

Excessive Costs & Insufficient Recoverability of Cost Awards

Academic Forum on ISDS

Working Group 1

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I. INTRODUCTION

This Concept Paper (the “Paper”) assigned to Working Group 1 concerns the issue of excessive costs and insufficient recoverability of cost awards. The Paper addresses the issue from four different angles. First, it deals with fees. On the one hand, it examines party costs (fees and expenses of counsel, experts, and witnesses) and, on the other, tribunal costs (fees and expenses of arbitrators and arbitral institutions, including secretariat services for *ad hoc* arbitrations). Second, it addresses the issue of the length of proceedings and its impact on costs, including the impact of document production on the length/cost analysis. Third, the paper delves into 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. Fourth, with respect to the issue of insufficiency of resources or unwillingness to pay a cost award, the Paper examines the availability or lack thereof of mechanisms to secure prompt payment of an award on costs. This includes a reference to the impact of TPF and security for costs.

Generally, this Paper considers the concerns about excessive costs and insufficient recoverability of costs awards under the four main reform scenarios identified by the Academic Forum on ISDS: Investment Arbitration (“IA”) improved; IA + appeal; creation of a multilateral investment court (“MIC”); and no investor-State dispute settlement (“ISDS”), with two sub-scenarios, namely (i) recourse to domestic courts only, and (ii) State-to-State arbitration. While for present purposes we have assumed that such concerns exist,² we note that on costs the concern refers to those costs that are *excessive*. Whether a given cost is justified depends on a variety of factors that are intimately linked to the circumstances of each case (the importance and complexity of the matters at stake, the interests and position of each party, the standard of the service provided, etc.). Yet it is clear that some costs related to arbitration proceedings, even if high, may be justified (at least from the perspective of one of the parties). Thus, we have not assumed that all reductions in costs are necessarily desirable.³

II. EXCESSIVE COSTS

The issue of excessive costs is discussed in three sections. Section A analyzes party costs and tribunal costs under the four reform scenarios. Section B discusses the length of proceedings. The intention is not to address all aspects of proceedings’ duration, but rather to consider the issue only in relation to costs. The last section, Section C, refers to the problem of insufficient resources to litigate before investment tribunals and considers potential solutions under the four reform scenarios.

² Of course, there are good reasons to assume that, for example, international arbitral proceedings costs is an issue of concern. See IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 4.

³ See UNCITRAL Doc. A/CN.9/WG.III/WP.153, para. 12 (stressing that “it would be important to draw a distinction between ‘excessive’ or ‘unjustified’ time and cost on the one hand, and ‘necessary’ or ‘justified’ time and cost on the other”).

A. Fees: Party Costs and Tribunal Costs

1. Costs in General

One of the criticisms levelled against investment arbitration relates to its high costs and the insufficient recoverability of such costs. As noted, here costs are divided between party costs (fees and expenses of counsel, experts, and witnesses) and tribunal costs (fees and expenses of arbitrators and arbitral institutions, including secretariat services for *ad hoc* arbitrations).

A 2017 study found that average party costs were USD 6,019,000 for the claimant and USD 4,855,000 for the respondent, while average tribunal costs were USD 933,000 (with average ICSID costs at USD 920,000 and average UNCITRAL costs higher at USD 1,089,000).⁴ Just a few high cost awards can of course skew average costs.⁵ 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”.⁶ The median tribunal costs in ICSID arbitration were US\$876,815.94.⁷ Another 2017 study shows that the average cost for an ICSID annulment applicant is USD 1.36 million and USD 1.45 million for a respondent.

According to an earlier (2016) study, which looked at awards delivered in 2011-2015, the average claimant costs were USD 5,619,261.74 (in 64% of the arbitrations, claimant costs were below USD 5 million, and in 36% they were above USD 5 million); and the average respondent costs were USD 4,954,461.27 (in 68% of the arbitrations, respondent costs were below USD 5 million, and in 32% above USD 5 million).⁸ Average ICSID tribunal costs were USD 882,668.19.⁹ These numbers point to party costs being considerably higher than tribunal costs: (according to the 2017 study) 92.1% party costs as opposed to 7.9% tribunal costs and (according to the 2016 study, focusing on ICSID arbitration) 92.3% party costs as opposed to 7.7% tribunal costs.

These figures show, on the one hand, that investment arbitration is a remedy that involves significant costs. Of course, for the claimant-investor incurring these costs may be perfectly rational, particularly if the investment is a large one and the investor perceives that no other effective remedy is available. For the respondent State, however, these costs will normally be higher than if the dispute had been processed through its national courts only. On the other hand, the figures also show that party costs are by far the largest portion of arbitration costs. While increased competition, as new players enter the market, may reduce party costs somewhat, not least lawyers’ fees, there is no evidence that these costs will be reduced significantly, at least in the short term. Yet it would be wrong to conclude that only the parties can do something about party costs. These costs are also influenced not only by “the manner in which the arbitration is

⁴ Matthew Hodgson and Alistair Campbell, “Damages and Costs in Investment Treaty Arbitration Revisited”, Allen & Overy, 14 December 2017, http://www.allenoverly.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf

⁵ 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.

⁶ Commission, J. and Moloo, R., *Procedural Issues in International Investment Arbitration* (2018) Oxford University Press, para. 10.17.

⁷ *Ibid.*, para. 10.18.

⁸ Jeffery P. Commission, “How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years” (2016) *Kluwer Arbitration Blog*, <http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>

⁹ *Ibid.*

conducted”,¹⁰ where the role of the arbitral tribunal is fundamental, but also more generally by the way in which the arbitration process (including any available remedies against the arbitral award) is structured. The latter issue is discussed below under the four different reform scenarios.

2. Party Costs Under the Four Reform Scenarios

(i) *Improvement of the current investor-State arbitration system (“IA improved”)*

It is unlikely that, aside from certain related ethical issues,¹¹ the amount of fees and expenses of counsel, experts, and witnesses will be regulated in arbitration rules. It will thus generally not be possible to alter counsel’s fees and expenses themselves. It is unclear whether such regulation would be desirable or even feasible, except perhaps in certain specific cases such as in contingency fee arrangements (which thus far remain largely unregulated in international arbitral rules).

However, measures aimed at reducing the proceedings’ length or more directly the lawyers’ work could help reduce party costs within the current system. These measures could include: i) limiting the length of all the parties’ written submissions including, on a case-by-case basis, any specific submission requested by the tribunal during the proceedings. We propose setting a maximum number of pages that is significantly lower than what is the current normal practice, but allowing for a higher limit if adequately justified.¹² Introducing page limits would mainly be the responsibility of arbitral tribunals, but arbitral institutions could also play a role by adopting practice guidelines suggesting page limits for cases of average complexity and size. ii) Tribunals should prevent/discourage extensive document discovery by not granting discovery requests that are not warranted, due to burden of proof considerations¹³ or the like, or by always including considerations related to the discovery phase (if any) when apportioning costs. Neither the arbitral tribunals nor the institutions should take the document discovery phase for granted.¹⁴ Institutions should not include a discovery phase in the template calendars they generally provide

¹⁰ Rivkin, D. W. and Rowe, S. J., *The Role of the Tribunal in Controlling Arbitral Costs*, *The International Journal of Arbitration, Mediation and Dispute Management (CIArb)* (2015), Vol. 81, No. 2, p. 116.

¹¹ Certain remuneration arrangements of witnesses and experts may be controversial and potentially subject to regulation, such as those that make the remuneration partially or totally dependent on the outcome of the case.

¹² Under the current Proposals for Amendment of the ICSID Rules, in the proposed expedited arbitrations the limit for the memorial and counter-memorial would be 200 pages and for the reply and rejoinder 100 pages. See Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, ICSID Secretariat, August 2, 2018, p. 313. These page-limits -or perhaps ones slightly higher, such as 250 and 150 pages respectively- appear apt more generally for ordinary investment arbitrations, subject to appropriate adjustments if requested by any of the parties and found justified by the arbitral tribunal.

¹³ See Derains, Y., “Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint”, 2006, *Document Production in International Arbitration*, ICC 2006 Special Supplement, 87; Hanotiau, B., “Document Production in International Arbitration: A tentative Definition of “Best Practices”, *Document Production in International Arbitration*, ICC 2006 Special Supplement, p. 116; Curatola, M. and de Luca, F., *Document Production in International Commercial Arbitration: A “Trojan Horse” for Uncontrolled Costs*, in *Transnational Dispute Management* Vol. 15, issue 4, p. 10.

¹⁴ For example, Article 2.5 of the Prague Rules provides that “[w]hen establishing the procedural timetable, the Arbitral Tribunal may decide... the form and extent of document production (*if any*)” (emphasis added). See Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), available at www.praguerules.com. ICSID has recently clarified that the fact that there is a provision in the ICSID arbitration rules addressing document production “does not mean that a document production phase must take place in every case”. Working Paper # 2, Volume 1, March 2019, Proposals for Amendments of the ICSID Rules, para. 237.

to the parties at the outset of the proceedings. Rather, in each case arbitral tribunals should consult with the parties and decide whether a discovery phase is justified. iii) Tribunals should discourage the submission of certain expert reports (such as international law experts, except in special circumstances) and generally the attendance of experts and witnesses at hearings whenever such attendance is not necessary in light of the issues that remain to resolve the dispute. iv) Tribunals should 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 submitted by one party is being challenged by the other).

Another issue to address within this scenario is the apportionment of costs and dismissal of frivolous claims. Because costs are high, how they are apportioned between the disputing parties is of the utmost importance. ICSID tribunals are, roughly, evenly divided as to whether they require the “losing party” to pay the costs (i.e. “loser pays” or “costs follow the event” approach) or require each party to pay its own costs and half of the arbitral tribunal costs (i.e. “pay your own way” approach).¹⁵ However, the majority of UNCITRAL tribunals (perhaps reflecting the difference in the applicable provisions on costs allocation) have applied some form of the former approach by entering adjusted costs orders.¹⁶ Each approach has its own advantages and disadvantages. For example, it may seem unfair for a prevailing party not to recover its costs when a tribunal has found that, as a matter of law, it was justified in bringing or defending against a claim. Yet it is often difficult to determine who is the winner and who the loser.¹⁷ It seems preferable not to adopt a specific rule or presumption on costs, but rather to grant tribunals discretion to allocate costs in light of the circumstances of the case. Nonetheless, arbitral rules should require tribunals to take into account, in the exercise of such discretion, certain criteria and to provide reasons explaining these criteria when distributing costs.¹⁸ Under ICSID’s most recent reform proposal, the following factors would have to be considered when allocating the costs of the proceeding: “(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.”¹⁹ While this kind of list provides tribunals enough leeway to consider any relevant circumstances, another factor that could be expressly mentioned would be the reasonableness of the amount claimed. This could serve to discourage unreasonably high claims, even by parties having meritorious claims. Aside from arbitral rules, further guidance on costs could be included in investment treaties.

