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# Rationalizing Costs in Investment Treaty Arbitration

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# RATIONALIZING COSTS IN INVESTMENT TREATY ARBITRATION

**SUSAN D. FRANCK***

*International investment and related disputes are on the rise. With national courts generally unavailable and difficulties resolving disputes through diplomacy, investment treaties give investors a right to seek redress and arbitrate directly with states. The costs of these investment treaty arbitrations—including the costs of lawyers for both sides, as well as administrative and tribunal expenses—are arguably substantial. This Article offers empirical research indicating that even partial costs could represent more than 10% of an average award. The data set from the pre-2007 population suggested a lack of certainty about total costs, which parties had ultimate liability for costs, and the justification for those cost decisions. Although there were signs of balance and a preference for parties to be responsible for their own costs, there was neither a universal approach to cost allocation nor a reliable relationship between cost shifts and losing. Awards typically lacked citation to legal authority and provided minimal rationale, and the justifications for cost decisions exhibited broad variation. Small pockets of coherence existed. Tribunals typically decided costs only in the final award; and as the amount*

* Associate Professor of Law, Washington & Lee University School of Law. The paper benefited from presentations at the United Nations Conference on Trade and Development and University of Sydney's Conference on International Investment Treaty Law and Arbitration. The author thanks Chris Brummer, Christopher Drahozal, Mark Drumbl, David Law, Jide Nzelibe, Alison Elizabeth Post, W. Michael Reisman, Benjamin Spencer, Paul Stephan, Ingrid Wuerth, and Jason Yackee for their comments on earlier drafts. She is also grateful for the diligent research efforts and statistical assistance of Melanie Neely Willis, Jenna Perkins, and Jason Ratigan. The author recognizes the assistance of the University of Nebraska–Lincoln's Department of Statistics and Bureau of Sociological Research in constructing variables related to costs. The data set and Codebook upon which this article is based is available at the author's Washington & Lee faculty webpage: http://law.wlu.edu/faculty/profiledetail.asp?id=267.



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*investors claimed increased, tribunal costs also increased. Such a combination of variability and convergence can disrupt the value of arbitration for investors and states. In light of the data, but recognizing the need for additional research to replicate and expand upon the initial findings, this Article recommends states consider implementing measures that encourage arbitrators to consider specific factors when making cost decisions, obligate investors to particularize their claimed damages at an early stage, and facilitate the use of other Alternative Dispute Resolution (ADR) strategies. Establishing such procedural safeguards can aid the legitimacy of a dispute resolution mechanism with critical implications for the international political economy.*

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The number of investment treaty arbitrations has nearly quintupled.[1] Billions of dollars—by virtue of cases like the 2002 Argentine currency crisis[2] or the Yukos Oil debacle[3]—are at stake. With global supply chains, massive investment flows,[4] and a network of 2600 treaties,[5] governments

1. *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), IIA ISSUES NOTE NO. 1, UNCTAD/WEB/DIAE/IA/2010/3, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 2–3 (2010), *available at* http://www.unctad.org/en/docs//webdiaeia20103_en.pdf; *see also* UNCTAD, IIA MONITOR NO. 1, UNCTAD/WEB/DIAE/IA/2009/6/Rev1, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 2–4 (2009), *available at* http://www.unctad.org/en/docs/webdiaeia20096_en.pdf [hereinafter 2009 IIA MONITOR] (describing the increase in claims and asserting there were 317 known disputes at the end of 2008); UNCTAD, UNCTAD/ITE/IIT/2005/4, INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW 1, 3–5 (2005) [hereinafter UNCTAD, ISDS]; Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 46–47 (2007) [hereinafter Franck, *Evaluating Claims*] (describing the increase in claims).

2. Luke Eric Peterson, *Round-Up: Where Things Stand with Argentina and its Many Investment Treaty Arbitrations*, INVESTMENT ARB. REP. (2008), http://www.iareporter. com/Archive/IAR-12-17-08.pdf.

3. Alex Spence, *Former Yukos Owners Begin $50bn Claim Against Russia*, TIMES (London), Nov. 17, 2008, http://business.timesonline.co.uk/tol/business/law/article5172520.ece; *see also* Press Release, Gold Reserve Inc., Gold Reserve Inc. Submits $1.928 Billion Arbitration Claim to World Bank's ICSID (Sept. 28, 2010), *available at* http://www.businesswire.com/news/home/20100928005541/en/Gold-Reserve-Submits-1.928-Billion-Arbitration-Claim (articulating claim for nearly US$2 billion for a dispute under the Canada-Venezuela investment treaty).

4. *See* UNCTAD, UNCTAD/DIAE/IA/2009/3, ASSESSING THE IMPACT OF THE CURRENT FINANCIAL AND ECONOMIC CRISIS ON GLOBAL FDI FLOWS (2009) (discussing foreign investment flows); *see also* Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor*

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are at risk for treaty arbitration when their regulatory measures, like legislation to redress global economic crises, adversely impact foreign investment.[6] Investment treaty arbitration has largely, but not exclusively, been a welcome advance. For foreign investors affected by government conduct, treaty arbitration offers a direct opportunity to sue states and receive damages, whereas alternative venues such as national courts are unavailable or undesirable.[7] Meanwhile, states have an opportunity to protect their investors abroad, vindicate their policy choices, and receive the benefit of increased investment arguably flowing from their investment treaties.[8] Nevertheless, there is a latent problem with investment treaty arbitration, namely, ambiguity about arbitration costs. The scope for cost liability includes: (1) the expenses of both parties' lawyers, (2) the costs of the tribunal and expenses related to administration, and (3) which party will bear these two expenses given the possibility of cost shifting.[9] The scope of cost liability may contribute to concerns about the international investment regime.[10] The lack of certainty and predictability about total

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*Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 730–41 (2009) (discussing global supply chains, particularly as regards China); Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 916–17, 926–41 (2007) (discussing the incorporation of environmental obligations into contracts that are part of the global supply chain).

5. *See* UNCTAD, IIA MONITOR NO. 3, UNCTAD/WEB/DIAE/IA/2009/8, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS (2008–JUNE 2009), at 2–6 (2009), *available at* http://www.unctad.org/eng/docs/webdiaeia20098_en.pdf (discussing the treaty network).

6. *See* Luke Eric Peterson, *Whither the New Financial Crisis Claims?*, KLUWER ARB. BLOG (Feb. 5, 2009), http://kluwerarbitrationblog.com/blog/2009/02/05/whither-the-new-financial-crisis-claims/ ("[I]t is entirely possible that the cataclysmic events of the last few months—including the sometimes haphazard crisis-management by governments—might give rise to treaty-claims against states.").

7. National courts may be unavailable, given sovereign immunity, or undesirable, given problems with the enforceability of judgments or concerns related to the integrity of domestic rule-of-law institutions. Espousal requires lobbying an investor's home state to act on its behalf before the International Court of Justice and will not result in an award payable to the investor. Diplomacy can be untenable as it politicizes commercial disputes and can result in inaction. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1536–38 (2005) [hereinafter Franck, *Legitimacy Crisis*].

8. *See* Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 793 n.116 (2008) [hereinafter Franck, *Empiricism*] (gathering sources debating the benefits of investment treaties). *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (suggesting that treaties signal to investors that investments will be protected under international law but also suggesting the effect on foreign investment is debatable).

9. *See infra* Part I.C (defining "cost," including the Tribunal's Costs and Expenses and Parties' Legal Costs and Expenses); *infra* Part II.A, C (exploring the law applicable to costs and cost shifting).

10. Other variables may contribute to the current discontent. *See, e.g.*, Ilija Mitrev Penuliski, *A*

costs, which party will have liability for which costs, and the justification for those cost decisions diminishes the effectiveness of investment treaty arbitration.[11]

In *Eureko v. Poland*,[12] for example, a Dutch investor sued the Republic of Poland under a bilateral investment treaty for problems with the US$1.34 billion insurance privatization.[13] The arbitration made headlines in the international financial news[14] and featured an internationally prominent tribunal.[15] The eighty-six-page award held Poland liable and required Poland to pay the fees of the tribunal and Eureko's lawyers. The arbitrators' full decision on costs was contained in two sentences: "Claimant has prevailed. Consequently, its costs and those of the Tribunal shall be borne by the Respondent."[16] The controlling treaty language prohibited this approach.[17] While the legal error makes it an arguable outlier and a subsequent decision redressed this error,[18] data nevertheless

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*Dispute Systems Design Diagnosis of ICSID*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 507–08 (Michael Waibel et al. eds., 2010) (suggesting that there are concerns of "favoring capital-exporting countries, lacking legal consistency, regulating types of government conduct which states have not agreed to submit to review, being opaque, and lacking legitimacy due to conflicts of interest among individuals who provide dispute resolution services").

11. *See* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1942–44, 1954 (2010) (suggesting that arbitrators in investment treaty disputes "bear the primary responsibility for lending certainty and predictability to investment transactions" and that "a more 'legitimate' body of law" can promote the integrity of arbitration).

12. Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion (Aug. 19, 2005), *reprinted in* 12 ICSID REP. 335 (2007), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf.

13. *Arbitration Scorecard 2007: Top 50 Treaty Disputes*, AM. LAW., June 13, 2007, http://www.law.com/jsp/article.jsp?id=1181639136817#.

14. *See, e.g.*, Jan Cienski, *Poland in Deal with Eureko over Stake in PZU*, FIN. TIMES, Oct. 2, 2009, at 11; Marek Strzelecki & Marynia Kruk, *Poland and Eureko Settle Dispute*, WALL ST. J., Oct. 5, 2009, at C6, *available at* http://online.wsj.com/article/SB125469684214462753.html.

15. The tribunal included Stephen Schwebel (former president of the International Court of Justice) and Yves Fortier (former president of the London Court of International Arbitration, member of the Permanent Court of Arbitration at The Hague, Canadian representative to the United Nations, and president of the Security Council). *Eureko*, *supra* note 12, at II.

16. *Id.* ¶ 261.

17. *See* Agreement Between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Neth.-Pol., art. 12(9), Sept. 24, 1996, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_poland.pdf ("Each Party shall bear the cost of the arbitrator appointed by itself and its representation. The cost of the chairman as well as the other costs will be borne in equal parts by the Parties."); *see also id.* art. 8(2) (mandating investor-state arbitration pursuant to Article 12(3–9)).

18. *See infra* note 307 (discussing the retraction of aspects of the *Eureko* award). The case may also be an outlier as the test of the relevant treaty specifically addressing the treatment of costs. While the author is unaware of empirical research that descriptively assesses whether and how IIAs address the costs of dispute resolution, doctrinal legal research suggested that addressing costs expressly in the text of treaties was somewhat unusual, but it was normal to include arbitration rules that impliedly addressed costs. *See infra* Part III.C. *See generally* Todd Allee & Clint Peinhardt, *Delegating*

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suggests that *Eureko*'s failure to cite any legal authority and the reliance on a single rationale was typical.[19]

Investment arbitration costs are called "a hot issue"[20] and "the sting in the tail."[21] Concerns about the legitimacy of investment treaty arbitration, and incoherency in areas such as costs, may cause states to reevaluate the value of investment treaties. The United States[22] and Norway[23] are reconsidering their model treaties. Meanwhile, Russia withdrew from the Energy Charter Treaty,[24] and Ecuador[25] and Bolivia[26] withdrew from the

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*Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. 1 (2010) (analyzing different dispute resolution delegations in investment treaties).

19. *See infra* Part III.D.

20. Walid Ben Hamida, *Cost Issues in Investor-State Arbitration Decisions Rendered Against the Investor: A Synthetic Table*, *in* TRANSNATIONAL DISPUTE MANAGEMENT 2 (2005), *available at* http://www. transnational-dispute-management.com.

21. Klaus Reichert & James Hope, *Costs—The Sting in the Tail*, 1 GLOBAL ARB. REV. 30, 30 (2006); *see also* Chiara Giorgetti, *Costs and Their Apportionment in International Investment Arbitration*, INT'L DISP. Q., Fall 2009, at 6, *available at* http://www.whitecase.com/idq/fall_2009_4/ ("The extent and eventual apportionment of arbitration costs constitute important considerations when parties explore the possibility of resolving a dispute through international investment arbitration.").

22. *Hearing on Investment Protections in U.S. Trade and Investment Agreements Before Subcomm. on Trade of the H. Comm. on Ways and Means*, 111th Cong. (2009), *available at* http://waysandmeans.house.gov/hearings/transcript.aspx?NewsID=10394; *House Looks To Finish Supplemental As Senate Begins Credit Card Debate*, CONG. DAILY, May 8, 2009, *available at* 2009 WLNR 8967848.

23. Luke Eric Peterson, *Norway Proposes Significant Reforms to its Investment Treaty Practices*, INVESTMENT TREATY NEWS, Mar. 27, 2008, http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf; Damon Vis-Dunbar, *Norway Shelves its Proposed Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, June 8, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/ norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx.

24. Emmanuel Gaillard, Letter, *Russia Cannot Walk Away from its Legal Obligations*, FIN. TIMES, Aug. 18, 2009, at 6; Alison Ross, *Russia withdraws from Energy Charter Treaty*, GLOBAL ARB. REV., Aug. 7, 2009, *available at* http://www.globalarbitrationreview.com/news/article/18495/ russia-withdraws-energy-charter-treaty/.

25. *See* News Release, ICSID, Ecuador's Notification under Article 25(4) of the ICSID Convention (Dec. 4, 2007), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType =CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&p ageName=Announcement9 (providing Ecuador's decision to withdraw from ICSID on disputes related to oil, gas and minerals); News Release, ICSID, Ecuador Submits a Notice under Article 71 of the ICSID Convention (July 9, 2009), *available at* http://icsid.worldbank.org/ICSID/FrontServlet? requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Annou ncements&pageName=Announcement20 ("[T]he World Bank received a written notice of denunciation of the [ICSID Convention] from the Republic of Ecuador."); *see also Ecuador Says Won't Extend U.S. Investment Treaty*, REUTERS, May 6, 2007, http://www.reuters.com/article/politics News/idUSN062642352 0070507 (discussing how Ecuadorian Foreign Affairs Minister stated that the U.S.-Ecuador treaty "'has caused our country a lot of problems'" and that "'this treaty doesn't represent our national interests'").

26. News Release, ICSID, Bolivia Submits a Notice under Article 71 of the ICSID Convention (May 16, 2007), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html.

World Bank's International Centre for the Settlement of Investment Disputes (ICSID).[27]

Better information about investment arbitration costs is necessary. Claims that costs are "no small matter"[28] or may range from US$1–21 million[29] require analysis. Objections that arbitrators "give cursory attention to fixing arbitration costs"[30] require assessment of what justifications tribunals do offer for cost decisions, particularly in the context of investment arbitration. Critiques that cost decisions are "arbitrary"[31] or "unpredictable"[32] necessitate analysis of what variables (if any) are reliably linked to cost decisions. While research in this Article is neither a predictive nor causal model of future outcomes, cost information has the power to (1) aid parties in understanding their arbitration risks and managing their investment treaty disputes,[33] including using Alternative

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27. *See also* Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L ECON. L. 457, 495 n.197 (2009) ("In the end of April 2007 the leaders of Bolivia, Venezuela, and Nicaragua have agreed to withdraw from the ICSID mechanism.").

28. Noah D. Rubins, *The Allocation of Costs and Attorney's Fees in Investor-State Arbitration*, 18 ICSID REV.-FOREIGN INVEST. L.J. 109, 124 (2003) [hereinafter Rubins, *Allocation of Costs*].

29. *See infra* notes 74–81, 215–16 (providing examples of total cost awards).

30. Lawrence W. Newman & David Zaslowsky, *Assessing Costs in International Arbitration*, N.Y. L.J., Jan. 29, 2010, at 2; *see also infra* notes 235–36 (critiquing the absence of costs justification).

31. *See infra* notes 237–38 (critiquing costs awards as arbitrary and unpredictable).

32. Lester Nurick, *Costs in International Arbitration*, 7 ICSID REV.-FOREIGN INVEST. L.J. 57 (1992); *see also* Ank A. Santens, *Costs in International Arbitration: A Plea for a Debate on Early Guidance by the Arbitral Tribunal on the Principles it Will Apply when Deciding on Costs*, KLUWER ARB. BLOG (June 10, 2009), http://kluwerarbitrationblog.com/blog/2009/06/10/costs-in-international-arbitration—-a-plea-for-a-debate-on-early-guidance-by-the-arbitral-tribunal-on-the-principles-it-will-apply-when-deciding-on-costs/ ("Whereas the outcome on costs is often almost as important as the outcome on the merits, this is an area where uncertainty reigns.").

33. Commentators suggest that costs influence parties' decisions to bring claims. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 584–93 (6th ed. 2003); John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Case Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1095–96, 1116–18 (1991); Stephan W. Schill, *Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration*, 7 J. WORLD INVESTMENT & TRADE 653, 654–55 (2006) [hereinafter Schill, *Cost-Shifting*]. *See generally* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CENTER, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 9 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf [hereinafter WILLGING & LEE, WORDS] (referring to remarks by an employment lawyer that "she had potential clients who could not afford to pay the fee for filing a case in federal court. She could not represent such clients because they would not be able to pay for other discovery expenses."). The generalization to investment arbitration is unclear given the lack of data related to cost assessments and decisions to arbitrate. Although appealing, it presumes that investors are rational actors, costs of ITA are reasonably predictable, and costs affect decisions to bring claims. This may not be the case. *See* DAN ARIELY, PREDICTABLY IRRATIONAL (2008). *But see* Ian A. Laird, *NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 228–29 (2001) (suggesting investors consider "real risk that such an investor would be obliged to pay the substantial costs" of treaty arbitration).

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Dispute Resolution (ADR)[34] to facilitate settlement;[35] (2) guide tribunals seeking descriptive data about costs;[36] (3) permit states to design better investment treaties in light of their normative policy choices;[37] and (4) inform the debate about the legitimacy of investment treaty arbitration.[38]

Despite the need for reliable information on investment treaty costs, empirical analysis is just beginning.[39] This Article is the first empirical analysis of investment arbitration costs that recommends potential reforms based upon available data and appropriate norms. Part I of the Article provides a background on investment agreements, treaty arbitration, and costs. Part II explores the doctrinal and normative bases for cost shifting

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34. UNCTAD, UNCTAD/DIAE/IA/2009/11, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010), *available at* http://www.unctad.org/en/docs/diaeia200911_en.pdf [hereinafter UNCTAD, ADR I]; UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration II (Sept. 3, 2010) (working draft) (on file with author) [hereinafter UNCTAD, ADR II].

35. Information gaps undermine the value of interest-based dispute resolution methods that require assessments about best and worst alternatives to negotiated agreements. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991); WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION (1991). The uncertainty creates challenges for distributive negotiation and understanding the zones of possible agreement. *See generally* ROBERT MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS 26–35 (2001).

36. *Tembec*, for example, referred to information about a contemporary trend in investment arbitration to justify its cost decision. Tembec v. United States, Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, ¶ 139 (NAFTA Ch. 11 Consolidation Trib. 2007), *available at* http://www.state.gov/documents/organization/90177.pdf. Data suggested that reference to stare decisis was unusual. *Infra* note 283. Arbitral tribunals are not the only adjudicators interested in arbitration costs; national courts may likewise be interested. *See* Kam-Ko Bio-Pharm Trading Co. v. Mayne Pharma Inc., 560 F.3d 935, 941–42 (9th Cir. 2009) (reviewing the cost implications of arbitration and citing the scholarship of Dean John Gotanda: "'[i]n international commercial arbitrations, the fees of the arbitral tribunal can be considerable'" (alteration in original)).

37. This presumes the use of rational cost benefit analysis. Cognitive biases and heuristics may prevent stakeholders from engaging in informed or rational decisions. *See generally* ARIELY, *supra* note 33 (discussing reaction to information in predictably irrational patterns). *See also* Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 279–82 (considering the utility of investment treaties via a cost/benefit matrix); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 124 (2006) [hereinafter *Global Administrative Law*] ("[T]he wider costs and benefits of investment treaties for states, have been the subject of some debate . . . .").

38. *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 956–57 (2007).

39. Franck, *Evaluating Claims*, *supra* note 1, at 70 (calling for expanded empirical research on costs); John Y. Gotanda, *Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations* 10 (Villanova Univ. School of Law Pub. Law & Legal Theory, Working Paper No. 2010–01, 2009), *available at* http://ssrn.com/abstract=1491755 [hereinafter Gotanda, *Fees*].

and its application to investment treaty arbitration. Part III describes the methodology, hypotheses, and results of the research.

The results suggested that cost was a key risk in investment treaty arbitration. Even limited data suggested that reported costs represented more than 10% of an average award (i.e., over US$1.2 million). As the data only measured the portion of one party's legal fees that was shifted (and tribunal costs where it was available), it necessarily omitted the full scope of both parties' legal costs; net costs could have been much larger and therefore a more substantial aspect of the amount awarded.[40] Regarding allocation of the risk of liability for arbitration costs, the data showed that costs exhibited a degree of incoherence buttressed by small pockets of coherence. There was no universal approach for how tribunals addressed costs; although tribunals most frequently required parties to share tribunal and administrative costs equally and absorb their own legal fees, there were a mix of approaches and outcomes.

Yet within the variance, the overall experiences of investors and states were relatively equivalent, with (1) parties often responsible for equal costs, or (2) rough parity between investors and states when tribunals did shift costs. There was, however, a lack of justification for these results. Although guidance or decisions on costs could be made at earlier phases, such as in preliminary questions,[41] tribunals typically waited until the end to make decisions. This meant that information, which was possibly vital to strategic settlement opportunities, was unavailable to the parties. When tribunals did make decisions, they did not regularly cite to any legal authority (i.e., citing less than one authority on average) and used minimal justifications (i.e., one to two on average) to justify the result. Where tribunals offered reasons, justifications diverged across categories. Although the literature suggests cost decisions are often based upon a pure "loser-pays" approach or a desire to punish inappropriate behavior, these were not the most frequent rationales; and there was no reliable statistical

40. *See, e.g.*, Giorgetti, *supra* note 21 ("The cost of counsel and associated expenses represent the most substantial expense in international arbitration. A recent Report by the Commission on Arbitration of the International Chamber of Commerce found that legal costs amounted to an average of 82 percent of the total arbitration costs. This finding can be used as a proxy for a discussion of costs in investment arbitration as well." (footnote omitted)). This Article does not address the issues of optimal settlement rates or the optimal fee structures of tribunals or parties' legal fees. Future research might develop these points. *See, e.g.*, Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 388 (1986) (suggesting that there is an optimal settlement rate).

41. *See infra* notes 336, 358 (discussing opportunities to raise preliminary questions).

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relationship between losing and cost shifting, either for parties' own legal fees or the tribunal and related administrative costs.[42]

There were other key commonalities. Tribunals were most likely to rationalize[43] their decisions using the parties' relative success and equitable considerations. They were unlikely to base their decisions expressly on concerns related to the public interest, party equality, stare decisis, or settlement efforts. A few remaining areas exhibited a degree of coherence. There was a link between an award's cost decisions, whereby if tribunals shifted attorney's fees onto another party, the same party was also liable for more than 50% of tribunal fees. Finally, there was a reliable relationship between the amounts investors claimed and the tribunal's total costs. If investors made low damage claims, tribunal costs were low; if damage claims were high, tribunal costs were high. As international arbitration has no equivalent to Federal Rule of Civil Procedure 11 requiring good-faith pleadings, the relationship has implications for using cost shifting in arbitration—perhaps even in domestic litigation[44]—to create incentives that promote efficient and fair dispute resolution. Overall, while there were pockets of rough coherence and parity, the larger picture suggests that costs exhibited a degree of uncertainty. The question

42. *See infra* notes 294, 312.

43. For the purposes of this Article, the terms "rationalize" or "rationalization" primarily refer to the processes of explaining, justifying, and streamlining the reasoning of the adjudicative outcomes in the cost decisions of investment treaty arbitration awards. These explanations may, in turn, benefit from a more economics-based approach to "rationalization" that is focused upon transitioning preexisting ad hoc systems into ones based upon sets of published and predictable rules.

44. *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1925, 1953–56, 1972 (2009) (discussing the impact of fee shifting on litigation and analyzing the role of settlement); Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 567–68 (2004) (discussing the demand curve for litigation and considering the impact of alternative dispute resolution methods); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 554–59 (2009) (proposing cost shifting in litigation to promote freedom for parties to adopt procedural laws in public adjudication); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 159 (1984) ("[T]he possibility of a fee shift against individual litigants relying on their own resources might well result in a greater tendency to settle claims . . . ."); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (describing litigation as investment and analyzing the implications of investing time and money into dispute resolution); *see also* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CENTER, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf (conducting a quantitative analysis of costs and finding that variables related to higher monetary stakes, longer processing times, case complexity, electronic discovery, summary judgment, and representation by large law firms, among others, were associated with higher litigation costs); WILLGING & LEE, WORDS, *supra* note 33 (describing interviews and potential variables affecting the efficacy of civil procedure in the federal courts in light of concerns related to costs and administrative efficiency).

is whether that is a desirable normative output from a system of justice for international economic law.

In light of these findings and the limitations inherent in the data, measures, and empirical models, Part IV argues that the system could nevertheless benefit from targeted modification. In an effort to promote norms of predictability, fairness, and efficiency, the Article recommends (1) addressing costs at an early stage; (2) encouraging tribunals to make transparent cost decisions with dollar values, legal authorities, and rationales; (3) articulating rules that offer arbitrators an express set of factors to use when making cost decisions; (4) implementing a pleading system that requires claimants to particularize their claimed damages; and (5) considering the use of legal expense insurance to defray arbitration risk. This Article concludes that, based upon the current evidence, investment treaty arbitration arguably remains a useful tool for resolving investment disputes, but issues of cost, should they continue in their present state, could create difficulties for the effective use of investment arbitration. Focused attention to matters of cost—by parties, arbitrators, policy makers, and scholars—is a desirable outcome for improving the legitimacy of treaty-based dispute resolution during a time of transition in the international economic framework.

## I. A PRIMER ON IIAS, ITA, AND RELATED COSTS

### *A. International Investment Agreements (IIAs)*

An international investment agreement (IIA) is a treaty made between two or more governments that safeguards investments made by qualifying investors in the territory of other signatories.[45] Countries might sign a regional trade agreement, such as the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA).[46] The theoretical justification for these agreements is that, on balance, the benefits flowing from signing IIAs—including increased investment flows, signaling that a

45. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 171 (2007) [hereinafter Franck, *Dispute Systems Design*].

46. Multilateral agreements, like DR-CAFTA and NAFTA, provide investment protection on a multilateral basis, and perhaps in conjunction with other international economic law rights. Dominican Republic-Central America-United States Free Trade Agreement art. 10, Aug. 5, 2004, 119 Stat. 462, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter DR-CAFTA]; North American Free Trade Agreement, U.S.-Can.-Mex. ch. 11, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 605; *see also* Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV.-FOREIGN INVEST. L.J. 287 (1997).

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state is willing to provide a stable investment regime (whether based on international law, domestic regulation, or a hybrid), partitioning aspects of domestic policy space, and providing protection to its own outward bound investors[47]—outweigh the costs and related risks of creating international economic law obligations.[48]

As a doctrinal matter, IIAs grant reciprocal investment rights, both procedural and substantive, to private investors from the signatory countries. Substantively, governments guarantee investors certain treatment, such as freedom from unlawful expropriation, freedom from discrimination, and the right to fair and equitable treatment.[49] Procedurally, an IIA permits investors who believe their substantive rights have been violated to seek direct redress against the host state through the treaty's dispute resolution mechanism. The objective is to move politicized forms of dispute resolution toward a neutral and rule-based forum.[50] Investors then have an opportunity to engage in non-adjudicative dispute resolution, and, if necessary, to resolve disputes finally through an enforceable arbitration proceeding.[51]

### *B. Investment Treaty Arbitration (ITA)*

Some investment conflicts involve overtly political elements.[52] Other treaty disputes appear more private, such as the revocation of a banking

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47. *See supra* note 8 and accompanying text (outlining benefits related to IIAs).

