Zivkovic, 'The Impact of Cost Decisions on the Efficiency of Arbitral Proceedings' 15(4) Transnational Dispute Management.
[107] Franck (n. 51).
[108] Aanchal Basur, 'As the Clock Ticks Away - The Indian Experiment with Time Limits in Arbitration' (2011) 28 Young Arbitration Review 41-46. India introduced time limitations in rendering awards through legislation imposing a reduction of up to 5% of arbitrators' fees for every month of delay.
[109] Risse (n. 832), p. 462; IBA Arbitration Subcommittee (n. 476), pp. 49-50.
[110] IBA Arbitration Subcommittee (n. 476), p. 49.
[111] This suggestion was met with the most positive, and least negative, response in the QMUL and White & Case 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015), p. 3.

progress updates.[112] Finally, arbitral tribunals could be asked to deliberate immediately after the hearing;[113] and to set time aside to draft the award uninterruptedly shortly after.

With respect to *post-award procedures*, under article 53 of the ICSID Convention an award is final and binding on the parties and under article 54 it is enforceable in the territory of any signatory party to the ICSID Convention as if it were a final judgment of a local court. No form of appeal is possible, aside from a request for annulment under article 52 of the ICSID Convention and other remedies provided for in the ICSID Convention. In non-ICSID arbitration, parties may initiate proceedings to annul/set aside the award in accordance with the law of the seat of the arbitration.

Enforcement proceedings in domestic courts may take several years while, on average, annulment proceedings in ICSID cases take two years.[114] Reducing the duration of such proceedings in domestic courts is up to each state. However, annulment proceedings could be improved by introducing the reforms discussed above, including page limits, eliminating or limiting the scope of submissions, and increasing incentives for *ad hoc* committees to render annulment decisions within shorter time frames.

3.4 Potential Solutions under the Four Reform Scenarios

3.4.1 IA improved

Under this scenario, improvement of the existing ISDS system (including a multiplicity of fora and arbitral institutions) essentially involves streamlining procedures by adopting the solutions described above, which over time could (to the extent possible) adopt the measures discussed throughout this section.

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[112] *Corona Materials, LLC v Dominican Republic*, ICSID Case No. ARB(AF)/14/3, First Procedural Order (16 December 2015); *ACP Axos Capital GmbH v Republic of Kosovo*, ICSID Case No. ARB/15/22, First Procedural Order (10 February 2016); and *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Procedural Order (29 March 2016).
[113] Franck (n. 51).
[114] Langford, Behn, and Létourneau-Tremblay (n. 876), p. 15.

All stakeholders have a role to play in improving cost-efficiency. Arbitral institutions could strive to continue to observe the application of their rules and amend them in appropriate cases to streamline procedures. Parties and counsel could strive to minimize the number and length of written pleadings, unwarranted discovery, hearings, and avoid the use of guerrilla tactics. Arbitrators could take a proactive role in securing the swift conclusion of the arbitration, including the deliberation and drafting of the award. Ultimately, any cost reduction will result from a more time efficient, streamlined arbitral proceeding.

3.4.2 IA + appeal

Under this scenario, the same conclusions discussed per the previous scenario would apply to the first phase of the arbitration. Regarding the appeal phase (AP), since the AP would be a permanent or semi-permanent body with continuity beyond a single dispute, considerably less time would be spent constituting a new arbitral tribunal. Additionally, the AP could increase efficiency by reducing inconsistency and shortening proceedings in the long run through, *inter alia*, less debate on certain issues. The argument that an AP would extend proceedings by creating an incentive for parties to always file an appeal is more theoretical than real. On the one hand, annulment requests are becoming more common. On the other hand, parties would be discouraged to appeal against a tribunal finding that it is consistent with the AP's *jurisprudence constante*.

3.4.3 MIC

A permanent and centralized international judicial structure could likely incorporate many of the proposed measures through a MIC statute. Additionally, judges could further specify the applicable measures during the case management conference according to previously established general rules. The result would be a shorter procedure that likely minimised costs. Finally, challenges against arbitrators could significantly delay proceedings and since the members of the MIC would be permanent or semi-permanent the grounds for such challenges would likely be reduced.

3.4.4 No ISDS

As regards proceedings before domestic courts, the differences between jurisdictions are of great significance.[115] However, given the procedural and substantive complexity of investment arbitration disputes it is highly unlikely that such disputes could be resolved faster in domestic proceedings than by a specialized international tribunal and procedure, especially if such system is improved as proposed above.