(ii) *IA + appellate mechanism (“IA + appeal”)*

¹⁵ Commission, J. and Moloo, R., *Procedural Issues in International Investment Arbitration* (2018) Oxford University Press, para. 10.47.

¹⁶ *Ibid.* While it is often suggested that the modern trend in investment arbitration generally is to follow the “loser pays” approach, the accuracy of this observation depends on how far back one goes. In the case of ICSID arbitration, even if one considers only the period 2011-2017, 56% of tribunals made some form of adjusted costs order, which is not a significant majority. See *ibid.*, para. 10.48.

¹⁷ Rovine, A. W., *Chapter 40: Allocation of Costs in Recent ICSID Awards*, in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E. Triantafilou (eds.), *Practising Virtue. Inside International* (Oxford University Press 2015), p. 659.

¹⁸ See *ibid.*, p. 660.

¹⁹ Working Paper # 2, Volume 1, March 2019, Proposals for Amendments of the ICSID Rules, p. 226-227.

In principle, replacing *ad hoc* annulment committees or set aside proceedings with a standing appellate body should not by itself impact party costs.²⁰ However, the impact the second reform scenario could have on party costs depends on the design of the appellate mechanism, including the level of review. For instance, costs would be different depending on whether the appellate mechanism requires a *de novo* review or whether it is limited to issues of legal correctness. If counsel has to plead the case anew, costs could be higher. If counsel pleads only legal correctness issues, costs may not be significantly different to what they are under the current system.

Another cost element to take into account in this respect is that an appeal means that the second instance can amend the award and thus there may be no need for, and perhaps no possibility of, resubmission (which means a new arbitration and can thus add significantly to the costs). Further, in the long run, to the extent the appellate mechanism brings more consistency (which is a likely outcome), costs may be reduced by reducing the time counsel for the parties need to address fundamental issues (because the appellate body has a clear position on these issues). If certain issues need little or no discussion because the appeal body has adopted a clear position, this may mean not only a significant reduction in counsel work but also that certain witnesses and experts may no longer be necessary (which would further reduce counsel's work).

(iii) *Introduction of a Multilateral Investment Court ("MIC")*

It is unclear whether the creation of a multilateral court itself would have an impact on how much parties are spending on counsel and expert fees. Yet a MIC could issue procedural rules or over time develop practices that could limit the extent to which parties resort to experts. For example, the MIC could signal that certain experts are in general not considered relevant or frequently appoint experts itself,²¹ thereby reducing the role of party-appointed experts. Further, the possible reduction of counsel fees through increased consistency, discussed in the previous section, would also be applicable here.

(iv) *No ISDS, with two sub-scenarios, namely (i) recourse to domestic courts only and (ii) State-to-State arbitration ("No ISDS")*

a) *Domestic courts*

In principle, in many (but not all) domestic jurisdictions party costs would tend to be lower than in investment arbitration. But in the end this very much depends on the length of the proceedings. Domestic proceedings are often lengthier than investment arbitrations of similar complexity, in part because there are more instances of recourse, and as a result domestic proceedings can end up being more costly.

²⁰ Nor would replacing *ad hoc* annulment committees or set aside proceedings with *ad hoc* appellate committees necessarily have a direct impact on costs. However, our assumption here is that we are discussing a standing appellate body, so *ad hoc* appellate committees are not considered.

²¹ ICSID recently noted that tribunal-appointed experts "are increasingly used" and is proposing a new rule to regulate their selection, appointment, and role. See Proposals for Amendment of the ICSID Rules — Working Paper, Volume 1, ICSID Secretariat, August 2, 2018, p. 6; *ibid*, Volume 3, p. 204. See also Prague Rules, Article 6. Yet a permanent tribunal could make more frequent use of tribunal-appointed experts than current *ad hoc* tribunals through, for example, setting up rosters of pre-approved experts (which could reduce the time and costs associated with their selection and appointment).

b) State-to-State arbitration

State-to-State arbitration is usually structured similarly to most investor-State arbitrations, i.e. a three-member *ad hoc* tribunal, some sort of secretariat services, written and oral proceedings take place before an award is rendered, etc. Hence, the arbitration itself may involve similar costs in State-to-State and in investor-State arbitration. Aside from the arbitration phase, it is true that, on the one hand, State-to-State arbitral proceedings generally do not provide for a subsequent annulment phase and thus the costs associated with the latter are not incurred. However, on the other hand, depending on the contents of the claim,²² State-to-State arbitration may require prior exhaustion of local remedies and thus on the whole involve higher party costs than investment arbitration.

3. Tribunal Costs Under the Four Reform Scenarios

While arbitration itself has elicited criticism for its high costs, when considering this section one should keep in mind that tribunal costs correspond to between 7.7% and 7.9% of arbitration costs.

(i) *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. This is likely related, at least in part, to the fact that ICSID Rules impose a cap on arbitrator fees while the UNCITRAL Arbitration Rules do not. An improvement that should be considered to the current system is, in non-ICSID investment arbitration, having an external body fixing uniform arbitrators' fees rather than the arbitrators themselves (as is currently the case 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 – in the absence of agreement, a three-member tribunal is the default rule. ICSID's proposed expedited arbitration would be conducted before a sole arbitrator, unless the parties notify the Secretariat of a different agreement within 30 days from registration of the request for arbitration.²³ 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, as regards 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 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 should always include the amount of fees charged by each arbitrator.

²² In principle, the exhaustion of local remedies will be required when the state has been injured indirectly, i.e. through a national, and not where the claimant state has been directly injured. See Draft Articles on Diplomatic Protection with commentaries, 2006, p. 45.

²³ See Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, ICSID Secretariat, August 2, 2018, p. 298.

(ii) *IA + appeal*

The cost of an appellate mechanism would depend on its design and overall architecture, including whether it would be a standing appellate body or a roster, the number of members, the arbitrators' salary in the case of a standing body or the arbitrators' hourly fee and the retainer fee in the case of a roster,²⁴ etc.

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 arbitrator hours. However, this could be more than offset by, *inter alia*, the increased consistency brought by an appellate mechanism, for reasons similar to the ones discussed above in relation to party costs,²⁵ and the power of the appellate body to modify awards, which in principle would make the resubmission of the dispute to a new tribunal unnecessary.

(iii) *MIC*

The considerations discussed in the two preceding sections are also relevant here. Further, to the extent the members of the MIC would receive a fixed salary, it is foreseeable that such salaries would be lower than if the judges were being 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.

(iv) *No ISDS*

a) *Domestic courts*

Strictly speaking, tribunal costs in national jurisdictions may be lower than in investment arbitration. But this requires a case-by-case comparison. Further, in national jurisdictions where the tribunal costs are determined as a percentage of the amount claimed, such costs may be higher than if the case were submitted to investment arbitration (particularly when the amount claimed is high).

b) *State-to-State arbitration*

In principle, there is no reason to assume a difference between investment arbitration and State-to-State arbitration as to arbitrators' fees.

4. Concluding Remarks

It has been shown that party costs are considerably higher than tribunal costs. As such, 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

²⁴ 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.

²⁵ For example, the existence of a clear position of the appellate body on certain fundamental legal issues could shorten tribunals' deliberations (both before first instance *ad hoc* tribunals and before the appellate body) and over time reduce the number of appeals against awards.

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 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.²⁶ To reduce costs, both party costs and tribunal costs, it would be interesting to consider methods, such as dismissal of frivolous claims, that have the potential to reduce costs under all reform scenarios. In addition, it is necessary to reflect further on the apportionment of costs, including on the specific criteria that arbitral tribunals should take into account and discuss in the awards when allocating costs. 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.²⁷

²⁶ Habegger, P. A., *Chapter 18, Part V: Saving Time and Costs in Arbitration*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2018), p. 2598.

²⁷ See UNCITRAL Doc. A/CN.9/WG.III/WP.153, para. 13 (“[p]articular attention was drawn to the lack of predictability as a cause for increased cost and duration”).

B. Length of Proceedings and Costs

1. The Problem of Costs in Relation to Length of Proceedings

The issue of excessive costs in international arbitration is inevitably linked to the issue of the length of proceedings.²⁸ Typically, the duration of arbitral proceedings has a direct correlation with costs that can be explained in the simplest form: in principle, the longer the proceedings, the higher the costs.²⁹

This lack of efficiency and its associated costs has become an ever-growing criticism of international arbitration.³⁰ While this debate on efficiency is wide-spread in the field of international commercial arbitration,³¹ it constitutes a somewhat recent concern in the area of investment arbitration.³² This recent concern may have to do with the excessive duration of many investment arbitration proceedings now being experienced—e.g. investment arbitral proceedings under the International Centre for Settlement of Investment Disputes (“**ICSID**”) Arbitration Rules had a duration of 39 months on average in 2015.³³

Efficiency concerns can also be identified in the perception of ISDS users. A 2014 survey of users found that 95% of all respondents considered the duration of arbitral proceedings and the availability of arbitrators to be issues of concern,³⁴ 85% thought the time spent by arbitrators to issue their awards after the hearing is an issue of concern,³⁵ and 75% were in favor of limiting the opportunity for document disclosure.³⁶

²⁸ WG2 of the ISDS Academic Forum is addressing the issue of Excessive Duration of ISDS Proceedings. Accordingly, this section of WG1, focused on length of proceedings, will only address the issue from the perspective of its impact on costs.

²⁹ ICC, ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018), p. 6.

³⁰ Queen Mary University of London and White & Case, *International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015), p.3.; and IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 36.