48. *See generally* Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009) (analyzing IIAs under contract theory given factors related to uncertainty, information asymmetry, and optimization of joint benefits).

49. UNCTAD, ISDS, *supra* note 1, at 31–47; Franck, *Dispute Systems Design*, *supra* note 45, at 172.

50. HOWARD MANN & KONRAD VON MOLTKE, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT 5–6 (1999); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 196 (2001); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 356–57 (2007) [hereinafter Rogers, *Have-Nots*]; Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 717 (1999).

51. Franck, *Dispute Systems Design*, *supra* note 45, at 172–73, 192–94; W. Michael Reisman, *International Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV.-FOREIGN INVEST. L.J. 185 (2009).

52. *See, e.g.*, Bernardus Henricus Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), *available at* http://ita.law.uvic.ca/documents/ZimbabweAward.pdf (deciding claim against Zimbabwe for repossession of land from white farmers); Canadian Cattlemen for Fair Trade v. United States, Award on Jurisdiction (NAFTA/UNCITRAL 2008), *available at* http://ita.law.uvic.ca/documents/CCFT-USAAward_001.pdf (deciding whether Canadian ranchers could sue the U.S. for restrictions put in place related to concerns about Bovine spongiform encephalopathy (i.e., Mad Cow disease)).

license or a breach of contract.[53] A cause of action under an IIA generally involves (1) a foreign investor asserting that a host state violated the treaty and damaged the investment, and (2) if the dispute is not otherwise resolved, the investor seeking redress by requiring the state to arbitrate. While treaties vary, investors can generally elect to arbitrate before: (1) an ad hoc tribunal organized under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, (2) the Stockholm Chamber of Commerce (SCC), and (3) a tribunal organized through the World Bank's ICSID.[54]

Arbitration mechanics are relatively straightforward. After complying with jurisdictional prerequisites, an investor initiates arbitration by submitting an arbitration request to its selected forum.[55] Then, the process of selecting a tribunal begins. Typically, panels of three arbitrators resolve investment disputes[56] in an impartial manner.[57] Parties then marshal their facts and legal arguments to address different phases of the dispute, namely, jurisdiction, merits, quantum, and costs. The investor must first establish that it meets the jurisdictional thresholds, namely, that there is a qualifying investor and investment brought under a qualifying treaty within a proper time frame. If this is not established, the case terminates. Otherwise, the dispute continues. The merits phase involves a tribunal's determination of whether the respondent breached the treaty's substantive obligations. If there is no substantive breach, the case terminates; otherwise, the dispute continues. At the quantum phase, the parties establish the value of the substantive treaty breach. Decisions related to costs can occur at any or all of these substantive phases, and tribunals

53. Franck, *Dispute Systems Design*, *supra* note 45, at 185–86; Franck, *Evaluating Claims*, *supra* note 1, at 10.

54. Parra, *supra* note 46, at 288. *But see* Agreement Between the Government of the People's Republic of China and the Government of Ghana Concerning the Encouragement and Reciprocal Protection of Investments art. 10, Oct. 12, 1989, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/china_ghana.pdf (providing that certain investment disputes are subject to ad hoc arbitration, SCC is the default appointing authority, and the tribunal can use either SCC or ICSID rules "as guidance"). Another prevalent arbitral institution is the International Chamber of Commerce (ICC). Aaken, *supra* note 48, at 3.

55. Franck, *Dispute Systems Design*, *supra* note 45. *But see* Christoph Schreuer, *Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVEST. & TRADE 231, 234 (2004) (suggesting that, irrespective of whether the substantive prerequisites are established, investors may proceed with arbitration).

56. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 124 (1995); Franck, *Evaluating Claims*, *supra* note 1, at 77.

57. Toby Landau, *Composition and Establishment of the Tribunal*, 9 AM. REV. INT'L ARB. 45, 52–53 (1998); Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 65 (1995); Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEY'S INT'L ARB. REP. NO. 10, 2, 3 (2002).

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sometimes render a separate substantive award to assess and allocate arbitration costs. The final award is enforceable worldwide.[58]

### *C. Costs of ITA*

For the purposes of this section, the Article defines costs broadly, but then particularizes "costs" for the remainder of the Article as a more narrow fiscal measure to conduct empirical analyses. It then discusses the critical nature of ITA costs and explains what is currently known about the more narrow fiscal costs of ITA.

#### *1. Defining Costs*

As a general matter, costs related to investment treaty disputes can take many forms.[59] Social costs involve unrest or other social considerations that arise as a result of the sensitive issues sometimes involved in ITA.[60] Political costs involve the value of sacrificing aspects of sovereignty,[61] the

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58. Franck, *Dispute Systems Design*, *supra* note 45, at 193–94. There is doctrinal variation. ICSID Convention arbitrations issue one final "award"; earlier decisions are not awards for enforcement purposes. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37(2)(b), Mar. 18, 1965, 4 I.L.M. 524, 541 [hereinafter ICSID Convention]. *But see* Franck, *Legitimacy Crisis*, *supra* note 7, at 1547–57 (comparing enforcement under ICSID and New York Conventions).

59. *See* Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 145–46 (2007) ("The potential costs of an investor-State arbitration are basically threefold. First, as indicated above, a host country faces the risk of having to pay awards that, in relation to its budget and financial resources, may prove extremely burdensome. Second, the host country must bear the substantial costs, both direct and indirect, of conducting the arbitration itself. Third, the 'policy cost' of investor-State arbitration is that a substantial award to the investor may require the host country to repeal or modify measures that were implemented for the public good."); *see also* Jennifer A. Heindl, *Toward A History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672, 686 (2006) (referring to the "political and financial costs" of ITA); Abba Kolo, *Tax "Veto" as a Special Jurisdictional and Substantive Issue in Investor-State Arbitration: Need for Reassessment?*, 32 SUFFOLK TRANSNAT'L L. REV. 475, 478, 492 (2009) (considering political and economic costs of tax-related investment disputes).

60. *Aguas del Tunari v. Bolivia* provoked riots, deaths, a state of emergency, and ITA. *See generally* OSCAR OLIVERA & TOM LEWIS, ¡COCHABAMBA! WATER WAR IN BOLIVIA (2004). Argentina's currency crisis created public upheaval. Mary Helen Mourra, *Privatization of Water Management in Latin America*, *in* LATIN AMERICAN INVESTMENT TREATY ARBITRATION: THE CONTROVERSIES AND CONFLICTS 83, 88–89 (Thomas E. Carbanneau & Mary H. Mourra eds., 2008); Alan Ciblis, *ICSID Bleeds Argentina*, MULTINATIONAL MONITOR, July 1, 2005, http://www.multinationalmonitor.org/mm2005/072005/front.html; *see also* David Collins, *Reliance Remedies at the International Center for the Settlement of Investment Disputes*, 29 NW. J. INT'L L. & BUS. 195, 211–12 (2009) (discussing the social costs of awards).

61. The U.S.-Australia Free Trade Agreement does not permit ITA and instead requires all investment conflict to be resolved in national courts, suggesting a concern about affronting national courts. William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1

need to raise domestic taxes,[62] or the procurement of international aid.[63] There are also economic costs, including opportunity costs from sinking resources (whether commercial or governmental) into ITA,[64] reputational costs that may impact the credit rating of sovereign debt,[65] and transactional costs related to paying lawyers, arbitrators, institutions, and their related expenses. The last set of dispute resolution costs are fiscal, tangible, and presumably easier to quantify. Although arguably not the most normatively important aspect of "cost" to measure, and although other variables are worthy of operationalizing to assess net costs, these fiscal elements are a tangible place to start and worthy of analysis.[66]

As regards the quantifiable fiscal costs, there are several variables that contribute to the scope of fiscal exposure in investment treaty arbitration.[67]

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(2006). Pakistan has refused to sign an IIA with the United States. Lauge Skovgaard Poulsen & Damon Vis-Dunbar, *Reflections on Pakistan's Investment-treaty Program after 50 Years: An Interview with the former Attorney General of Pakistan, Makhdoom Ali Khan*, INVESTMENT TREATY NEWS, Mar. 16, 2009, http://www.investmenttreatynews.org/cms/news/archive/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan.aspx; *see also* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 436–37 (2009) [hereinafter Franck, *Development*] (discussing reactions to allegations that ITA is unfair or improperly infringes upon sovereignty); *La ALBA Quiere Crear un Tribunal de Arbitraje Paralelo al Ciadi*, HOY BOLIVIA, Feb. 20, 2009, http://www.hoybolivia.com/Noticia.php?IdEdicion=519&IdSeccion=3&IdNoticia=21205 (discussing denunciation of ICSID and advocating ALBA's creation of a parallel regional arbitration institution).

62. Luke Eric Peterson, *Czech Republic Hit with Massive Compensation Bill in Investment Treaty Dispute*, INVEST. L. & SUSTAINABLE DEV. WKLY. NEWS BULL. (Mar. 21, 2003), http://www.iisd.org/pdf/2003/investment_investsd_march_2003.pdf ("[O]ne proposal mooted by some officials is for an increase in value-added tax on goods and services which would see all taxpayers absorbing the cost of the investment treaty arbitration.").

63. *See* Susan D. Franck, *International Decisions*, Occidental Exploration & Production Co. v. Republic of Ecuador, 99 AM. J. INT'L L. 675, 681 (2005) (discussing the implications of foreign aid to Ecuador after the adverse award in *Occidental*).

64. Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANAT'L L. 1251, 1259–60 (2008) ("[Arbitration] diverts time, money, and energy to ancillary procedural quarrels . . . . [S]ubstantial time and money is often spent selecting arbitrators and wrangling about information gathering." (footnote omitted)); Salacuse, *Is There a Better Way?*, *supra* note 59, at 142 (referring to "indirect costs such as the time of the government officials and corporate executives devoted to preparing and participating in" arbitration).

65. *See* Salacuse, *supra* note 59, at 146; *see also* Schill, *Cost-Shifting*, *supra* note 33, at 682 (suggesting there are costs related to state compliance with international legal obligations). Reputation costs may also have economic implications, such as investors' decisions about the utility of investing, future investors' assessment of the pricing of investment risk, and the price premium later investors may extract.

66. *See infra* notes 68–73.

67. The overall dispute resolution risk calculus is likely a function of: (1) amount claimed, (2) amount likely to be awarded, (3) amount actually awarded, (4) amount of interest on any award, (5) TCE, (6) PLC, and (7) tribunal allocation of TCE and PLC. *See* Franck, *Evaluating Claims*, *supra* note 1, at 57–70 (discussing various arbitration risks); *see also* J. Gillis Wetter & Charl Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 AM. REV. INT'L ARB. 249, 253–54

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For the purposes of the remainder of this Article, the relevant variables relate to (1) amounts claimed, (2) damages awarded, (3) tribunal costs and related administrative expenses for conducting the arbitration (TCE),[68] (4) the parties' own legal costs and expenses for their lawyers and related expenses (PLC),[69] and (5) tribunal decisions allocating TCE and PLC to affect the parties' ultimate fiscal liability.[70] As these different cost elements can involve different legal rules,[71] this research demarcates between TCE and PLC decisions.[72]

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(1991) (mentioning interest as a cost). Interest impacts liability and would be worthy of a separate, future analysis to assess the scope of net fiscal risk.

68. Arbitration is an ad hoc, non-publicly funded process requiring payment of fees and expenses of arbitrators, administrative charges of any arbitral institution, costs associated with renting facilities, fees of transcription services, interpreters, and other costs. Micha Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, 22 ASA BULL. 249, 249 (2004); *see* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW & PRACTICE 812–14 (2d ed. 2001); *see also* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 684–85 (Emmanuel Gaillard & John Savage eds., 1999). TCE consists of administrative charges, arbitrators' fees, arbitrators' expenses (hotel, typists, etc.), expert costs (retained by tribunal), secretaries' costs (retained by tribunal), and other costs that may occur for the tribunal or its work. Salacuse, *supra* note 59, at 142 (defining costs in connection with the charges of the arbitral tribunal and institution); Wetter & Priem, *supra* note 67, at 253–54 (same).

69. PLC consists of administrative costs (research, legal, processing, witnesses, etc.), outside legal costs, and costs in connection with resolving the dispute. *See* Wetter & Priem, *supra* note 67, at 254; *see also* Salacuse, *supra* note 59, at 142 (defining costs related to parties' legal costs and expenses in connection with preparation and conduct of the arbitration). While some countries permit shifting of PLC, other jurisdictions may prohibit it. John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 9–10 (1999) [hereinafter Gotanda, *Awarding Costs*]. National law may be irrelevant for cost shifting. *Infra* notes 136–39.

70. Other commentators demarcate TCE and PLC. Reichert & Hope, *supra* note 21, at 30; *see* Bühler, *supra* note 68, at 250; *see also* Eric Gottwald, *Leveling The Playing Field: Is It Time For A Legal Assistance Center For Developing Nations In Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 250–51 (2007) (identifying various costs associated with ITA).

71. *See* U.N. Comm'n Int'l Trade Law [UNCITRAL] Arbitration Rules, G.A. Res. 31/98, art. 40(1)–(2), U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf [hereinafter 1976 UNCITRAL Arbitration Rules] (providing that procedural costs are "borne by the unsuccessful party," but, for legal costs, the tribunal is "free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable").

72. The distinction permits stakeholders to differentiate among cost elements. Different elements—and their allocation—may reflect different normative objectives. Costs may have different magnitudes. Predicting cost liability enables parties to assess the benefit of arbitration. If "the worst thing a client can ever be is surprised," precision permits better management of stakeholder expectations, encourages realistic views about possible outcomes, and minimizes outcries of unfair surprise at the end of the process. Susan D. Franck, *Considering Recalibration of International Investment Agreements: Empirical Insights*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (José E. Alvarez & Karl P. Sauvant eds., forthcoming 2011) (referring to observations by Sherry Williams).

### 2. *Why Costs Matter*

Commentators sometimes make observations about ITA costs that are not based upon evidence from systematic reserach, which presumably mimic an intuitive understanding based upon personal experience.[73] There are at least five major reasons to take cost allocation seriously and offer careful, systematic analyses.

First, there is significant financial exposure at stake given the risk of being liable for TCE, PLC, or both. Commentators observe that costs in international arbitration could be enormous, possibly in the millions of dollars.[74] UNCTAD suggests that "*costs involved in investor-State arbitration have skyrocketed* in recent years."[75] UNCTAD then cites cases where the net result involved (1) a losing investor having to pay approximately US$12.7 million in costs,[76] (2) a losing state having to pay US$9 million in costs,[77] (3) a losing state being required to pay US$7.7 million in costs,[78] and (4) a losing state being required to pay US$10.1

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73. That even includes the present author. *See* Franck, *Legitimacy Crisis*, *supra* note 7, at 1592 ("International arbitration tribunals are not shy about making costs orders. Cost sanctions can be applied either during a case or after an award to discourage vexatious [arbitration]." (footnote omitted)); *see also* Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 10 n.8 (2005) (observing that NAFTA tribunals "have been disinclined, for various reasons, to award costs"); Jonathan L. Frank & Julie Bédard, *Electronic Discovery in International Arbitration: Where Neither the IBA Rules nor U.S. Litigation Principles are Enough*, 62 DISP. RESOL. J. 62, 68 (2008) ("In international arbitration, the rule is not 'each party bears its own costs.' The arbitral tribunal generally will make a discretionary determination of the allocation of arbitration costs. It could allow the winning party to recover, and require the losing party to bear the costs of arbitration in whole or in part . . . ."); Stephen W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1, 46 (2009) [hereinafter Schill, *Enabling Private Ordering*] ("[W]hat seems fully sufficient to serve as a filter for access to investment treaty arbitration is the cost risk connected to potential claims. Only when a dispute is sufficiently economically valuable will an investor chose to initiate arbitration and incur the cost risk. This should effectively bar trivial disputes from investment treaty arbitration." (footnote omitted)).

74. *See* Gotanda, *Awarding Costs*, *supra* note 69, at 2–3 (stating, "It is not uncommon for such costs to run into the millions of dollars, sometimes even exceeding the amount in dispute" and describing possibly unrepresentative cost allocations of US$14.5 million, US$5 million, and US$8.1 billion); *see also infra* notes 212–16 (providing anecdotal data about the scope of costs).

75. UNCTAD, ADR I, *supra* note 34, at 16–18 (emphasis in original).

76. Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, ¶¶ 310, 312, 322–24 (Aug. 27, 2008), *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf, (identifying investor PLC as around US$4.7 million, respondent PLC was allocated at US$7 million, and TCE was nearly US$1 million).

77. Casado v. Republic of Chile, ICSID ARB/98/2, ¶¶ 723–24, 730–31 (May 8, 2008), *available at* http://ita.law.uvic.ca/documents/PeyLAUDO.pdf (explaining that Chile's PLC was approximately US$4.3 million, finding investor's reasonable PLC to be paid by Chile was US$2 million, and allocating 75% (approximately US$3 million) of TCE to Chile).

78. ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 543 (Oct. 2, 2006), *available at* http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf ("Respondent shall

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million in costs.[79] It failed, however, to refer to other cases around the same time frame, such as *Merrill & Ring Forestry v. Canada*, where the tribunal only cost around US$1 million, and the parties split those fees evenly and internalized their own legal fees.[80] Other unpublished research from UNCTAD for the legal fees in ITA for a limited group of states (i.e., a limited sample with arguable case selection bias) provided limited data that also suggested legal fees were not trivial. One country had ITA disputes where its legal fees were in the order of US$2.5 million and US$1.95 million; another country had estimates of its own PLC in the order of US$1 million for a dispute; and a third state experienced PLC in the order of US$1.2 million, US$1 million, and US$12 million.[81]

Meanwhile, Professor Peters asserts, "several transborder investment arbitrations conducted pursuant to NAFTA and bilateral investment treaties required four years to conclude and cost millions of U.S. dollars" and explains that these "direct costs of international arbitration are often significant and sometimes wind up exceeding actual amounts gained."[82] It is one thing to spend millions of dollars in legal fees, but it is another to learn that one is also required to pay the award, pay for one's own lawyers, pay for the entirety of the tribunal's costs, and then pay for its opponent's lawyers.

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pay to the Claimants the sum of US$7,623,693 in full satisfaction of both Claimants' claims for costs and expenses of this arbitration.").

79. Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 604–05, 611–12, 631 (June 1, 2009), *available at* http://ita.law.uvic.ca/documents/WaguihElieGeorgeSiag-AwardandDissentingOpinion_002.pdf (investors' PLC of US$6 million, respondent's PLC around US$3.5 million, and approximate TCE of US$600,000).

80. Merrill & Ring Forestry L.P. v. Canada (NAFTA Ch. 11 Consolidation Trib. 2010), at 107, *available at* http://ita.law.uvic.ca/documents/MerrillAward.pdf.

81. UNCTAD, *Inciativa de un Centro de Asesoría Legal Sobre Derecho Internacional en Inversión y Controversias Invesionista-Estado* (May 26–27, 2009) (on file with author). It is unclear, however, how the data are collected and how replicable the results are. Meanwhile, there is a critical case selection bias as the data only focus on the lawyer fees of respondent states; this does not consider the lawyers' fees of investors, which may be of a different magnitude. While an interesting starting place, the research requires systemic analysis and replication. Moreover, it is not clear whether these same fees were ultimately borne by the state or whether they were paid (in part or in total) by the investor. Likewise, it is not clear whether the state may have also been responsible for the PLC of the investor. None of the data appeared to address costs related to TCE.

82. Peters, *supra* note 64, at 1260, 1285; *see also* Luke Eric Peterson & Nick Gallus, *International Investment Treaty Protection of Not-for-Profit Organizations*, 10 INT'L J. NOT-FOR-PROFIT L. 47, 72 (2007) ("[E]ach of the three arbitration tribunal members will charge hundreds of dollars an hour for their time. BIT disputes often last several years, in which time, lawyer, arbitrator and institution fees can amount to several million dollars. Losing claimants are sometimes ordered to pay the entire fees of the winning respondent state. Even 'victorious' claimants are not always awarded their legal costs, which may diminish the attraction of arbitration over smaller claims." (footnotes omitted)).

Second, managing costs and related expectations can affect stakeholders' satisfaction with ITA and aid in the consideration of the net benefit of entering into an IIA. Offering greater guidance about likely cost outcomes helps prepare stakeholders and permits them to manage their expectations and resources more effectively than in the absence of data. Without proper planning, parties may find themselves in a worse position than anticipated. "Such uncertainty is clearly undesirable in terms of foreseeability and legal certainty and compromises the calculability of risk and potential liability for an investor who decides to bring an action under an international investment treaty."[83] A loss on the merits of a dispute may be upsetting, but parties consent to the theoretical possibility of a "loss" when they choose arbitration as their adjudicative form of dispute resolution. Cost shifting, by contrast, could be more unanticipated. Parties could complain that they should have made an advance agreement on costs, yet this approach appears rare.[84] As states may not have been fully cognizant of their potential arbitration risks at the time an IIA was signed,[85] they may likewise not have anticipated the complete scope of arbitration costs and related risk. Such informational deficits may in part explain why, up to now, parties have not opted to address cost allocation ex ante. This research, with all its limitations, provides stakeholders with an opportunity to re-assess that choice on the basis of data.

Third, being able to assess arbitration costs reliably could permit stakeholders to weigh the value of arbitration during the entire life cycle of the dispute resolution process. Costs could be leveraged to influence the parties' incentive structures.[86] In effect, costs could streamline arbitration

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83. Schill, *Cost-Shifting*, *supra* note 33, at 656.

84. *See id.* at 658 n.28 ("Only occasionally do bilateral investment treaties expressly address the allocation of costs in investor-State disputes. . . . Even more uncommon are *arrangements between the foreign investor and the host State prior* or subsequent to the initiation of an investment treaty dispute." (emphasis added)). The author is unaware of empirical research on precisely this point.

85. *See* Jose E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 26 (2009) (suggesting that some argue "like consumers hoodwinked by an unscrupulous car dealer, that what it actually accomplished through conclusion of a BIT is greater exposure to unexpected financial liabilities").

86. Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 820 n.329 (2008) ("[H]igh costs and risks associated with initiating an investment arbitration . . . [prevent] a 'race to the courthouse.'"); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1400–01 (2003) [hereinafter Coe, *Taking Stock*] (discussing NAFTA settlements, the presence of entities with "adequate funding contemplate a vigorous, protracted campaign" and tribunals having "exhibited a disinclination to award costs"); Salacuse, *supra* note 59, at 165 ("One way for arbitrators to dissuade such frivolous cases is to allocate all or a substantial portion of the arbitration costs to such claimants if they lose their case."); William Schreiber, *Realizing the Right to Water in International Investment*

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efficiency by creating incentives for party decisions to initiate or defend claims, bring particular motions, and engage in delay tactics.

Fourth, costs may have a disparate effect on economically disadvantaged stakeholders. Smaller investors may not be able to access justice in the same manner if the cost of bringing claims makes it economically untenable.[87] Likewise, countries with limited resources may end up having to allocate scarce public funds to shoulder arbitration costs.[88] Professor Salacuse discusses the particular cost for the developing world and explains, "the costs of an investor-State arbitration . . . may prove to be a significant burden for developing countries."[89] Economically disadvantaged stakeholders may therefore need more information about what to expect from adjudication and how to plan for costs related to ITA in order to promote equality of arms and basic access to justice.[90]

Fifth, the legitimacy of dispute resolution depends on creating a system that is seen to—and actually does—provide a level playing field that permits stakeholders to understand their risk and make economic, legal, and political plans accordingly. A process that appears arbitrary or unpredictable[91] may generate concerns and sustainability issues.[92] Yet a

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*Law: An Interdisciplinary Approach to BIT Obligations*, 48 NAT. RESOURCES J. 431, 473 (2008) ("If more judgments are to be released penalizing claimants to such an extent, it may be possible to avert further arbitration threats from investors as their penalty for losing such a case may be more damaging than the possible outcome.").

87. *See* Coe, *Taking Stock*, *supra* note 86, at 1401 (describing arbitration's "elite" nature); Lindsay C. Nash & Adam McBeth, *Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 167, 174 (2008) ("Initial requests for arbitration cost U.S. $ 25,000, which is far from the total costs of the proceeding, and forecloses claims from most private individuals and many poorer governments.").

88. Not all countries permit contingent fee arrangements, particularly where a client may be a government. See Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1, 29–30 (2002) (citing JOHN H. MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1026 (1994)); *see also Briefing: Third Party Litigation Funding*, INT'L DISPS. (Simmons & Simmons, London), May 6, 2008, at 4–5, http://www.elexica.com/download.aspx?area=crms&resource=IntDisputes052008.pdf (describing funding lawsuits on a conditional basis in the U.S., England, Germany, France, Belgium, France, Netherlands, Spain, Italy, and Hong Kong).

89. Salacuse, *supra* note 59, at 142; *see* Hena Schommer, *Environmental Standards in U.S. Free Trade Agreements: Lessons from Chapter 11*, 8 SUSTAINABLE DEV. L. & POL'Y 36, 36 (2007) ("[Mexico] had to cover the costs and expend resources for two years to defend itself . . . . The potential expenditure of resources in international arbitration could prove to be a burden to developing countries." (footnote omitted)); *see also* LUKE ERIC PETERSON, ALL ROADS LEAD OUT OF ROME: DIVERGENT PATHS OF DISPUTE SETTLEMENT IN BILATERAL INVESTMENT TREATIES 18 (2002), *available at* http://www.iisd.org/pdf/2003/investment_nautilus.pdf ("[S]ubstantial costs make contestation of an arbitral claim an unattractive option for poorer developing countries.").

90. Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT'L L. & POL'Y 47, 86–87 (2005) [hereinafter Franck, *Bright Future*]; *see also infra* note 255.

91. *See* Gotanda, *Awarding Costs*, *supra* note 69, at 21–22 (discussing three maritime arbitration

lack of uniformity in the outcome of cost decisions need not destroy legitimacy if there are respectable reasons for the divergence. Should IIAs and their dispute resolution provisions form part of an effort to promote rule-of-law institutions, there will be challenges where otherwise "reasonable" or other cost allocations are made without justification.[93]

If stakeholders deem the overall costs[94] of ITA to be too high, a range of responses is possible. Countries may abandon arbitration altogether, mandate other forms of dispute resolution (perhaps as a precursor to arbitration or as an alternative), use arbitration strategically in conjunction with other processes, return to international diplomacy, or reject the creation of IIAs.[95] Assessing the costs and benefits of ITA, the arguable de

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decisions, one shifting all costs to the loser, one shifting some costs to the loser, and the last deciding each bore its own costs).

92. *See* Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT'L L. 213, 221 (2001) ("Arbitrations that have broad and far-reaching public policy implications tend to draw attention from media and nongovernmental organizations. Maintaining a shroud of confidentiality over proceedings and documentation simply draws intense criticism and does harm to the legitimacy of the process."); Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 324 (2004) ("A lack of transparency leads to 'a legal morass that complicates court proceedings . . . [lending to the] random and arbitrary nature of court decisions.'" (alterations in original) (quoting Rudolf Hommes, *Institutional Reliability and Development*, *in* JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 48 (E. Jarquin & F. Carillo eds., 1998)); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1308 (2006) ("[T]he right of public access seems self-evident in the context of WTO proceedings and investor-state arbitration, where transparency is important to the institutions' perceived legitimacy.").