Concerning the use of the state-to-state arbitration system, if such a system were to adopt a similar procedure and structure as investment arbitration, there would be no real difference from a cost-time efficiency perspective in terms of the arbitration itself. However, state-to-state dispute settlement would likely be longer overall, since investors would first need to seek the representation of their home states, adding an extra phase to the proceeding. Additionally, the affected investor may also be required to exhaust local/domestic remedies prior to the state-to-state arbitration.

3.5 Concluding Remarks

Duration is without doubt one of the most important factors affecting the costs of investors, states, and arbitral tribunals. Unsurprisingly, it is also one of the greatest concerns among users of ISDS. This means that implementation of effective measures reducing the duration of proceedings (such as those discussed above) will significantly contribute to resolving the excessive costs issue.

4. The Problem of Insufficient Resources to Bring or Defend Against an Investment Claim

This section discusses both the issue faced by parties that have insufficient resources to litigate before investment tribunals and potential solutions under the four reform scenarios. ISA financing has rapidly become a frequently-found feature in many arbitrations,[116] through which

[115] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017), p. 91: e.g., the average length of civil litigation cases to obtain and enforce a final judgment can vary from 1 year in the United States to 3.9 years in India.

[116] See Brooke Guven and Lise Johnson, The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement, CCSI Working Paper 2019, p. 1.

impecunious claimants, or claimants who simply prefer to externalize their arbitration costs, resort to third parties to fund their claims. However, the availability of a particular financing method for a particular party and the financing method's impact on the parties' ability to bring or defend against an investment claim varies.

Third-party funding (TPF), contingency and conditional fee arrangements are among the most commonly-used financing methods in litigation. Of particular importance in investment arbitration is the use of TPF, which in the past few years has seen an exponential growth in its use in the field. Broadly defined, third party funding is the provision of funds to a party to an arbitration (normally covering, totally or partially, the funded party's legal fees and expenses, and the administering institution's administrative fees) by a third party not involved in the arbitration in exchange for an agreed return. The amounts claimed in investment arbitrations tend to be high and so is the potential return on the investment, which has caught the interest of a broad range of organizations that are nowadays prepared to fund investment arbitration claims. These include hedge funds, investment banks, insurance companies, and even law firms. Yet the questions raised by these different actors are different. While funds providing financing to parties in ISDS are so far subject to little or no regulation specific to their activity, law firms providing advise under contingency fee arrangements are typically subject to external regulation.[117]

The forceful irruption of TPF in investment arbitration can also be explained in economic terms. Kalicki and Joubin-Bret remind us that investment treaties are 'first and foremost a matter of economics' and '[t]he decision as to whether to commence an arbitration claim is effectively a further investment decision based on an assessment of the relative risks and rewards'.[118] Kalicki and Joubin-Bret also point out that the average 'all in' costs of an investment treaty arbitration in 2015 are just short of US$10 million. Such high costs may be prohibitive for impecunious claimants with valid claims.[119]

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[117] Ibid, pp. 39-40.

[118] Matthew Hodgson, 'Costs in Investment Treaty Arbitration: The Case for Reform', in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (TDM 2015). See also Anna Joubin-Bret, 'Spotlight on Third-Party Funding in Investor-State Arbitration: case comment on RSM Production Corporation v Sant Lucia, ICSID Case No. ARB/12/10, Decision on Saint-Lucia's Request for Security for Costs, 13 August 2014' (2015) 16 Journal of World Investment & Trade 727-733.

[119] Derric Yeoh, 'Third Party Funding in International Arbitration: A slippery Slope or Levelling the Playing Field?' (2016) 33(1) Journal of International Arbitration 115-122.

However, also according to Kalicki and Joubin-Bret, the average amount awarded to successful claimants is US$76 million (with the median at just US$10.5 million). A more recent study from 2017 shows that the average compensation in awards amounts to approximately US$72.8 million. Also in 2017, UNCTAD noted that the average amount awarded in favour of claimant investors is US$522 million.[120] In sum, the combination of high costs of ISA and high stakes to be gained from a lucrative market has made the TPF industry (currently estimated at US$5 billion) boom as the most prevalent method for financing investment arbitrations. In fact, it is estimated that over 40% of ISDS cases are funded by TPF.[121] While having financing options available for claimants who are either impecunious or have limited financial resources may be a welcome development,[122] the side-effects of these financing methods on the costs of ISA are a reason for concern.[123]