³¹ While improving efficiency in commercial arbitration typically involves a balancing act between the cost, time, and finality aspects of arbitral awards, investment arbitration adds further dimensions, including the protection of the public interest involved in investor-State disputes and the higher transparency required in investment arbitration. However, this should not prevent one from identifying common problems in relation to the duration-cost conundrum—and thus, also take advantage of the research in the field of commercial arbitration.

³² Markert, L., *Efficiency and Investment Arbitration*, p. 2; IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 36.

³³ ICSID, *Annual Report 2015*; p. 31. Available at https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf

³⁴ IBA Subcommittee on Investment Treaty Arbitration, Report on the Subcommittee’s Investment Treaty Arbitration Survey (May 2016), Qs38 and 39; IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 36.

³⁵ IBA Subcommittee on Investment Treaty Arbitration, Report on the Subcommittee’s Investment Treaty Arbitration Survey (May 2016), Q40; IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 36.

³⁶ IBA Subcommittee on Investment Treaty Arbitration, Report on the Subcommittee’s Investment Treaty Arbitration Survey (May 2016), Q44; IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 36.

Our review of the literature shows that improving cost-efficiency from the perspective of time is essential and requires a streamlining of the proceedings,³⁷ which can be achieved through a holistic, multi-faceted approach involving all stakeholders, including States at the time of negotiating international investment agreements (“IIAs”), the parties and their counsel,³⁸ arbitrators and arbitral institutions.³⁹

Within this approach, the principal issues to be addressed are the characteristics of the ISDS system that cause time-cost inefficiency and which can be grouped into three categories:

- 1) Systemic issues: these involve the structure and wording of arbitration clauses in IIAs and contracts,⁴⁰ as well as the tools provided by the different institutions as contained in the arbitration rules chosen by the parties or guidance in the form of notes or communications. International organizations may also play a role at the systemic level with the issuance of soft law instruments such as guidance notes, rules, recommendations or papers.
- 2) Structural issues: these involve the structure of the arbitration proceedings from the moment in which the investor files the request for arbitration to the rendering of the award and the post-award proceedings. The structure is heavily influenced by the frameworks provided for in the arbitration rules chosen by the parties and, where flexibility is allowed, the choices parties make relating to procedural issues.⁴¹
- 3) Arbitral tribunal issues: these involve the way an arbitral tribunal is composed and the powers that are bestowed upon it, which can drastically affect the time-cost efficiency of the arbitral proceeding.

What follows is an open list of actions—identified by different authors and covering each of the three categories mentioned—which can serve as potential solutions to achieve an optimized time-cost efficiency of the arbitral proceedings.

2. Systemic Solutions

(i) *Arbitration clause*

Starting with the arbitration clause, be it in a contract or in an IIA, a clearly written and more sophisticated clause may potentially improve the efficiency of the proceeding. Arbitration

³⁷ Franck, S. D., *Chapter 9: The Way Forward in Arbitration Costs in Myths and Realities in Investment Treaty Arbitration* (forthcoming March 2019) Oxford University Press: “time was the only variable reliably predicting investors’ costs, states’ costs, and tribunals’ costs.”

³⁸ However, concerns specifically related to the parties, such as the choice of counsel or the role of in-house counsel fall beyond the scope of this paper since the focus here is solely on the design of the ISDS system.

³⁹ Markert, L., *Efficiency and Investment Arbitration*.

⁴⁰ Habegger, P. A., *Chapter 18, Part V: Saving Time and Costs in Arbitration*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2018), pp. 2595 - 2614.

⁴¹ While some Rules provide opportunities to use dilatory tactics at different stages of the proceedings, the parties and their counsel may make choices as they relate to the procedure of the arbitration (e.g. in relation to the use of technology to speed up the proceedings such as the use of green filings; limiting written submissions; minimizing the document production phase; etc.).

clauses that are simply and clearly drafted allow parties to avoid uncertainty and disputes over their meaning and effect, as well as over the arbitral tribunal's jurisdiction or the process of appointing arbitrators.⁴²

Measures to optimize arbitration clauses include: (i) introducing settlement provisions—e.g. distinguishing the amount in dispute;⁴³ and (ii) prescribing document-only proceedings for disputes involving a claim of less than a set amount and a full proceeding for disputes involving claims of more than such amount.⁴⁴

(ii) *Arbitral institutions*

Arbitral institutions may also take a more active role in amending their rules to provide for more efficient proceedings, thus decreasing duration and costs. For example, irrespective of what the default position is under their rules, arbitral institutions may take an active role in informing the parties of the benefits of appointing a sole arbitrator, or nominating a younger, lesser known arbitrator.⁴⁵ They may also inform the parties of ADR mechanisms aside from arbitration,⁴⁶ or amend rules to allow parties to reevaluate the possibility of early settlement at distinct points during the proceedings.

3. Structural Solutions

(i) *Pre-constitution of the arbitral tribunal*

a) *Early settlement promotion*

The simplest way of reducing the time and cost of an arbitral proceeding would be to avoid it altogether and one way of doing this is by settling the claim.

In order to promote the use of claim settlement procedures where parties would otherwise resort to arbitration, parties must be informed of any mechanism available to them as soon as the arbitral institution becomes involved in the dispute.⁴⁷

Another way of achieving early settlement is resorting to the Calderbank settlement process, which can encourage settlement at the earliest stages of the dispute. A Calderbank settlement offer is a “without prejudice save as to costs” settlement offer and implies that 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

⁴² Habegger, P. A., *Chapter 18, Part V: Saving Time and Costs in Arbitration*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2018), pp. 2595 - 2614.

⁴³ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 47.

⁴⁴ Markert, L., *Efficiency and Investment Arbitration*, p. 34.

⁴⁵ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 38.

⁴⁶ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, pp. 43-47.

⁴⁷ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 43-44.

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.⁴⁸

b) Early dismissal of unmeritorious claims

Aside from settling, another way to quickly end an arbitral proceeding and avoid unnecessary time and cost expenses is by getting the claim dismissed.

The procedure discussed here involves the dismissal of a claim at the time of its registration for manifest lack of legal merit. Aside from ICSID Arbitration Rule 41(5) discussed below, for example, Article 36(3) of the ICSID Convention grants the Secretary-General the power to dismiss claims, before the constitution of the arbitral tribunal, if the dispute is manifestly outside the jurisdiction of the Centre.

c) Emergency arbitrator procedure

Another way of promoting time-cost efficiency would be to obtain early measures, even before the constitution of the arbitral tribunal, that facilitate and speed up the future proceeding. This can be achieved through an emergency arbitrator procedure.

In the past few years, several arbitration rules have incorporated a procedure by which parties may request provisional measures before the constitution of the arbitral tribunal,⁴⁹ including through an emergency arbitrator.⁵⁰ By way of example, the ICC Arbitration Rules offer a procedure for parties to seek urgent temporary relief before an emergency arbitrator.⁵¹ Parties can thus obtain short-term relief until the tribunal is constituted. The emergency arbitrator issues an order which may be revisited later by the arbitral tribunal once constituted. Another example is that of the emergency arbitrator procedure under the Stockholm Chamber of Commerce (“SCC”) Rules, which is applicable to both commercial and investment arbitration. It consists of appointing an emergency arbitrator within 24 hours after receiving the application, who has to decide on the application no later than five days from the date the application is referred to her/him.⁵²

d) Expedited procedures

Expedited procedures may reduce the duration of proceedings and costs in some cases.⁵³ For example, the ICC provides for Expedited Procedure Rules for proceedings under USD 2 million.⁵⁴ The procedure applies by default to arbitration agreements concluded after 1 March

⁴⁸ Weiss, A. J., Klisch, E. E., *et al.*, *Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements*, Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2017, Volume 34 Issue 2), pp. 257 - 274.

⁴⁹ Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 10-16.

⁵⁰ For example, 2017 SCC Rules, Appendix II; SIAC IA Rules, art. 27(4) and Schedule 1; CIETAC IIA Rules, art. 40.1 and Appendix II.

⁵¹ ICC Arbitration Rules, Art. 29 and Appendix V.

⁵² Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), *Appendix II*, Arbitration Rules (2017), at Articles 4(1) and 8(1).

⁵³ For example, IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, pp. 51-52.

⁵⁴ ICC Arbitration Rules (2017), art. 30 and Appendix VI.

2017. 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 permits document-only proceedings or the limitation of the length and scope of submissions and evidence. The award must be issued within a shorter deadline from the case management conference.

(ii) *Post-constitution of the Arbitral Tribunal*

a) *Early dismissal of unmeritorious claims*

If the dismissal of unmeritorious claims is not possible before the constitution of the arbitral tribunal, as described above, there are mechanisms to do so afterwards.⁵⁵

The creation of adequate structures to deal with either legally, factually or jurisdictionally meritless claims is necessary.⁵⁶ Several institutions offer a procedure for early dismissal of claims on an expedited basis after the constitution of the arbitral tribunal.⁵⁷ As noted, under ICSID Arbitration Rule 41(5), a party may file a preliminary objection within 30 days of the constitution of the arbitral tribunal, which the latter must resolve at the latest at the first session, which should take place within 60 days of the constitution of the tribunal.

b) *Dismissal of frivolous claims*

Another approach that can reduce costs irrespective of the above scenarios is a provision for the dismissal of frivolous claims.

The first reactions to the 2006 introduction of the new Arbitration Rule 41(5) in the ICSID Arbitration Rules, which allows for the summary dismissal of claims manifestly without legal merit, were mixed.⁵⁸ However, more recent assessments appear more favorable.⁵⁹ It is to be expected that as the case law on ICSID Arbitration Rule 41(5) develops, the criteria for the application of similar provisions will become more firmly established, thereby allaying the fears of unjustified summary dismissals affecting the claimants' right to a fair hearing of their claims.

Notwithstanding the above, while allowing for some arbitral discretion, it would be desirable for States to provide further guidance as to the conditions for the application of summary dismissal provisions. For example, by clarifying whether they apply to jurisdiction/admissibility or merits issues or to both. These clarifications could be included in arbitral rules or in IIAs themselves.

c) *Case Management Conferences (“CMCs”)*

⁵⁵ e.g., ICSID Rules, art. 41(5); 2017 SCC Rules, art. 39; SIAC IA Rules, art. 25(1); and CIETAC IIA Rules, art. 26. See also Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 16-22.