93. *See* Rubins, *Allocation of Costs*, *supra* note 28, at 119 (discussing 1976 UNCITRAL Arbitration Rules). It may be possible, however, that the decision to not offer any reasoning or to offer minimal reasons is an effort to retain tribunal net discretion over an award. For example, if tribunals engage in compromise adjudicative outcomes in the substantive phase of the case, tribunals may implicitly be using their discretion as regards costs (and possibly interest) to permit some kind of strategic decisions or negotiated log-rolling related to the net outcome of the dispute. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (discussing Epstein and Knight's research and independently looking at assessing consistency of judicial behavior); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1446–47, 1485–91 (2001); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L. L. & BUS. 383, 403–04 (2010) (referring to scholarship by Epstein and Knight to consider the strategic aspects of adjudication); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 369–71 (2008) (considering the affects of tribunal homogeneity and compromise decisions by the "median Justice"). This theory, however, would benefit from thoughtful empirical study—perhaps in the context of a survey instrument or series of case studies.

94. "Overall costs" incorporates hard, fiscal costs like PLC and TCE, but may include other aspects. *Supra* notes 47–48, 60–65.

95. These options were considered during the United States' review of its model investment treaty. ADVISORY COMM. ON INT'L ECON. POLICY, U.S. DEPT. OF STATE, REPORT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY 9–14, 16–17 (2009), *available at* http://www.state.gov/e/eeb/rls/othr/2009/

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facto dispute resolution mechanism, is critical. A richer understanding of "bargaining in the shadow of arbitration"[96] can aid effective management of investment treaty conflict and aid negotiation of dispute resolution terms in international economic agreements.

### *3. Existing Data on ITA*

The growing empirical literature on ITA makes several points. First, governments can (and did) win investment disputes. Governments were more likely than investors (57.7% versus 38.5%) to win cases and have no damages awarded for alleged treaty breaches.[97] Second, the average amount awarded (approximately US$10 million) was a fraction of what investors typically requested (approximately US$343 million).[98] In other words, investors lost more than they won; and when investors did win, they usually received less than claimed. Dispute resolution risk is about more than outcome and damages. PLC and TCE are key variables, as they reflect the cost of obtaining a beneficial outcome at both the outset[99] and

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131098.htm; *see also* GUS VAN HARTEN ET AL., PUBLIC STATEMENT ON THE INTERNATIONAL INVESTMENT REGIME (2010), http://www.osgoode.yorku.ca/public_statement/documents/Public%20 Statement.pdf (critiquing the IIA and ITA systems).

96. *See, e.g.*, Mark L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979); Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449 (2008).

97. Franck, *Evaluating Claims*, *supra* note 1, at 49. There is other research that mirrors the general pattern of this research but uses different data and methodology. *See* Linda A. Ahee & Richard E. Walck, *ICSID Arbitration in 2009*, TRANSNAT'L DISP. MAN. (2010), http://www.gfa-llc.com/ images/tdm_2010_-article006.pdf ("Claimants were successful in less than one-half of the matters that went to an award"); *see also* UNCTAD, IIA ISSUES NOTE NO. 1, UNCTAD/WEB/DIAE/IA/2010/3, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 3 (2010), *available at* http://www.unctad.org/en/ docs//webdiaeia20103_en.pdf ("[B]y the end of 2009, 164 cases had been brought to conclusion. Out of these, 38 per cent were decided in favour of the State (62) and 29 per cent in favour of the investor (47), while 34 per cent (55) cases were settled."); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 81 (2010) (suggesting that for an analysis focused on "elite" arbitrators, tribunals denied recovery to claims in 60.5% of the cases, and only 7% of investors were awarded 100% of amounts claimed).

98. Franck, *Evaluating Claims*, *supra* note 1, at 57–62; *see also* Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, COLUM. FDI PERSP., No. 7 (June 15, 2009), http://vcc.columbia.edu/documents/SusanFranckPerspective-Final.pdf.

99. Ben Hamida, *supra* note 20; *see also* Schill, *Cost-Shifting*, *supra* note 33, at 654 ("[T]he decision to arbitrate will depend on a cost-benefit analysis that takes into account the potential outcome of the arbitration and the damages the investor expects to recover, as well as the risks and liabilities incurred by engaging in investor–State arbitration. An important aspect of this cost-benefit analysis is the allocation of the costs of arbitration, both the costs of the proceedings in the strict sense, like the arbitrators' fees, and the costs of legal representation.").

the end of a case.[100] Yet, there is little empirical analysis on point.[101]

## II. DOCTRINAL AND POLICY BASES FOR SHIFTING COSTS

Understanding the doctrinal landscape of ITA costs is vital. This section explores historical issues, policy, and underlying doctrine.

### *A. Normative Baselines of Cost Shifting*

Norms in international dispute resolution come from various places, such as international conventions, national laws, institutional rules, and international practices. International arbitration costs trace their roots to norms from Roman, U.S., and Swedish law.[102]

The first normative approach traces its roots to Roman law.[103] The "loser-pays" rule—also known as "costs follow the event"—requires losers to compensate winners for their costs.[104] Various civil law jurisdictions use this principle in court litigation and arbitration.[105] In

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100. Reichert & Hope, *supra* note 21, at 30.

101. *See* Franck, *Development*, *supra* note 61; Franck, *Evaluating Claims*, *supra* note 1; *see also* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008) (comparing interpretive modalities of ITA tribunals with other international adjudicative bodies). ICSID and UNCTAD express concerns about costs. UNCTAD, 2009 IIA MONITOR, *supra* note 1, at 11–12; UNCTAD, ISDS, *supra* note 1, at 8–12; Press Release, UNCTAD, UNCTAD Reviews Investor-State Dispute Settlement Cases and Draws Implications for Developing Countries (May 2, 2006), *available at* http://www.unctad.org/Templates/webflyer.asp?docid=6967&intItemID=1634&lang=1 (identifying the cost of ITA as an area of concern); *see also* Anoosha Boralessa, *The Limitations of Party Autonomy in ICSID Arbitration*, 15 AM. REV. INT'L ARB. 253, 292–93 (2004) (discussing the benefits of hiring elite law firms, but explaining that "[a] barrier to hiring such law firms is the cost: in the law firms' defense it should be pointed out that investment arbitration requires an enormous amount of time and work by the team of attorneys on the case to succeed"); Ucheora Onwuamaegbu, *The Role of ADR in Investor–State Dispute Settlement: The ICSID Experience*, 34 NEWS FROM ICSID, no. 2, 2005 at 12, 14; Roberto Dañino, *Making the Most of International Investment Agreements: A Common Agenda*, TRADE OBSERVATORY (Dec. 12, 2005), http://www.tradeobservatory.org/headlines.cfm?refID=78365 (An "issue of concern has been the growing cost of arbitration. This is particularly true for the low-income countries, and for a few small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are.").

102. The rules emanating from the doctrine have independent significance beyond pure national rules, but rather come to represent paradigmatic normative approaches in their own right.

103. Gotanda, *Awarding Costs*, *supra* note 69, at 5; Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 40–42 (1984).

104. Schill, *Cost-Shifting*, *supra* note 33, at 654. Even in the "costs follow the event" rule, there are various rules and exceptions in national jurisdictions that follow this rule. Bühler, *supra* note 68, at 252; *see* Gotanda, *Awarding Costs*, *supra* note 69, at 6–7 (quoting France's and Germany's civil codes).

105. Pfennigsorf, *supra* note 103, at 44 ("[M]ost European countries (1) regard the objective fact of defeat as sufficient ground for imposing the costs on the losing party, without requiring any evidence of fault or bad faith, and (2) include in the costs to be reimbursed to the winner by the loser

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England, although costs were initially not available at common law,[106] this changed[107] and courts of equity permitted judges[108] and arbitrators[109] to shift costs.[110] Jurisdictions following this approach[111] strive to (1) indemnify successful parties; (2) discourage frivolous actions, defenses, or motions; and (3) put parties who have been wronged in the position that they would have been in if the wrong had not been committed.[112]

A second norm reflects a "pay-your-own-way" approach. Under the so-called "American rule,"[113] parties bear their own costs for adjudication irrespective of the outcome.[114] Although there may be supplementary, non-preempted state law,[115] U.S. law generally presumes there is no cost shifting unless expressly permitted by contract, statute, or arbitration rules.[116] Even the "pay-your-own-way" approach has exceptions[117] and

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not only court fees and related costs but also the attorney fees and other expenses incurred by the winner.").

106. The Bailiffs and Burgesses of the Corp. of Burford v. Lenthall, (1743) 26 Eng. Rep. 731, 732 (holding that common law courts have no inherent jurisdiction to order costs but holding courts of equity did, and proceeding to make a costs award on that basis).

107. Arthur L. Goodheart, *Costs*, 38 YALE L.J. 849, 851–55 (1929) (discussing the history of attorney's fees in England).

108. Andrews v. Barnes, [1888] 39 Ch. Div. 133 at 138 (Eng.). In 1875, the English court rules provided express discretion to determine amounts awarded to litigants, including attorney's fees. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993).

109. Mordue v. Palmer, [1870] 6 Ch. App. 22 at 32 (Eng.) ("[W]hen a reference as to costs is made by a Court of Equity, the Court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit.").

110. In many common law jurisdictions, authority to order costs in litigation only rises to orders that shift the full legal costs of representation in those cases of misconduct, fraud, or corruption. Murry L. Smith, *Costs in International Commercial Arbitration*, 56 DISP. RESOL. J. 30, 31 (2001) [hereinafter Smith, *Costs*].

111. *See* Gotanda, *Awarding Costs*, *supra* note 69, at 6 ("Most jurisdictions allocate costs and fees in litigation according to the principle that costs follow the event.").

112. Smith, *Costs*, *supra* note 110, at 30.

113. Other jurisdictions use this method. *Infra* note 128 (describing China and Japan).

114. Bühler, *supra* note 68, at 250; *see also* Gotanda, *Awarding Costs*, *supra* note 69, at 10 ("[T]he parties in litigation must generally bear their own expenses, including attorneys' fees."); Rubins, *Allocation of Costs*, *supra* note 28, at 109–10 (describing the "costs follow the event" and "American rule" approaches).

115. While some states may prohibit shifting of PLC-related expenses (i.e. attorney's fees) in the context of domestic arbitration, they may permit it in the context of international arbitration. *See* Gotanda, *Awarding Costs*, *supra* note 69, at 12. *Compare* CAL. CIV. PROC. CODE § 1297.318 (West 2009) ("(a) Unless otherwise agreed by the parties, the costs of an arbitration shall be at the discretion of the arbitral tribunal. (b) In making an order for costs, the arbitral tribunal may include as costs any of the following: (1) The fees and expenses of the arbitrators and expert witnesses. (2) Legal fees and expenses. (3) Any administration fees of the institution supervising the arbitration, if any. (4) Any other expenses incurred in connection with the arbitral proceedings."), *with* N.C. GEN. STAT. § 1-569.21(b) (2009) (permitting arbitrators to award "reasonable expenses of arbitration" and allowing "reasonable attorneys' fees" in limited circumstances).

116. *See* THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 123:01 (1999); Bühler, *supra* note

gives courts discretion, in extreme circumstances, to shift costs where there is bad faith during the adjudication.[118] The policy choice helps provide access to justice given three key concerns.[119] First, where litigation is uncertain, it is unfair to penalize the loser if there was a good-faith basis for bringing or defending a lawsuit.[120] Second, there is a desire to not unjustly discourage the poor from vindicating their rights and defending their conduct.[121] Third, seeking administrative convenience, detailed proceedings related to cost would create an unnecessary burden on adjudicative administration.[122]

Lars Welamson, a Swedish academic who later became a judge on the Swedish Supreme Court, championed the third normative approach, where parties pay for costs on the basis of relative success and conduct. This approach allocates costs

> on a sliding scale proportionate to the assessment by the court of claims made by the parties; the introduction of such a rule would provide both parties with an incentive to make the claims/offers as

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68, at 257; Wetter & Priem, *supra* note 67, at 280–82; *see also* Metromedia Energy, Inc. v. Enserch Energy Servs., Inc., 409 F.3d 574, 583 (3d Cir. 2005) (permitting recovery of attorneys' fees where permitted by party agreement); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 453 (1988) (explaining that the Uniform Arbitration Act permits an award of costs but does not permit shifting without contractual authorization).

117. *See e.g.*, Ramos v. Lamm, 539 F. Supp. 730, 755–57 (D. Colo. 1982) (listing statutory exceptions to the American Rule); *see also* Vargo, *supra* note 108, at 1578–90 (discussing exceptions).

118. Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064–65 (9th Cir. 1991); WMA Sec. Inc. v. Wynn, 105 F. Supp. 2d 833, 839–40 (S.D. Ohio 2000); *see also* Gotanda, *Awarding Costs*, *supra* note 69, at 13; John W. Hinchey & Thomas V. Burch, *An Arbitrator's Authority to Award Attorney Fees for Bad-Faith Arbitration*, 60 DISP. RESOL. J., May–July 2005, at 10–17; Wetter & Priem, *supra* note 67, at 282–86.

119. *See* Vargo, *supra* note 108, at 1575–87 (providing various exceptions to the pay-as-you-go approach); *see also* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 297–98, 298 n.22 (1990) (discussing the importance of access to justice and citing authorities about the lack of access to justice when parties are denied access to courts by excessive attorneys' fees, particularly when compared to the value of the underlying claim).

120. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 249–50 (1975) (In *Arcambel*, "the inclusion of attorneys' fees as damages was overturned on the ground that '[t]he general practice of the United States is in oposition (sic) to it.'" (footnote omitted) (alteration in original)); Vargo, *supra* note 108, at 1575–78 (describing the evolution of the American Rule).

121. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *see also* Vargo, *supra* note 108, at 1593–96, 1634–35 (arguing that the ultimate justification for the American Rule is access to justice).

122. *Fleishmann*, 386 U.S. at 718 (citing Oelrichs v. Spain, 83 U.S. (15 Wall.) 211, 231 (1872)); Gotanda, *Awarding Costs*, *supra* note 69, at 11.

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> realistic as possible and thus would be the best conceivable method by which to promote settlement on reasonable terms.[123]

In an effort to allocate costs on the basis of certain factors (i.e. "factor-dependent"), the more in parity the amounts claimed and awarded are, the more likely that the claimant will receive full compensation for its costs. This gives parties incentives to make precise damage arguments,[124] while opening the doors to meritorious claims, preventing inflation of damages, and providing compensation where dispute resolution strategies were efficacious.

These different approaches are grounded in rules, tradition, and policy. Despite suggestions that the Roman (i.e., "loser-pays") approach is universal[125] or "axiomatic,"[126] this claim is disputed;[127] or it is at least worthy of empirical verification. The reality is that there are multiple acceptable methodologies for addressing costs.[128] As existing scholarship has not empirically confirmed whether a particular practice is uniform, the

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123. Wetter & Priem, *supra* note 67, at 274; Lars Welamson, *Principer om rattegangskostnader under debatt*, *in* FESTSKRIFT TILL OLIVECRONA 684–709 (1964); Lars Welamson, *Svensk rattspraxis: Civil-och straffprocessratt 1980–1987*, 74 SVENSK JURISTTIDNING 497, 531 (1989). After Professor Welamson joined the Swedish Supreme Court, the Swedish court system adopted this approach to costs. Wetter & Priem, *supra* note 67, at 274–75.

124. *But see* Wetter & Priem, *supra* note 67, at 275 (suggesting a complex approach that may require "[c]omputer models . . . to properly master the intricacies of the system").

125. *See* Bühler, *supra* note 68, at 259 ("Some recently published arbitral decisions hold that 'according to general principles' or 'in accordance with basic procedural principles followed in arbitration', (*sic*) the costs of arbitration should be borne by the party which loses arbitration."); *see also* AMERICAN LAW INSTITUTE, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 176, art. 25 (2004) [hereinafter ALI/UNIDROIT PRINCIPLES] ("25.1. The winning party ordinarily should be awarded all or a substantial portion of its reasonable costs. 'Costs' include court filing-fees, fees paid to officials such as court stenographers, expenses such as expert-witness fees, and lawyers' fees. 25.2. Exceptionally, the court may withhold or limit costs to the winning party when there is clear justification for doing so."); JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 654 (2003) (suggesting there is an emerging trend for tribunals to order losing parties to bear TCE and PLC).

126. Rubins, *Allocation of Costs*, *supra* note 28, at 109; *see* Marc J. Goldstein, *Some Thoughts About Costs in International Arbitration*, INT'L ARB. NEWS, Summer 2003, 16, 18 ("International arbitral practice generally follows the principle that, as a first approximation, costs should 'follow the event,' . . . . This may now be said (with some trepidation) to be a general principle of international law."); Smith, *Costs*, *supra* note 110, at 32; *see also* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 68, at 686.

127. *See* RUBINO-SAMMARTANO, *supra* note 68, at 815.

128. The "loser-pays" rule is followed by common and civil law jurisdictions. The "American rule" (i.e., "pay-as-you-go") is applied in countries like the U.S., Japan, and China, which are major economies that it would be unwise to ignore or minimize. ALI/UNIDROIT PRINCIPLES, *supra* note 125, at 67; Bühler, *supra* note 68, at 250. There is also a robust economic literature that considers that the utility of following either a "loser-pays" or "pay-as-you-go" approach is most appropriate. *See, e.g.*, Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee Shifting When Legal Standards are Uncertain*, 15 INT'L REV. L. & ECON. 205, 205 (1995).

possibility of variance must be acknowledged. To the extent that this variability is written into ITA, it is perhaps unsurprising that variation in doctrinal foundation may create variation in arbitration cost decisions. This variation may, in turn, create difficulties in forecasting cost outcomes and underscore the critique that cost decisions may seem unpredictable.[129]

### *B. Shared Policy Considerations for Cost Shifting*

Despite these different doctrinal approaches, it is critical to remember that there is nevertheless a commonality both in approach and policy. The "loser-pays," "pay-as-you-go," and "factor-dependent" paradigms tend to follow a standard approach by establishing presumptive rules with exceptions and room for discretion to foster policy objectives.[130] What they also have in common is the objective of creating incentives for appropriate party behavior while incorporating systematic concerns of justice.[131] Although the balance weighs differently in different doctrinal approaches, the goal is to promote party welfare in light of the overall public benefit. In the context of ITA, this involves encouraging desirable behavior (i.e., admissions and settlement opportunities),[132] discouraging waste (i.e., tactical delays or bad-faith arguments),[133] and minimizing

129. *See* Bühler, *supra* note 68, at 249 ("[A]rbitral precedent [exists] to support nearly any approach a tribunal may wish to apply to its cost decision. Even cost awards rendered under the same arbitration rules sometimes vary fundamentally without any apparent reason. The bottom line is that it is often impossible to predict with any satisfactory degree of certainty how the costs will be awarded.").

130. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 660, 662–63 ("In recent decades, the American rule . . . has come under increasing questioning and criticism. At the same time, the rule has been riddled with ever more numerous exceptions.").

131. Rowe discusses: (1) "fairness" considerations arising from a "loser-pays" approach, (2) an indemnity approach to provide "full compensation for legal injury", and (3) "punitive emphasis" to deter or punish misconduct rather than to compensate. *Id.* at 653–61; *see also* Bühler, *supra* note 68, at 251 (discussing the value of providing compensation—i.e., "full value" for cost shifts); Gotanda, *Awarding Costs*, *supra* note 69, at 5–6 (explaining the value of indemnifying the winning party to provide full compensation for the legal wrong); Smith, *Costs*, *supra* note 110, at 33 ("The party who is put to the cost of prosecuting a claim should be able to recoup those costs and likewise a party that is put to the cost of defending a claim which is not meritorious should be made whole by an award of full indemnity costs"). By not punishing good-faith, well-managed, or well-intended arbitration claims, the public benefits by not inhibiting critical claims, ensuring equality of arms, and promoting access to justice while minimizing the administrative burdens. Pfennigsorf, *supra* note 103, at 61–64; Rowe, *supra* note 130, at 662, 675.

132. Gotanda, *Awarding Costs*, *supra* note 69, at 5–6; *see also* Wetter & Priem, *supra* note 67, at 330 (explaining that shifting costs permits successful parties to regain expenses incurred in pursuit of their properly brought legal claims and defenses).

133. Gotanda, *Awarding Costs*, *supra* note 69, at 5–6; Pfennigstorf, *supra* note 103, at 41–43.

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inefficient management of procedural issues (i.e., timetables and evidence).

### *C. The Law of Cost Shifting*

Given the variance in normative approaches, some suggest that there is "no general practice as to the treatment of costs" in international arbitration.[134] This section explores the applicable law of costs.

Arbitral tribunals can and should be considering applicable law. The key is to understand the panoply of legal sources for costs. This section addresses key sources implicating cost allocation in ITA, including: (1) express party agreement, (2) institutional rules, (3) national law on arbitration,[135] (4) rules from international courts and tribunals, and (5) practices (i.e., customs and usage of trade). These sources matter as different choices of law modalities could result in different applicable laws and outcomes.[136] As some tribunals have "routinely award[ed] [costs and] attorneys' fees, usually without discussing questions of applicable law,"[137] it begs a fundamental question about conflict of laws—namely, what law is applicable to costs.

Where not made clear through international law, there is likely to be confusion about the law applicable to costs. Dean Gotanda's seminal work observes that different laws may apply to different applicable law issues,[138] and arbitrators may need to undertake a complex choice-of-law

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134. Bühler, *supra* note 68, at 250; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 406 (3d ed. 1999).

135. FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 68, at 685–86. The Second Circuit held the FAA governs the issue of whether attorneys' fees can be awarded and the arbitrators' power. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996); William M. Howard, *Awarding Attorneys' Fees in Connection with Arbitration*, 60 A.L.R. 5TH 669 (1998); *see also* Peter Schlechtriem, *Attorney's Fees as Part of Recoverable Damages*, 14 PACE INT'L L. REV. 205, 207 (2002) ("If the proceedings are governed by an (arbitral) procedural law which gives the court or tribunal the power to grant reimbursement for costs of litigation and the pursuit of a claim according to its own discretion, these same principles should govern its deliberations."). *But see* Schill, *Cost-Shifting*, *supra* note 33, at 657–58 (arguing that uncertainty comes from discretion in arbitration rules).

136. ICSID Convention is a self-contained, exclusive forum that requires consideration of parties' agreement and treaty rules. ICSID Convention, *supra* note 58, art. 42. ITA under other doctrinal regimes (for example, ICSID-Additional Facility cases, ad hoc, or ICC arbitrations under the New York Convention) have a different approach on applicable law. *But see* Smith, *Costs*, *supra* note 110, at 31 ("In most cases the *lex arbitri* does not restrict the award of legal fees and often expressly authorizes indemnity for costs in the nature of legal fees.").

137. Gotanda, *Awarding Costs*, *supra* note 69, at 17–18 (second alteration in original) (quoting GARY B. BORN, INT'L COMMERCIAL ARBITRATION IN THE UNITED STATES 626 (1994)).

138. *See* Gotanda, *Awarding Costs*, *supra* note 69, at 15–17 (identifying the conflict issues in costs and potential substantive and procedural elements); Veijo Heiskanen, *Forbidding Dépeçage:*

analysis to determine the governing law.[139] For international commercial arbitration, these difficulties can mean costs are awarded "'usually without discussing questions of applicable law.'"[140] To the extent that ITA is a rule–of-law institution, arbitrators should (1) cite to legal authority, (2) explain their legal reasoning, and (3) have reliable links between legal reasoning and cost outcome. It is currently an open question whether these normative aspirations are empirically accurate descriptive statements.

### *1. Party Agreement*

Parties generally can agree on cost issues and allocation.[141] Given international arbitration's focus on party autonomy, tribunals and courts tend to enforce the party agreement.[142] Parties have various opportunities to agree on cost allocation. Parties might agree in advance about cost allocation through an express contract, reference to institutional rules with

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*Law Governing Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 367, 375–76 (2009) (describing different types of applicable law in arbitration).

139. The first concern will be what choice-of-law rules apply. The next challenge is whether costs are substantive or procedural, provided that characterization is relevant under the choice-of-law method. Next, issues of how to assess the proper law may require consideration of the law of the arbitral seat, arbitrators' home countries, country of enforcement, or location of institutions with supervisory authority. *See* OKEZIE CHUKWUMERIJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 34–35 (1994); Gotanda, *Awarding Costs*, *supra* note 69, at 16–18; Ole Lando, *The Law Applicable to the Merits of the Dispute*, 2 ARB. INT'L 104, 107 (1986); Peter Nygh, *Choice of Forum and Laws in International Commercial Arbitration*, FORUM INTERNATIONALE, no. 24, 1997, at 13; Jaffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393, 394–95, 399–401, 442 (1988); Michael Pryles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200 (1997). *But see* Nurick, *supra* note 32, at 58 (declining to consider applicable law); Wetter & Preim, *supra* note 67, at 333 ("[U]niversally, the allowability of costs and their allocation is regarded as a matter of procedural law . . . .").

140. Gotanda, *Awarding Costs*, *supra* note 69, at 18 (quoting GARY B. BORN, INT'L COMMERCIAL ARBITRATION IN THE UNITED STATES 626 (1994)).

141. This may depend on the institutional rules and substantive law applicable to the arbitration. In Ireland, parties "are free to agree on how the costs of the international commercial arbitration are to be allocated and on the costs that are recoverable." Klaus Reichert, *Ireland's New International Commercial Arbitration Law*, 11 AM. REV. INT'L ARB. 379, 382 (2000). The national arbitration laws of other countries, which might apply as the place of arbitration or provide the *lex arbitri*, may place limitations on parties' capacity to agree on costs. *See, e.g.*, Arbitration Act, 1996, c. 23, §§ 60–61, sch. 1 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1996/23/section/60 (permitting tribunals to make cost awards but providing that party agreements on costs can only be made after a dispute has arisen and making that rule mandatory); Gotanda, *Awarding Costs*, *supra* note 69, at 14–15; Vargo, *supra* note 108, at 1578.

142. There may be reasons to disregard party choice. Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 87–88 (2d Cir. 2009); Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB., Dec. 1997, at 23–24, 40; Gotanda, *Awarding Costs*, *supra* note 69, at 30.

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cost guidelines, or rules provided in an IIA's offer to arbitrate.[143] The treaty in *Eureko* provided that each party "shall bear the cost of the arbitrator appointed by itself and its representation. The cost of the chairman as well as the other costs will be borne in equal parts by the Parties."[144] To provide a degree of predictability, express agreements offer a clear mandate and cap tribunal discretion.

The empirical reality of how often parties agree to costs in advance is uncertain, and agreement may be a rare phenomenon.[145] While parties can be intractable and unable to agree on costs, agreement is a theoretical option. In *Lemire v. Ukraine*, the award embodying the settlement agreement made each party responsible for its own costs.[146] Without an express choice, tribunals must consult the applicable arbitration rules to assess how the rules supplement (or supplant) the otherwise applicable law.

### *2. Institutional Rules*

Guidance on how costs must or may be allocated also comes from institutional rules. This might be done through express incorporation in a treaty. The 2004 U.S. Model Bilateral Investment Treaty (BIT), for example, permits tribunals to award "costs and attorneys' fees in accordance with this Treaty and the applicable arbitration rules."[147] Cost rules may also become implied terms of the parties' agreement,[148] to provide guidance to parties and arbitrators about addressing costs.[149] Yet

143. *See, e.g.*, Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FOREIGN INVEST. L.J. 232, 236–41, 250–51, 255–66 (1995) (arguing that IIAs are offers to arbitrate—irrespective of privity and a direct contractual relationship—that nevertheless permit qualifying investors to pursue direct action against states).

144. Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Neth-Pol., Sept. 7, 1992, 2240 U.N.T.S. 387, 399, 400.

145. Bühler, *supra* note 68, at 253.

146. Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1, Award Embodying Settlement Agreement (Sept. 18, 2000), *reprinted in* 15 ICSID REV.-FOREIGN INVEST. L.J. 530, 537, 541 (2000), *available at* http://ita.law.uvic.ca/documents/Lemire-Award.pdf.

147. Model Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouraged and Reciprocal Protection of Investment art. 34(1), Nov. 2004, *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter 2004 U.S. Model BIT]. As the U.S. is in the midst of considering changes to its Model BIT, it may be useful to consider cost provisions in greater detail.

148. Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP.L. 1, 49 (2000) (explaining how institutional rules can become implied terms of arbitration agreements).

149. *See* Bühler, *supra* note at 68, at 254 ("If the parties have adopted a certain set of arbitration rules, it must be assumed that such reference includes the provisions therein relating to the

rules diverge on treatment of costs.[150] For ICSID Convention cases, the Convention, the ICSID Arbitration Rules, and the Financial Regulations govern costs.[151] Originally, the draft ICSID Convention provided parties (1) would cover their own PLC and (2) bear TCE equally.[152] As enacted, the distinction was less precise and tribunals have general discretion to assess costs. Article 61 provides:

> (2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.[153]

Rather than only addressing costs at the end, the ICSID Arbitration Rules permit tribunals to be proactive. Arbitration Rule 20 permits tribunals to consult the parties as to "the manner in which the cost of the proceeding is to be apportioned."[154] Although tribunals can assess costs and proportionate allocation[155] "at any stage of the proceeding," final awards must contain any decision regarding costs.[156] The ICSID Rules do not

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determination and allocation of costs."); *see also* Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 120, 122 (2d Cir. 2003) (holding arbitrability of attorney's fees and costs must be decided by an arbitrator, because the parties agreed that "[a]ll disputes . . . concerning or arising out of this Agreement shall be referred to arbitration to the [ICC]," and ICC rules required an arbitrator to make the initial determination of arbitrability).

150. Some rules do not distinguish between PLC and TCE; others do not expressly permit party autonomy; others vary in what standards tribunals use to decide costs. *See infra* notes 153, 158, 161–63, 165–69 and accompanying text.

151. ICSID Convention, *supra* note 58. The ICSID Financial Regulations refer to "direct costs of individual proceedings," which involve the fees and expenses of arbitrators. ICSID, FINANCIAL REGULATION 15, *compiled in* ICSID CONVENTION, REGULATIONS, AND RULES, at 62 (2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_ English-final.pdf.

152. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 112 (2001); *see also* Nurick, *supra* note 32, at 59–60 ("[T]here was extensive debate on the subject of costs . . . . All [propoals] were rejected in favor of giving the tribunal discretion in cost allocation . . . .").

153. ICSID Convention, *supra* note 58, art. 61; ICSID, FINANCIAL REGULATION 14, *compiled in* ICSID CONVENTION, REGULATIONS, AND RULES, at 60 (2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. Article 61(2) arguably demarcates: (1) expenses incurred by parties, (2) tribunal expenses, and (3) ICSID's charges. SCHREUER, *supra* note 152, at 1222–23; *see also* LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 93 (2004).

154. ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, Rule 20(1)(j), *compiled in* ICSID CONVENTION, REGULATIONS, AND RULES, at 99 (2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID ARBITRATION RULES].

155. *Id.* art. 28(1).

156. *Id.* art. 27(2).

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provide standards that guide tribunals about how to exercise their authority.[157] ICSID's Additional Facility Rules have a similar approach.[158]

The 1976 UNCITRAL Arbitration Rules, generally used for ad hoc arbitration, provide specific rules about compensable costs.[159] In any award, regardless of the phase of the case, the 1976 Rules permit an award on costs.[160] They demarcate costs related to TCE[161] as well as the "costs for legal representation and assistance of the successful party."[162] The 1976 UNCITRAL Rules provide tribunals guided discretion about how to allocate TCE by using a "loser-pays" approach that takes into account "the circumstances of the case."[163] The recent 2010 revisions to the UNCITRAL Arbitration Rules have a similar demarcation in different types of costs, namely, the costs of the tribunal and institution as well as the parties' own legal fees.[164] PLC decisions, in contrast, offer tribunals more discretion to consider "the circumstances" and reasonableness.[165]

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157. Gotanda, *Awarding Costs*, *supra* note 69, at 23.

158. The Additional Facility Rules require tribunals to consult the parties on cost allocation and provide cost decisions in the award but do not provide standards for cost allocation. ICSID, ADDITIONAL FACILITY RULES, at 58, 67, 69 (2006), *available at* http://icsid.worldbank.org/ICSID/staticfiles/Facility/AFR_English-final.pdf [hereinafter ICSID/AF RULES]. ICSID fact-finding and conciliation rules require that fees from third-party neutrals and ICSID be "borne equally by the parties" and make each party responsible for "any other expenses it incurs." ICSID/AF RULES 22, 42.

159. 1976 UNCITRAL Rules, *supra* note 71.

160. *See id.* arts. 32, 38 (providing the tribunal authority "to make interim, interlocutory, or partial awards" and stating that the tribunal "shall fix the costs of arbitration in its award"). The 2010 rules express that the 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." U.N. Comm'n Int'l Trade [UNCITRAL], Arbitration Rules, art. 42(2) (2010), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/revised/arb-rules-revised-2010-e.pdf [hereinafter 2010 UNCITRAL Rules].

161. 1976 UNCITRAL Rules, *supra* note 71, art. 38 ("The term 'costs' includes only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the arbitral tribunal; (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; . . . [and] (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.").

162. *Id.* art. 38 ("(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.").

163. *Id.* art. 40(1).

164. 2010 UNCITRAL Rules, *supra* note 160, arts. 40–41.

165. 1976 UNCITRAL Rules, *supra* note 71, art. 40(2). The 2010 UNCITRAL Rules are somewhat similar and require costs "shall in principle be borne by the unsuccessful party" and that the tribunal can apportion costs as it determines is "reasonable, taking into account the circumstances of the case." 2010 UNCITRAL Rules, *supra* note 160, art. 42. They also, however, require separate accountings for arbitrators, reasonableness for arbitrator fees, and arbitrators "inform[ing] the parties as to how it proposes to determine its fees and expenses." *Id.* art. 41.

The SCC makes clear demarcations between TCE and PLC,[166] permits parties to retain autonomy about how costs are apportioned, and provides tribunals with limited guidance on allocating costs. For the last element, SCC Rules permit the tribunal to decide TCE and PLC "having regard to the outcome of the case and other relevant circumstances."[167] The SCC neither particularizes how to exercise discretion nor suggests circumstances relevant to cost decisions. Other major arbitral institutions, like the London Court of International Arbitration (LCIA)[168] and the International Chamber of Commerce (ICC),[169] have somewhat similar approaches.

### *3. National Laws*

Recognizing that there is no international convention on the treatment of costs in investment treaty arbitration,[170] the next key source is national law.[171] National laws can grant arbitrators authority to address international arbitration costs[172] and run the gamut of cost approaches. One

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166. Stockholm Chamber of Commerce (SCC), Arbitration Rules, art. 43 (2007), *available at* http://www.sccinstitute.com/filearchive/2/21686/2007_arbitration_rules_eng.pdf [hereinafter SCC Rules] (providing that "Costs of the Arbitration" include tribunal and institutional fees and describing separate rules for party costs, which can include "any reasonable costs incurred by another party, including costs for legal representation").

167. *Id.* arts. 43(5), 44.

168. Although the LCIA has highly detailed cost rules, none of the cases in the data set used them. London Court of International Arbitration (LCIA), Arbitration Rules, art. 28.2–28.4 (1998), *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx [hereinafter LCIA Rules].

169. Similar to ICSID, the ICC fails to clarify how tribunals should exercise their discretion. International Chamber of Commerce (ICC), Rules of Arbitration (1998), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf [hereinafter ICC Rules]; W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 91–96 (3d ed. 2000) ("Rules authorize the arbitral tribunal to decide that 'costs follow the event' [but] they do not compel this solution"); *see also* ICC Rules, *supra*, art. 31; Rubins, *Allocation of Costs*, *supra* note 28, at 112 (suggesting the ICC approach to costs "do[es] not differ substantially" from ICSID).

170. The ICSID Convention is the only exception, but ICSID Convention cost-shifting rules only apply via party agreement through consent where: (1) states assent to ICSID-Convention arbitration, and (2) investors elect this form.

171. This national law may apply by virtue of: (1) the place of arbitration (i.e. *lex arbitri* applicable to the arbitration), or (2) the law that may form part of the substantive law applicable to the agreement to arbitration. If these are different, the applicable law is a complex question beyond the scope of this Article.

172. *See, e.g.*, John Y. Gotanda, *Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L L. 95, 132 n.168 (2005) (collecting the law of various countries on issues of cost shifting in international commercial arbitration); Gotanda, *Fees*, *supra* note 39, at 5–8. A comprehensive comparative assessment of national law is beyond the scope of this Article, yet it is prudent to offer a flavor of the orientation as, where it applies, national law can affect cost decisions when: (1) providing supplementary provisions

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option is silence on costs, exemplified by the UNCITRAL Model Law on International Commercial Arbitration.[173] Another option is unfettered discretion. Neither Swiss Private International Law nor the French New Code of Civil Procedure guides or restrains arbitrators' approach to costs.[174] Some countries, like Germany[175] and England,[176] give more guidance but tend to prefer a "loser-pays" approach. At the other end of the spectrum, the U.S. and Japan[177] follow the "pay-your-own-way" model.

### *4. International Case Law*

The Statute of the International Court of Justice suggests other relevant authority on costs,[178] including decisions of international judicial bodies.[179]

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where the parties' arbitration agreement or arbitration rules (if any) are silent on costs, (2) arbitrators consult the parties' home jurisdictions to consider party expectations, and (3) the law of the place of arbitration that may trump party agreement as in *Reliastar*. *See* Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81 (2d Cir. 2009) (holding, despite party agreement to split costs, to shift costs to sanction bad-faith behavior); Bühler, *supra* note 68, at 256 (describing the role of party expectation from national law).

173. The 1985 Model Law did not address costs, perhaps given normative variations. UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17/Annex I (June 21, 1985), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf; *see also* UNCITRAL First Working Group Report, U.N. Doc. A/CN.9/460, ¶¶ 106–13 (Apr. 6, 1999) (suggesting costs were an inappropriate subject for the Model Law); PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 356–57 (2d ed. 2005) ("[W]ide support was expressed for the view that costs should not be dealt with in the text. . . . [I]t was preferred that the issue be left to the individual states."). The 2006 Model Law did not address assessment or apportionment of PLC or TCE. UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, art. 17G, U.N. Sales No. E.08.V.4 (2008).

174. Bühler, *supra* note 68, at 253–54.

175. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 1, 1998, b. X, c. VI, ZPO, § 1057(1) (Ger.), *translated in* Georges R. Delaume, *Germany: Act on the Reform of the Law Relating to Arbitral Proceedings*, 37 I.L.M. 790 (1998) (giving tribunals discretion to allocate costs but requiring them to "take into account consideration of the circumstances of the case, in particular the outcome"); *see also* Guido Santiago Tawil & Rafael Mariano Manovil, *Argentina*, 2005 INT'L COMP. LEGAL GUIDE TO: INT'L ARB. 40, 43, *available at* http://www.bomchil.com/cas/articulos/2005-01-01-IntlArbitration.pdf (describing the Argentine approach to costs as "arbitrators may award fees and costs . . . . The general principle is that the winning party is entitled to recover its fees and costs as regulated in the law, which basically provides for fees as a percentage of the award.").

176. The English Arbitration Act gives tribunals the power to award costs "on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs." English Arbitration Act, 1996, § 61(2), c. 23, sch. 1 (Eng.), *available at* http://www.legislation.gov.uk/ukpga/1996/23/section/60.

177. *See supra* note 128.

178. Statute of the International Court of Justice art. 38(1), June 26, 1946, 59 Stat. 1055, 8 U.N.T.S. 993.

179. Franck, *Legitimacy Crisis*, *supra* note 7, at 1611–12 nn.434–37.

This Article focuses on two international law entities with developed case law, namely the Iran-U.S. Claims Tribunal (IUSCT) and the International Court of Justice (ICJ).

IUSCT's mandate to resolve disputes related to investors and states has drawn upon the 1976 UNCITRAL Rules (in a slightly modified form) to resolve disputes[180] and address costs and cost shifting.[181] As Iran and the U.S. pay TCE, the key cost issues relate to PLC and limited administrative expenses.[182] The rules presume that the unsuccessful party, in principle, will bear administrative costs, but the tribunal will "tak[e] into account the circumstances of the case" to determine what apportionment is reasonable.[183] Irrespective of the rules' default preference for the "loser-pays" approach, part of the IUSCT's calculation of reasonableness also involves party conduct. The IUSCT has shifted costs to make winners pay, particularly in cases involving process abuse or misuse. While this Article does not provide a comprehensive empirical analysis of the IUSCT,[184] IUSCT has focused upon inhibiting dilatory tactics, promoting compliance with tribunal decisions, or avoiding inappropriate conduct.[185] The net

180. ALAN REDFERN, MARTIN HUNTER & MURRAY SMITH, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 50–51 (2d ed. 1991) (describing history of the IUSCT); *Background Information*, IRAN-UNITED STATES CLAIMS TRIBUNAL, http://www.iusct.org/background-english.html (last visited on Feb. 27, 2011).

181. *See* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 16–20, 760–62 (1998) (referring to modified use of UNCITRAL Rules for costs).

182. Article 38(c) refers to the costs for "legal representation and assistance" to the extent that they are "reasonable." Articles 38(a),(b) refer to administrative costs—for experts and other witnesses—requested by the tribunal. Iran-U.S. Claims Tribunal, Tribunal Rules of Procedure art. 38, May 3, 1983, *available at* http://www.iusct.org/tribunal-rules.pdf.

183. *Id.* art. 40.

184. An article analyzing one year of tribunal cost decisions ($n$=41) found that only ten awards adjusted costs and "[m]ost often, no analysis is offered to explain the award or denial of costs." Nurick, *supra* note 32, at 65.

185. RUBINO-SAMMARTANO, *supra* note 68, at 818. Reasonable costs might depend upon party behavior, the amount at stake, and the degree of success. In *Behring*, a failure to respond to tribunal orders justified an award of US$60,000. Behring Int'l Inc. v. Islamic Rep. of Iran Air Force et al., 27 IRAN-U.S. CL. TRIB. REP. 218 (1991). In *Sylvania*, where an investor prevailed on a central contract claim against Iran but lost on other contract issues, the Tribunal required Iran to pay Sylvania's "reasonable" US$50,000 in legal fees given that the case "involve[d] factual and legal issues that [we]re neither of extreme nor of quite ordinary complexity in comparison to other cases before the Tribunal." Sylvania Technical Sys., Inc. v. Iran, 8 IRAN-U.S. CL. TRIB. REP. 298, 323–24 (1985). Judge Holtzman articulated specific factors to guide cost assessments: (1) whether costs were claimed; (2) whether lawyers were necessary in light of the issues of fact and law at stake and existing international practice; (3) whether costs were reasonable given the time spent, case complexity, and from where the lawyers originated; and (4) the circumstances of the case, including relative success. *Id.* at 329, 332–36 (asserting reasonable costs were US$265,000); *see also* Nurick, *supra* note 32, at 66–68.

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effect suggests that, as a practical matter, the IUSCT employs a "factor-dependent" approach.

The ICJ approach is less about discretion and more about precision. The rule itself is concise: "Unless otherwise decided by the Court, each party shall bear its own costs."[186] For litigation among states, the rule appears to prefer the "pay-your-own-way" approach, although tribunals retain a degree of discretion. The ICJ could exercise this discretion to foster policy goals such as seeking indemnification of parties where states have acted wrongfully.[187]

### 5. *Sources of Soft Law and Practice*

Sources of law may also be relevant to cost analyses, such as the commentary of academics, international practice, and other arbitral awards.[188] Commentators offer guidance via scholarship related to international commercial arbitration,[189] ICSID arbitration,[190] and investor-state arbitration.[191] As the research was not designed to investigate ITA disputes and costs on a holistic basis, it is a useful starting point for future inquiry. Nevertheless, for the targeted objective of studying ITA costs, given concerns of external validity, it is useful to identify methodological limitations related to: (1) under-inclusivity,[192] (2) over-inclusivity,[193] (3) temporal gaps,[194] (4) failure to explain methodology,[195] and (5) sample

186. Statute of the International Court of Justice, *supra* note 178, art. 64.

187. Draft Articles on State Responsibility art. 42(1), Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, at 63, U.N. Doc. A/51/10 (1996), GAOR, 51st Sess., Supp. No. 10 (1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/CN.4/SER.A/1996/Add.1; *see also* The Factory at Chorzów (Ger. v. Pol.), Judgement, 1928 P.C.I.J. (Ser. A), No. 17, at 47 (Sept. 13) ("[A]s far as possible, [reparation must] wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed.").

188. *See* Franck, *Legitimacy Crisis*, *supra* note 7, at 1611–12 nn.434–42 (discussing standards promulgated by the ICJ and possible application to treaty arbitration).

189. Gotanda, *Awarding Costs*, *supra* note 69.

190. Nurick, *supra* note 32.

191. Ben Hamida, *supra* note 20; Rubins, *Allocation of Costs*, *supra* note 28.

192. Professor Ben Hamida's analysis is underinclusive and focuses only on awards rendered against the investor rather than those against the investor *and* the state. Ben Hamida, *supra* note 20; *see also* MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA, art. 1135 (2006) (looking systematically at cost awards for NAFTA arbitrations—not ITA generally).

193. *See* Rubins, *Allocation of Costs*, *supra* note 28, at 112–24 (providing overinclusive analysis that includes cases arising under investment treaties as well as investor-state disputes from traditional commercial agreements); *see also* Nurick, *supra* note 32, at 58 (same); UNCTAD, ISDS, *supra* note 1, at 3–9 (failing to offer methodology and referring to a US$824 million case, *CSOB v. Slovak Republic*, when the compensation was not based upon breach of an IIA).

194. Nurick, *supra* note 32, at 60–64 (referring to eight different ICSID cases—*MINE*, *LETCO*, *Klöckner*, *Amco*, *Benvenuti*, *AGIP*, *AAPL*, and *SOABI*—but only *AAPL* arose under an investment

bias.[196] The last aspect is noteworthy as cognitive biases[197] create a possibility of inadvertently selecting unrepresentative samples or examples that do not reflect plausible counternarratives.[198] Using data and hypotheses directed toward ITA, this research attempts to address methodological differences and explore the treatment of cost in ITA.

## III. EMPIRICAL ANALYSIS

Costs in ITA do not appear to be completely rationalized. It is not clear that cost decisions follow a predictable pattern, rely on legal authority, or use consistent rationales. There has been no empirical research about how and why tribunals in ITA make cost determinations. War stories and

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treaty).

195. *Compare* Ben Hamida, *supra* note 20 (failing to explain data selection process and to define certain terms), *and* Goldstein, *supra* note 126, at 10 nn.21–25 (discussing an "informal survey" without disclosing methodology), *and* Reichert & Hope, *supra* note 21, at 30 (failing to provide underlying data or methodology), *and* Schill, *Cost-Shifting*, *supra* note 33, at 673 (failing to identify the sample and unit of analysis), *with* Franck, *Empiricism*, *supra* note 8, at 786–88 (gathering sources to articulate good social science practices).

196. *See* Bühler, *supra* note 68, at 261 (using potentially unrepresentative sample); Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 409, 427–29 (2009) (using *Metalclad* to analyze ITA costs); Goldstein, *supra* note 126, at 5, 10 nn.21–25 (describing "an overall sense that law and practice are moving in the direction of more generous awards of legal costs to deserving prevailing parties," citing two cases and no counter-points); Salacuse, *supra* note 59, at 142–43 (failing to explain sample selection); Schill, *Cost-Shifting*, *supra* note 33, at 659 (stating that tribunal reasoning on costs is scarce and only citing *Metalclad*).

197. Cognitive biases include: (1) confirmation bias, namely, the tendency to search for and interpret information in a way that confirms one's perceptions; (2) expectation bias, namely, publishing information that agrees with expected outcomes and downgrading data that appear in conflict with one's expectations; (3) selective perception, namely, the tendency for expectations to affect perceptions; (4) the projection bias, namely, the tendency to assume unconsciously that others share similar thoughts, beliefs, or positions; and (5) blind spot bias, namely, the tendency to not compensate for one's own cognitive biases. *See, e.g.*, SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCH. 1121 (1999); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1468–81 (2006).

198. *See* Peterson & Gallus, *supra* note 82, at 72 (stating, without comprehensive data, that "BIT disputes often last several years, in which time, lawyer, arbitrator and institutional fees can amount to several million dollars" but offering a useful baseline for future empirical analysis (footnote omitted)); Smith, *Costs*, *supra* note 110, at 30 ("An informal survey indicates that many North American arbitrators are overly influenced by litigation precedents and only award full legal fees and other party expenses on rare occasions. At the same time, there is anecdotal evidence that some of the most experienced international arbitrators from the United States commonly award legal fees . . . .").

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related generalizations are insufficient, as it can be unclear whether these instances are representative of the larger whole. Moreover, uncontextualized examples do not permit parties to anticipate where, when, why, and how tribunals will use and apply their authority to shift costs. The information void prevents parties from accurately calculating dispute resolution risk. This gap adversely affects parties' capacity to make informed decisions about how to conduct their dispute resolution process, which might involve basic choices such as the decision to initiate arbitration, raise particular arguments, or engage in other forms of dispute resolution. The aim of this research is to begin providing systematic information of the international practice to promote appropriate doctrinal and normative choices about the use of investment treaty arbitration.

### *A. Methodology*

This research used existing archival data collected according to previously described methods[199] to explore PLC and TCE. The data came from the population of 102 investment treaty awards from 82 different cases that were publicly available before June 1, 2006. As identified in previous literature and this Article, there are inevitable limitations that derive from the data collection process.[200]

Nevertheless, using this data—which is the only data set known to the author that describes the process of data selection, coding, and inter-coder reliability assessments[201]—the objective of this quantitative research was to assess hypotheses about cost amounts, cost allocations, justifications for cost determinations, and other associated costs variables. The research explores three questions using a combination of descriptive and associative modalities. First, the research considers whether there is one uniform approach for cost determinations. It then explores the actual decisions, dollar amounts involved in PLC and TCE awards, and percentage of shifts for PLC and TCE. It also explores whether a shift of either PLC or TCE is reliably associated with winning an ITA dispute. Second, the research considers the extent of the justification for cost decisions by exploring (1) whether there is any rationalization for the decision, (2) what legal authority (if any) is used to justify the decision,

199. Franck, *Evaluating Claims*, *supra* note 1, at 24, 52; *see also* Codebook [hereinafter Codebook]. The largest sub-segment of the data set was from ICSID awards ($n$=60), whereas there were also awards from the SCC ($n$=5) and ad hoc awards ($n$=17). Franck, *Evaluating Claims*, *supra* note 1, at 38–41.

200. Franck, *Evaluating Claims*, *supra* note 1; *infra* notes 327–33.

201. Franck, *Evaluating Claims*, *supra* note 1, at 16–23.

and (3) what rationale (if any) is relied upon to explain the decision. Third, the research assesses links to cost variables and considers whether there were reliable links between (1) PLC and TCE outcomes, (2) amounts claimed and TCE, and (3) amounts awarded and TCE.

### *B. Scope of Cost Decisions*

Out of the 102 total awards in the pre-2007 population analyzed, eighty awards involved some analysis of PLC, TCE, or possibly both types of costs.[202] Out of the 102 awards, there were fifty nonfinal awards, and of those nonfinal awards, nineteen were silent on the issue of costs, twenty-six reserved cost decisions for the future, and five made substantive cost determinations. Out of the 102 awards, there were fifty-two final awards, and of those awards, three lacked decisions on costs, and forty-nine made substantive cost decisions. See Table 1.

TABLE 1: BREAKDOWN OF TREATMENT OF COSTS IN ARBITRATION AWARDS AND AWARD FINALITY

| | Treatment of Costs | | | |
|---|---|---|---|---|
| *Award Finality* | *No Costs Reference* | *Cost Decision Reserved* | *Substantive Decision Made* | *Total* |
| *Nonfinal Award* | 19 | 26 | 5 | 50 |
| *Final Award* | 3 | 0 | 49 | 52 |
| Total | 22 | 26 | 54 | 102 |

202. Of the eighty awards, approximately fifty contained TCE decisions, and a subset (*n*=17) quantified TCE. Of the same eighty awards, fifty-four contained PLC decisions, and a subset (*n*=11) quantified PLC shift. *Id.* at 68–69. Of the original 102 awards, the remaining twenty-two did not refer to, reserve, or make a substantive determination of costs. *See* Codebook at 10 (defining "Treatment of Costs").

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Although tribunals made substantive cost determinations in nonfinal awards, they did so in a limited number of cases.[203] The lack of substantive cost decisions in the nonfinal awards was striking. While there may be practical reasons for failing to issue a cost decision at an early stage,[204] tribunals were not doctrinally prohibited from making cost determinations before a final award.

The provision of early cost decisions could, however, provide useful guidance to the parties about the ultimate cost implications, insights for ongoing settlement opportunities, and feedback for modulating parties' tactical choices during arbitration. This might include, for example, a statement that certain activities—such as success on aspects of a claim, deleterious tactics, or "best practices" for lawyer conduct—may result in particular consequences. Likewise, it might involve clarifying whether, in accordance with the applicable law, the tribunal will follow a "loser-pays," "pay-your-own-way," or "factor-dependent" model.[205] By providing advance guidance to parties about the possible pay-off matrix for their behavior, although it would not guarantee constructive conduct, tribunals could create incentives for productive and efficient party activity. The gap suggests that arbitral tribunals may be missing a critical opportunity to provide incentives to encourage appropriate behavior during the dispute resolution process, give parties information for their dispute resolution risk calculus, manage expectations, and enhance legitimacy by being clear about when, where, why, and how they will exercise their adjudicative discretion.

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203. The nonfinal awards were *Wena*, *UPS*, *Eureko*, *Ethyl*, and *CME*. Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion (Aug. 19, 2005), *reprinted in* 12 ICSID REP. 335 (2007), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf; CME Czech Republic B.V. v. Czech Republic, Partial Award (Sept. 13, 2001), *reprinted in* 9 ICSID REP. 121 (2006), *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf; United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction (NAFTA Ch. 11 Consolidation Trib. 2002), *available at* http://ita.law.uvic.ca/documents/UPS-Jurisdiction.pdf; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award on Merits (Dec. 8, 2000), 41 I.L.M. 896 (2002), *available at* http://ita.law.uvic.ca/documents/Wena-2000-final.pdf; Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998), *available at* http://Ita.law.uvic.ca/ documents/Ethyl0Award.pdf.

204. Tribunals may find it easier to assess costs in the final award because the parties' and tribunal's costs are fixed and the tribunal has fulfilled its obligations of impartiality.