4.1 TPF and Contingency and Conditional Fee Arrangements in a Nutshell

There are several funding options available to parties who are unable to fund their disputes, or wish to transfer the risk of proceedings onto another person or institution. For example, in addition to TPF, contingency and conditional fee arrangements involve financing of the arbitration by the lawyers representing the client in return for a fee based on the relative success of the claim. We briefly describe each type of TPF and contingency and conditional fees in turn. TPF is a financing method in which a natural or legal entity external to the underlying legal relationship in dispute agrees to fund one party's legal fees or other arbitration costs, or otherwise agrees to provide that party with similar support, in return for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[124]

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[120] A Special Update on Investor–State Dispute Settlement: Facts And Figures', UNCTAD, Available online at <https://investmentpolicyhub.unctad.org/Publications/Details/180> accessed 4 July 2019.
[121] Wang Hui, 'Third-Party Funding in Arbitration: Potential Trends and Implications for China'(2018) 2 Journal of Business Law 122-147, quoting S. Brekoulakis.
[122] However, Guven and Johnson note that 'in many and a growing number of cases, claimants seek funding not because they are impecunious but because they wish to pursue claims with as little impact on cash flows, and as great a chance of success, as possible'. Guven and Johnson (n. 115), p. 12.
[123] See Franck (n. 242), pp. 189-190.
[124] Cf. Lisa B. Nieuwveld and Victoria S. Sahani, 'Third Party Funding in International Arbitration' (2017) 1 Kluwer Law International; Duarte G Henriques, 'Third-Party Funding: A Protected Investment?' (2017) 30 Spain

TPF represents a fairly recent phenomenon in international investment arbitration.[125] Praised by some as a mechanism which facilitates access to arbitral justice,[126] TPF is criticized by others for its capacity to create imbalance between the parties to an arbitration and adversely affect costs and the integrity of the proceedings (e.g. through potential conflicts of interest arising from the lack of transparency, etc.).[127]

First, the parties to investor-State arbitration have unequal access to TPF. Since TPF is normally a commercial operation, funders seek to finance proceedings that will achieve the best possible return on investment. Accordingly, they are more likely to support claimants, who seek to recover damages, than respondents, who at most may recover the costs of proceedings. In cases where TPF was provided to respondent States[128] it was by an entity with a particular interest in the substantive outcome of the proceedings. Therefore, their interest in funding the proceedings was not of a direct financial nature, but rather the result of a whole set of specific circumstances. Second, recourse to TPF is likely to increase the overall quantum of costs of proceedings.[129] Because the funder has a strong interest in a positive outcome and may have significant funds at its disposal, they will likely finance more and better (and often more expensive) lawyers, experts, etc. Apart from increasing the total amount of costs, this practice may also financially drain the opponent (most often a respondent State). That said, there is a lack of empirical evidence on whether the increased number of investor claims or high damages claims are related to TPF and whether TPF leads to additional speculative, marginal, or frivolous cases.[130]

Arbitration Review 100, 115; see also 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (2018) 4 The ICCA Reports.

[125] Marie Stoyanov and Olga Owcarzek, 'Third-Party Funding in International Arbitration: Is It Time for Some Soft Law Rules?' (2015) 2 BCDR International Arbitration Review 171. For an overview of some notable conferences dedicated to the issue, see Selvyn Seidel, 'Third-Party Investing in International Arbitration Claims' in Bernardo Cremades and Antonias Dimolitsa (eds), *Third Party Funding in International Arbitration* (ICC Publication No 752E 2013), p. 18.

[126] Jonas von Goeler, *Third Party Funding in International Arbitration and its Impact on Procedure* (Kluwer Law International 2016) 82-83; Henriques (n. 124), pp. 127-128

[127] Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third Party Funding' (2016) 33 Journal of Investment Arbitration 125, 127-129; Goeler (n. 126), pp. 87-88; Nieuwveld and Sahani (n. 124), p. 16; Stavros Brekoulakis and Catherine Rogers, 'Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy', Academic Forum on ISDS Concept Paper 2019/11, 31 July 2019.

[128] See e.g., *Philip Morris v Uruguay*, ICSID Case ARB/10/7 and *Philip Morris v. Australia*, PCA Case 2012-12.

[129] Stoyanov and Owcarzek (n. 125), pp. 171, 191.

[130] See also Guven and Johnson (n. 115), p. 21 (discussing the challenges of identifying a frivolous claim in ISDS).