⁵⁶ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, pp. 41-42.

⁵⁷ ICC; SIAC Rules (2016), Art. 29.1; SCC Rules (2017), Art. 39; CCTPP Rules, Art. 1, which incorporates TPP Rules, Art. 9.23(4).

⁵⁸ Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 18.

⁵⁹ Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 22.

The use of CMCs may contribute to achieving a time-cost efficient arbitral proceeding as they may help to narrow the issues and contested facts of the case. Some authors even suggest that at least one CMC, if not more, should be mandatory.⁶⁰

Some aspects to consider to improve the efficacy of the CMCs may be, for example: to consider whether it is appropriate to hold the conference without a physical meeting; the parties should consider having a person from within their organization attend the conference; and client representatives and witnesses, including experts, should be kept informed of the input required from them to comply with the timetable.⁶¹ However, arbitral tribunals should avoid turning CMCs into a further opportunity for parties to argue their case. The tribunal should, beforehand, clearly establish the purpose and scope of the CMC and should actively prevent the parties from departing from the intended purpose. Otherwise, CMCs could end up broadening, not narrowing, the issues the tribunal would have to decide.

d) Bifurcation norms

Recent studies show that a bifurcated case takes between one and one and a half years longer to complete than a non-bifurcated case.⁶² These findings suggest that the parties and ultimately the tribunal should assess whether bifurcation is warranted with full awareness of its possible impact on time and costs.

e) Establishment of stricter time limits

An obvious solution to improve time-cost efficiency would be to establish stricter time limits throughout the proceedings. In fact, some arbitration rules⁶³ already include short time limits, for example, to respond to the notice of arbitration (35 days under the SIAC IA Rules and 30 days under CIETAC Rules). Moreover, in order to promote parties' compliance with the time limits, new rules could provide, as ICSID is proposing, that where parties act after the expiry of a time limit, those activities shall be disregarded unless there are special circumstances justifying the delay.⁶⁴ The limit for this, of course, is guaranteeing each party's right of defense and to fully present its case. Further, the position of each party should be considered. The claimant would typically have had at least several months to prepare the notice of arbitration. Although the respondent would generally have some knowledge of the dispute before receiving the actual request for arbitration, for example through letters sent during the cooling-off period, it would only be in a position to respond to the request once it receives it.

⁶⁰ Franck, S. D., *Chapter 9: The Way Forward in Arbitration Costs in Myths and Realities in Investment Treaty Arbitration* (forthcoming March 2019) Oxford University Press. ICSID's latest proposal is to "require Tribunals to convene at least one case management conference during the arbitration." Working Paper # 2, Volume 1, March 2019, Proposals for Amendments of the ICSID Rules, p. 165.

⁶¹ Habegger, P. A., *Chapter 18, Part V: Saving Time and Costs in Arbitration*, in Manuel Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2018), p. 2601.

⁶² Behn, Daniel, Tarald Berge, Malcolm Langford and Maksim Usynin, *What Causes Delays in International Investment Arbitration, PluriCourts Working Paper*, ICSID (2018). Annual Report 2018.

⁶³ For example, SIAC IA Rules, art. 4(1) and CIETAC IIA Rules, art. 9.1.

⁶⁴ Franck, S. D., *Chapter 9: The Way Forward in Arbitration Costs in Myths and Realities in Investment Treaty Arbitration* (forthcoming March 2019) Oxford University Press.

f) Regulation of multiple parties

It is important to have a clear regulation of multiparty and multicontract arbitrations, as some rules provide.⁶⁵ However, these circumstances may inevitably add to the complexity and length of the proceedings. Therefore, the conditions that regulate joinders, multiparty, and multicontract arbitrations must set clear conditions and speedy resolution procedures so as to avoid, for example, wasting time and money by making claims that will be rejected or by claiming against parties over whom the tribunal will have no jurisdiction.⁶⁶

(iii) Written submissions

a) Level of detail of first submissions

A more detailed notice of arbitration and/or statement of claim may produce greater procedural efficiency by introducing greater clarity about the respective arguments of the parties by front-loading the proceedings.⁶⁷ This approach has been adopted in the UNCITRAL Rules, which require greater detail when submitting a statement of claim and even provide for the possibility of the claimant electing to treat his notice of arbitration as the statement of claim.⁶⁸ This is also being considered by ICSID.

b) Length and number of submissions

As noted above, an obvious solution to time-cost inefficiency may be limiting the length of all written submissions, especially in the second round, which can help parties to focus on the key issues and reduce repetition, thus saving time and costs.⁶⁹ These limitations may depend on the type of proceeding.⁷⁰

Post-hearing submissions should also be minimized and, to the extent possible, only address issues raised at the hearing or the specific questions of the arbitral tribunal.⁷¹

(iv) Evidence production

At the start of each case, the arbitral tribunal should consider whether providing for a document production phase (discovery) is at all necessary. If so, the tribunal should always encourage counsel to produce evidence as wisely and concisely as possible.

⁶⁵ For example, 2010 UNCITRAL Rules, art. 17(5) and ICC Rules arts. 7-10.

⁶⁶ ICC, ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018), p. 15.

⁶⁷ Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 25.

⁶⁸ UNCITRAL, *Arbitration Rules* (2010), at Article 20. See also ICC, ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018), p. 11: “[i]f the parties set out their cases in full early in the proceedings, the parties and the Arbitral Tribunal will be better able to understand the key issues at an early stage. Doing so will help ensure that the procedure defined at the case management conference is efficient and that time and money are not wasted on matters that turn out to be of no direct relevance to the issues to be determined.”

⁶⁹ ICC, ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018), pp. 11-12.

⁷⁰ For bold proposals see Risse, J., *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, *Arbitration International* (2013), Vol. 29, No. 3, p. 456.

⁷¹ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 49.

A key aspect in this regard is the timing of the discovery. In principle, document production should be scheduled when the parties have exchanged a first round of briefs and not earlier. This helps narrow the document production to the most essential elements and allows the tribunal to assess issues of relevance.⁷²

Moreover, the arbitral tribunal should consider the burden of proof so as to deny requests made by a party that is not required to provide evidence of a given issue.⁷³

(v) *Other issues*

Aside from bifurcation, the procedural events that most significantly impact on the duration of the proceedings are arbitrator challenges, arbitrator replacements, and dissenting opinions. All these events are significantly and strongly associated with longer case durations.⁷⁴ Consequently, in order to reduce the time-cost inefficiencies of these events, a straightforward procedure with short time limits is needed for challenges and replacements.⁷⁵

4. Arbitral Tribunal's Solutions

(i) *General*

Arbitration rules should expressly state that arbitrators have a right and obligation on the part of the Arbitral Tribunal to use its procedural discretion to conduct the arbitration in a cost-effective manner and to avoid delays.

(ii) *Selection of the arbitral tribunal*

With respect to the procedure for appointing arbitrators, it must be swift and minimize the possibility that a recalcitrant party chooses to slow down the arbitration through guerrilla tactics (e.g. filing of tactical arbitrator challenges, waiting for the expiry of the time period granted to make the default mechanism of three arbitrators applicable, etc.).

Currently, some studies show that the constitution of an ICSID arbitral tribunal may take between five and nine months from the registration of the request for arbitration.⁷⁶ The UNCITRAL Rules are not free of inefficiencies either.⁷⁷

The IBA Report proposes several solutions amending institutional rules to create a sanctioning mechanism for parties who cause undue delay in selecting an arbitrator.⁷⁸

⁷² Curatola, M. and de Luca, F., *Document Production in International Commercial Arbitration: A "Trojan Horse" for Uncontrolled Costs*, in *Transnational Dispute Management* Vol. 15, issue 4.

⁷³ Curatola, M. and de Luca, F., *Document Production in International Commercial Arbitration: A "Trojan Horse" for Uncontrolled Costs*, in *Transnational Dispute Management* Vol. 15, issue 4.

⁷⁴ Langford, M., Behn, D., and Létourneau-Tremblay, L., *What do we know? Empirical Perspectives on Investment Arbitration* in ISDS Academic Forum Working Group 7 Paper (Draft 28 January 2019), p. 18.

⁷⁵ For example, both CETA and the EU-Vietnam FTA reduce the time to issue a decision on such challenges to 45 days from the four months they take on average for ISDS.

⁷⁶ IBA Arbitration Subcommittee on Investment Treaty Arbitration, "*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*", November 2018, p. 37.

⁷⁷ IBA Arbitration Subcommittee on Investment Treaty Arbitration, "*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*", November 2018, p. 38.

⁷⁸ Margaret Moses, "The Growth of Arbitrator Power to Control Counsel Conduct" *Kluwer Arbitration Blog* (2014) <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, art. 18.6 (1 October 2014).

As noted, appointing a sole arbitrator must also be considered whenever possible.⁷⁹ This choice may not only increase availability of arbitrators in investment treaty arbitration,⁸⁰ but also reduce the time it takes to start the arbitration and to render the award, since no deliberations would be required. It also implies the obvious direct reduction of costs by appointing only one arbitrator. Although in investment arbitration it is common to have a three-member tribunal, the *Pantechniki v. Albania* case serves as a good example of time and cost reduction of arbitral proceedings.⁸¹ The sole arbitrator in this case managed to conclude the proceedings within two years and render an award of only 29 pages.⁸²

Besides, at the time of selecting the arbitrators, parties and the institution must consider their availability and ability to manage the procedure swiftly,⁸³ as discussed below.

(iii) *Availability of the arbitral tribunal*

With respect to ensuring that arbitrators are not agreeing to act in matters for which they do not have time availability, the IBA Report proposes requiring greater disclosure from arbitrators regarding their availability.⁸⁴ For example, arbitrators could be required to disclose their diary 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.⁸⁵ Finally, arbitral institutions should provide concrete guidelines as to what is a reasonable number of “active” cases that an arbitrator can handle effectively at the same time, distinguishing between arbitrators that only do arbitrator work and others that perform other activities (academia, counsel work, etc.).