205. The tribunal may not, for example, know who the "loser" is or be able to estimate the parties' "relative success" until the final determination. Nevertheless, tribunals might offer guidance to parties—even in a jurisdictional award—regarding how behavior, success, or other factors (either related to the jurisdiction or other phases) may affect the ultimate treatment of costs. Given the doctrinal ambiguity and discretion, advance notice can promote incremental management of party expectation and related behavior.

http://openscholarship.wustl.edu/law_lawreview/vol88/iss4/1

### *C. Hypothesis 1: Descriptive Scope of Cost Decisions*

#### *1. Substantive Outcomes of PLC and TCE*

One of the controversial areas in the literature is whether there is a "traditional" approach to cost shifting and, if so, what format that approach follows.[206] As ITA is a hybrid of public international law disputes (where two states litigate on the basis of the "pay-your-own-way" approach) and commercial arbitration involving private parties (arguably following a "loser-pays" or "factor-dependent" approach), the research hypothesis was that tribunals would vary in how they addressed costs.

Overall, the data supported the hypothesis that tribunals diverged in their approach to costs. There were seven different theoretical permutations for allocating PLC and TCE, and tribunals used nearly every one. While there was no one uniform approach to cost allocation in the pre-2007 data set, certain themes emerged suggesting some systemic balance in cost awards.

First, the majority of awards did not involve either a shift in PLC costs or a deviation from the baseline that parties equally shared TCE ($n$=33). This generally occurred irrespective of which party ultimately won. Second, there were equivalent numbers of cases shifting both PLC and TCE to claimants ($n$=6) or respondents ($n$=6). Third, in those few cases where tribunals only shifted TCE, the claimants and respondents were successful in reasonably equal measure. See Table 2.

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206. *See supra* notes 103–28.

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TABLE 2: AWARDS MAKING COST DECISIONS ON PLC AND TCE AS A FUNCTION OF THE ULTIMATE WINNER (*N*=52)

| *Cost Decisions* | *Number of Awards* | *Ultimate Winner: Substantive Result* |
|---|---|---|
| *Claimant Pays PLC Shift and more than 50% of TCE* | 6 | Respondent wins=5<br>Nonfinal awards=1[207] |
| *Respondent Pays PLC Shift and more than 50% of TCE* | 6[208] | Claimant wins=4<br>Nonfinal awards=2[209] |
| *No PLC Shift and TCE Shared Equally* | 33 | Claimant wins=12<br>Respondent wins=19<br>Settlements=2 |
| *No PLC Shift but Claimant pays more than 50% of TCE* | 2 | Respondent wins=2 |
| *No PLC Shift but Respondent pays more than 50% of TCE* | 4 | Claimant wins=3<br>Respondent wins=1 |
| *Claimant Pays PLC Shift and TCE shared Equally* | 0 | Not Applicable |
| *Respondent Pays PLC Shift and TCE shared Equally* | 1 | Claimant wins=1 |

207. *Ethyl Corp. v. Canada* was a jurisdictional award that did not involve a final determination of the merits of the treaty claim but did provide a determination on costs. *Ethyl Corp.*, 38 I.L.M. at 708.

208. *Wena Hotels v. Egypt* was coded as only involving a PLC decision in an award with a Claimant win, but is referred to here as a case involving both PLC and TCE decisions for the sake of convenience. *Wena Hotels Ltd.*, 41 I.L.M. at 896.

209. The two "nonfinal" awards both involved a determination on the merits in favor of the claimant that the respondent had breached the relevant IIA; but as there was not yet a damage award to specify the degree of loss, the claims were ongoing and could not be coded as an "Ultimate Win." *See* Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion (Aug. 19, 2005), *reprinted in* 12 ICSID REP. 335 (2007), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAward andDissenting Opinion.pdf; CME Czech Republic B.V. v. Czech Republic, Partial Award (Sept. 13, 2001), *reprinted in* 9 ICSID REP. 121 (2006), *available at* http://ita.law.uvic.ca/documents/CME-2001 PartialAward.pdf; *infra* note 294 (defining that variable).

The initial analyses from the pre-2007 data contradicted certain existing academic commentary[210] about the existence of a "traditional" or "universal" approach to ITA costs. There was variation in the population, and the variation was not applied in an asymmetric manner. This suggests that stakeholders should be aware that there is more than one way in which tribunals can and will allocate costs. It also suggests that, while the "pay-your-own-way" baseline was dominant, future analysis should consider whether additional data exhibits enhanced variation and suggests a different baseline (i.e., a "loser-pays" or "factor-dependent" approach).[211]

### 2. *TCE and PLC in Dollar Values*

There are various suggestions about the scope of costs and their purported allocations in some international arbitrations. Some suggest that because there are "large amounts of money involved,"[212] costs are "prohibitive" or "practically limit[] access" unless investors are "very wealthy humans or [] multinational enterprises."[213] At a recent conference, Professor Philippe Sands observed that legal costs arising in investment arbitration "can be jaw dropping in terms of amount, having regard to the nature and scope of the issues and proceedings involved."[214] Dean

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210. *See supra* notes 125–26.

211. Although this analysis is based on pre-2007 data, later data does not appear to be markedly different from this baseline. *See* Gotanda, *Fees*, *supra* note 39, at 1, 12–14 (describing similar permutations in cost awards from 2008–2009 where the "pay-your-own-way" approach dominates); David Smith, Note, *Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration*, 51 VA. J. INT'L L. 749, 755–56 (2010) [hereinafter Smith, *Shifting Sands*] (replicating aspects of this research with 2008–2009 data from cost decisions in final awards and revealing similar results, particularly with regard to some variability in cost shifting but with a majority of cases resulting in no shift of costs). *But see* Uzma Balkiss Sulaiman, *New ICSID Award States Rule on Costs "May be Changing,"* GLOBAL ARB. REV., Oct. 16, 2009 ("[I]nvestment tribunals are indeed looking at the question of costs more seriously, and perhaps using a loser-pays rule more often . . . ."); *see also* EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award and Dissenting Opinion (Oct. 8, 2009), *available at* http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf (finding for the majority that a "loser-pays" approach is "growing [in] application to investment arbitration" and having the dissent articulate that "some recent ICSID cases have shown a certain tendency to move in the direction of commercial arbitration in assessing costs, though it is too soon to know whether a different approach may be taking hold" and preferring the "pay-your-own-way" approach).

212. Nurick, *supra* note 32, at 57.

213. Van Harten & Loughlin, *supra* note 37, at 138; *see also* Gottwald, *supra* note 70, at 274 ("Due to a lack of relevant legal expertise within their own government ministries, many developing nations are forced to hire one of a handful of international law firms at a cost of millions per year. Meanwhile, those who cannot afford outside counsel face scattered, incomplete sources of precedent and have nowhere to turn for affordable legal assistance." (footnote omitted)); *cf.* REED ET AL., *supra* note 153, at 91–93 (suggesting, at ICSID, the costs of TCE are low, but PLC is high).

214. Philippe Sands, Q.C., Keynote Address at University of Sydney Law School International Investment Treaty Law and Arbitration Conference, Conflict and Conflicts: Challenges and Prospects

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Gotanda meanwhile refers to cases with total costs (i.e., complete information on PLC and TCE) in the order of US$21 million and US$19 million.[215] In another instance, commentators suggested US$1.35 million in arbitrator fees denied access to justice "because investors must pay half of the cost of an investment arbitration, and the cost is prohibitive . . . [and this] practically limits access to those investors who have a significant monetary interest in the outcome of a dispute."[216]

The data suggests that, although not inconsequential, tribunal costs were not necessarily exorbitant. The average TCE was US$581,333. The minimum was US$31,088 and maximum was US$1,500,000 (*n*=17; SD=512,553). TCE was paid, on average, in reasonably equivalent amounts by investors (US$289,753) and states (US$291,580).[217] Paying approximately US$600,000 for a tribunal is different from paying a minimal filing fee of under US$500 in a national court[218] but may arguably be cheaper since (1) defenses of sovereign immunity may be available in national courts but not treaty arbitration, (2) there may be concerns with the independence and integrity of the judiciary, and (3) enforcement of arbitration awards is doctrinally streamlined as compared to court judgments.

The average PLC shift was in the order of US$655,407. The minimum was US$22,200 and the maximum was US$2,989,424 (*n*=11; SD=873,178).[219] This meant, beyond a party's own legal expenses and the risk of losing a case, parties arguably risked an additional US$1.2 million (i.e., possibly paying for 100% of the tribunal and a portion of the other

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for Investment Treaty Arbitration (Feb. 19, 2010), *available at* http://www.law.usyd.edu.au/events/2010/Feb/ITAbrochure_Feb10_for_WEB.pdf.

215. Gotanda, *Fees*, *supra* note 39, at 5; Plama Consortium Ltd. v. Bulgaria, ICSID Case No. ARB/03/24, Award, ¶¶ 310–12 (Aug. 27, 2008), *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf; *see also* Gotanda, *Awarding Costs*, *supra* note 69, at 2–3 ("It is not uncommon for such [commercial arbitration] costs to run into millions of dollars, sometimes even exceeding the amount in dispute." (footnote omitted)).

216. Van Harten & Loughlin, *supra* note 37, at 138 (footnotes omitted); *see supra* note 81 (discussing unpublished UNCTAD data related to the possible scope of costs for certain states).

217. For Claimant's TCE, the standard deviation was 371,382; and for Respondent's TCE, the standard deviation was 305,618.

218. The filing fee in the United States District Court for the Southern District of New York is US$350. Gotanda, *Fees*, *supra* note 39, at 3; *Representing Yourself in Federal Court*, UNITED STATES DISTRICT COURT, http://www.nysd.uscourts.gov/courtrules_prose.php?prose=fees (last visited Mar. 6, 2011); *see also* 28 U.S.C. § 1914(a) (2006).

219. The data was limited given the standard deviation and size of the pre-2007 then-known population. One hypothesis is that PLC amounts against investors was higher as states were required to engage in greater effort to particularize their costs in affidavits as there were not hourly bills since government lawyers may not have been paid by the hour. This may not hold true if private law firms represented states. *See also infra* notes 224–34 (discussing limitations of data).

side's lawyers). Considering that this is more than 10% of the average amount awarded, these costs were not irrelevant, particularly when compared to the US$194,000 average costs for just one side's PLC in U.S. domestic antitrust litigation.[220] The combined costs—namely, paying for both a tribunal and one's own legal fees, particularly as this is the most prevalent baseline—may prove troubling. It suggests that where attorney's fees and tribunal costs exceed the possible damages (i.e., for smaller investments), those fiscal costs may deter investors with legitimate claims of international law violations from arbitrating their claims. In other words, cost decisions can be critical to assessing the utility of arbitration and its efficacy in promoting access to justice and the rule of law.

### *3. Percentage of PLC and TCE Allocation*

Although some have suggested PLC awards in international commercial arbitration are 1/3 of party costs,[221] the data did not support that hypothesis in investment arbitration. For awards where PLC shifts (*n*=8) were available, there were a range of shifts. None of the awards reflected a 33% shift. Rather, three awards contained a 100% shift, whereas the remaining awards shifted PLC 80%, 76%, 75%, 15.4%, and 13.5%. While there was missing data, the existing data showed a broad range of PLC shifts, which suggests an approach more consistent with the "factor-dependent" approach. See Table 3.

TCE allocations also varied. The largest number of awards (*n*=34) was concentrated on a 50%/50% split of costs, which was consistent with the "pay-your-own-way" approach. A small cluster contained a 100%/0% split in favor of the claimant TCE (*n*=4) and similar 100%/–0% split in favor of the respondent (*n*=4). There is a degree of balance for whether investors or states paid more than 50% of the TCE. Respondents contributed more than 50% to TCE in only nine awards, and investors contributed more than 50% in six awards. See Table 3.

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220. *See* Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1012–14 (1986) (collecting data and finding average settlements were US$1,244,000, but a party's mean costs were US$194,000 (median=US$59,000) in 1984 dollars); *see also* Robert T. Duffy, *Awards of Costs to Taxpayers: A Reform Proposal for Section 7430*, 48 TAX LAW. 937, 944–45 (1995) (finding tax litigation costs between 1982 and 1992 averaged US$220,000 annually or US$6,300 per award).

221. Wetter & Priem, *supra* note 67, at 292–93.

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TABLE 3: PERCENTAGES OF COST SHIFTING FOR PLC AND TCE FOR THE TOTAL NUMBER OF AWARDS (*N*=102)

| *Cost Issue* | *Frequency* | *Valid Percent of Awards with Available Data* |
|---|---|---|
| Percentage of PLC Shift (*n*=8)[222] | | |
| *13.5%* | 1 | 12.5 |
| *15.4%* | 1 | 12.5 |
| *75%* | 1 | 12.5 |
| *76%* | 1 | 12.5 |
| *80%* | 1 | 12.5 |
| *100%* | 3 | 37.5 |
| Percentage of Claimant Responsibility for TCE (*n*=50)[223] | | |
| *0%* | 4 | 8.0 |
| *27%* | 1 | 2.0 |
| *33%* | 1 | 2.0 |
| *40%* | 1 | 2.0 |
| *42%* | 1 | 2.0 |
| *45%* | 1 | 2.0 |
| *50%* | 34 | 68.0 |
| *67%* | 1 | 2.0 |
| *75%* | 1 | 2.0 |
| *90%* | 1 | 2.0 |
| *100%* | 4 | 8.0 |

It would be remiss not to observe that the data related to quantified dollar values and percentages were based upon a small subset of the overall data set. Out of the 102 awards in the eighty-two different cases in the dataset,[224] twenty-one awards (in twenty different cases) offered express quantification for one or more of the following: (1) percentage of a PLC shift, (2) dollar value of the PLC shift, (3) dollar value of claimant TCE contribution, and (4) dollar value of respondent TCE contribution.[225]

222. In ninety-four awards, this data was unavailable.

223. In fifty-two awards, this data was unavailable. This data reflected the claimant percentage of responsibility; the respondent's percentage was the reverse (100%–Claimant%).

224. This set of 102 awards includes final (*n*=52) and nonfinal cases (*n*=50).

225. This subset (*n*=21) also includes eight awards addressing the percentage shift of PLC, eleven awards providing the amount of PLC shifted, and seventeen awards providing the amount of TCE to be paid by both the investor and state. Because certain awards contained multiple, but not all of these

Only five cases had awards with full details for all four variables.[226] Given the missing data within the existing data set, inferences should be made with caution, and any normative recommendations based upon the results must recognize the inherent limitations and need for replication before making definitive statements. There were key aspects of the subset of cases that have quantitative data on PLC or TCE similar to the overall data set, such as the reasonably equivalent win rates,[227] the variation in the pool of arbitrators,[228] and the similarity in the development background of the investors[229] and the respondent state.[230] There were, however, a few facial differences in the subset, including (1) underlying IIAs tended to involve the United States and/or European states, particularly states from Eastern Europe;[231] (2) awards tended *not* to be rendered by ICSID tribunals;[232] (3)

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data points, in total there were twenty-one awards (out of a total of 102 in the data set, fifty-two of which were final awards). There were, however, fifty awards that provided information about the percentages of allocating TCE among the investor and state. *Eureko v. Poland* only contained information about the degree of PLC shift. *CME v. Czech Republic* also contained two different cost awards.

226. This included data on: (1) percent of PLC shift, (2) amount of PLC shifted, (3) percent of TCE allocation for claimant and respondent, and (4) amount of TCE allocation. *But see supra* note 202 (describing the broader scope of ITA cost data in the data set).

227. The set of final awards has thirty respondent wins (57.7%), twenty claimant wins (38.5%), and two settlement agreements (3.8%). Franck, *Evaluating Claims*, *supra* note 1, at 49–51, 84. The subset of costs had seven respondent wins (33.3%), twelve claimant wins (57.7%), and two awards with system-missing data (9.5%).

228. For final awards, most wing-arbitrators had a single appointment, whereas a small group had two, three, or—in the case of one chair—five appointments. *See* Franck, *Evaluating Claims*, *supra* note 1, at 77–79 (discussing arbitrator pool). In the subset of costs awards, for the first arbitrator, only one arbitrator had two appointments in multiple awards (Schwebel: *CME v. Czech Republic* and *Eureko v. Poland*); the remaining arbitrators had one appointment. For the second arbitrator, only one (Ivan Zykin: *CME v. Czech Republic*) appeared in two awards, and those two awards involved one case. All the remaining wing-arbitrators had a single appointment. The situation of the Chair was the same (i.e., Wolfgang Kühn: chair in *CME v. Czech Republic*).

229. For final awards, forty-six (88.5%) of the claimants were from OECD countries, and six (11.5%) were from non-OECD countries. In the subset, twenty (95.2%) were OECD claimants and six (4.8%) were not.

230. For final awards, nineteen (36.5%) respondents were OECD countries and thirty-three (63.5%) were not. In the subset, there were nine (42.9%) OECD respondents and 12 (57.1%) non-OECD states.

231. NAFTA forms the basis of awards in final ($n$=13; 25%) and costs ($n$=4; 19%) awards. The ECT was involved in final ($n$=2; 3.8%) and costs ($n$=2; 9.5%) awards. In the final awards, the remaining awards exhibited broad geographical scope. The subset has a heavy focus ($n$=10; 47.5%) on treaties between the United States, Western Europe, and Eastern Europe (i.e., Czech Republic, Germany, Latvia, Moldova, Netherlands, Russia, Sweden, United States, and United Kingdom); and only five awards (24%) involve treaties with states from Latin America, Egypt, Sri Lanka, or the Democratic Republic of the Congo.

232. In the final awards, there were thirteen ad hoc (25%), thirty-four ICSID (65.4%), and five SCC (9.6%) awards. Ad hoc and SCC arbitrations represented the majority of awards in the subset (ad hoc=12 (57.1%); ICSID=5 (23.8%); SCC=4 (19%)), which suggests that in the subset of twenty-one awards, non-ICSID awards were more heavily represented than the general data set of final awards.

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certain industries, such as telecommunications, had a higher proportion of cases;[233] and (4) awards contained a larger proportion of separate opinions.[234] These differences may not generally prove troubling, but, given the prevalence of publicly available ICSID awards in the overall data set, it is noteworthy that ICSID awards were underrepresented in terms of awards expressly quantifying the dollar values and/or percentages of cost decisions. This creates challenges for uniform policy reform as it is prudent to suggest reforms that have a requisite nexus between the data and the legal architecture. While implementing structural safeguards may prove useful for SCC and ad hoc proceedings (given that the express quantifications of cost primarily originate from those institutions), it is more challenging to suggest that equivalent solutions be implemented at ICSID when it is uncertain whether ICSID cost awards were equivalent or systematically different. Further research should therefore gather data on ICSID ITA disputes, particularly as regards quantitative information related to parties' legal fees and the tribunal/administrative costs, the shifted amounts, and percentages shifted. This will promote a more considered assessment of cost implications for ICSID ITA disputes.

### *D. Hypothesis 2: Legal Justification for Costs Decisions*

ITA involves states, public resources, and adjudicative processes that can demonstrate the rule of law in an international context. A key normative aspiration is that arbitrators should explain decisions related to international legal obligations with financial implications. The research hypothesis (and normative hope) was that tribunals would rationalize their decisions and provide consistent legal authorities and rationale.

Commentators suggest that arbitration awards lack justification. Nurick suggests arbitrators "rarely discuss in detail the reasons for their decisions on costs."[235] Schill asserts that "reasons for adopting a certain cost decision are rarely given" as awards do not make "reference to specific

233. For final awards, there were fifteen sectors represented, including top categories such as Energy (*n*=9; 17.3%); Food and Beverage (*n*=6; 11.5%); Waste Management (*n*=6; 11.5%); Real Estate (*n*=5; 9.6%); Chemical-Mining (*n*=4; 7.7%); Financial Services (*n*=4; 7.7%); Industrial Supplies (*n*=4; 7.7%); and Telecommunications (*n*=4-7.7%). In the twenty-one award cost subset, there were thirteen industries, including: Energy (*n*=3; 14.3%); Real Estate (*n*=3; 14.3%); Industrial Supplies (*n*=2; 9.5%); and Telecommunications (*n*=4; 19%).

234. For final awards, there were twelve awards (23%) with separate opinions and forty (77%) without. In the subset, there were ten awards (52.4%) with separate opinions and eleven awards (57.6%) with no separate opinion.

235. Nurick, *supra* note 32, at 57; *see also* Reichert & Hope, *supra* note 21, at 30 ("[Costs] give rise to significant difficulties at the end of a case . . . .").

policy considerations."[236] This leads to the descriptive inquiry: how often do tribunals justify their cost decisions, if at all? The related question is: presuming there is some justification, is there any regularity to the rationale?

Some argue that there is no general approach to ITA costs. Finding "no uniform pattern,"[237] they assert cost awards are "often arbitrary and inconsistent."[238] Three other groups suggest that there is a pattern, but disagree on its shape.[239] One group—following a "pay-your-own-way" approach—argues for regularity and asserts that there is a "traditional rule" about equal allocation of costs[240] where (1) parties pay their own way, and (2) tribunals otherwise divide costs equally between the two parties.[241] The "loser-pays" advocates posit that approach is increasingly the normative benchmark for costs.[242] Similarly, relying on analysis that

236. Schill, *Cost-Shifting*, *supra* note 33, at 659; *see also* Newman & Zaslowsky, *supra* note 30 (noting that "although arbitrators have applied careful and thoughtful reasoning to resolution of such matters as jurisdiction, standing and the application of international law, they do not seem to have applied the same kind of rigorous analysis to the factual and legal bases on which they have assessed costs"); Wetter & Priem, *supra* note 67, at 261 (expressing concern that, despite how critical costs are, they have received little scrutiny).

237. Nurick, *supra* note 32, at 58; *see also* Gotanda, *Awarding Costs*, *supra* note 69, at 2–4 (suggesting in international commercial arbitration, awards "have no uniform approach for awarding," and this unpredictability makes disputes more difficult to settle and "undermines the legitimacy of the arbitral process"); Rubins, *Allocation of Costs*, *supra* note 28, at 126 (stating that "no general cost-shifting rule appears to have emerged for investment arbitration"); Schreuer, *supra* note 152, at 1225 ("The practice of ICSID tribunals in apportioning costs is neither clear nor uniform.").

238. Gotanda, *Awarding Costs*, *supra* note 69, at 2; *see also* Gotanda, *Fees*, *supra* note 39, at 2 (finding treaty "awards of costs and fees are arbitrary and unpredictable").

239. Gotanda, *Awarding Costs*, *supra* note 69, at 21–23 (describing various approaches).

240. *See, e.g.*, Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 393 (2008) ("Parties to investor-state arbitrations have traditionally borne their own attorneys' fees and costs. . . . [T]ribunals still tend to favor an equal division of costs in the absence of 'exceptional circumstances,' [and] several awards in 2007 reflected an apportionment more explicitly tied to the merits of the arbitration." (footnote omitted)); *see also* SCHREUER, *supra* note 152, at 1231–32 (suggesting that awards generally split costs and parties pay their own expenses); Kevin Tuininga, *International Commercial Arbitration in Cuba*, 22 EMORY INT'L L. REV. 571, 617 n.385 (2008) ("[E]qual division of legal costs appears to be standard in arbitration awards.").

241. *See* REED ET AL., *supra* note 153, at 91–93 (suggesting that parties bear their own PLC but equally split TCE); Nurick, *supra* note 32, at 58 (stating that "costs are usually shared equally"); Rubins, *Allocation of Costs*, *supra* note 28, at 126 ("[M]ore often than not [tribunals] divid[e] the arbitration costs equally between the parties, and, more frequently yet, order[] each party to bear its own legal fees. In particular, awards of costs or legal fees against unsuccessful claimants in investment arbitration cases appear to be exceedingly rare.").

242. *See* UNCTAD, 2009 IIA MONITOR, *supra* note 1, at 10 (observing that some "losers" paid higher costs but acknowledging that other cases "seem to adopt the traditional approach"); Goldstein, *supra* note 126, at 10 nn.21–25 ("[T]here is an overall sense that law and practice are moving in the direction of more generous awards of legal costs to deserving prevailing parties. . . ."); Smith, *supra* note 240, at 393 ("Recently, however, tribunals have been increasingly inclined to consider the so-called "loser-pays" principle."); *see also* SCHREUER, *supra* note 152, at 1231–32 (suggesting that if one party has overwhelmingly prevailed on the merits, a losing party may have to bear the majority of

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has arguable methodological shortcomings,[243] Schill describes an "emerging pattern" where losing investors do not pay costs, but losing respondents do.[244]

Recognizing the possibility of variation, "factor-dependent" advocates identify different variables impacting cost decisions. First, they consider party behavior during the arbitration process. In its common, negative variation, commentators focus on whether parties have "acted frivolously, in bad faith or otherwise irresponsibly."[245] Taking a more positive tack, commentators also suggest tribunals consider parties' cooperativeness and efficiency.[246] Second, tribunals can focus on economic efficiencies,[247]

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arbitration costs and part or all of the winner's expenses); Rowe, *supra* note 130, at 653–59 (articulating the need to provide fair compensation and indemnity to successful parties).

243. The article cites a dissent that "extensively document[s]" a particular position, namely, that "tribunals in general do not shift costs incurred by the respondent government to the losing investor." Schill, *Cost-Shifting*, *supra* note 33, at 660; *see also* Int'l Thunderbird Gaming Corp. v. Mexico, Separate Opinion of Prof. Thomas Wälde, ¶¶ 126–39, Annex (NAFTA Ch. 11 Consolidation Trib.) (citing Ben Hamida, *supra* note 20), *available at* http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf. The opinion and article rely on a "synthetic table" critiqued earlier. *Supra* notes 192, 195.

244. *See* Schill, *Cost-Shifting*, *supra* note 33, at 660 ("In case the investor's claim is dismissed, arbitral tribunals in general do not shift costs incurred by the respondent government to the losing investor."); *see also id.* at 672 ("[T]he practice of allocating costs by investment tribunals can be described as a one-way, pro-investor cost-shifting approach."); Smith, *Shifting Sands*, *supra* note 211 at 756 (providing some data in support of Schill's claims during the 2008–2009 time frame of investment arbitration awards). *But see* Schill, *Cost-Shifting*, *supra* note 33, at 657 (making an exception for frivolous claims).

245. Nurick, *supra* note 32, at 58; *see also* RUBINO-SAMMARTANO, *supra* note 68, at 818–19 (indicating that party behavior, like no grounds for bringing the claim or frivolous or vexatious conduct, is a reason to shift costs); Paul D. Friedland & Lucy Martinez, *The UNCITRAL Arbitration Rules: A Commentary*, 101 AM. J. INT'L L. 519, 523 (2007) (book review) (suggesting cost shifting, "particularly where the unsuccessful party has presented its case in an inefficient or obstructive manner."); Schill, *Cost-Shifting*, *supra* note 33, at 673 (discussing how "spurious" or "frivolous" behavior affects cost shifts). Such conduct might involve: (a) gross exaggeration of claim, (b) unsatisfactory party conduct, (c) unreasonable or obstructive conduct that protracts proceedings or increased costs, or (d) extravagance in the conduct of the hearing. Wetter & Preim, *supra* note 67, at 327; *see also* Rowe, *supra* note 130, at 653, 660–61 (articulating a punitive rationale to deter aggravated misconduct including "raising baseless claims and defenses generally and in the use of unjustified tactics"); Rubins, *Allocation of Costs*, *supra* note 28, at 126 (indicating a need to punish "dilatory or otherwise uncooperative behavior[,] . . . obstruction of discovery, delay of proceedings, raising frivolous claims and defenses, and other apparent bad-faith behavior").

246. REED ET AL., *supra* note 153, at 93 (suggesting that "arbitrators' perception of the reasonableness with which the parties pursued their claims and defenses [and] the parties' general cooperativeness in achieving cost-effective results" affect cost decisions); *see also* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 68, at 686 (suggesting, without explaining the basis for the assertion, that it is "increasingly common" for tribunals to shift costs to the party that loses on the merits and observing that the arbitrators "may take into account the attitude of the parties during the arbitral proceedings" in making their determinations).