Third, TPF arguably reduces the possibility of reaching a settlement, since the financial interests of the funder would not be satisfied if the parties settled for a sum lower than that owed to the funder.[131] What is more, funders are unlikely to reach 'non-cash settlements', where the State assumes a non-pecuniary obligation, such as restitution in kind or an offer for a new investment opportunity.[132] As such, the TPF's control may lead to unnecessary prolongation of the proceedings or obstacles to settlement and, consequently, an increase in costs.

In contingency and conditional fee arrangements, attorneys act as funders. The two arrangements are closely related. Generally, an attorney-client fee arrangement is 'contingent' if the attorney's compensation depends, in any part, on success in the representation (e.g. 'no win no fees').[133] If the lawyer charges the client lower than the normal rate and recovers an 'uplift' or 'success' fee if it is successful in the arbitration, it is a conditional fee arrangement.[134] Typically, contingency fees are in the range of 20%-40% of the award.[135] These financing methods may be more appropriate where the lesser amount in dispute means the case is unlikely to be funded by a TPF.

4.2 Concluding Remarks

Both TPF and contingency and conditional fee arrangements may have positive aspects, as long as their drawbacks remain in check. While institutions and parties have long been aware of the broad implications these methods may have on the legitimacy of the ISDS system, regulation by arbitral institutions and States is lagging behind. Therefore, it would be a welcome development to incorporate a specific regulation of the ISDS financing market in institutional rules and other bodies of hard and soft law affecting the ISDS system.

5. Insufficient Recoverability of Costs Awards

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[131] Niccolò Landi, 'The Arbitrator and the Arbitration Procedure: Third-Party Funding in International Commercial Arbitration – An Overview' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (C.H. Beck – Stämpfli 2012) 99-101; Stoyanov and Owcarzek (n. 125), p. 191.
[132] Stoyanov and Owcarzek (n. 125), pp. 171, 191.
[133] Adam Shajnfeld, 'A critical survey of the law, ethics, and economics of attorney contingent fee arrangements' (2010) 54 New York Law School Law Review 773-809, 775.
[134] The Law Reform Commission of Hong Kong, 'Conditional Fees' (2007).
[135] Asialaw Dispute Resolution Conference (20 September 2018). See also 'Chapter 6: Third-Party Funding in the United States of America' in Nieuwveld and Sahani (n. 124), pp. 129-174, 131.

Where an arbitral tribunal issues a costs order but the party against whom it has been issued refuses voluntary payment, the winning party may experience various obstacles to enforce such order. This section addresses some of these obstacles and potential solutions under the prism of two different tools used in investment arbitration: TPF and security for costs. TPF enables access to investment arbitration to impecunious claimants (although, as noted, not only to impecunious claimants), but the procedural implications of using TPF may impact various elements of the proceedings, including the recoverability of costs in the event of an adverse award. Security for costs is a tool that facilitates the recovery of costs awards if the debtor is unwilling or unable to pay. But this tool also raises a number of concerns. The potential solutions concerning TPF and security for costs as they relate to the recoverability of costs orders under the four reform scenarios will be examined separately in the following sections.

5.1 TPF Concerns and Potential Solutions under the Four Reform Scenarios

TPF gives rise to serious concerns about liability for and recoverability of costs.[136] Given that the third-party funder is not a party to arbitration, in principle it cannot be directly awarded the costs of proceedings nor can it be obliged to pay adverse costs to the other party. Nevertheless, its influence on the proceedings may affect costs allocation and recovery. If the funded party prevails, it is normally due to pay a certain percentage of the award on damages to the funder. However, in the ICC arbitration of *Essar v. Norscot,*[137] the sole arbitrator qualified the amount due to the funder as 'other costs of proceedings' and awarded it as a special item to the party funded. Though this scenario has not yet been replicated in investment arbitration, it is a potential concern. Concerns regarding recoverability of costs become particularly acute in cases where the funded party is impecunious, so the award on costs, which is not binding upon the funder, cannot be enforced on the party's non-existent or insufficient assets.

[136] Ibid, 194-196; Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third Party Funding' (2016) 33 Journal of Investment Arbitration 125, 130-131.
[137] *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd*, EWHC 2361 (Comm) (2016).

5.1.1 IA improved

To reduce or eliminate concerns arising from TPF in investment arbitration, the improvement of IA should be aimed at decreasing the need for this financing method, enhancing the recoverability of costs of proceedings and having clear regulation.