(iv) *Role of the arbitral tribunal*

a) *A proactive role*

It can be argued that achieving a time-cost efficient arbitration depends in large part on how arbitrators approach their case management powers and, if they adopt a proactive role, they can help reduce the time-cost inefficiencies drastically. Revised rules adopted by most institutions and UNCITRAL tend to reflect this idea by vesting final authority in the arbitral tribunal, whether or not the parties have agreed on procedure, to conduct arbitral proceedings as they see fit.⁸⁶ In line with recent amendments to other arbitral rules, ICSID is proposing to

⁷⁹ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 38.

⁸⁰ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, pp. 40-41.

⁸¹ *Pantechniki S.A. Contractors and Engineers v. Republic of Albania* [*Pantechniki v. Albania*], ICSID Case No. ARB/07/21, Award (Jul. 1, 2009).

⁸² Markert, L. *Efficiency and Investment Arbitration - New Developments and the Need for a Multi-Dimensional Approach* (2018), in *Transnational Dispute Management* Vol. 15, issue 4, p. 33.

⁸³ ICC, ICC Commission Report, *Controlling Time and Costs in Arbitration* (2018), p. 7.

⁸⁴ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, pp. 40-41.

⁸⁵ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 50.

⁸⁶ Rivkin, D. W. and Rowe, S. J., *The Role of the Tribunal in Controlling Arbitral Costs*, *The International Journal of Arbitration, Mediation and Dispute Management (CI Arb)* (2015), Vol. 81, No.2, pp. 116-130.

include a general duty in the ICSID arbitration rules under which “[t]he Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.”⁸⁷

The new rules also provide for other mechanisms to promote efficient resolution of disputes, such as requiring the arbitrators to provide a statement of availability prior to appointment or declaring an explicit duty of the arbitral tribunal to conduct the case with diligence and avoid unnecessary expense and delay.⁸⁸ Some examples of how this proactive role can be articulated would be arbitral tribunals rejecting evidence introduced in an untimely manner or unsolicited submissions on the merits except under exceptional circumstances, or the arbitral tribunal providing clear direction on the document production process and informing the parties that costs for that stage of the proceedings will be allocated separately.

Arbitrators must also take a proactive role in the CMCs to streamline the procedure as much as possible, suggesting ways in which parties may save costs. This could include the use of technology and green filings,⁸⁹ suggesting single written submissions and post-hearing briefs, as well as limiting the filing of witness statements and expert reports.

b) A “town elder plus” model

A step further in promoting a proactive arbitral tribunal in the control of time-cost efficiency could be to adopt a “town-elder plus” model, which empowers arbitrators to establish and inform the parties of the minimum procedures necessary for the resolution of the case.⁹⁰

c) Dealing with party misbehavior

In relation to the previous aspects mentioned, when the arbitral tribunal is proactively managing the case to control time and cost, it should never allow any parties to unjustifiably contradict its actions. Misconduct may be punished by cost-shifting sanctions.⁹¹ The use of sanctions can enhance the arbitral tribunal’s ability to control the proceeding and achieve a time-cost efficient arbitration.

(v) Costs allocation

In the current international arbitration landscape, when it comes to deciding on the allocation of costs, arbitrators are taking into account the bad-faith or dilatory behaviors of the parties, which seems appropriate and is in line with the concerns of practitioners on current

⁸⁷ Working Paper # 2, Volume 1, March 2019, Proposals for Amendments of the ICSID Rules, p. 83.

⁸⁸ Rivkin, D. W. and Rowe, S. J., *The Role of the Tribunal in Controlling Arbitral Costs*, *The International Journal of Arbitration, Mediation and Dispute Management (CIArb)* (2015), Vol. 81, No.2, pp. 116-130.

⁸⁹ Young ICCA Group paper, “Four Ways to Sharpen the Sword of Efficiency in International Arbitration”, pp. 25-30.

⁹⁰ Weiss, A. J., Klich, E. E., *et al.*, *Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements*, *Journal of International Arbitration*, (© Kluwer Law International; Kluwer Law International 2017, Volume 34 Issue 2), pp. 257 - 274.

⁹¹ Mohebbi, M., and Asgharian, M., *The Role of Arbitrators in Effective Time and Cost Reduction*, in *Transnational Dispute Management*, Vol. 15, issue 4, pp. 8-9. *See also*: Browne, O. E. and Price, R., *Saving Time and Money by Sanctioning Bad Behavior*, in *Transnational Dispute Management* Vol. 15, issue 4.

arbitration costs.⁹² Therefore, a simple way to reduce the time-cost inefficiencies of arbitration could be to warn the parties that any bad faith or dilatory behavior will be determinant when allocating costs. In this sense, some have suggested that the allocation of costs could also take account of any meritless claims a party may have advanced or any evidence or pleadings untimely introduced.⁹³ A supplementary measure could be to have an enforceable code of ethics with effects on cost allocation in order to help increase its efficacy, as well as improve overall time-cost efficiency of the proceedings.⁹⁴

Furthermore, another way that arbitral tribunals could take advantage of their cost allocation power is to use it earlier in the proceeding to promote a time and cost efficient proceeding. Arbitral tribunals should use interim decisions on costs to provide clear and transparent guidance early on about the principles upon which they will exercise their mandate to address costs.⁹⁵

(vi) *Rendering of the award*

In order to reduce the time taken to render the award, two basic approaches can be considered: (i) give arbitral tribunals a financial incentive to render the award quickly;⁹⁶ or (ii) reduce the arbitrators' fees for each month of delay.⁹⁷ Another measure in this regard could be to ask for the parties' assistance in writing the final award through drafting summaries of their positions on the main issues so they can be incorporated into the final award.⁹⁸ Another costs-saving measure would be for arbitral tribunals to considerably reduce the sections of the award devoted to describing the parties' positions.

Arbitrators should also arrive well prepared at the hearing and, at the end of the hearing, the arbitral tribunal should establish a deadline for submitting post-hearing briefs and the award, and must inform the parties if the tribunal is not able to meet this deadline. Arbitrators would be well advised to set aside a certain period of time after the hearing for deliberations and always request counsel to address only relevant issues in their post-hearing briefs. Finally, arbitrators should set aside the necessary time to draft the award uninterrupted. The length of the award should be limited to what is necessary to address the relief sought and the main legal arguments

⁹² Romero, M. and Sierra, N., *Costs in International Arbitration: The continual search for cost-efficient arbitrations*, Spain Arbitration Review | Revista del Club Español del Arbitraje (© Club Español del Arbitraje; Wolters Kluwer España 2016, Volume 2016 Issue 26), pp. 31-38.

⁹³ IBA Arbitration Subcommittee on Investment Treaty Arbitration, "Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration", November 2018, pp. 43 and 50.

⁹⁴ Zivkovic, P., *The Impact of Cost Decisions on the Efficiency of Arbitral Proceedings*, in Transnational Dispute Management, Vol. 15, issue 4.

⁹⁵ Franck, S. D., *Chapter 9: The Way Forward in Arbitration Costs in Myths and Realities in Investment Treaty Arbitration* (forthcoming March 2019) Oxford University Press.

⁹⁶ Risse, J., *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, Arbitration International (2013), Vol. 29, No. 3, p. 464.

⁹⁷ Basur, A., *As the Clock Ticks Away - The Indian Experiment with Time Limits in Arbitration*, Young Arbitration Review (2011), Year 7, Ed. 28, pp. 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.

⁹⁸ Risse, J., *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, Arbitration International (2013), Vol. 29, No. 3, p. 462; IBA Arbitration Subcommittee on Investment Treaty Arbitration, "Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration", November 2018, pp. 49-50.

put forth by the parties.⁹⁹ As noted, lengthy descriptions of the parties' position will generally be unnecessary and should thus be avoided.

Another innovation to reduce the gap before the rendering of the award could be to require arbitral tribunals to deliberate immediately after the last written or oral submission.¹⁰⁰ Also, 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.¹⁰¹ In fact, recent procedural orders entered in three ICSID cases demonstrate how arbitral tribunals have started to commit to schedules for the drafting of awards, including giving the parties regular progress updates.¹⁰²

(vii) *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. 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.

On the one hand, the enforcement stage of the proceedings in domestic courts may take several years, depending on the number of appellate review stages that are possible in a particular domestic system; on the other hand, the annulment process in ICSID cases averages about two years.¹⁰³ Reducing the duration of annulment/enforcement proceedings in domestic courts is in the hands of each State. However, the annulment proceeding could be improved by introducing some of the reforms discussed above, including page limits, eliminating or limiting the scope of certain submissions that may be less relevant in annulment proceedings such as post-hearing briefs, and adopting further incentives for *ad hoc* committees to render annulment decisions within shorter time frames.

5. Solutions Under the Four Reform Scenarios

(i) *IA improved*

Under this scenario, the improvement of the existing ISDS system—which involves a multiplicity of fora and arbitral institutions available for parties who may access international arbitral courts through dispute resolution clauses contained in IIAs or contracts—essentially involves streamlining procedures by adopting the solutions described above.

⁹⁹ IBA Arbitration Subcommittee on Investment Treaty Arbitration, “*Report on Consistency, Efficiency and Transparency in Investment Treaty Arbitration*”, November 2018, p. 49.

¹⁰⁰ Franck, S. D., *Chapter 9: The Way Forward in Arbitration Costs in Myths and Realities in Investment Treaty Arbitration* (forthcoming March 2019) Oxford University Press.

¹⁰¹ This suggestion was the one 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.

¹⁰² First procedural order of 16 December 2015 in *Corona Materials, LLC v. Dominican Republic*; first procedural order of 10 February 2016 in *ACP Axos Capital GmbH v. Republic of Kosovo*; and procedural order of 29 March 2016 in *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*.

¹⁰³ Langford, M., Behn, D., and Létourneau-Tremblay, L., *What do we know? Empirical Perspectives on Investment Arbitration* in ISDS Academic Forum Working Group 7 Paper (Draft 28 January 2019), p. 15.

Therefore, in order to improve cost-efficiency with respect to the current ISDS system, all stakeholders have a role to play. Arbitral institutions must strive to continue to observe the application of their rules and amend them in appropriate cases in order to streamline procedures under the different arbitration rules; parties and counsel must strive to minimize the number and length of written pleadings, unwarranted document production requests and hearings, as well as avoid the use of guerrilla tactics; and arbitrators must take a proactive role in securing the swift conclusion of the arbitration, including the deliberation and drafting of the award.