247. *See* Salacuse, *supra* note 59, at 142 ("[C]osts will vary depending on the complexity of the case, the amount in controversy, and the extent of time needed to resolve it.").

parties' relative success[248] in the overall dispute, individual claims or defenses, procedural motions, or other matters.[249] Considerations of relative success in cost shifting are designed to allocate costs in proportion to relative success to encourage both parties to make their claims as realistic as possible and to facilitate settlement.[250] Third, reasonable offers of settlement might result in economic efficiencies that could influence cost-shifting decisions.[251]

Another group of factors relates to access to justice. Fee shifting can be based upon the public interest. Like a private attorney general, costs should create incentives for dispute resolution that further the public interest or a private interest with implications for multiple stakeholders.[252] This rationale might be critical in cases with special social importance or where government resources do not assure adequate public enforcement.[253] Similarly, novel claims or good-faith arguments for modification of existing law—whehther as regards claims or defenses—might affect a tribunal's willingness to shift costs or to maintain the status quo. To the extent that claims are new, the scope of liability is uncertain or defenses are being scrutinized in a unique manner, this factor permits tribunals to take into consideration the parties' arguable good faith in bringing a claim or defense.[254] Another factor might involve the relative strength of the parties involved in the claim (including their relative fiscal, economic, or political advantage) and the need for equality of arms[255] in the dispute resolution process. This may occur when one side of the arbitration—

248. RUBINO-SAMMARTANO, *supra* note 68, at 819 (suggesting that improperly inflating claims affects costs).

249. *See* Rubins, *Allocation of Costs*, *supra* note 28, at 126 (focusing on the proportion of success "including the percentage of damages requested that were actually awarded, as well as recognition of the validity of particular defenses or objections"); Wetter & Preim, *supra* note 67, at 327 (focusing on factors including outcome of legal claims, disputed factual and other issues, and the relative prima facie strength of the parties' cases).

250. *See supra* note 123.

251. *See* RUBINO-SAMMARTANO, *supra* note 68, at 815 ("[A] good reason not to award the costs to the winning party may be due to the defendant having offered to pay to the claimant the amount which in the end was awarded to it or an amount in that range."); Rowe, *supra* note 130, at 653, 665–66, 670 (suggesting a need for economically efficient dispute settlement).

252. Rowe, *supra* note 130, at 653, 662–63.

253. *Id.* at 653, 662–63.

254. REED ET AL., *supra* note 153, at 93; *see also* Rubins, *Allocation of Costs*, *supra* note 28, at 126 (suggesting that confusion is "reasonable or understandable, given that little or no legal guidance as to the interpretation of treaties and customary international law was available").

255. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 667, 676–79 (2010) (discussing equality of arms and relative procedural strengths in international criminal law); Franck, *Bright Future*, *supra* note 90, at 86 n.149 (discussing equality of arms and the value of a balanced dispute resolution process).

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whether the state or the investor—has superior resources.[256] Tribunals might also rely upon basic notions of justice related to the equities of the situation or the reasonableness of the costs assessed.[257] Other elements may involve concerns for fundamental justice and the breadth of tribunal discretion to effectuate its arbitral mandate.[258] Another factor might involve a substantive concern, perhaps about the purported gravity or seriousness of the alleged conduct.[259]

To assess the literature's descriptive accuracy, this research analyzes PLC and TCE decisions to explore tribunals' rationalization of cost decisions. It first assesses how many awards referenced cost decisions. It then considers, for both PLC and TCE, whether awards cited legal authority to justify the decision. Finally, it examines what legal rationales tribunals offered to justify cost decisions. Further research (presumably with more data on the fiscal aspects of costs) should explore this conflux to consider which variables are reliably associated with specific quantitative cost outcomes.

### *1. The Pre-2007 Data Set: Overall and as a Function of Finality*

Using the total data set of 102 awards from the pre-2007 population,[260] there were stark findings about tribunals' rationalization of cost decisions, namely the lack of (1) legal authority or (2) rationale. Overall, for PLC[261] and TCE,[262] tribunals failed to offer legal authority for costs in nearly 75%

256. Rowe, *supra* note 130, at 653, 663–65.

257. Gotanda, *Awarding Costs*, *supra* note 69, at 24–25; Rubins, *Allocation of Costs*, *supra* note 28, at 128–29 ("Considerations of justice and equity may play some role in the cost allocation process, particularly when the losing party is *not* ordered to pay the winner's expenses.").

258. Gotanda, *Awarding Costs*, *supra* note 69, at 24–25.

259. *Id.* at 42–43 (suggesting costs are shifted when there are special reasons); Rubins, *Allocation of Costs*, *supra* note 28, at 128–29 ("[T]he seriousness of the respondent's illegal conduct towards the successful claimant . . . where a host state has behaved with particular malice towards the claimant [means] the arbitrators may be more likely to order the respondent to cover a larger proportion of costs and legal fees.").

260. This amount includes both final and nonfinal arbitration awards; it also means that the data includes the seventeen disputes that spawned multiple awards. *See* Gotanda, *Fees*, *supra* note 39, at 10; *see also* Franck, *Evaluating Claims*, *supra* note 1, at 24 ("The 102 awards came from eighty-two separate cases. Seventeen cases spawned multiple awards. There were sixty-five cases with one award, fifteen cases with two awards, and one case with three awards. Only one case—*Pope & Talbot v. Canada*—had four awards separately addressing jurisdiction, merits, damages, and costs.").

261. For PLC, 76.5% of the data set ($n$=78) lacked any reference to legal authority. Only 53.9% provided a rationale ($n$=55) for the PLC decision.

262. For TCE, nearly three-quarters of the data set ($n$=75) failed to provide any reference to legal authority. Only 26.5% of awards ($n$=27) cited legal authority. Tribunals also failed to cite to rationale nearly 50% of the time.

of the awards, even when such authority was readily available in arbitration rules.

Although costs can be assessed at various stages, as a practical matter, they were most likely to be fixed definitively in the final award. It is perhaps, therefore, not surprising that there were statistically significant differences in how tribunals addressed both PLC and TCE in nonfinal and final awards.[263] It is therefore prudent to assess failure to cite to authority and rationale in awards through the lens of finality. The overall picture was of a lack of rationalization generally, but the problem was noticeably prevalent in nonfinal awards.

Another theme was that tribunals appeared to rely upon legal rationale more often than they provided legal authority. Nevertheless, tribunals failed to offer rationale for costs in nearly half the awards—even when it was as simple as saying that costs could be made in the future or on the basis of tribunal discretion. The lack of a thorough explanation casts doubt on the credibility of tribunals making decisions with crucial implications on the efficacy of arbitration. It is, however, theoretically possible that tribunals may "hold in their mind" the basis of their legal authority and their rationale for cost decisions yet refrain from putting the proverbial pen to paper.[264] Nevertheless, given critiques related to legitimacy, an evolving need for transparency in international ajudication, and the increasing value of coherent results, it is prudent for tribunals to provide clear justifications and to offer explanations that promote coherent and predictable outcomes. This should be a relatively straightforward exercise for costs, particularly as the issue is largely depoliticized. This section therefore explores, both for PLC and TCE, the rationalizations tribunals offered (if any) for their cost decisions.

### *2. PLC Justifications: Legal Authority and Rationale*

For PLC, lack of legal authority was problematic. For the final fifty-two awards, less than half ($n$=21) contained reliance on legal authority,

263. *See infra* notes 265, 266, 296, 297 and accompanying text (analyzing differences between final and nonfinal awards).

264. This may be equivalent to tribunals relying on "unobservable forms of precedent." *See* Weidemaier, *supra* note 11, at 1901 ("We might therefore describe the arbitration system as 'precedential' even if it produces awards that obscure the operation of precedent and even if the disputants themselves are unaware that precedent exists."). It is also possible (but not analyzed in this Article) that tribunals use cost determinations to control the net result and ultimately use costs discretion to prevent compromises in the substantive determinations from being apparent. *See infra* note 93 and accompanying text.

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and only 6% (*n*=3) of the fifty nonfinal awards relied upon authority.[265] The rationale of a tribunal's PLC decision was slightly better. For final awards, 81% (*n*=40) of awards provide a rationale; whereas, only 30% (*n*=15) of nonfinal awards provide a rationale.[266] See Table 4. Remembering that each award could cite multiple authorities, it is interesting that the maximum number of authorities cited in a single award was four, while the mean number of authorities cited was .65 (SD=.99)—less than a single citation to authority for the mean award.[267]

TABLE 4: PRESENCE OF LEGAL AUTHORITY AND RATIONALE FOR PLC DECISIONS AS A FUNCTION OF AWARD FINALITY

| | Tribunal References | | |
|---|---|---|---|
| *PLC Justification* | *Present* | *Not Present* | Total |
| Treaty Claim Not Final | | | |
| *Reliance on Legal Authority* | 3 | 47 | 50 |
| *Rationale Explained* | 15 | 35 | 50 |
| Treaty Claim Final | | | |
| *Reliance on Legal Authority* | 21 | 31 | 52 |
| *Rationale Explained* | 40 | 12 | 52 |

Given the gaps and lack of regular citation to authority, it is useful to consider—where tribunals did bother to provide a justification—what the authority was. For legal authority, the most heavily cited source was the 1976 UNCITRAL Rules, followed closely by the ICSID Convention, ICSID Arbitration Rules, the applicable investment treaty, and decisions of other tribunals. Only about 25% (*n*=6) of ICSID Convention cases cited to the Convention; not quite 10% (*n*=1) of ICSID Additional Facility awards cited to those rules; and 20% (*n*=1) of the SCC cases cited SCC

265. There was a statistically significant difference in citation to legal authority for PLC at a final and nonfinal stage of the proceedings, where there was more of a reliance on authority in a final award. [$\chi^2(1)=16.749$; $p<.01$; $n=102$]. The effect size was $r=.405$, suggesting a large effect of award finality on a tribunal's willingness to cite legal authority. *See* Franck, *Development*, *supra* note 61, at 457–58 (explaining that an effect size greater than $r=.30$ is "medium" and anything over $r=.50$ is considered "large").

266. These differences were statistically significant. The pattern of the relationship was that more nonfinal awards than final awards failed to provide a PLC rationale [$\chi^2(1)=22.588$; $p<.01$; $n=102$]. The effect size was large [$r=.471$].

267. For nonfinal awards, the maximum number of authorities cited in an award was 1.0 and the mean was .06 (SD=.24; *n*=50). For the subset of twenty-one final awards that did cite to any legal authority, the mean number of citations was 1.62 (SD=.92; *n*=21).

rules. In contrast, 91% (*n*=10) of cases using the 1976 UNCITRAL rules offered those as authority. See Table 5.

TABLE 5: LEGAL AUTHORITY RELIED UPON BY TRIBUNALS FOR PLC DECISIONS IN FINAL AWARDS (MORE THAN ONE AUTHORITY POSSIBLE FOR EACH AWARD)

| | Tribunal References | | |
|---|---|---|---|
| *PLC Justification* | *Present* | *Not Present* | Total |
| *ICSID Convention* | 6 | 46 | 52 |
| *ICSID Arbitration Rules*[268] | 3 | 49 | 52 |
| *ICSID Additional Facility Rules*[269] | 1 | 51 | 52 |
| *SCC Rules*[270] | 1 | 51 | 52 |
| *1976 UNCITRAL Rules*[271] | 10 | 42 | 52 |
| *Investment Treaty* | 4 | 48 | 52 |
| *Investment Treaty Awards* | 4 | 48 | 52 |
| *International Tribunals* | 2 | 50 | 52 |
| *National Courts* | 0 | 52 | 52 |
| *Other* | 3 | 49 | 52 |

It is somewhat unfortunate that—even though available to explain and analyze cost-shifting determinations—tribunals did not cite or use arbitration rules and other sources of legal doctrine to rationalize cost decisions.[272] This finding is striking when compared to empirical studies that observe the use of, and arguably meaningful increase in reliance on, arbitral precedent.[273] The gap in reliance on authority for cost issues is

268. Twenty-four awards arose under the ICSID Convention and Arbitration Rules.

269. Eleven awards arose under the ICSID Additional Facility Rules.

270. Five awards arose under the SCC Arbitration Rules.

271. Eleven awards arose under the 1976 UNCITRAL Arbitration Rules.

272. Even in the subset of fifty nonfinal awards, only three contained references to legal authority for PLC decisions (whether to shift costs or defer the matter). All three awards cited the 1976 UNCITRAL Rules. Saluka Investments B.V. v. Czech Republic, Partial Award, ¶ 510 (Perm. Ct. Arb. 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-Partialaward Final.pdf; Methanex Corp. v. United States, Partial Award, ¶ 170 (NAFTA Ch. 11 Arb. Trib. 2002), *available at* http://ita.law.uvicca /documents/Methanex-1stPartial.pdf; CME Czech Republic B.V. v. Czech Republic, Partial Award, ¶ 619 (Sept. 13, 2001), *reprinted in* 9 ICSID REP. 121 (2006), *available at* http://ita.law.uvic.ca/ documents/CME-2001Partial Award.pdf.

273. *See* Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration*, 24 J. INT'L ARB. 129, 149 (2007) (analyzing decisions, awards, and orders rendered by ICSID and finding mean citations of .33 in 1990, 2.55 in 2001, and between 7 and 11.25 in 2006); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 304, 310, 312,

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troubling given what is potentially at stake; namely, absorbing the costs of one party's legal costs and possibly even two sets of lawyers' fees from both domestic and multinational law firms over the course of several years.

In contrast to the citation of less than one type of legal authority, tribunals were nearly twice as likely to offer a legal rationale for a decision.[274] It is helpful to assess what tribunals did offer to justify cost determinations. For final awards, the most common rationales influencing PLC decisions[275] were: (1) parties' relative success or failure related to the claim (*n*=19),[276] (2) considerations of equity and reasonableness (*n*=17),[277] (3) efforts to encourage appropriate behavior (*n*=12),[278] (4) substantive reasons underlying the claim (*n*=11),[279] and (5) the discretion of the tribunal (*n*=10).[280] At the other end of the spectrum, no tribunal referenced the need to make an informed decision;[281] and only a few referenced

314, 335 (2008) (analyzing ninety-eight decisions by ICSID tribunals between 1998 and 2006 and finding they used case law (*n*=92), the Vienna Convention on the Law of Treaties (*n*=35), customary international law (*n*=34), and general principles of law (*n*=8)). *But see* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 362 (2007) (describing literature in international commercial arbitration that (1) out of a set of 100 awards involving the Vienna Sales Convention, only six referred to past awards, and (2) and out of 190 International Chamber of Commerce awards, about 15% cited other awards).

274. *See supra* table 3 (legal authority (*n*=21) and rationale (*n*=40) in the fifty-two final awards).

275. Mentioning a factor was not defined as "influencing" the decision. Factors were only coded as being present where the factor affected the tribunal's ultimate determination about how it addressed the PLC by itself or in conjunction with the TCE decision.

276. The Codebook operationalized the "Welamson" variable to reflect parties' relative success (i.e., they might have won some arguments but lost others) where the tribunal determined that "costs should be allocated *inter partes* on a sliding scale proportionate to the assessment by the [tribunal] of the claims made by the parties." Codebook at 18, 24 nn.40, 56 (citing Wetter & Preim, *supra* note 67, at 274).

277. The Codebook operationalized "equity" as expressing a desire to be based upon principles of fairness, justice, equity, appropriateness or reasonableness. For PLC, "reasonableness" also related to the PLC amount charged. Codebook at 19, 25 nn.49, 65.

278. The Codebook defined encouraging appropriate behavior as expressing a desire to praise or reward appropriate behavior, including (1) professionalism of parties and their attorneys, (2) constructive nature of parties' pleadings or proof, (3) efficiency in making arguments, (4) efficiency in the administration of the arbitration, and (5) the absence of inappropriate behavior. *Id.* at 18, 24 nn.42, 58.

279. The Codebook defined the "substantive" variable as the tribunal expressing concern with party conduct related to underlying substantive disputes including a concern that parties won or lost based upon procedural issues (i.e., burdens of proof or evidentiary rules) or there was an issue regarding the inappropriate nature of a party's substantive conduct. *Id.* at 18, 25 nn.42, 64.

280. The Codebook defined a decision based upon "discretion" as "more than a mere reference to a rule that references the possibility of a tribunal exercising discretion; rather the award must demonstrate that the tribunal was exercising that discretion." *Id.* at 19, 25 nn.50, 66.

281. The Codebook defined the need for "Informed Decisions" as indicating "a desire to make a full and informed decision on costs or asks for information about costs." *Id.* at 19, 25.

considerations such as equality of arms (*n*=1),[282] stare decisis (*n*=3),[283] public interest (*n*=3),[284] or party settlement efforts (*n*=3).[285] Meanwhile, a handful (i.e., between 12–18% of tribunals) referenced factors like novelty of a claim (*n*=9),[286] deterring inappropriate behavior (*n*=9),[287] rewarding the winner (*n*=6),[288] or making the loser pay (*n*=5).[289] See Table 6.[290] The maximum number of rationales cited in a single case was seven, but the mean number of rationales cited was 2.12 (SD=1.99).[291] This means that, while the average number of reasons relied upon for PLC decisions was small, as a facial matter, it appeared marginally better than citation to PLC authority.

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282. The Codebook operationalized equality of arms as "inequalities between the parties, whether based upon power, size or finances." *Id.* at 19, 25.

283. "Stare decisis" was defined as an effort "to adhere to previous cases" and, beyond mere citation to other materials, involved "an interest in adhering to established precedent and principles of stare decisis (i.e., treating like cases alike), or analyzes the application of or distinctions from previous investment treaty awards." *Id.* at 19, 24 nn.46, 62.

284. Public interest was a concern that "the public, issues of policy, or matters of public importance are implicated by the claim and/or the issues raised in the arbitration." *Id.* at 18, 24, nn.45, 61.

285. The Codebook operationalized settlement efforts influencing cost decisions as "(1) references that parties have made settlement efforts whether through mediation, negotiation or some other facilitative process or (2) the parties' recorded settlement agreement." *Id.* at 18, 24 nn.43, 59.

286. "Novelty" rationale was present when the "claim or argument made is novel and/or is challenging to establish." *Id.* at 18, 24 nn.44, 60.

287. The Codebook defined deterring inappropriate behavior as "prevent[ing] or sanction[ing] inappropriate behavior including: (1) bad faith conduct in adjudicating the proceedings, (2) poor pleadings or proof, (3) delays in making arguments, (4) inefficient administration of the arbitration, (5) repetitive or unfounded conduct, (6) unwillingness to produce documents, (7) reliance on annulled cases, or (8) lack of cooperation with the tribunal." *Id.* at 18, 24 nn.41, 57.

288. The Codebook operationalized rewarding the winner for "making winning arguments and/or compensat[ing] the winner and making them whole for either: (1) needing to expend legal fees to fully compensate their losses, or (2) put[ting] the party in the position they would have been but for the need to bring the claim." *Id.* at 18, 23 nn.39, 55.

289. The Codebook defined the "loser-pays" rationale as expressing "a desire to have the loser pay for making losing arguments." *Id.* at 17, 23 nn.38, 54.

290. Nonfinal awards (*n*=50) exhibited similar patterns with one exception. Nine tribunals that addressed PLC (whether in terms of an affirmative decision or reservation of the issue) cited a desire to make an informed decision. Otherwise, there were minimal considerations of equity (*n*=4), encouraging appropriate behavior (*n*=3), and deterring inappropriate behavior (*n*=2). Other rationale (Welamson's relative success approach, loser-pays, rewarding the winner, and claim novelty) were cited once each.

291. The minimum number of rationales cited in final awards was zero. For the subset of forty final awards that contained any kind of PLC rationale, the mean number of rationales provided was 2.75 (SD=1.836). For nonfinal awards, the maximum PLC rationale was four and the mean was .44 (*n*=50; SD=.88).

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TABLE 6: FOR ALL FINAL AWARDS, TYPE OF RATIONALE RELIED UPON BY TRIBUNALS FOR PLC DETERMINATIONS (A SINGLE AWARD CAN CITE TO MULTIPLE RATIONALES)

| | Tribunal References | | |
|---|---|---|---|
| *PLC Justification* | *Present* | *Not Present* | *Total* |
| *Loser Pays* | 5 | 47 | 52 |
| *Rewarding Winner* | 6 | 46 | 52 |
| *Welamson (Relative Success/Failure)* | 19 | 33 | 52 |
| *Deter Inappropriate Behavior* | 9 | 43 | 52 |
| *Encourage Appropriate Behavior* | 12 | 40 | 52 |
| *Party Settlement Efforts* | 3 | 49 | 52 |
| *Novelty of Claim or Defense* | 9 | 43 | 52 |
| *Public Interest Considerations* | 3 | 49 | 52 |
| *Stare Decisis* | 3 | 49 | 52 |
| *Party Equality of Arms* | 1 | 51 | 52 |
| *Substantive Reasons* | 11 | 41 | 52 |
| *Equity Considerations* | 17 | 35 | 52 |
| *Discretion of Tribunal* | 10 | 42 | 52 |
| *Making Informed Decisions* | 0 | 52 | 52 |
| *Other* | 2 | 50 | 52 |

Although previous commentators did not distinguish clearly between how these rationales could—or should—apply differently to issues related to the parties' versus tribunals' costs, one thing was clear: those sources that commentators have used to justify cost decisions were *not* those most commonly relied upon in this research. While there was reliance on factors such as "loser-pays"[292] and punishing negative behavior,[293] tribunals used a plethora of other rationales more frequently.

On that basis, it is perhaps unsurprising that, for final awards and excluding pairwise cases when a value was missing, there was no reliable statistical relationship between the ultimate winner of ITA and the party responsible for making a PLC contribution ($r$=-.13; $p$=.38; $n$=49).[294] This

292. *See supra* notes 242–44.

293. *See supra* notes 245–46.

294. The bivariate correlation analyzed the ultimate winner of ITA ("UltimateWin") and the PLC contributor (plcN). "UltimateWin" was defined as: 1=Respondent win where Claimant was awarded US$0 or Respondent was awarded any amount; 2=Investor win where Claimant was awarded more than US$0; 3=Settlement Agreement. "plcN" was defined as: 1=No shift of PLC, 2=Respondent is the Contributing Party and makes a contribution to the Claimant's PLC; 3=Claimant is the Contributing

finding, namely, the lack of a reliable relationship between the ultimate winner and PLC, also undercuts the idea that "loser-pays" has been the normative baseline for ITA.

These results begin to suggest that advocates of a "factor-based" approach to cost shifting [295] were descriptively accurate about the state of play. Yet, there was a lack of focus on factors such as equality of arms, stare decisis, public interest, and settlement efforts as a descriptive matter. That lack of focus may be undesirable as a normative matter, particularly given the focus on the public interest in ITA, the desire to encourage settlements, and the value of promoting efficient dispute resolution. One might imagine that tribunals' failure to focus on those factors is linked to the parties' approach to dispute resolution and perhaps inhibits parties from actively considering the use of alternative modalities, such as mediation or negotiation, as part of their viable dispute resolution options.

### *3. TCE Justifications: Legal Authority and Rationale*

For TCE, much like PLC, there was a general lack of reliance on legal authority, but the gap was more pronounced in nonfinal awards. For nonfinal awards, 94% ($n$=47) lacked a reference to authority for possible or actual cost-shifting decisions. In final awards, more than 50% of the awards ($n$=28) failed to cite to legal authority for their conclusions.[296] In contrast to legal authority, there was a greater reliance on rationale. For nonfinal awards, 74% ($n$=37) contained no rationale; whereas for final awards, 22% ($n$=11) did provide some explanation for the tribunal's

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Party and makes a contribution to the Respondent's PLC. Using a power table to conduct a post hoc power analysis indicates that the power of that bivariate relationship ($r$=.13; $n$=49) is around .20, which suggests an 80% possibility of a Type II statistical error and the need for replication of the research with expanded data. Franck, *Development*, *supra* note 61, at 461 n.132; *see also* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 3–6 (2d ed. 1988). Analyzing the relationship of pure respondent wins (Rwins=1) versus claimant wins and settlement agreements (Rwins=0) and excluding cases pairwise where a data point was missing, there was likewise no significant relationship between PLC allocation (plcN) and respondent wins ($r$=.09; $p$=.54; $n$=47). A Chi-Square analysis comparing "UltimateWin" and the existence of any PLC shift (i.e., combining respondent and claimant contributions) failed to reveal a statistically significant pattern of relationship [$\chi^2(2)$=.832; $p$<.66; $r$=.13; $n$=49]. Given the effect sizes and size of the last two tests, a post-power analysis would also suggest that the power of those analyses is .20 or less, suggesting there is a .80 statistical likelihood of having committed a Type II Error.

295. *See supra* notes 245–59.

296. Twenty-four (46.2%) final awards relied on legal authority, whereas only twenty-eight (53.8%) final awards lacked authority for TCE. When compared to nonfinal awards, the pattern of relationship between citation to legal authority for TCE decisions was significantly different; tribunals were more likely to cite legal authority in final awards and less likely to cite authority in nonfinal awards [$\chi^2(1)$=21.116; $p$<.01; $r$=.46; $n$=102].

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approach to allocating its own expenses.[297] See Table 7. For final awards,[298] the mean number of citations to TCE legal authority was .67 (SD=.92; *n*=52),[299] with a maximum of four legal authorities cited in a single award and a minimum of zero.[300]

TABLE 7: PRESENCE OF LEGAL AUTHORITY AND RATIONALE FOR TCE DECISIONS AS A FUNCTION OF AWARD FINALITY

| | Tribunal References | | |
|---|---|---|---|
| *TCE Justification* | *Present* | *Not Present* | Total |
| Treaty Claim Not Final | | | |
| *Reliance on Legal Authority* | 3 | 47 | 50 |
| *Rationale Explained* | 13 | 37 | 50 |
| Treaty Claim Final | | | |
| *Reliance on Legal Authority* | 24 | 28 | 52 |
| *Rationale Explained* | 41 | 11 | 52 |

As tribunals considering TCE decisions were (much like their PLC counterparts) nearly twice as likely[301] to cite a rationale rather than authority,[302] understanding which rationales were used is vital to

297. These differences were statistically significant. Nonfinal awards were likely to lack a reference to rationale, whereas final awards were more likely to provide a rationale for TCE decisions [$\chi^2(1)=28.574$; $p<.01$; $r=.53$; $n=102$].

298. The situation for nonfinal awards and legal authority was more dire, with a maximum number of citations at 1 and a mean of .06 (SD=.24; *n*=50).

299. When considering the subset of twenty-four final awards that include some citation to legal authority for TCE decisions, the mean was 1.46 (SD=.83; *n*=24).

300. For final awards, the facially equivalent mean citation for PLC (.65) and TCE (.67) suggests reasonable parity in terms of authority provided for cost issues generally.

301. *See supra* table 5 (legal authority (*n*=24) and rationale (*n*=41) for final awards).

