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The Stakes Are High:
A review of the financial costs of investment treaty arbitration

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Written by Diana Rosert

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1.0 Introduction

The amounts at stake in investment treaty arbitration are very often high. The average claim in investor–state arbitrations based on bilateral investment treaties (BITs) and other international investment agreements (IIAs) is about US$492 million (Hodgson, 2014c), and multibillion-dollar claims are increasingly common. Recent billion-dollar awards—such as the US$50 billion award against Russia in relation to the dissolved Yukos oil company[1] and a US$1.77 billion award for Occidental in a dispute with Ecuador[2]—highlight just how large the stakes can get.

As such, entering into treaties with investor–state dispute settlement clauses, which allow foreign investors to initiate arbitrations directly against host states, carries significant financial risks for governments. Under this system the state is always the respondent, never the claimant, and it is the only party liable for treaty breaches under existing agreements.[3] Even where the respondent state successfully defends itself, it typically incurs significant arbitration costs, often amounting to several million U.S. dollars. This is of particular concern to developing countries, which may struggle to cover the damages and costs.

This paper discusses the financial implications of investment treaty arbitrations. It begins by reviewing the amounts of compensation that investors have claimed from states in international investment arbitrations. It then evaluates how much compensation investors were awarded when they prevailed on the merits of their claims. This is followed by a discussion of the trend among tribunals to award compound rather than simple interest on the amount of compensation. Next, the paper looks at three types of arbitration costs in more detail: lawyers' costs, arbitrators' fees and administrative costs. In this context, it also addresses third-party funding and contingency fee arrangements for claimants as well as arbitral tribunals' cost and fee allocation between disputing parties. Finally, the paper indicates potential reforms to investment arbitration that could help contain costs.

[1] Consisting of three cases heard by the same arbitral tribunal in parallel: *Yukos Universal Limited (Isle of Man) v. Russian Federation*, UNCITRAL (PCA Case No. AA 227); *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, UNCITRAL (PCA Case No. AA 228); *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, UNCITRAL (PCA Case No. AA 226). The Final Awards of 18 July 2014 are available at http://www.pca-cpa.org/showpage.asp?pag_id=1599.

[2] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/11), Award.

[3] In a rare number of investment treaty arbitrations, respondent states have made counterclaims against the investor that commenced the arbitration. For a discussion of the jurisdictional issues involved, see Bjorklund (2013).

2.0 Amounts of Compensation Claimed

According to a recent study, the amount of compensation that investors claimed in some 130 disputes averaged US$492 million (Hodgson, 2014c).[4] Based on UNCTAD data, there were 43 billion-dollar claims by the end of 2012.[5] A list published in The American Lawyer in July 2013 counts 52 claims above US$1 billion, with the largest totalling US$114 billion against the Russian Federation, followed by a US$50 billion claim against Peru, and US$31.7 billion against Venezuela (Goldhaber, 2013).[6]

Developed countries like Australia, Belgium, Germany, Greece and the United States, as well as a number of developing countries and transition economies, have also faced multibillion-dollar claims (see Table A1). Another 113 cases were found to involve claims between US$100 million and US$1 billion, which concerned a larger number of respondent countries, including least developed countries like Laos and Tanzania (Goldhaber, 2013). Most of the known multibillion-dollar claims are relatively recent and still pending. Disconcertingly, the outcomes of some high-stake cases that have been concluded remain unknown to the public.

The impact of such large claims not only rests on their eventual outcome, such as the amounts of compensation that are granted or denied (see further Section 3). These lawsuits put respondent states under great pressure to hire specialized arbitration lawyers from top law firms, which will likely charge higher fee rates for services related to large claims. The existence and proliferation of large claims may also serve to sustain "threats of arbitration," e.g., increase the bargaining power of investors in informal discussions with governments where the aim is to water down specific (envisaged) government measures or to obtain settlement payments (Gallagher & Shrestha, 2011, p. 5).[7] Not only awards in favour of the investor, but also settlements can be worth hundreds of millions and even billions of U.S. dollars.[8] Illustrating the dire consequences of arbitrations on respondent states, billion-dollar claims may reinforce the "dissuasive effect" that the expectation of high arbitration costs is assumed to have on states (OECD, 2012, p. 22). If "investors can use the spectre of high-cost ISDS [investor–state dispute settlement, added] litigation to bring a recalcitrant State to the negotiating table for purposes of achieving a settlement of the dispute" (OECD, 2012, p. 22), they can also take advantage of the fear of facing billion-dollar claims.