Accordingly, any cost reduction will result from a more time efficient streamlined arbitral proceeding.

(ii) *IA + appeal*

Under this scenario, the same conclusions as under the previous scenario would apply to the first tier proceeding of the arbitration if the solutions discussed above are also adopted.

Regarding the second tier of the proceeding (i.e. the appeal phase) (“AP”), and based on the assumption that the AP would replace current annulment mechanisms and not constitute an additional tier of review, time and cost could very well be reduced as compared to those of current annulment proceedings. Since the AP is a permanent or semi-permanent body with continuity beyond a single dispute, considerably less time would be spent constituting a new arbitral tribunal to hear the recourse against the award.

The AP could also increase efficiency by reducing inconsistency, since the appeal mechanism would in the long run tend to shorten the proceedings through, *inter alia*, less debate on certain issues. The argument that an appeal mechanism would create an incentive for parties to always file an appeal and thus extend the proceedings is more apparent than real. On the one hand, annulment requests are becoming more and 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*.

(iii) *MIC*

A permanent and centralized international judicial structure could over time adopt the measures discussed throughout this section. The result would be a streamlined procedure that would likely be shorter and cheaper. Moreover, since the members of the MIC would be permanent or semi-permanent, the grounds for challenges would likely be reduced. Here it should be borne in mind that challenges against arbitrators can significantly delay the proceedings.

(iv) *No ISDS*

a) *Recourse to domestic courts only*

It is practically impossible to reach a clear conclusion in this scenario since the differences between jurisdictions are of great significance.¹⁰⁴ However, it seems highly unlikely that disputes of such complexity, both procedural and substantive, as the ones that are regularly

¹⁰⁴ Bonnitca, J., Poulsen, L., and Waibel, M. *The Political Economy of the Investment Treaty Regime* (2017) Oxford University Press, 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.

dealt with in investment arbitration, could be resolved in less time in domestic proceedings than by a specialized international tribunal and procedure, especially if such system is improved as proposed above.

b) State-to-State arbitration

If a State-to-State arbitration system were to adopt essentially a similar procedure and structure as investment arbitration, no real difference could be seen from a cost-time efficiency perspective with one exception: a State-to-State arbitration may be even longer than investment arbitration since, presumably, investors would first need to seek the representation of their home States, thus adding an extra phase to the proceeding. Of course, if before the State-to-State arbitration the affected investor were required to exhaust local remedies, resolving the dispute in this scenario could require first going through all the domestic proceedings and afterwards through the State-to-State arbitration.

6. Concluding Remarks

Time 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. However, this also means that if effective measures are implemented to reduce the duration of proceedings, such as those discussed above, this would in turn make a significant contribution to resolving the excessive costs problems.

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

1. Introduction

We look here at the issue of insufficient resources to bring or defend against an investment claim to assess the impact of different alternatives to providing financing in ISDS (particularly, TPF and contingency and conditional fee arrangements) on the ability of impecunious claimants, or claimants who simply prefer to externalize the cost of arbitrating their dispute, to bring forward those claims. We first give an overview of these elements and then examine whether and how the concerns raised by TPF and contingency and conditional fee arrangements may be addressed in each of the four possible scenarios.

2. General Remarks on ISA Financing

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”.¹⁰⁵ Kalicki, and Joubin-Bret writing in 2015 also point out that the average “all in” costs of an investment treaty arbitration (arbitral tribunal costs and party costs) are just short of USD 10 million (with the median lower, at around USD 6 million). As already discussed in the section on party costs above, the high costs of initiating an international arbitration proceeding may be prohibitive for impecunious claimants with valid claims.¹⁰⁶

However, also according to Kalicki, and Joubin-Bret, the average amount awarded to successful claimants is around USD 76 million (with the median at just USD 10.5 million). This is consistent with the 2012 OECD Working Paper on Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, which refers to the average costs as being over USD 8 million and the International Institute for Sustainable Development paper in 2014 “The Stakes Are High: a review of the financial costs of investment treaty arbitration”, which stated that the average award (excluding the extremely large Yukos award) was USD 81.4 million. A more recent study from 2017 shows that the average compensation in awards amounts to approximately USD 72.8 million and the grand total awarded amounts to approximately USD 10.2 billion. Also in 2017, UNCTAD in “A Special Update On Investor–State Dispute Settlement: Facts And Figures”¹⁰⁷ noted that the average amount awarded in favor of claimant investors is USD 522 million.

Considering the above, there is a huge premium to be gained, i.e. an 8-fold multiple, for successful claimants in the average case. It is therefore hardly surprising that a TPF litigation market (currently estimated at USD 5 billion) is now well established and available whenever a

¹⁰⁵ Matthew Hodgson, “Costs in Investment Treaty Arbitration: The Case for Reform”, in *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*, J. E. Kalicki and A. Joubin-Bret (eds., 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”, *J. World Investment & Trade* 16(2015), 727-733.

¹⁰⁶ Derric Yeoh, “Third Party Funding in International Arbitration: A slippery Slope or Levelling the Playing Field?”, *Journal of International Arbitration* (2016, Vol. 33:1), pp. 115-122.

¹⁰⁷ Available online at <https://investmentpolicyhub.unctad.org/Publications/Details/180>.

party has insufficient resources to bring (or defend against) an investment claim.¹⁰⁸ In fact, it is estimated that over 40% of ISDS cases are funded by TPF.¹⁰⁹ The recent Queen Mary University 2018 International Arbitration Survey states: “Results show that 42% of respondents have encountered non-recourse third party funding in practice either by having used it themselves (16%) or by having seen it used (26%).”

In sum, the combination of high costs of ISA and high stakes to be gained from a lucrative market has made the TPF industry loom as the most prevalent method for financing investment arbitrations. Other possibilities exist, such as contingency and conditional fee arrangements, which imply the financing of the arbitration by the lawyers representing the client in return for a fee based on the relative success of the claim.

While having financing options available for claimants who are either impecunious or unable to bear the associated financial risks of initiating an ISA claim (due to their limited financial resources) is a welcome development, the side-effects of these financing methods on the costs of ISA are a reason for concern.

3. TPF and Contingency and Conditional Fee Arrangements in a Nutshell

As noted in the previous section, 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. We briefly describe each type of TPF and contingency and conditional fees in turn.

Third-party funding 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, often in return for remuneration should that party prevail in the proceedings.¹¹⁰ In this regard, the ICCA-Queen Mary Task Force Report on TPF describes TPF as an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party: a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases; and b) such support or financing is either provided in exchange 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.¹¹¹

TPF represents a fairly recent phenomenon in international investment arbitration.¹¹² Nevertheless, it has attracted significant attention both in legislation and in scholarly writings.

¹⁰⁸ K.M. Lacroix, “The Latest on Third-Party Litigation Funding”, Post in *Litigation Funding*, 15 January 2018. Available online at <https://www.dandodiary.com/2018/01/articles/litigation-financing-2/latest-third-party-litigation-financing/>

¹⁰⁹ Wang Hui, “Third-Party Funding in Arbitration: Potential Trends and Implications for China”, *Journal of Business Law* (2018:2), pp. 122-147, quoting S. Brekoulakis.

¹¹⁰ cf Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third Party Funding in International Arbitration* (2nd edn, Kluwer Law International 2017), 1; Duarte Gorjão Henriques, “Third-Party Funding: A Protected Investment?” (2017) 30 *Spain Arbitration Review* 100, 115.

¹¹¹ *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, April 2018, The ICCA Reports No. 4.

¹¹² Marie Stoyanov and Olga Owcarzek, “Third-Party Funding in International Arbitration: Is It Time for Some Soft Law Rules?” 2 *BCDR International Arbitration Review* 171, 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), 18

Praised by some as a mechanism which facilitates access to arbitral justice by impecunious claimants or claimants seeking to preserve the liquidity of their funds by not tying them up in arbitral proceedings,¹¹³ third-party funding is criticized by others for its capacity to create imbalance between the parties to an arbitration and adversely affect various elements of the proceedings, namely the integrity of the proceedings (through potential conflicts of interest, arising from the lack of transparency of TPF arrangements or the incompatibility of this mode of financing with a system paid for with public funds) and their costs.¹¹⁴

First, the parties to investor-State arbitration have unequal access to third-party funding. Since third-party funding is normally a commercial operation, a reasonable funder would seek to allocate external financing of the proceedings so as to achieve the best possible return on the money invested. Accordingly, it is more likely to provide funding to claimants, who seek to recover damages arising from the violation of their rights, rather than to respondents, who, if they prevail, may only hope to recover the costs of proceedings at most. Even though there are cases of third-party funding provided to respondent States,¹¹⁵ it should be noted that in those cases funding was provided 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 circumstances.

Second, the recourse to third-party funding is likely to increase the overall quantum of costs of the proceedings.¹¹⁶ Given that the funder has a strong interest in a positive outcome for the party it provides funds to and may have significant funds at its disposal, the TPF has a strong incentive to 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 the respondent State). That said, as the Working Group 7 Paper on empirical approaches points out, 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 (lack of transparency regarding funding may be at the heart of this absence of empirical evidence).

Third, it has been noted that third-party funding arguably reduces the possibility of reaching a settlement, since the financial interests of the funder would not be satisfied if the parties to the proceedings were to reach a settlement for a sum which is lower than the one owed to the funder by the party funded.¹¹⁷ What is more, it has also been argued that the funders would not be inclined to reach so-called non-cash settlements, by way of which the State would undertake to assume a non-pecuniary obligation, such as restitution in kind or an offer for a new investment opportunity.¹¹⁸ Although this concern primarily arises from the problem of the TPF's control over the claim and the proceedings, it nevertheless has repercussions on the issue of costs,

¹¹³ Jonas von Goeler, *Third Party Funding in International Arbitration and its Impact on Procedure* (Kluwer Law International 2016) 82-83; Henriques (n 1) 127-128

¹¹⁴ 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 2) 87-88; Nieuwveld and Sahani, (n 1), 16

¹¹⁵ see e.g. *Philip Morris v. Uruguay*, ICSID case ARB/10/7 and *Philip Morris v. Australia*, PCA case 2012-12.