302. The legal authority cited by tribunals in final awards (*n*=52) for TCE decisions was reasonably equivalent to the authorities cited for PLC decisions in Table 5. In particular: (1) for the twenty-four ICSID Convention awards, six cited to the ICSID Convention (25% of total ICSID Convention awards); (2) three cited to the ICSID Arbitration Rules (12.5% of the total ICSID Convention awards); (3) for the eleven ICSID-Additional Facility awards, one cited to the ICSID Additional Facility rules (9.1% of the Additional Facility awards); (4) for the five SCC cases, four cited to the SCC rules (80% of the SCC awards); (5) for the eleven awards under the 1976 UNCITRAL rules, ten cited to the UNCITRAL Rules (91% of the UNCITRAL awards); (6) four cited to the IIA; (7) three cited to investment treaty awards; (8) one cited to an international tribunal; (9) none cited to national court decisions; and (10) three cited to other forms of authority, such as a law review article.

understanding what affects decisions about TCE allocation. For final awards, the most common rationales for TCE decisions were: (1) parties' relative success or failure related to the claim (*n*=18), (2) considerations of equity and reasonableness (*n*=13), (3) substantive reasons underlying the claim (*n*=12), (4) efforts to encourage appropriate behavior (*n*=9), (5) efforts to discourage inappropriate behavior (*n*=9), (6) the discretion of the tribunal (*n*=9), and (7) the novelty of the claim or defense (*n*=7). At the other end of the spectrum, less than 10% of final awards relied upon "loser-pays" (*n*=5), rewarding the winner (*n*=5), party settlement efforts (*n*=4), stare decisis (*n*=2), public interest (*n*=2), or equality of arms (*n*=1). No tribunals relied upon the need to make informed decisions. See Table 8.[303] The maximum number of rationales cited in a single case was six, and the mean was 1.88 (SD=1.70).[304] This means that, while the average number of citations to legal rationale for final TCE decisions was still small, it appeared marginally better than citation to TCE authority. But, comparatively, they may still be statistically equivalent.[305]

303. Like the counterpart for nonfinal PLC awards, the most frequent rationale mentioned in nonfinal awards (*n*=50) for TCE decisions was the intent to make an informed decision (*n*=9). Otherwise, nonfinal TCE awards cited similar rationale to TCE final awards: equity (*n*=3), encouraging appropriate behavior (*n*=2), deterring inappropriate behavior (*n*=2), rewarding winner (*n*=1), loser-pays (*n*=1), and novelty (*n*=1). There were no references to relative success or failure in those awards.

304. The minimum number of rationale cited was zero. For those forty-one awards that did rely on some rationale for the cost decision, the mean was 2.39 (SD=1.563).

305. For nonfinal awards (*n*=50), the maximum rationales cited was four, and the mean was .38 (SD=.81). For the final awards (*n*=52), the facially equivalent mean citation for PLC (2.12) and TCE (1.88) suggests parity for rationale provided for cost issues generally.

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TABLE 8: FOR FINAL TREATY CLAIMS RELYING ON SOME RATIONALE, TYPE OF RATIONALE RELIED ON BY TRIBUNALS FOR TCE DETERMINATION (A SINGLE AWARD CAN CITE TO MULTIPLE RATIONALES)

| | Tribunal References | | |
|---|---|---|---|
| *TCE Justification* | *Present* | *Not Present* | Total |
| *Loser-Pays* | 5 | 47 | 52 |
| *Rewarding Winner* | 5 | 47 | 52 |
| *Welamson (Relative Success/Failure)* | 18 | 34 | 52 |
| *Deter Inappropriate Behavior* | 9 | 43 | 52 |
| *Encourage Appropriate Behavior* | 9 | 43 | 52 |
| *Party Settlement Efforts* | 4 | 48 | 52 |
| *Novelty of Claim or Defense* | 7 | 45 | 52 |
| *Public Interest Considerations* | 2 | 50 | 52 |
| *Stare Decisis* | 2 | 50 | 52 |
| *Party Equality of Arms* | 1 | 51 | 52 |
| *Substantive Reasons* | 12 | 40 | 52 |
| *Equity Considerations* | 13 | 39 | 52 |
| *Discretion of Tribunal* | 9 | 43 | 52 |
| *Making Informed Decisions* | 0 | 52 | 52 |
| *Other* | 2 | 50 | 52 |

The implications for TCE were similar to its PLC counterpart. For the tribunal costs, there was a gap in the tribunal's citation to legal authority. This gap is not without critical implications. One need only recall *Eureko v. Poland*[306] and the lack of citation to legal authority that facilitated an outcome prohibited by the treaty. Failure to confirm legal authority can lead to legal error, and although it may be correctable by the tribunal itself in subsequent awards,[307] appeal or annulment for legal error is not presently a doctrinal feature of ITA.[308]

306. Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion (Aug. 19, 2005), *reprinted in* 12 ICSID REP. 335 (2007).

307. The tribunal issued a supplementary award retracting its decision on cost. Press Release, Ministry of Treasury of the Republic of Pol., Information Concerning the Decision Made by the Arbitration Tribunal on Introduction of a Correction to the Partial Ruling it Had Issued (Oct. 3, 2005), *available at* http://www.msp.gov.pl/portal.php?serwis=en&dzial=16&id=311&search=8216.

308. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 299 (2010); Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT'L L. 43, 52–53 (2008); *see also* Franck, *Legitimacy Crisis*, *supra* note 7, at 1547–55 (discussing means for reviewing arbitration awards).

Legal authorities—including rules, conventions, and treaties—are available for free on the Internet and can be quickly inserted into an award where applicable. One wonders why activity that involves such minimal cost—but provides the profound benefit of preventing errors and enhancing perceived legitimacy—is nevertheless ignored by some tribunals. If first-year law students can find, cite, and use authority to analyze legal questions with critical financial implications, why should international law specialists be exempt from engaging in a similar, basic analysis when the stakes are higher and they are paid for their services? The lack of a cogent answer creates an area of potential concern. As Lord Denning observed,

> It is of course true that [an adjudicator's] decision may be correct even though he should give no reason for it or even give a wrong reason: but, in order that a trial be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons.[309]

This citation to legal authority should be contrasted with the legal rationale provided for TCE decisions. The number of awards offering some form of rationale was higher, and the scope of rationales offered was also greater. Nevertheless, there was still little reasoning offered in support of cost decisions, which might have a critical financial impact and the potential to affect parties' overall dispute resolution strategy. Similar to the use of rationale for PLC decisions, there were a set of legal rationales that tribunals did not use, such as equality of arms, stare decisis, public interest, and settlement efforts. To the extent that parties wish to understand factors guiding tribunals' decisions, the current data demonstrated that tribunals appeared more influenced by factors such as the parties' relative success, substantive concerns related to the claim, and equity. Unlike the arguments presented by previous commentators, considerations of "loser-pays"[310] or punishing poor conduct[311] did not appear to be the key motivators. They were, however, part of an overall mix.

For final awards, there was also no reliable statistical relationship between the ultimate winner of ITA and which party was responsible for

309. SIR ALFRED DENNING, THE ROAD TO JUSTICE 29 (1955).
310. *See supra* notes 242–44.
311. *See supra* notes 245–46.

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paying more than 50% of TCE ($r$=-.20; $p$=.17; $n$=48).[312] This finding, namely, the lack of a reliable relationship between the ultimate winner and a shift of TCE, undercuts the suggestion that the "loser-pays" approach was the normative baseline. It also creates initial evidence that "factor-based" approaches to cost-shifting decisions[313] are worthy of expanded research. Additionally, there could be value in isolating variables or variable combinations that are reliably linked to cost decisions. Future research in this area might usefully explore those aspects.

### *E. Hypothesis 3: Relationships Among Costs and Other Variables*

Based on the foregoing, one might begin to imagine a scenario where a lack of guidance on legal authority and rationale combined with a variety of substantive approaches creates confusion. This narrative finds some support in the data that reflected the existence of various cost outcomes, minimal citation to legal authority for cost decisions, and a broad spectrum of different rationales. Nevertheless, as the data suggested, the predominant approach of tribunals reflected a "pay-as-you-go" approach, and there is a plausible counternarrative about pockets of potential coherence and reliability in cost awards. This next section explores three areas of arguable rationality: (1) the intertwined relationship of PLC and TCE decisions, (2) the relationship between TCE and amounts claimed (versus amounts awarded), and (3) uncertainty begetting a form of certainty.

#### *1. Relationship Between PLC and TCE*

PLC and TCE are doctrinally different types of arbitration costs—the costs of parties' attorneys versus the cost of adjudicators and associated administration. It is possible that tribunals might wish to use different cost aspects to signal different things to parties. Tribunals could, for example,

312. The bivariate correlation considered the variables "UltimateWin" and the TCE contribution. "UltimateWin" was defined previously. *See supra* note 294. TCE contribution (TCEcontribN) was defined as: 1=No TCE shift, each party bears 50% of tribunal costs; 2=Respondent contributes more than 50% to tribunal costs; 3=Claimant contributes more than 50% to tribunal costs). Using a power table to conduct a post-hoc power analysis indicates that the power of that bivariate relationship ($r$=-.20; $n$=48) is approximately .30, which suggests a 70% possibility of a statistical error and the need for future replication of the research. Franck, *Development*, *supra* note 61, at 461 n.132; *see also* COHEN, *supra* note 294, at 3–6. In any event, a Chi-Square analysis comparing "UltimateWin" and existence of a TCE shift was also not statistically significant [$\chi^2(2)$=.880; $p$<.64; $n$=48]. There was likewise no bivariate relationship comparing respondent wins versus claimant wins plus settlements ("Rwins") and TCE contribution ($r$=.16; $p$=.29; $n$=46).

313. *See supra* notes 245–59.

allocate TCE equally in an effort to make arbitration follow a "pay-as-you-go" approach that prevents imbalance in the cost of adjudicators. Similarly, to promote a "factor-dependent" approach that retains tribunal discretion to provide strategic incentives for prudent or inappropriate behavior, they could be more aggressive with a PLC shift. Given this theoretical distinction and the utility in signaling a specific payoff matrix for the parties, the research hypothesis was that there would not be a reliable link between the PLC and TCE decisions.

In contrast to the research hypothesis, however, there was a reliable relationship between PLC and TCE decisions. As indicated previously, there was some parity in the number and type of rationales offered for both PLC and TCE.[314] But the relationship was more substantial. A bivariate correlation between the party making a contribution to PLC was linked to the party responsible for paying more than 50% of TCE, and the effect was statistically large ($r$=.74; $p$<.01; $n$=48).[315] In other words, if the respondent paid a portion of PLC, the respondent was likely to be responsible for more than 50% of the TCE. Likewise, if the claimant was responsible for a portion of the respondent's PLC, there was a statistically significant likelihood of being responsible for paying more than 50% of TCE. Yet as PLC and TCE measure aspects of the same construct—namely, arbitration costs—even with the doctrinal distinction, the co-linearity is perhaps unsurprising.

The lesson is, on the basis of the existing data, that where tribunals are in for a penny, they are in for a pound. Shifts (or lack thereof) of the parties' legal expenses and the tribunal's costs generally occur together, and a treatment of one cost variable may be a useful predictor for other aspects of a tribunal's treatment of the other cost variable.[316] Although it is theoretically useful (and perhaps required in some circumstances) to consider cost variables separately given their different doctrinal bases, the reliable link suggests that it would be prudent for parties to consider the risk factors for the two distinct costs concurrently. The data did not

314. *See supra* notes 267, 291, 298, 303, 305.

315. *See supra* note 265; Cohen, *supra* note 294 at 113–16. This bivariate correlation included final awards but excluded pairwise cases if there was a missing value (i.e., either PLC or TCE was unavailable). The variables analyzed were plcN and TCE contribution, defined in *supra* notes 294 and 312. The bivariate correlation for those two variables using nonfinal and final awards, which excluded pairwise cases where there was a missing value, was similar ($r$=.77; $p$<.01; $n$=51).

316. The test of a bivariate relationship is not, however, a predictive or causal model. Rather, it is a test of association looking for reliable relationships. MILDRED L. PATTEN, UNDERSTANDING RESEARCH METHODS: AN OVERVIEW OF THE ESSENTIALS 9 (7th ed. 2009) (articulating the difference between causal and correlation research).

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support the hypothesis that tribunals would use distinct cost aspects to differentiate strategically in an effort to create incentives to promote different norms or party behavior.

### *2. Relationship with TCE, Amount Claimed, and Damage Awards*

There is also value in considering what cost-related variables might be reliably linked with the ultimate fiscal cost of ITA. For that reason, the next section considers the link between certain other fiscal data—namely, amounts claimed and amounts awarded—in an effort to identify potential reliable relationships. The objective would be, in the first instance, to create a descriptive model to consider those variables linked with net costs for ITA with the hope being that, in the future, a predictive model might permit parties to begin to estimate the fiscal cost of ITA. While such an approach might not be able to address the more generalized "cost" related considerations addressed earlier,[317] it may preliminarily begin to identify tangible fiscal costs.

The next two research hypotheses focused exclusively on the relationship of TCE and other fiscal variables for key reasons. First, as coded on the basis of the available data, PLC was a partial variable that only addressed the amount of the *shift* of legal fees. PLC was not the total scope of a single party's own lawyer's fees, let alone the lawyer's fees for both parties, which necessarily means that the scope of fiscal risk measured is limited. Second, there were more awards that provided quantitative data on TCE totals, and on the amounts paid by both the investor and the state. This means that the TCE variable is a more complete measure of the scope of financial risk associated with arbitration costs. Particularly, as some anecdotal evidence suggests that the scope of actual risk for parties' attorneys' fees is substantially larger than TCE alone,[318] future research can and should usefully isolate the full scope of the parties' legal costs (for both investors and states). In the interim, it is useful to consider the relationship that TCE has with both the amounts claimed and the amounts awarded.

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317. *See supra* notes 59–65 (considering social, political, and economic costs).

318. UNCTAD, ADR I, *supra* note 34, at 16–17 (explaining that "costs for conducting arbitration procedures are extremely high, with legal fees amounting to an average of 60 per cent of the total costs of the case").

The first analysis examined the bivariate relationship between amounts investors' claimed and total TCE costs. The test reflected that there was a significant, positive relationship between the amount claimed and TCE totals.[319] On the theory that large infrastructure energy projects might have large values and skew the results, a partial correlation was run to control for the effect of awards related to the energy sector. Even controlling for the effect of energy disputes, there was still a significant and positive relationship between the amounts claimed and TCE totals.[320] In other words, as the amount investors claimed increased, so did total TCE. See Chart 1.

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319. Recognizing that the amounts claimed incorporated some partially and fully quantified amounts claimed, this was true irrespective of whether amounts claimed by investors were analyzed using raw data [$r(11)=.88$; $p<.01$; $n=13$], winsorized data to eliminate the effect of outliers [$r(11)=.83$; $p<.01$; $n=13$], or even data that was transformed using log transformations to minimize the positive skewing data [$r(11)=.93$; $p<.01$; $n=13$]. The original skewness of the claimed damages was 6.792, which was large. After winsorizing, the skewness for claimed amounts was -1.034; after log transformations the skewness was .088. Reliance on the log transformation is likely most appropriate as it reduces the skewness and promotes the analysis of data that most closely conforms to the underlying assumption of the statistical tests (i.e., normally distributed data) and enhances statistical conclusion validity. The TCE Total variable did not require transformation as skewness was .753 (i.e., under +/- .80) and there were no outliers in the upper or lower bands. In essence, the raw TCE totals were reasonably approximate to the normal curve.

320. This was again true for: (1) the raw data [$r(10)=.87$; $p<.01$] that included statistical outliers on claimed damages, (2) winsorized data [$r(10)=.84$; $p<.01$] that eliminated outliers, and (3) data subject to log transformations [$r(10)=.93$; $p<.01$] to minimize positive skewing.

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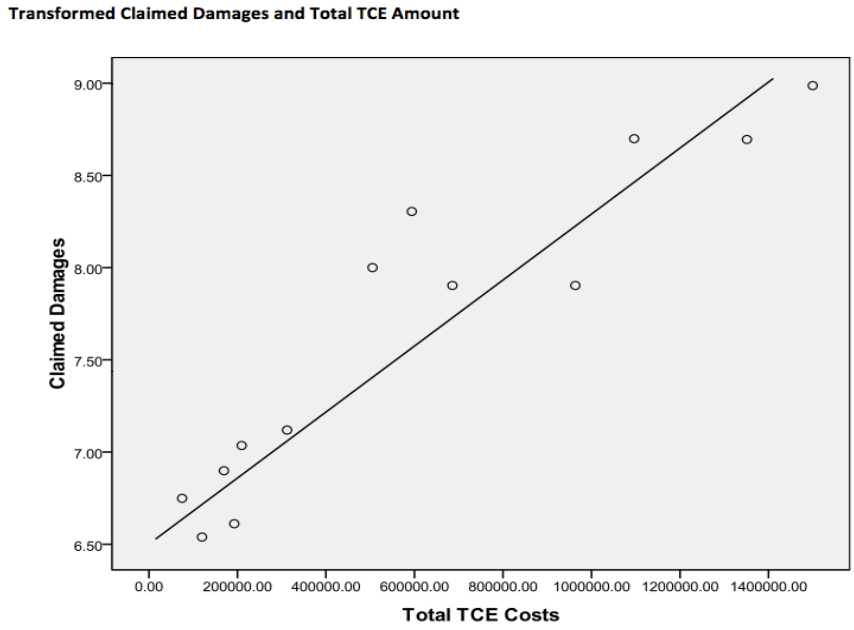
CHART 1: SCATTERPLOT OF TOTAL TCE COSTS (U.S. DOLLARS) AND TRANSFORMED DAMAGES CLAIMED



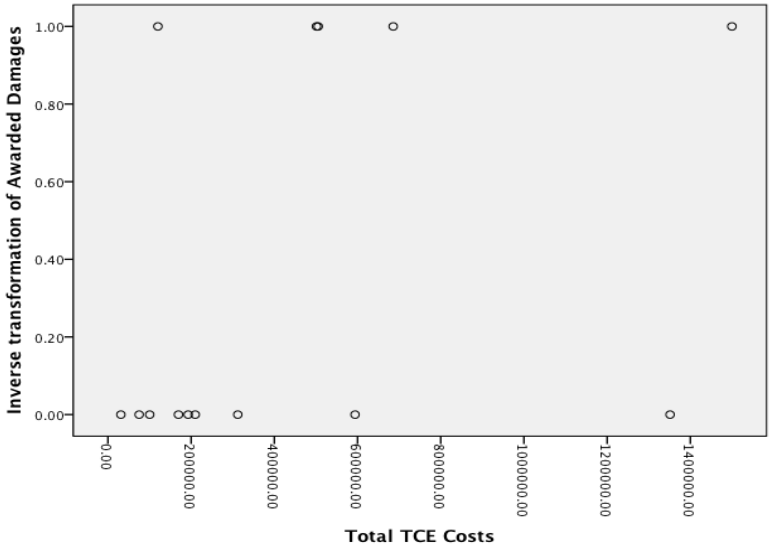

This relationship has potential implications when one considers that, as a doctrinal matter, only investors have the initial capacity to estimate, and to articulate, their claims of damages.[321] There is a vast difference between suggesting that a reliable link exists between variables and demonstrating that one variable *causes* a particular result. Further analyses are necessary both to replicate this existence of the bivariate relationship and to explore whether the variance persists in a more complex multivariate model that controls for potentially co-linear variance, such as the length of the case, presence of electronic discovery, scope of motion practice, challenges to arbitrators, and the type of law firms involved.[322]

321. Under the 1976 UNCITRAL Rules, for example, the notice of arbitration must include a "general nature of the claim and an indication of the amount involved." 1976 UNCITRAL Arbitration Rules, *supra* note 71, art. 3.3(e). Respondents can dispute the amount claimed and scope of damage thereafter. IIAs do not, however, typically grant an independent set of substantive rights (or a claim for damages related to breach) to states; rather, IIAs grant rights to investors and investments. See UNCTAD, UNCTAD/ITE/IIA/2007/3, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING 7–30 (2007) (explaining who is entitled to bring claims under IIAs), *available at* http://www.unctad.org/en/docs/iteiia20073_en.pdf.

322. These are, for example, variables that are linked to increased litigation costs in quantitative

The reliable relationship between amounts claimed and TCE totals takes on particular salience when compared to another critical variable—the amount awarded by the tribunal. Using data that conformed to the underlying assumptions of the statistical tests, bivariate analyses between awarded amounts and TCE totals failed to reveal a reliable statistical relationship between those two variables.[323] Even for partial correlations controlling for disputes in the energy sector, there was still no reliable relationship between TCE and the damages tribunals awarded.[324] See Chart 2.

CHART 2: SCATTERPLOT OF TOTAL TCE COSTS (U.S. DOLLARS) AND TRANSFORMED DAMAGES AWARDED




research in the U.S. federal courts. *See* LEE & WILLGING, *supra* note 44.

323. TCE Total was normally distributed. *See supra* note 319. The raw data of awarded damages was positively skewed (5.311); after winsorizing the data, the skewing was still 1.414, and an inverse log transformation resulted in skewing of -.40. Transformed data best adheres to the statistical parameters underlying the test. Transformed data did not reveal a reliable statistical relationship [$r(12)=.35$; $p=.22$; $n=14$]; winsorized data also did not reveal any statistically significant association [$r(12)=.14$; $p=.63$; $n=14$]. There was a slight difference in the raw data, which did suggest the existence of a reliable statistical relationship [$r(12)=.568$; $p=.03$; $n=14$]. But as that data exhibited skewing and contained outliers, inferences drawn from it must be done with extreme caution—particularly given the small nature of the subset of data. In any event, the arguable concerns about statistical power (.20 or less) can and should be addressed by replicating this research in the future.

324. There was no reliable relationship using transformed [$r(11)=.35$; $p=.24$] or winsorized [$r(11)=.15$; $p=.64$] data for amount claimed. Raw data, which failed to comport with assumed statistical normality, exhibited a correlation but is suspect [$r(11)=.568$; $p=.04$].

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This lack of a relationship is not per se troubling and offers an interesting perspective on the arguable integrity of the arbitration process. There was no reliable statistical relationship between the amounts awarded and the amounts paid to the tribunal for their services, which provides some initial evidence to suggest that arbitrators were not "self-dealing." The lack of a relationship means that, based upon the limitations of the data, measures, and models, the amount awarded appeared to operate independently from remuneration received. While in need of replication with a larger size beyond the pre-2007 population and a more complex model to assess potential moderating variables, the findings offer initial evidence supporting a narrative that arbitrators made awards based upon something other than a desire for a large personal pay day—and that perhaps the cause of a substantive award was due to other factors, possibly even including the actual or relative merits of claims and defenses. Particularly when compared with the statistical significance of amounts claimed—a variable entirely in the hands of claimants—the difference in the relationship between TCE and amounts awarded was pronounced and is worthy of further study.

### *3. The Certainty of Uncertainty*

Although the data offered some evidence of areas of predictability and even a primary reliance on the "pay-your-own-way" model, there is still much that is unknown regarding costs. The existence of pockets of uncertainty in how and on what basis tribunals will decide costs, in some respects, begins to suggest that there will be wide variance on cost-related issues. The question, however, is whether in light of the current data, the existing degree of uncertainty is normatively desirable. Historically, there may have been a sense that the time was not "ripe for laying down clear guidelines for the treatment of costs."[325] Yet this has implications—namely, at the price of predictability, determinacy, coherence, and consistency—particularly where arbitrators, parties, and their lawyers may come from different legal backgrounds and have different expectations.[326] This lays the seeds for a clash of cultures, a clash of law, a clash of expectations, and an ambiguity of result that—in an area of significant public international importance—is a lurking problem that can serve as the basis for discontent. The question we now face is whether we wish to

325. Bühler, *supra* note 68, at 253.
326. *Id.*

change our practice going forward in light of normative objectives or if we are content with the status quo.

## IV. ANALYSIS AND RECOMMENDATIONS

Full rationalization of costs in ITA is not yet possible. Nevertheless, we can and should begin the process of systematic analysis while understanding the implicit limitations of both the data and the evolution of the ITA system. This section, therefore, addresses the limitations of the data before discussing, within that context, where we might consider heading in light of certain normative objectives.

The current data and associated analyses were necessarily limited. Replication and convergence of research with more data and enhanced modeling is both necessary and appropriate. As suggested in previous research using the current database, recognizing the limitations is fundamental to understanding the scope of reasonable inferences that can and should be drawn from the data;[327] they inevitably have implications for the integrity of potential normative reforms.[328] First, there are issues of case selection bias in the study of publicly available awards that may mean, for example, that private awards might vary on critical issues pertaining to cost outcomes and justification. Second, particularly as regards the quantification of PLC and TCE data, there are pockets of missing data where tribunals failed to provide any quantitative information about the actual dollar values involved. This necessarily raises the question of whether the tribunals that did provide data offered adequate information or suffered from systemic bias. Although preliminary analysis in this research suggests there were some key similarities to the larger data set,[329] given the potential underrepresentation of ICSID cases, replication with expanded data would be particularly prudent to reassess these preliminary results. Third, there are issues as the data comes from the then-known population of awards from before June 1, 2006. There is a possibility that the data has a temporal limitation (i.e., an issue related to external validity and generalizability to the current and future population). Supplemental data may (or may not) conform to the initial baselines identified in this research. In the interim, the research provides a useful

327. Franck, *Development*, *supra* note 61, at 440, 459 n.129, 472, 474–76, 478 n.187; Franck, *Evaluating Claims*, *supra* note 1, at 17, 24 n.109, 39 n.170, 62, 68, 73, 83.

328. Franck, *Empiricism*, *supra* note 8, at 811–12.

329. *See supra* notes 225–34.

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baseline for future evaluation.[330] Finally, the strength of the statistical inferences is limited, may not reflect population parameters, and may, theoretically, be the result of variation that is due to chance alone. While the overall data set is arguably limited—in the sense that it is not a study with, for example, over 1,500 cases[331]—this does not mean that the data set itself is unworthy of quantitative study. To the extent that ITA is a relatively recent phenomenon in international law, there were simply no awards available in the past to analyze;[332] but particularly as there are now awards and more disputes in the pipeline, some sense of where the data are now is vital to create baselines for future consideration.

Nevertheless, it is always critical to remember that (1) systematic analysis must describe its methodology to promote the reliability of data collection, reliability of coded measures, validity of statistical modelling, and integrity of related statistical inferences; (2) research must be subject to replication in the future; and (3) expanded analysis with more sophisticated models and statistical control is prudent. While no quantitative research is perfect, provided it is methodologically sound ex ante, it is normatively preferable to no research at all or to the substitution of personal opinion or political power that is not grounded in a tested academic approach.[333]

Even with these limitations, some preliminary rationalization of the existing data may be helpful if, for nothing else, to provide insights for future research. The data suggested that while there were small pockets of convergence and reliable relationships, the overall picture was of variability.

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330. It is for this reason that the author is in the process of expanding the data set to include data for the time period before June 1, 2009. Research on final arbitration awards from 2008–2009 also appears to confirm the default baseline that most awards did not shift costs. *See* Smith, *Shifting Sands*, *supra* note 211 at 767 ("Of the thirty-one decisions in the sample, the majority (58.1%) do not shift costs.").

331. *See* Franck, *Development*, *supra* note 61, at 461 n.132 (suggesting that, given the nature of the effect in a particular model, a sample of 1,562 investment treaty disputes would be required to definitively accept or reject a research hypothesis for the evovolved population that would permit conclusive statements for all small, medium, and large effects).

332. Small numbers of investment treaty disputes is perhaps not surprising. The population of treaty disputes was small in the first place given that ITA is a recent international law phenomena. Moreover, empirical evidence for a related area—namely, international trade law disputes at the WTO—suggests that, under the GATT era, there were approximately nine cases a year but there are now approximately thirty to thirty-five per year. *See* Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 15–16 (1999); Eric A. Posner & John C. Yoo, *Judicial Independence and International Tribunals*, 93 CALIF. L. REV. 1, 46 (2005).