[4] An earlier study that evaluated 79 publicly available awards prior to 2010 determined the average amount claimed at US$370,898,027 (raw mean amount controlled for inflation). See Franck (2012, p. 894).

[5] According to the same data set, amounts claimed were known in some 224 cases. See UNCTAD, Database of Treaty-Based Investor–State Dispute Settlement Cases. Retrieved from http://iiadbcases.unctad.org/.

[6] Two of claims listed by Goldhaber (2013) might be based on contracts rather than on investment treaties (*Mobile Telesystems v. Uzbekistan and International Quantum Resources v. DR Congo*). One listed treaty claim has not been registered with ICSID to date (*Cyprus Popular Bank v. Greece*).

[7] See further Tienhaara (2011).

[8] This was demonstrated by an agreement—worth more than US$920 million—reached in a dispute between a subsidiary of the Danish Maersk Group and Algeria related to a windfall tax on oil profits. See Maersk Oil (2012a; 2012b), and *Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/09/14). In another case, Venezuela paid US$600 million to the Dutch building materials company CEMEX to settle a dispute. See CEMEX (2011), and *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15).

3.0 Amounts of Compensation Awarded

By the end of 2012, claimants prevailed in 32 per cent of the concluded arbitration cases, while 41 per cent were rendered in favour of the state and 26 per cent were settled.[9] As of September 2013, 83 awards in favour of the investor were publicly available (see Table 1 and Annex – Table 2). The principal amounts awarded to the investor totalled about US$6.8 billion excluding interest. The average amount, across all rules and venues, was US$81.4 million.[10] The July 2014-award of US$50 billion for the *Yukos* claimants,[11] which is not included in this data set, is seven times higher than the amounts awarded in all known investment treaty arbitration awards taken together. At the same time, the tribunal granted the claimants less than half of the much larger amount of compensation—US$114 billion—that they originally sought.

More generally, evaluations of arbitration awards indicate that, on average, the sums awarded to claimants are significantly lower than the sums claimed (Franck, 2012, p. 894). As a recent study concludes, "on average a successful claimant was awarded 41 per cent of the amount it claimed" (Hodgson, 2014b, p. 5).

TABLE 1: AMOUNTS OF COMPENSATION AWARDED TO THE INVESTOR (IN US$ W/O INTEREST), BY RULES

	TOTAL	AVERAGE	MEDIAN	HIGHEST	LOWEST
International Centre for Settlement of Investment Disputes (ICSID) Rules (52 awards)	4,562,286,428	87,736,277	13,203,371	1,769,625,000	155,404
United Nations Commission on International Trade Law (UNCITRAL) Rules (21 awards)	1,241,835,801	59,135,038	16,300,000	269,814,000	461,566
Stockholm Chamber of Commerce (SCC) Rules (9 awards)	20,927,285	2,325,254	2,026,480	8,890,000	24,642
Other rules (1 award)	935,000,000	-	-	-	-
Total (83 awards)	**6,760,049,514**	**81,446,380**	**10,694,005**	**1,769,625,000 (ICSID)**	**24,642 (SCC)**

Source: IISD table based on United Nations Conference on Trade and Development (UNCTAD) data,[12] Investment Treaty Arbitration (italaw.com) and Investment Arbitration Reporter (iareporter.com). The data sample consists of 83 awards in favour of the investor rendered between 1990 and 2013, which were publicly available as of September 1, 2013.

The largest known award prior to Yukos[13] was rendered in *Occidental v. Ecuador*,[14] where Ecuador was ordered to pay US$1.77 billion in damages to the American oil company Occidental. The second-highest amount—US$935 million—was awarded to a Kuwaiti company in an arbitration decision against Libya.[15] The 310 million Moldovan *lei* (approximately US$24,642), awarded to a Russian investor in 2005 is the lowest known damages award in the

[9] Based on unpublished UNCTAD data. For published UNCTAD data on the issue, see UNCTAD (2013, p. 5).
[10] A recent study that examined awards up to December 31, 2012, calculated an average of US$76,331,000. See Hodgson (2014c). Other studies calculated a significantly lower average amount by taking into account both awards in favour in the investor and those in favour of the state (as zero compensation). See Franck (2007, pp. 58-59) and Franck (2012, p. 894).
[11] The claimant Hulley Enterprises was awarded US$39.97 billion, Veteran Petroleum US$8.2 billion and Yukos Universal US$1.85 billion, amounting to a total of US$50 billion. See supra note 1.
[12] The data was retrieved from the UNCTAD Investor–State Dispute Settlement Database (http://iiadbcases.unctad.org/) as well as UNCTAD IIA Issues Notes from 2010 to 2013 (www.unctad.org/iia).
[13] See supra note 16.
[14] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/11), Award.
[15] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award.