¹¹⁶ Marie Stoyanov and Olga Owcarzek, "Third-Party Funding in International Arbitration: Is It Time for Some Soft Law Rules?" 2 *BCDR International Arbitration Review* 171, 191.

¹¹⁷ Niccolò Landi, "The Arbitrator and the Arbitration Procedure: Third-Party Funding in International Commercial Arbitration – An Overview" in Christian Klausegger et al. (eds) *Austrian Yearbook on International Arbitration* (C.H. Beck – Stämpfli 2012) 99-101; Stoyanov and Owcarzek (n 2) 191

¹¹⁸ Marie Stoyanov and Olga Owcarzek, "Third-Party Funding in International Arbitration: Is It Time for Some Soft Law Rules?" 2 *BCDR International Arbitration Review* 171, 191.

as it may lead to the unnecessary prolongation of the proceedings and, consequently, an increase in overall costs.

In contingency and conditional fee arrangements, attorneys act as funders (by not getting paid or by getting paid less than their normal rate). The two arrangements are closely related. In general, if the attorney-client agreement operates on a “no win no fees” basis, it is a contingency fee agreement. If the lawyer charges the client lower than the normal rate and recovers an additional fee if it is successful in the arbitration, it is a conditional fee arrangement (the additional fee is often referred to as an “uplift” or “success” fee).¹¹⁹ These financing methods may be more appropriate where the amount in dispute means the case is unlikely to be funded by a TPF, which typically need higher claims to justify the risk of funding a dispute. Typically, contingency fees are in the range of 20%-40% of the award.¹²⁰

An attorney-client fee arrangement is “contingent” if the attorney’s compensation depends, in any part, on success in the representation.¹²¹ The success fee is often one-third or 33% of net damages after expenses are paid.

4. Potential Solutions Under the Four Reform Scenarios

For the potential solutions under the four possible scenarios, please refer to section III.C below.

5. 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, arbitral institutions and States are lagging behind in regulating these matters. 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.

¹¹⁹ The Law Reform Commission of Hong Kong, Report, Conditional Fees’ 2007.

¹²⁰ Asialaw Dispute Resolution Conference 20 September 2018. See also ‘Chapter 6: Third-Party Funding in the United States of America’, in Lisa Bench Nieuwveld and Victoria Shannon Sahani , Third-Party Funding in International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2017) pp. 129 – 174, p. 131.

¹²¹ Shajnfeld, Adam. (2010). A critical survey of the law, ethics, and economics of attorney contingent fee arrangements. *New York Law School Law Review*, 54(3), 773-809’ p. 775.

III. INSUFFICIENT RECOVERABILITY OF COST AWARDS

This section addresses two issues related to costs: TPF and security for costs (“SfC”). TPF enables access to investment arbitration to impecunious claimants, but it may affect various elements of the proceedings, including the recoverability of costs in the event of an adverse award. SfC is a tool that facilitates the recovery of costs awards if the debtor is unwilling or unable to pay. We will deal first with the rationale, practice, and concerns with respect to TPF and SfC. We will then analyze potential solutions concerning TPF and SfC under the four reform scenarios.

A. Third-Party Funding: Implications on Costs Recovery

Third-party funding raises serious concerns as to the liability for and recoverability of the costs of proceedings.¹²² Given that the third-party funder is not a party to arbitration, it cannot be directly awarded the costs of proceedings nor can it be obliged to pay adverse costs to the other party. Nevertheless, its indirect, financial influence on the proceedings may affect the costs allocation and recovery. As far as costs allocation is concerned, if the funded party prevails, it is normally due to pay a certain percentage of the award on damages to the funder. However, a recent case from the realm of commercial arbitration allows a different scenario to be envisaged. In *Essar v. Norscot*,¹²³ an ICC arbitration conducted in London, the sole arbitrator qualified the amount due to the funder as “other costs of proceedings”, i.e. the costs of obtaining litigation funding, and awarded it as a special item to the party funded. Though this scenario has not (yet) been replicated in investment arbitration, it should be recognized as a potential concern. On the other hand, as far as the recoverability of the costs of proceedings is concerned, this concern becomes 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.

1. Potential Solutions for TPF Under the Four Reform Scenarios

(i) *IA improved*

In order to reduce or eliminate the concerns arising from third party funding in investment arbitration, the improvement of IA should be aimed at decreasing the need for this financing method, enhancing the recoverability of the costs of proceedings and, overall, at a clear regulation of this concept.

When it comes to decreasing the need for third party funding, at least as far as impecunious claimants are concerned, an improvement could be achieved through conceiving a system of legal aid in ISDS. Due to the nature of arbitration, the concept of legal aid is generally alien to this dispute settlement method, but there are examples to the contrary. Namely, the Court of Arbitration for Sport has developed a noteworthy system of legal aid,¹²⁴ which might be used as a model for IA’s improvement. However, since this mechanism would be available only to

¹²² Ibid, pp. 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.

¹²³ 2016 EWHC 2361 (Comm)

¹²⁴ See Guidelines on Legal Aid before the Court of Arbitration for Sport, http://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Rules_2016_English.pdf accessed 15 October 2018

impecunious parties, third party funding would still find its place with parties who wish to preserve their liquidity and avoid engaging their assets in the proceedings.

The issue of recoverability of costs, especially when they are due by the impecunious party, also leaves room for improvement. A classical approach would be to rely upon security for costs orders. However, in order to avoid other problems which may stem from the use of that mechanism,¹²⁵ 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.¹²⁶ 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 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, it should be noted that the efforts already made to create guidelines and soft rules for third party funding, as useful as they may be, still remain fairly fragmentary as they apply only to some TPF-related issues¹²⁷ or to some institutional arbitrations.¹²⁸ Here, drafting more detailed and harmonized rules on third party funding 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 in question.

(ii) *IA + appeal*

Bearing in mind that the concerns arising from third party funding are not necessarily linked to the characteristics of the review mechanism (if any), the introduction of an appeal instance does not seem likely to bring about any meaningful change. The only conceivable advancement stemming from the introduction of an appeal mechanism might be sought at the level of the general review of the part of the award dealing with costs, assuming that the appeal mechanism would be competent to perform such a review.

(iii) *MIC*

The problem of the need to have recourse to third party funding 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 contribute to reduce the need for third party funding.

Given its permanent and centralized judicial structure, the MIC could adopt rules providing systemic answers to the cost-related problems of TPF.

¹²⁵ For a detailed analysis of the interplay between third-party funding 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.

¹²⁶ For the "conventional" use of insurance in terms of third-party funding, see Nieuwveld and Sahani, (n 1), 4.

¹²⁷ For example, ICC Notes to Parties and Arbitral Tribunals on the Conduct of the Arbitration (<https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration> accessed 15 October 2018) in point 24 refer only to the issue of disclosure for the purpose of assessing independence and impartiality

¹²⁸ For example, SIAC 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

Finally, 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.

(iv) *No ISDS*

a) *Recourse to domestic courts only*

The recourse to domestic courts only for settling investor-State disputes would largely do away with the need for third party funding on the part of impecunious parties, who could make use of the generally available mechanisms of legal aid under national law. Even if third party funding is used (which could still be the case for parties not wishing to tie up their own funds in litigation), 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.

b) *State-to-State arbitration*

Given that States do not have easy access to third party funding, as described above, it may be argued that resolving investment disputes through State-to-State arbitration would significantly reduce, if not entirely eliminate, the demand for third party funding, at least in its most common form. However, it cannot be excluded that State-to-State arbitration might lead to the creation of new forms of third party funding.

B. Security for Costs

1. Rationale and Practice Concerning Security for Costs

States very often raise concerns as to whether it will be possible to recover the costs associated with investment arbitration in cases where investors have been ordered to pay all or part of them. There is a significant number of cases in which investors have lost and have been ordered to pay costs but the State has not been able to collect them.¹²⁹ There is also a significant number of cases where States have requested SfC,¹³⁰ but only in two of them was the request granted (*RSM Production Corporation v Saint Lucia*,¹³¹ under the ICSID Convention, and

¹²⁹ See Christine Sim, "Security for Costs in Investor-State Arbitration", *Arbitration International*, Volume 33, Issue 3, 427-495, 461-462.

¹³⁰ See also, "Costs and Security for Costs", in *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration*, April 2018, The ICCA Reports No. 4, pp. 145-183, 175.

¹³¹ *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.

Garcia Armas et al v Venezuela,¹³² under the 1976 UNCITRAL Rules and ICSID Additional Facility Rules).

However, these expressions of concern do not appear to be paired with developments in IIAs. Very few treaties include provisions on SfC, examples including the recent Iran and Slovakia¹³³ and India-Belarus¹³⁴ BITs and the EU-Vietnam,¹³⁵ the EU-Mexico,¹³⁶ and the Australia-Indonesia¹³⁷ Free Trade Agreements (FTAs). The possibility to order SfC 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.¹³⁸

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 urgency and necessity of such orders. In the recently published Proposals for Amendment of the

¹³² *Manuel García Armas et al. V. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, 20 June 2018

¹³³ The Slovakia/Iran BIT 2016, Article 21 “Awards”, 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.”

¹³⁴ India-Belarus BIT (2018), Article 28.2. The text of the agreement is available at <https://mea.gov.in/Portal/LegalTreatiesDoc/BL18B3432.pdf>.

¹³⁵ The EU-Vietnam FTA (authentic text as of August 2018) provides in Article 3.48 “Security for Costs”: “1. For greater certainty, the Tribunal may, upon request, order the claimant to provide security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant. 2. If the security for costs is not provided in full within 30 days of the Tribunal’s order, or within any other time period set by the Tribunal, the Tribunal shall so inform the disputing parties. The Tribunal may order the suspension or termination of the proceedings.” In turn, Article 3.37. “Third-Party Funding” provides in the relevant part: “3. When applying Article 3.48 (Security for Costs), the Tribunal shall take into account whether there is third-party funding. When deciding on the cost of proceedings pursuant to paragraph 4 of Article 3.53 (Provisional Award), the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 of this Article have been respected. Article 3.54 “Appeal Procedure” provides in the relevant part: “6. 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.”

¹³⁶ The provisions in the EU-Mexico FTA are similar to the ones in the EU-Vietnam FTA already mentioned. See EU-Mexico FTA, Articles 22 and 30.