333. Franck, *Empiricism*, *supra* note 8, at 784–90.

On the side of divergence, the data suggested ITA costs were marked by a degree of unpredictability and a gap between what tribunals were anticipated to do as a matter of normative policy and what they did do as a matter of descriptive reality. Although there was a preference for the "pay-as-you-go" approach, various approaches to cost shifting in a variety of permutations were utilized. Similarly, the data did not reveal any reliable relationship between a shift of costs (either for parties' legal fees or tribunal/administrative costs) and the ultimate case outcome. Moreover, in some instances, there was wholesale abandonment or scant justification for decisions that involve key financial risks and implicate institutional legitimacy. The wide variation in types of rationale cited was also noteworthy.

There was, however, partial rationalization and pockets of coherence. These data points refute the blanket claim that "awards of costs and fees are arbitrary and unpredictable" for ITA.[334] Data showed that (1) tribunals could have made cost decisions at early stages of the dispute, although they often did not; (2) tribunals exhibited reasonable parity between cost allocations between investors and states; (3) tribunals were twice as likely to provide reasons than to cite to authority; (4) PLC and TCE decisions tended to occur together and in the same direction; and (5) there was a relationship between the amounts claimed and tribunal costs. The remainder of this section synthesizes the data, analyzes the implications, and offers normative recommendations to integrate norms of efficiency and fairness.

### *A. Costs Matter, Need Early Consideration, and Require Additional Data*

It was concerning that most of the cost-shifting decisions occurred in final awards. This was a missed opportunity. As it is doctrinally permitted to render cost decisions prior to the final award, tribunals did not capitalize on an opportunity to influence party behavior by incentivizing or "nudging" desired behavior.[335] Recognizing that, in the past, tribunals have awarded costs prior to final awards, tribunals should look for strategic opportunities to award costs, such as at jurisdiction or during preliminary challenges to the merits of a claim.[336] The failure to make such

334. Gotanda, *Fees*, *supra* note 39, at 2.

335. *See generally* ARIELY, *supra* note 33; RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

336. Various treaties and rules permit states to bring a preliminary challenge to arbitration claims. *See* ICSID Arbitration Rules, *supra* note 154, art. 41; 2004 U.S. Model BIT, *supra* note 147, art. 28(4); *see also infra* Part VI.B–C (discussing possible reforms).

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costs awards means that parties lack information about the potential costs of ITA that could facilitate full consideration of the costs and benefits of a dispute resolution strategy.[337] If parties act rationally to assess the costs and benefits of pursuing ITA, possible settlement opportunities are arguably lost.[338] Given the increased attention to settlement and alternative modes of resolving treaty disputes, this is concerning.[339]

The data also help contextualize claims that the costs of ITA were relatively high.[340] The average cost of a tribunal was more than US$600,000. That is not insignificant—but it must also be remembered that the fiscal data comes from a limited data set that requires expansion and replication of the research. Likewise, the availability of data on PLC, suggesting that average shifts were also in the order of US$600,000, suggests that the costs could be critical, namely, (1) paying 100% of US$600,000 for a PLC shift, (2) paying 100% of the US$600,000 TCE, and (3) any lawyer's fees the losing party also experiences. This suggests three things. First, it is difficult to ascertain "full" costs without expanded data on both parties' legal costs. Indeed, presuming that parties briefed tribunals on cost issues, it is curious that tribunals, more often than not, failed to provide a full explanation of claimed and awarded costs.[341]

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337. Resources matter particularly for the developing countries, which are the majority of respondents. *See* Franck, *Development*, *supra* note 61, at 446–47. Defending claims may require advance budgeting to allocate specific line items for conflict management. Without understanding the scope of arbitration risk, governments may not be in a position to make fully informed decisions about the value of IIAs.

338. In international commercial arbitration, the inability "to predict with any degree of certainty the outcome of a claim for costs . . . impairs the ability of parties to fully evaluate the case and consequently settle the dispute." Gotanda, *Awarding Costs*, *supra* note 69, at 38; *see also* Michael Bühler, *Costs in ICC Arbitration: A Practitioner's View*, 3 AM. REV. 116, 117 (1992) ("[I]t must be a prerequisite to any international arbitration that the parties know well in advance what to budget for costs, and that the cost system of the administering institution is fully transparent from the outset, so that clients and their counsel know how their money will be spent, and if they can expect to recoup it fully or in part.").

339. *See* UNCTAD, ADR I, *supra* note 34; UNCTAD, ADR II, *supra* note 34; Washington & Lee University School of Law & UNCTAD, *Joint Conference on International Investment and ADR*, WASHINGTON & LEE (Mar. 29, 2010), http://investmentadr.wlu.edu; *Investor-state mediation: when is mediation suitable and should the legal framework for settling, investment disputes be strengthened to include procedures supporting the mediation of such disputes?*, MEDIATION NEWS (Int'l Bar Ass'n, London), Oct. 2009, at 8; *see also* Salacuse, *supra* note 59, at 153 ("If, on the other hand, host countries and international investors can find and develop effective alternatives to international investor-State arbitration for the settlement of treaty-based investment disputes, the costs of investment dispute settlement for both states and investors may decline while working relationships between investors and host governments may improve."). *But see* Schill, *Cost-Shifting*, *supra* note 33, at 692 (suggesting that the purpose of IIAs is not to facilitate bargaining but to create a predictable legal regime).

340. *See supra* notes 212–16.

341. Based upon data in the publicly available awards, it is unclear whether the tribunals were

Second, this can create difficulties in accessing justice and fully pursuing claims and defenses if parties are unable to pay their lawyers, unable to pay the tribunal, or the fiscal cost of pursuing arbitration substantially outweighs the amount in dispute. This suggests that investment treaty conflict may be lurking beneath the surface, but it may simply be unaddressed given that the fiscal reality of ITA may inhibit access to justice. This may prove particularly troubling for investors or states with limited budgets to pursue adjudication. Third, uncertainty about cost allocation can prevent parties from fully appreciating the scope of their arbitration risk. All of these concerns suggest the need for doctrinal shifts, particularly in terms of encouraging tribunals to provide more complete data and to address cost issues at early stages of the dispute.[342] More information at an earlier stage holds the potential to manage stakeholder expectations (and presumably party resources) more effectively and to offer more complete empirical data for the future.

### *B. Signs of Balance Even Without a "Universal" Approach to Costs*

Current data suggests that there was a relative degree of parity between investors and states regarding costs. Most typically, the parties equally shared TCE and there was no shift of PLC. Meanwhile, there were an equivalent number of states and investors that experienced both a shift of PLC and a payment of more than 50%. As regards the actual dollar values of cost decisions, there was parity among investors and states for the payment of TCE; but there was less equilibrium on PLC shifts, which was arguably due to the small number of awards reporting dollar values for PLC shifts. Percentages of PLC shifts exhibited broad divergence; and although the largest proportion of TCE allocations were 50%/50%, there were various approaches to cost decisions.

Overall, while there was a degree of parity among investors and states, there was nevertheless variability in the fiscal outcome of cost decisions that refutes the supposition that there is a "universal" or "loser-pays"

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fully briefed on costs. Tribunals should include information on PLC and TCE in the award to aid in the assessment of this data and provide a more nuanced picture of ITA costs. *See supra* notes 224–26 (discussing the missing data related to costs).

342. *See* Reichert & Hope, *supra* note 21, at 30 ("[A]rbitrators and parties should consider costs at the beginning of an arbitration. Arbitrators should make it clear from the outset that the parties' conduct throughout the proceedings will be [considered] . . . . Parties should clarify the basis on which costs will be awarded and assessed, and the procedure to be used."); Smith, *Costs*, *supra* note 110, at 32 (The "arbitrator may wish to address the ambit of costs authority at a preliminary hearing. This would avoid any dispute as to the extent of the jurisdiction of the arbitrator to award costs at the end of the day.").

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approach to costs.[343] There was no reliable statistical relationship between (1) losing and PLC shifts, and (2) losing and TCE allocation. Although a "loser-pays" approach is doctrinally permissible and possibly a "trend" for analysis with a historical lens, data did not demonstrate a reliable—let alone causal—link between losing and cost outcomes. This suggests that it is inappropriate for parties to assess cost risk on the "loser-pays" variable in complete isolation; rather, the data seemed to suggest that a "factor-dependent" or "pay-your-own-way" approach was descriptively dominant. While more data and developed modeling may offer additional insight in the future, as a normative matter, stakeholders should recognize the degree of variability and consider what this could mean for their dispute resolution choices. Policy makers should likewise assess whether this unpredictability is normatively desirable and consider shaping their policy choices related to IIAs and their legal options for dispute resolution accordingly.

### *C. Gaps in Legal Authority and Rationale Suggest Need for Rationalization*

There is a plethora of legal authority from which tribunals could draw to justify cost decisions.[344] It is troubling that even when sources are easy to locate (and arguably readily known), tribunals fail to provide authority for cost decisions. Although this gap was most prominent in nonfinal awards (and perhaps not unexpected), even final awards exhibited the failure to offer authority (i.e., less than one authority on average). Such an approach is troubling if ITA is a rule-of-law demonstration project. If IIAs provide incentives for investors and states to engage in rules-based decision making, then arbitrators should adhere to the same credo. Simply presuming authority is inappropriate. It can lead to legal errors, such as *Eureko*, which must then be corrected (provided that is even doctrinally permissible). Particularly when references are straightforward, easy to include, and guide decisions, a citation gap creates challenges for perceived legitimacy and procedural justice.[345] For those cases citing

343. *See supra* notes 125–26.

344. *See supra* Part II.A, II.C.

345. *See generally* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 476, 477 (2008) (describing how disclosure of information can facilitate value creation and explaining how, irrespective of the outcome in terms of distributive justice, stakeholders "care, independently, about the fairness of the process by which those outcomes were obtained"); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of*

authority, it was unfortunate that institutional tribunals, particularly ICSID, failed to cite their own rules. Nevertheless, there is a degree of good news that, for ad hoc arbitrations, tribunals regularly cited 1976 UNCITRAL Rules. This is a step in the right direction for promoting the legitimacy of ITA. Future tribunals should follow that example and cite legal authority, particularly from the governing law.

Another step in the right direction was for tribunals to offer a legal rationale. For both PLC and TCE, tribunals offered rationales nearly twice as often as authority, averaging one or two reasons per final award. For both PLC and TCE, the awards exhibited variation in rationale. The most frequently cited factors were parties' relative success and failure, considerations of equity, and underlying substantive concerns. Concerns about encouraging appropriate behavior and discouraging inappropriate behavior also held some sway. But issues related to party equality, public interest, and settlement efforts had little impact on cost decisions. If stakeholders wish to create a dispute resolution system with cost implications that promote fairness and efficiency, this latter finding requires both attention and redress.[346]

There is irony in that commentators suggest that we need not worry about "flooding investment tribunals with trivial disputes" largely because investors will make a rational assessment of "the cost risk connected to investment treaty arbitration" prior to initiating claims.[347] But how can investors make such an assessment if a key variable—which may entail a large portion of the overall commercial, economic, and political risk—is unknown and potentially unknowable given the lack of predictability and guidance?

The lack of coherence in rationale is unsurprising in certain respects.[348] Treaties and arbitration rules that form the bulk of the governing law are

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*Government*, 28 LAW & SOC'Y REV. 809, 827 (1994) (finding "that the use of fair decisionmaking procedures does enhance the legitimacy of national governmental authorities").

346. *See* Wetter & Preim, *supra* note 67, at 333 (arguing that "a much increased awareness of the impact and proper allocation . . . (including the proper methods of their assessment) is desirable . . . [and] much greater care and time must be devoted in arbitral proceedings to the presentation of cost claims and to their determination").

347. Schill, *Enabling Private Ordering*, *supra* note 73, at 96; *see also* Salacuse, *supra* note 59, at 153 ("[A] rational investor will not lightly resort to [arbitration] and will examine other options for redress of its grievance before doing so. The final and perhaps most important reason for increased recourse to investor-State arbitration may be that aggrieved investors, having undertaken that search for other options, have concluded that they have no more cost-effective, reliable remedy for the settlement of disputes than investor-State arbitration.").

348. Schill, *Cost-Shifting*, *supra* note 33, at 659 ("The discretion conferred upon arbitral tribunals accounts for a considerable amount of uncertainty in the allocation of costs in investment treaty

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often silent or fail to address costs in detail. Key institutions—like ICSID—are silent on cost guidelines or vaguely reference factors such as the "outcome of the case" or "other relevant circumstances."[349] It is then little wonder that tribunals pick reasons at their leisure to justify decisions. One might reasonably suggest that arbitrators simply give parties what they requested. If stakeholders create an ITA system that fails to address costs clearly, stakeholders should hardly be surprised when the system they created—and the individuals to whom they have outsourced their adjudicative responsibility—do not provide clear results.[350]

The broader normative question is whether clarity is desirable. In the context of ITA, given the overall problems related to inconsistency, incoherence, and gaps in determinacy, there is value in providing pockets of predictability and clarity. Costs are tangible, and, as a structural matter, the risks arguably affect investors and states in equal measure. Costs implicate the utility of arbitration as opposed to other dispute resolution mechanisms, and understanding the scope of ITA costs could aid dispute resolution strategy to promote (but not guarantee) greater efficiency overall. As cost issues should be relatively politically neutral, costs could be an area to begin to bring clear rules—or at least improved normative guidance—about how tribunals can and should exercise their discretion.

There are different types of choice architectures for approaching ITA costs. First, states might articulate a clear rule that they prefer, such as a "loser-pays," "pay-your-own-way," or "factor-dependent" approach. Second, states could provide for cost rules in line with the original ICSID approach, namely, providing clear rules in advance of a dispute detailing how costs will be addressed (i.e., the "pay-your-own-way" approach where parties pay their own lawyers and split the costs of arbitrators equally). Third, states might take a "factor-dependent" approach that requires tribunals to use standards that are normatively desirable. For example, to the extent that states wish to encourage settlement in ITA, they may require tribunals to consider party settlement efforts. Particularly, as tribunals did not regularly cite settlement efforts, introducing this factor clearly into the normative baseline may affect tribunal, and possibly party, behavior. Likewise, to the extent that states

arbitration. What makes it additionally difficult to discern a structure in the cost decisions of tribunals is the fact that reasons for adopting a certain cost decision are rarely given.").

349. *See supra* notes 157–58, 163, 167–69.

350. *See generally* William W. Park, *The 2002 Freshfields Lecture—Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion (The 2002 Freshfields Lecture)*, 19 ARB. INT'L 279 (2003) (discussing the costs and benefits of specific rules in international arbitration).

may be concerned about the inequality experienced by small investors or states with smaller amounts of legal capacity, expressly requiring states to take issues of public interest or party equality into account may encourage parties and arbitrators to be more proactive in addressing these issues—and perhaps even treat different costs issues differently in an effort to optimize different opportunities to signal the likely pay-off matrix. While the choice to include a particular approach is a policy choice that reflects a treaty negotiation dyad, the last two options (namely, "pay-your-own-way" and "factor-dependent") are most attractive.

The first option—"loser-pays"—is less desirable at present. Given the inconsistency and breadth of the case law, it may be difficult to know in advance which party will "win" and which party will "lose." This makes a "loser-pays" approach susceptible to variance and injects an avoidable (and arguably unnecessary) degree of uncertainty into ITA, which creates greater challenges in predicting costs. Rather than engaging in a high-stakes poker game where there are risks of both an adverse substantive award and a related cost decision, it is preferable to enhance determinacy and coherence by promulgating clearer guidelines about cost decisions. This is not to say that an indemnification objective is undesirable. Rather, the issue might be whether policy makers can create standards that direct tribunals on how to incorporate that factor into cost decisions.

The value of the second option—the "pay-your-own-way" approach—is that it provides a degree of up-front certainty.[351] Parties have advance warning that they will be responsible for half of TCE and be responsible for their own PLC. This gives parties an incentive to be "good stewards" and manage their expenses effectively, knowing they will not be able to recoup their fees from the other side at the end of the case (or earlier). To the extent that parties can reasonably anticipate tribunal costs, know they will be responsible for one-half of TCE, and keep their own costs under control, that knowledge provides a reasonable degree of advance clarity. The weaknesses of the approach, however, are that if parties engage in deleterious behavior during the course of arbitration, that behavior cannot be penalized, and tribunals cannot use cost awards to encourage efficient arbitration conduct. It also potentially inhibits parties' access to justice and implicates fairness considerations, particularly when there is a relationship between the amounts an investor claims and the ultimate scope of TCE. Moreover, it fails to provide indemnification for a party that has been brought to the dispute resolution table and has expended costs to defend

351. Dean Gotanda favors this approach. Gotanda, *Fees*, *supra* note 39, at 2–3.

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the case. Using this approach inevitably creates sunk costs for dispute resolution. Should they wish to include treaty language to require this or adopt institutional rules that would support such clarity, stakeholders need to appreciate those drawbacks in light of the overall benefits.

The third option—the "factor-dependent" approach—may be the most normatively useful. This approach permits stakeholders to prioritize behaviors that they wish to encourage and to nudge efficient and desirable conduct.[352] In other words, if states wish to caveat the scope of arbitrator discretion—providing more guidance to tribunals and increasing certainty—they can and should do so in the text of IIAs[353] when they negotiate treaties or when there is an opportunity to renegotiate.[354] In such a case, states must make a normative choice about those factors that they find to be most appropriate. The data suggests that the most "naturally" occurring factors were considerations of relative success, equities of the situation, and concern about underlying substantive behavior. Should states wish to reinforce these factors and encourage the addition of other default rationales for arbitral decisions, they can expressly articulate these standards in treaties. If, however, states wish to incentivize other aspects—such as the role of access to justice, social justice, or other fairness considerations—this suggests states may need to incorporate express requirements that tribunals consider other factors, such as public policy or equality of arms. Likewise, if states wish to increase settlement opportunities, they could require tribunals to consider the cost implications of meritorious arguments or the social utility of claims or defenses during the proceedings.

One might imagine the text of an IIA's investor-state dispute settlement chapter that incorporates specific provisions for costs. It would specifically define both PLC and TCE. It would grant parties authority to agree about costs. It would then provide a default that, in the absence of

352. *See, e.g.*, Schill, *Cost-Shifting*, *supra* note 33, at 666 (suggesting cost shifting can "channel the behavior" to preserve arbitral efficiency); *see also* Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 208 (1984).

353. *See* Andrea K. Bjorklund, *Investment Treaty Arbitration Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin Picker et al. eds., 2008) ("[D]ecisions regarding . . . allocation of costs play an increasingly important role in investment arbitrations but are also not addressed thoroughly in the treaties."). Other options may involve the revision of institutional or UNCITRAL arbitration rules to address cost shifting in ITA. The current reforms at UNCITRAL and ICC do not suggest this is currently likely. Another option, presuming it forms a part of the applicable law, includes revising national arbitration laws on cost, but this may be difficult.

354. *See* UNCTAD, IIA MONITOR, UNCTAD/WEB/DIAE/IA/2008/1, NO. 2, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS (2007–2008), at 4–5 (2008) (discussing the increasing number of renegotiated IIAs).

choice, tribunals would have authority to assess costs at any stage of the proceedings but, in any event, must do so in the final award. It would require that the tribunal provide reasons for its cost decisions and then require the tribunal to take certain factors into account expressly, such as: (1) the parties' relative success, (2) whether cost shifting would be equitable given the parties' behavior during the arbitration, and (3) the parties' settlement efforts. Factors could be added or eliminated depending upon the normative choices of the treaty partners.

Although this "nudging" approach cannot guarantee behavior or eliminate all forms of discretion, it can encourage stakeholders to take key variables into account.[355] By establishing normatively desirable standards that reflect empirical knowledge about existing behavior, stakeholders can begin to move beyond a baseline of unbridled discretion or unpredictability to encourage useful behavior and generate enhanced certainty. Putting parties on notice about the utility of their behavior and the potential merits of their claim may provide parties with an incentive and opportunity to settle or consider other dispute resolution mechanisms. While tribunals must maintain their independence and impartiality, where they are also required to take factors into account through express treaty language, the guidance can create a level playing field that offers useful information and incentives. It will, moreover, aid the continued rationalization of costs in ITA and promote greater systemic legitimacy. While arbitrator discretion will remain,[356] it will be directed toward streamlined variables that the parties can anticipate and use to plan their conduct.

### *D. Links with Cost Variables Suggest Need for Caution and Rationalization*

Although the preceding discussion of gaps in legal authority and reasoning suggests a lack of coherence, cost variables exhibited small pockets of reliability that aid the rationalization of cost awards. There was

355. *See generally* ARIELY, *supra* note 37; THALER & SUNSTEIN, *supra* note 335; Anne C. Dailey & Peter Siegelman, *Predictions and Nudges: What Economics Has to Offer the Humanities, and Vice-Versa*, 21 YALE J.L. & HUMAN. 341, 343 (2009) (reviewing RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) and DAN ARIELY, PREDICTABLY IRRATIONAL (2008) and discussing the value of cognitive psychology and behavioral economics for socio-legal issues).

356. Eliminating all discretion on costs may create perverse incentives or prevent the exercise of judgment to make good decisions in difficult cases. There is nevertheless utility in guiding discretion to aid incremental advances toward improved rationalization.

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a reliable relationship between a shift of PLC and TCE such that, if there was a shift in the parties' costs, the same party would also be likely to pay for more than 50% of TCE and vice versa. Similarly, where there was no shift in TCE, there was no shift in PLC. In other words, awards linked decisions related to lawyer's fees and tribunal costs. As both PLC and TCE relate to ultimate ITA costs, this seems reasonably appropriate, and there seems little to do except clarify that the relationship exists and advise clients accordingly. If, however, stakeholders wish to make a normative choice to parse costs differently and finely tune their policy objectives for different types of costs, they can do so. If, for example, there is a particular desire to increase access to justice and consider party equality of arms, perhaps stakeholders may require tribunals to address PLC early on the basis of equality of arms, and public interest as ongoing payment of lawyers' fees may affect party capacity to continue with protracted ITA claims. In such a case, TCE could perhaps be allocated on a "pay-your-own-way" basis on a different timetable. Such a choice could reflect the normative concerns of parties related to efficiency and fairness.

There was also a reliable relationship between amounts claimed by investors and the amount of the tribunal's total cost. As the amount claimed was lower, the cost of the tribunal was lower; but as the amount claimed by the investor increased, so did the total tribunal cost. This—when contrasted with the lack of a reliable relationship between amounts awarded and tribunal costs—has implications for how and when investors might uniquely influence ultimate arbitration costs. It means that when investors initiate arbitration—as they are often the only parties with the legal right to initiate claims—the amount of damages they request implicates the baseline of ultimate costs, fees, and expenses of the entirety of the ITA process. It must be remembered that a reliable statistical relationship does not necessarily denote cause; and it is possible that a high-damage claim denotes a serious case, a case that has been protracted, or a case where major multinational law firms are involved. In serious or protracted cases, arbitrators rightly take more time to decide the dispute, thereby resulting in increased costs.[357]

357. This may also be a function of institutional rules. ICSID, LCIA, and ad hoc arbitrations often pay arbitrators by the amount of time spent. *See* LCIA, SCHEDULE OF ARBITRATION COSTS (2010), *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Costs.aspx (paying arbitrators by the hour); *see also* ICSID, SCHEDULE OF FEES, art. 3 (2008), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH8actionsVal=ShowDocument&ScheduledFees=True&language=English (setting fees for arbitrators on the basis of a daily rate). The ICC pays based upon the amount in controversy. ICC Rules, *supra* note 169, at app. III. Given that the data

If there is a causal relationship—namely, that investors set the amount in controversy and the higher their request, the higher the ultimate cost—that has serious implications. It suggests a need for clarity, at the outset, of how arbitration costs will be allocated. It suggests a need for procedural safeguards to minimize the harms (namely, increased costs and decreased settlement opportunities) that result from arguably inflated claims. Such a procedural safeguard might, for example, take the form of requiring investors to accompany their request for arbitration with a preliminary expert report. Particularly, as there is no equivalent of Federal Rule of Civil Procedure 11 sanctions in international arbitration and parties are free to claim any amount, there may be value in making changes to pleading requirements and encouraging more accurate assessments of damages at the outset.[358] Changing pleading obligations or using cost-shifting standards strategically offers incentives for party behavior that foster norms of efficiency and fairness. Using these process tools imposes a discipline that may lower the overall arbitration costs for both parties. It may also decrease arbitration-based buyer's remorse by focusing clients and counsel on the relative worth of arbitration.[359] Likewise, it may facilitate negotiation within realistic zones of possible agreement[360] and, similar to early damage assessments in asbestos litigation, aid settlement opportunities.[361] Nevertheless, policy choices based upon inferences from this data must be done with caution in light of the size of the subset of the data set and variations even between the subset and the larger pre-2007 population.[362]

There may be opportunities to rationalize cost beyond legal solutions, such as (1) encouraging tribunals to address costs early, often, and with

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subset came from ICSID or ad hoc tribunals, a more complex case requiring more hours would increase overall TCE.

358. Damage assessments would be preliminary and would evolve in light of the evidence and arguments presented during the proceedings.

359. Although possibly unrepresentative, the former CEO of a company that won an award against Mexico suggested that the experience was "so dissatisfying that he wished he had merely entrusted his company's fate to informal mechanisms," including political options, given the lost time and arbitration costs. Coe, *supra* note 73, at 8–10.

360. *See* WATKINS & ROSEGRANT, *supra* note 35, at 31–33 (discussing the functioning of ZOPAs); *see also* Michael L. Moffitt, *Will this Case Settle? An Exploration of Mediators' Predictions*, 16 OHIO ST. J. ON DISP. RESOL. 39, 44–52 (2000) (discussing ZOPAs and their impact on dispute settlement).

361. Asbestos litigation has benefitted from addressing damages early. *See* Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 218 (2008) (analyzing early assessment of damages in asbestos litigation and concluding it "fosters settlements; it generally yields verdicts more reflective of the merits of a case; and it discourages frivolous litigation"); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 374–75 (2006).

362. *See supra* text accompanying notes 199–234.

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reasons; (2) providing enhanced clarity in the terms of treaties; or (3) offering further guidance in arbitration rules. Another form of rationalization may be to create a market for "legal expense insurance" to help both investors and states address their costs risks in ITA.[363] The challenge, however, would be making sure that actuaries had something to work with to assess and to predict that risk to price policies properly. As a result, even insurers would likely want to have data from tribunals.

Promoting informed cost assessments and access to justice to permit cost-effective dispute resolution is critical. The objective should be to work with the pockets of coherence and balance that already exist and then begin to rationalize the treatment of costs to provide enhanced predictability and consistency on an incremental basis. Encouraging states (when drafting IIAs), parties (when engaging in dispute resolution), and arbitrators (when making cost assessments) to be clear, transparent, and precise (in light of the overriding policy objectives) would facilitate the incremental rationalization of costs in investment arbitration.

## CONCLUSION

ITA can be a useful tool for resolving investment treaty disputes, but issues of cost—should they continue in their present state—will create challenges for using ITA in the most fair and efficient manner possible. More attention to matters of cost—by parties, arbitrators, policy makers, and scholars conducting empirical research—is a desirable outcome. Promoting transparency, clarity, and determinacy in the costs will enhance the efficacy and legitimacy of IIAs and ITA. In a time of transition in international investment, the normative approaches suggested in this Article may offer an opportunity to provide the stability and rationalization necessary for the creation of international economic justice and sustainable dispute resolution systems.

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363. Legal expense insurance can cover risks related to bringing protracted and potentially expensive claims or can cover policyholders against the potential costs of legal action against them. *See, e.g.*, AMERICAN HERITAGE DICTIONARY OF BUSINESS TERMS (2010), *available at* http://www.yourdictionary.com/business/legal-expense-insurance.