First, a system of legal aid in ISDS would decrease the need for TPF. For example, UNCITRAL has considered the creation of an advisory centre and has suggested that it could offer the following services: assistance in organizing the defence; support during dispute settlement proceedings; advisory services; alternative dispute resolution (ADR) services; as well as capacity-building and sharing of best practices.[138] In this manner, the advisory centre would reduce the burden 'that the cost of ISDS creates a burden on States, in particular developing and least developed countries, as well as investors, mainly small- and medium-sized enterprises and individuals'.[139] Due to the nature of arbitration, the concept of legal aid is generally alien, but there are examples. The Court of Arbitration for Sport has developed a noteworthy system of legal aid,[140] which might be used as a model for IA's improvement. However, since this mechanism would be available only to impecunious parties, TPF would still find its place with parties who wish to preserve their liquidity and avoid engaging their assets in the proceedings.
Second, recoverability of costs leaves room for improvement. A classical approach would be to rely upon security for costs orders. However, to avoid associated problems,[141] more detailed rules or guidelines on examining the requests for Security for costs should be included in arbitral rules to prevent the abuse of that tool and avoid the undue increase of the overall costs of proceedings. Insurance mechanisms could also be used to cover awards on costs.[142] In that way, there would be no need to use Security for costs, so the quantum of arbitration costs would be built up independently from the financial situation of the party funded. However, the liability insurance

[138] See UNCITRAL Working Group III (ISDS Reform), Note by the Secretariat, 'Possible reform of investor-State dispute settlement (ISDS) — Advisory Centre' (25 July 2019) A/CN.9/WG.III/WP.168.
[139] Ibid, para. 4.
[140] See Court of Arbitration for Sport Guidelines on Legal Aid (entered into force 1 September 2013, amended 1 January 2016) <http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_English.pdf> accessed 15 October 2018.
[141] For a detailed analysis of the interplay between TPF and Security for costs, see e.g., William Kirtley and Koralie Wietrzykowski, 'Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?' (2013) 30 Journal of International Arbitration 17, 17-30.
[142] For the 'conventional' use of insurance in terms of TPF, see Nieuwveld and Sahani (n. 124), p. 4.

would increase the overall costs of the investment, so the discussion as to the desirability of such a solution should shift to the field of economic analysis.

Finally, the efforts to create guidelines and soft rules for TPF, as useful as they may be, remain fairly fragmentary as they apply only to some TPF-related issues[143] or to some institutional arbitrations.[144] Drafting more detailed and harmonized rules on TPF at the international level might prove helpful in clarifying certain basic principles, which may then be followed by investment tribunals even if not contained in the arbitration rules specifically applicable to the proceeding.

5.1.2 IA + appeal

Bearing in mind that the concerns arising from TPF are not necessarily linked to the characteristics of any review mechanism, the introduction of an appeal does not seem likely to bring about meaningful change. The only conceivable advancement stemming from the introduction of an appeal mechanism might be through the general review of the costs in the award, assuming that the appeal mechanism would be competent to perform such a review.

5.1.3 MIC

The problem of the need to have recourse to TPF before a MIC could be resolved in two ways. First, being a permanent international judicial structure, the MIC could set the court fees so that they do not represent a real obstacle to access to justice for parties experiencing financial difficulties.

Second, in the same way as IA improved, the MIC could establish a mechanism of legal aid that could reduce the need for TPF. Given its permanent and centralized judicial structure, the MIC could adopt rules providing systemic answers to the cost-related problems of TPF.

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[143] For example, ICC's 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' in point 24 refer only to the issue of disclosure for the purpose of assessing independence and impartiality <https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration> accessed 15 October 2018.

[144] For example, SIAC's 'Practice Notes on Arbitrator Conduct in Cases Involving External Funding' <http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf> accessed 15 October 2018.

Third, the recoverability of the award on costs would depend on the scope of MIC decisions. The MIC's constitutive instrument could provide that any award on costs would be binding on the third-party funder. Here, enforcement against the funder's assets would not appear problematic as long as these assets are located in a state party to the MIC. Under other hypotheses, the solutions would have to be sought by analogy to IA improved.

5.1.4 No ISDS

The recourse to domestic courts only for settling investor-state disputes would reduce the need for TPF (in those jurisdictions where TPF is permitted) on the part of impecunious parties, who could make use of the available mechanisms of legal aid under national law. Even if TPF is used by parties wishing to stay liquid, the decision on costs would be rendered as a part of a final judgment and it could be enforced not only against the parties to the dispute, but possibly also against the funders, provided that the applicable procedural requirements are met. However, such a judicial decision may not be enforceable in states other than the one where it was issued. Enforcement would depend on the law of each country where execution is sought.