¹³⁷ Australia-Indonesia FTA (2019), Article 14.28. The text of the agreement is available at <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default.aspx>.

¹³⁸ Other arbitration rules that provide for security for costs include the English Arbitration Act (1996), Article 38 (3); the Arbitration Rules of the Singapore International Arbitration Centre (2013), Article 24.1.k; the Arbitration Rules of the London Court of International Arbitration (2014), Article 25.2; the Arbitration Rules of the Australian Centre for International Commercial Arbitration (2016), Article 33.2(e), the SCC Rules for Expedited Arbitrations 2017, Article 39; and the Vienna Rules of Arbitration and Mediation of the Vienna International Arbitral Centre (2018), Article 33 (6) and (7).

ICSID Rules, the ICSID Secretariat proposes that a new arbitration rule be introduced to address orders for security for costs.¹³⁹

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.¹⁴⁰

2. Concerns Related to SfC in the Current ISDS System

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

- **Concern 1:** The risk that unsuccessful claimants could or would not pay any costs orders that might be rendered against them.¹⁴¹ This is the main concern raised by States and, to a certain extent, encompasses the other concerns. 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, corporate structuring, or otherwise.¹⁴² 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.¹⁴³

- **Concern 2:** Another concern is the high number of cases that are discontinued for lack of payment of advanced fees.¹⁴⁴ This situation sometimes arises when the investor perceives during the proceedings that it has little chance of succeeding (e.g. when the bifurcation of a case means that it will be unable to present the case on jurisdiction together with the merits, when another arbitral tribunal has decided in a similar issue, or after a hearing when the investor thinks that the award will go against it).

- **Concern 3:** SfC has generally been requested under the rule concerning provisional measures and parties are generally required to meet the legal standard for provisional measures,

¹³⁹ See ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, August 2, 2018, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf. In its most recent proposal, the ICSID Secretariat introduced changes to the proposed rule. See Working Paper # 2, Volume 1, March 2019, Proposals for Amendments of the ICSID Rules, pp. 229-236.

¹⁴⁰ United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) — cost and duration, 31 August 2018 A/CN.9/WG.III/WP.153, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/WP_153.pdf

¹⁴¹ United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) — cost and duration, 31 August 2018 A/CN.9/WG.III/WP.153, para 33.

¹⁴² ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, August 2, 2018, para. 497.

¹⁴³ Survey for ICSID Member States on Compliance with ICSID Awards, <https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf>.

¹⁴⁴ 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>

which is a high one. Evidence of “exceptional circumstances” is generally required and arbitral tribunals analyse the urgency and necessity for such orders.¹⁴⁵ The result has been that in very few cases investment tribunals have ordered SfC.

- **Concern 4:** 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.¹⁴⁶

- **Concern 5:** States have pointed out that tribunals generally consider that the mere existence of TPF, without any other relevant circumstances, is an insufficient basis for requiring a party to provide SfC.¹⁴⁷ Some authors consider that this is a correct approach.¹⁴⁸ At the same time, it has been argued that the presence of third-party funding increases the risk of non-payment and should have the effect of reversing the burden of proof for SfC requests.¹⁴⁹

- **Concern 6:** In cases where investors resort to TPFs there are concerns that the third-party-funder could escape liability for the tribunals’ award on costs. The funder will benefit if such a claimant prevails, but if the case is lost, the funder may avoid liability for any costs awarded in favour of the respondent.¹⁵⁰ This situation is aggravated when the third-party financing agreement explicitly provides that the third-party-funder will not pay for any adverse costs.¹⁵¹

3. Potential Solutions for SfC Under the Four Reform Scenarios

(i) *IA Improved*

Concern 1 (lack of payment of costs orders by claimants). One option would be to include a specific provision that deals with SfC (e.g. as in the case of the EU-Vietnam FTA, the EU-Mexico FTA, the Australia-Indonesia FTA, the Slovakia-Iran BIT, and the India-Belarus BIT) as a relief different from provisional measures. Another option would be to include a provision on provisional measures that deals specifically with SfC (e.g. as in the 2010 UNCITRAL Arbitration Rules, which include a non-exhaustive list of possible interim measures,

¹⁴⁵ On this issue see Lars Markert, “Security for Costs Applications in Investment Arbitrations Involving Insolvent Investors” (2018) 11(2) *Contemp. Asia Arb. J.* 217.

¹⁴⁶ ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, August 2, 2018*, paras. 507 and 510.

¹⁴⁷ 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).

¹⁴⁸ For example, Christine Sim, “Security for Costs in Investor–State Arbitration”, *Arbitration International*, Volume 33, Issue 3, 427–495. This is also the approach recently endorsed by the ICSID Secretariat. See Working Paper # 2, Volume 1, March 2019, *Proposals for Amendments of the ICSID Rules*, para. 363.

¹⁴⁹ *RSM v. St Lucia*, Assenting Reasons of Gavan Griffith, 12 August 2014, paragraph 18.

¹⁵⁰ ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3, August 2, 2018*, para. 497.

¹⁵¹ This was the case, for example, in *Armas v Venezuela*.

including measures that “provide a means of preserving assets out of which a subsequent award may be satisfied” (Art. 26(2)).

Concern 2 (procedures discontinued for lack of payment). One option would be to include a possibility to request SfC in early stages of the proceedings (e.g. as in the case of the proposed ICSID Rule 51 on “Security for Costs”). Another option could be to establish a presumption of SfC if the advances in arbitral proceedings are not paid promptly.

Concern 3 (provisional measures’ threshold being too high). A solution could be to include SfC provisions with more flexible requirements, as in the case of the EU-Vietnam FTA that refers to “reasonable grounds”, the Slovakia-Iran BIT 2016 that refers to “reasonable doubt”, or the India-Belarus BIT 2018 that refers to “a reason to believe”.

Concern 4 (situations that create risks or doubts of not recovering costs). One option could be to include a list of concerns that has to be taken into account by the arbitral tribunal in the analysis of SfC requests (e.g. the provision on SfC included in the SCC Rules for Expedited Arbitrations 2017) or that creates a presumption in favour of SfC.

Concern 5 (TPF alone is considered insufficient for a tribunal to order SfC). One option would be to establish a provision indicating that the existence of third-party funding reverses the burden of proof on SfC.

Concern 6 (the risk that the third-party-funder could escape liability). One option would be the possibility 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.

(ii) *IA + appeal*

Regarding **concerns 1 to 6**, the same 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 could be to 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 (this type of provision was included in the EU-Vietnam FTA, Article 3.54.6).

(iii) *MIC*

The same solutions proposed in the “IA improved” scenario regarding **concerns 1 to 6** could be applied, *mutatis mutandis*, to the MIC scenario.

(iv) *No ISDS*

In a system with no investment arbitration and State-to-State arbitration, the concerns related to SfC 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 bear in equal parts the expenses of the arbitrators as well as other costs of the proceedings, unless otherwise agreed, and 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).

C. Concluding Remarks on TPF and SfC

TPF and SfC 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 arbitration and adversely affect various elements of the proceedings. One of these negative effects relates to the recoverability of costs awards. There are also other events that can affect the recoverability of costs in arbitral proceedings, such as the discontinuance of cases for lack of payment of advanced fees by investors. A useful tool to avoid such problems is SfC. This tool however should be developed 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.

Concerning SfC, the concern as to the recoverability of costs awards and costs in the proceedings could be resolved by the inclusion of specific provisions regulating this tool, as a relief different to provisional measures and with less stringent requirements.

IV. SUMMARY TABLE

Concerns	Scenarios / Issues	IA improved	IA + appeal	MIC	No ISDS
Excessive costs	Excessively high fees	~	~	~	X
	Length of proceedings ¹⁵²	✓	~ ¹⁵³	~ ¹⁵⁴	X ¹⁵⁵
	Insufficient resources ¹⁵⁶	✓	✓	✓	✓
Insufficient recoverability of cost awards	Third Party Funding ¹⁵⁷	✓	✓	✓	✓
	Security costs ¹⁵⁸ for	✓	✓	✓	X

¹⁵² If the proposed solutions are adopted, the problem of length of proceedings would presumably be solved and a time-cost efficient arbitration would be achieved.

¹⁵³ An improvement in the second tier (i.e. appeal mechanism) would only occur if the new appeal mechanism substitutes the current annulment proceeding—not becoming a *de facto* third instance—and is more efficient than the latter.

¹⁵⁴ If the MIC were to adopt all the measures discussed, the result would be a streamlined arbitral procedure that would likely be shorter and cheaper. Moreover, since the arbitrators in the MIC would have been pre-approved by the institution, the grounds for challenging the arbitrators, which can significantly delay the proceedings, would be reduced.

¹⁵⁵ If the only possibility left is recourse to domestic courts, it is practically impossible to draw a clear conclusion due to the significant differences between jurisdictions. If a State-to-State arbitration system is contemplated and it were to adopt essentially a similar procedure and structure as investment arbitration, no real difference could be seen from a cost-time efficiency perspective with one exception: a State-to-State arbitration may be even longer than investment arbitration since, presumably, investors would first need to seek the representation of their home States, thus adding an extra phase to the whole proceeding.

¹⁵⁶ Both TPF and contingency and conditional fee arrangements may have positive aspects as they may provide resources to claimants with valid claims that have limited or no funds. While institutions and parties have long been aware of the broad implications these methods may have on the legitimacy of the ISDS system, arbitral institutions and States are lagging behind in regulating these matters. 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. For this reason, since the solution to address the concerns about TPF and other financing arrangements requires regulating the ISA financing market, the concerns can be positively addressed in all four reform scenarios.

¹⁵⁷ Third-party funding 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, often in return for remuneration should that party prevail in the proceedings. For the reasons stated in footnote 156, we believe that the concerns can be positively addressed in all four reform scenarios.

¹⁵⁸ SfC is an important tool to guarantee that the State will be able to recover costs awards and the costs related to proceedings that are abandoned by the investor. The use of SfC would resolve the concerns in the first three

scenarios. Concerning the no ISDS scenario, the concerns related to recoverability of costs are less likely to be justified. Thus, here it would not be necessary to include provisions on SfC.