Concerning state-to-state arbitration, given that states do not have easy access to TPF, resolving investment disputes through state-to-state arbitration would significantly reduce, if not entirely eliminate, the demand for TPF in its most common form. However, state-to-state arbitration might lead to the creation of new forms of TPF.

5.2 Security for Costs

5.2.1 Rationale of provision of security to guarantee compliance with costs orders

The rationale and practice concerning the use of the tool for securing the costs of the proceedings is simple. There is a significant number of cases where investors lost and were ordered to pay costs, but the state has not been able to collect.[145] There is also a significant number of cases where states have requested Security for costs,[146] but they have only been granted twice.[147]

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[145] See Christine Sim, 'Security for Costs in Investor–State Arbitration' (2017) 33(3) Arbitration International 427-495, 461-462.

[146] See also 'Costs and Security for Costs' in ICCA-Queen Mary Task Force (n. 124) 145-183, 175.

[147] *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014); and *Manuel García Armas et al. v Bolivarian Republic of Venezuela*, PCA Case No 2016-08, Procedural Order No 9 (20 June 2018).

However, these concerns do not appear to be paired with developments in IIAs. Few treaties include provisions on Security for costs, examples including the recent Iran and Slovakia[148] and India-Belarus[149] BITs and the EU-Vietnam,[150] the EU-Mexico,[151] and the Australia-Indonesia[152] Free Trade Agreements (FTA). The possibility to order Security for costs in the form of provisional measures is recognized (expressly or implicitly) in several arbitration rules, such as in the 2010 UNCITRAL Arbitration Rules and the ICSID Convention.[153]

Article 26.2.c of the 2010 UNCITRAL Arbitration Rules provides that '[t]he Arbitral Tribunal may, at the request of a party, grant interim measures', which may include an order for a party to 'provide a means of preserving assets out of which a subsequent award may be satisfied'. Article 42.2 states that '[t]he Arbitral Tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs'.

Article 47 of the ICSID Convention provides that '[e]xcept as the parties otherwise agree, the arbitral tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.' Until now, efforts to obtain Security for costs under the ICSID Convention were analysed as requests for provisional measures, with the consequent need for applicants to demonstrate the

[148] Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed on 19 January 2016, entered into force 20 August 2017) (Slovakia-Iran BIT), art. 21 provides in the relevant part: '6. [a] tribunal may order security for costs if it considers that there is a reasonable doubt that claimant would be not capable of satisfying a costs award or consider it necessary from other reasons.'
[149] Treaty Between the Republic of Belarus and the Republic of India on Investments (signed 24 September 2018) (India-Belarus BIT), art. 28.2 <https://mea.gov.in/Portal/LegalTreatiesDoc/BL18B3432.pdf.> accessed 4 July 2019.
[150] The EU-Vietnam Free Trade Agreement (authentic text as of August 2018) (EU-Vietnam FTA) provides in art. 3.48 'Security for Costs', in art. 3.37 'Third-Party Funding' and in art 3.54 'Appeal Procedure'.
[151] The provisions in the EU-Mexico Free Trade Agreement (entered into force 1 March 2001) (EU-Mexico FTA) are similar to the ones in the EU-Vietnam FTA. See EU-Mexico FTA, arts. 22, 30.
[152] Comprehensive Economic Partnership Agreement between Australia and Indonesia (signed 4 March 2019) (Australia-Indonesia FTA) art. 14.28 <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default.aspx> accessed 4 July 2019.
[153] Other arbitration rules that provide for Security for costs include the English Arbitration Act (entered into force 17 June 1996), art. 38.3; the SIAC Rules (as of 2013), art. 24.1.k; the LCIA Rules, art. 25.2; the ACICA Arbitration Rules (entered into force 1 January 2016), art. 33.2.e; the SCC Rules for Expedited Arbitrations (entered into force 1 January 2017), art. 39; and the VIAC Rules of Arbitration and Mediation (entered into force 1 January 2018), art. 33 (6) and (7).

urgency and necessity of such orders. In the recently published Proposals for Amendment of the ICSID Rules, the ICSID Secretariat proposes that a new arbitration rule be introduced to address orders for Security for costs.[154]

At the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform), participating states pointed out that in investment arbitration they might find themselves unable to recover a substantial part or indeed any of their costs, and expressed their will to discuss policy and practical considerations on whether and under what circumstances ISDS tribunals should be allowed to order Security for costs.[155]

5.2.2 Concerns raised by the issue of provision of security to guarantee compliance with costs orders under the current ISDS system

The main concerns that have been expressed in relation to Security for costs in the current ISDS System can be grouped as follows:

First, the risk that unsuccessful claimants won't pay any cost orders against them.[156] States have pointed out that there is a perceived imbalance in the parties' ability to enforce an award and State respondents are less likely to be judgment-proof than individual or corporate claimants, which may have insufficient assets as a result of bankruptcy or corporate structuring.[157] The ICSID Secretariat conducted a survey at the request of Panama on compliance with and enforcement of costs awards, identifying non-compliance with 12 of the 34 Awards of Costs and/or Damages in favour of the State.[158]

[154] See ICSID Secretariat (n 20). In its most recent proposal, the ICSID Secretariat introduced changes to the proposed rule. See ICSID Secretariat (n. 22), pp. 229-236.
[155] UNCITRAL Working Group 3 (n. 8).
[156] Ibid, para. 33.
[157] ICSID Secretariat (n 20) para 497.
[158] ICSID, 'Survey for ICSID Member States on Compliance with ICSID Awards' (2017) <https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf.> accessed 4 July 2019.

Second, the high number of cases that are discontinued for lack of payment of advanced fees.[159] This sometimes arises when the investor perceives during the proceedings that it has little chance of succeeding.

Third, security for costs has generally been requested under the rule concerning provisional measures and parties are generally required to meet the associated high legal standard. Evidence of 'exceptional circumstances' is generally required and arbitral tribunals analyse the urgency and necessity for such orders.[160] The result is that in very few cases investment tribunals have ordered Security for costs.

Fourth, States generally raise concerns about practices or situations that create risks or doubts as to the possibility of recovering costs, such as: impecunious investors, arbitration initiated by multiple claimants, the use of shell companies, failure of claimants to comply with their financial obligations in other cases, failure to pay the first advance payments in the arbitral proceedings, an abuse of process in any arbitral proceeding, or the use of TPFs.[161]

Fifth, States have pointed out that tribunals generally consider the mere existence of TPF, without any other relevant circumstances, is an insufficient basis for requiring security for costs.[162] Some authors consider this is a correct approach.[163] At the same time, the presence of TPF increases the risk of non-payment and should have the effect of reversing the burden of proof for Security for costs requests.[164]

Sixth, there are concerns that the third-party-funder could escape liability for the tribunals' award on costs. A funder will benefit if the claimant prevails, but may avoid liability for any costs

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[159] The ICSID web page records 18 cases where the tribunals or annulment committees issued a procedural order for the discontinuance of the proceeding for lack of payment of the required advances <https://icsid.worldbank.org/en/Pages/cases/ConcludedCases.aspx?status=c> accessed 4 July 2019.

[160] On this issue see Lars Markert, 'Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors' (2018) 11(2) Contemporary Asia Arbitration Journal 217.

[161] ICSID Secretariat (n 20) paras 507, 510.

[162] See for example, *EuroGas Inc. & Belmont Resources Inc. v Slovak Republic*, ICSID Case No ARB/14/14, Procedural Order No 3—Decision on Requests for Provisional Measures (23 June 2015); *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No 2011-17, Procedural Order No 14 (11 March 2013); and *South American Silver Ltd (Bermudas) v Bolivia*, PCA Case no 2013-15, Procedural Order No 10 (11 January 2016).

[163] For example, Christine Sim, 'Security for Costs in Investor–State Arbitration', 33(3) Arbitration International 427–495. This is also the approach recently endorsed by the ICSID Secretariat. See ICSID Secretariat (n. 221), para. 363.

[164] *RSM v St Lucia* (n. 1476), Assenting Reasons of Gavan Griffith (12 August 2014), para. 18.

awarded in favour of the respondent.[165] This situation is aggravated when the TPF agreement explicitly provides that the third-party funder will not pay any adverse costs.[166]

5.2.3 Potential solutions under the four reform scenarios

5.2.3.1 IA Improved

Regarding the concern that unsuccessful claimants won't pay any cost orders against them, one option would be to include a specific provision on security for costs as a relief different from provisional measures. Another option would be to include a provision on provisional measures that deals specifically with Security for costs.

As to the risk of discontinuance of cases for lack of payment of advanced fees, it would be possible to include an option to request security for costs in early stages of the proceedings (e.g. as in the case of the proposed ICSID Rule 51). Another option would to establish a presumption of security for costs if the advances in arbitral proceedings are not paid promptly.

With respect to addressing the concern of the provisional measures' high threshold through that security for costs requests are usually subject to, a potential solution would be, for example, to include security for costs provisions with more flexible requirements, as in the case of the EU-Vietnam FTA that refers to 'reasonable grounds'.

To address some of the circumstances that may create risks or doubts of not recovering costs, such as impecuniosity, use of shell companies to bring claims or multi-party arbitrations, a list of concerns to be taken into account by the arbitral tribunal in the analysis of security for costs requests could be included in arbitration rules (e.g. the provision on security for costs included in the SCC Rules for Expedited Arbitrations 2017) or a presumption in favour of security for costs could be also be included in the rules in such instances.

The fact that the mere existence of a TPF arrangement alone is usually considered insufficient for a tribunal to order security for costs, could be addressed by establishing a provision indicating that the existence of TPF reverses or may reverse the burden of proof on security for costs.[167]

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[165] ICSID Secretariat (n. 201), para. 497.
[166] For example, in *Armas v Venezuela* (n. 1476).
[167] See Brekoulakis and Rogers (n. 126), p. 25; Elena Gutiérrez García de Cortázar, A vueltas con la justicia cautelar: Árbitro de Emergencia, Security for Costs... ¿Estamos mejor que hace 10 años?, Anuario de Arbitraje, 2019, p. 352.

As to the risk that the third-party funder could escape liability, a possibility would be for the arbitral tribunal to analyse the text of the TPF agreement and request the funded party to secure further guarantees from the third-party funder.

5.2.3.2 IA + appeal

The solutions proposed in the 'IA improved' scenario could be applied, *mutatis mutandis*, to the IA + appeal scenario. In the case of appeal procedures, good practice would include a provision stating that a disputing party lodging an appeal shall provide security, including the costs of appeal, as well as a reasonable amount to be determined by the appeal tribunal in light of the circumstances of the case (similar to the EU-Vietnam FTA, Article 3.54.6).

5.2.3.3 MIC

The same solutions proposed in the 'IA improved' scenario may be applied, *mutatis mutandis*, to the MIC scenario.

5.2.3.4 No ISDS

In a system with no investment arbitration and State-to-State arbitration, the concerns related to Security for costs are less likely to occur since the State of the nationality of the investor will be handling the dispute in favour of the investor. An example of investment treaties with no investment arbitration and state-to-state arbitration are Brazil's Cooperation and Investment Facilitation Agreements (CIFAs). Under these treaties, contracting parties equally bear the expenses of the arbitrators, as well as other costs of the proceedings, unless otherwise agreed. If the arbitral award establishes monetary compensation, the party receiving such compensation must transfer it to the investors in question once the costs of the dispute have been deducted (e.g. Brazil-Colombia CIFA, Brazil-Chile CIFA, and Brazil-Mexico CIFA).

5.3 Concluding Remarks on TPF and Security for costs

TPF and Security for costs are two aspects of investment dispute settlement that should be addressed in any reform of the regime. TPF can create imbalances between the parties to an arbitration and adversely affect various elements of the proceedings, including in respect of recoverability of costs awards. A useful tool to avoid such problems is Security for costs. This tool, however, should be regulated in a way that it allows tribunals to resort to it when it is

justified, without the need to apply the same requirements applicable to provisional measures and at the same time without unduly affecting each party's right of access to justice. The concern as to the recoverability of costs awards and costs in the proceedings could be resolved by the inclusion of specific provisions regulating Security for costs, as a relief different to provisional measures and with less stringent requirements.

6. Conclusion: Summary Table

We provide below a summary of our conclusions in the form of a table. The table shows to what extent we believe the four different reform scenarios will improve the current *status quo* as regards the above-discussed concerns about excessive costs and insufficient recoverability of costs. The answer may be positive (✓), negative (x), or not certain (**~**).

Concerns	**Scenarios / Issues**	**IA improved**	**IA + appeal**	**MIC**	**No ISDS**
Excessive costs	Excessively high fees	~	~	~	X
	Length of proceedings	✓	~	~	X
	Insufficient resources	✓	✓	✓	✓
Insufficient recoverability of costs awards	Third Party Funding	✓	✓	✓	✓
	Security for costs	✓	✓	✓	X