history of investment treaty arbitration.[16] There are only nine known cases in which tribunals awarded less than US$1 million, and another six cases where the tribunals determined some treaty breaches, but did not award any compensation.[17]

Considering the implications for states, the Organisation for Economic Co-operation and Development (OECD) warned that large awards could "seriously affect a respondent country's fiscal position" (OECD, 2012, p. 5, footnote omitted), referring to the US$270 million *CME* award against the Czech Republic.[18] At the time of the award in 2003, the World Bank classified the Czech Republic as an upper-middle-income economy (World Bank, 2003, p. 296). Undoubtedly, the impacts of large damages awards on low-income and lower-middle-income country are even stronger. Seeing a large award in proportion to a country's GDP or government budget highlights the implications for a developing or transition economy (Gallagher & Shrestha, 2011, pp. 9-10). For example, the US$50 billion award against the Russian Federation amounts to about 12 per cent of the government's revenue in 2014, which was valued at US$410 billion (RUB 13.6 trillion) (RIA Novosti, 2013). For 2014, the government expected a budget deficit of some US$12 billion (RIA Novosti, 2013). The *Yukos* award could significantly add to this deficit. Another example is the US$1.77 billion award against Ecuador in the *Occidental* case which is equivalent to 6.8 per cent of Ecuador's US$26 billion government budget in 2012, the year of the award (Ochoa, 2012). By coincidence, the amount awarded to Occidental precisely corresponds to the Ecuadorian Ministry of Health's budget of US$1.77 billion in the same year (Ochoa, 2012).

Compensation can be awarded for different treaty breaches and involve different categories of damages, subject to the treaty language and the tribunals' assessment of the specific circumstances of a case. In past cases, tribunals awarded compensation not only for direct or indirect expropriation, but also for the breach of the fair and equitable treatment obligation and other standards of treatment (Ripinsky & Williams, 2008, pp. 13-14). The amount of compensation may comprise damages to the actual investment, lost opportunities, lost profits and, occasionally, moral damages. Especially where a treaty's provisions on compensation are vague, arbitral tribunals have considerable discretion in resolving questions of compensation.

In practice, determining the value of an investment is a complex exercise, which entails some uncertainty and a varying degree of speculation depending on the selected method of valuation (Nikièma, 2013, pp. 13–14). Typically, damages are based on the investment's fair market value, which "represents the price that a seller would be willing to accept and a buyer would be willing to pay for it in an arm's length transaction" (UNCTAD, 2012, p. 117). However, the fair market value approach has been criticized for encouraging high awards, while not taking into account factors that may balance investor and host state interests (Nikièma, 2013, p. 10). Such balancing factors could include the legitimate purpose of government measures, e.g., social justice (UNCTAD, 2012, pp. 114-115), the historic circumstances under which the investment was acquired or the host state's socio-economic situation when the treaty breach occurred (Nikièma, 2013, p. 10, 14). A related issue, discussed in the next Section, is the payment of interests on amounts of compensation.

[16] *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova* (SCC), Award.

[17] The six cases are *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2), Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Luigiterzo Bosca v. Lithuania, Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (SCC Case No. V (064/2008)), Nordzucker v. Poland, and Ronald Lauder v. Czech Republic.*

[18] *CME Czech Republic B.V. v. The Czech Republic, UNCITRAL,* Final Award.

4.0 Simple vs. Compound Interest on the Amount of Compensation

Most investment treaties require the payment of "prompt, adequate, and effective" compensation (UNCTAD, 2012, p. 40).[19] The 2012 U.S. Model BIT (Article 6) and various existing treaties further state that compensation must be paid without delay, at fair market value and in freely transferable currency. However, investment treaties are generally silent on the type of interest rates that shall apply to amounts of compensation. At the same time, it is common practice among tribunals to award interest (Newcombe & Paradell, 2009, p. 397) and interest "may be as significant from a monetary standpoint as the principal claim itself" (Gotanda, 2007, p. 1). A widely held notion is that the payment of interest is consistent with customary international law and may be necessary to achieve "full compensation."[20]

A number of treaties explicitly state that compensation includes the payment of interest (UNCTAD, 2012, pp. 45–47), for instance requiring "interest at a commercially reasonable rate,"[21] "appropriate interest,"[22] "interest at a fair and equitable rate,"[23] or "interest at the rate of London Interbank Offered Rate (LIBOR)."[24] At the same time, it is rarely specified whether simple or compound interest rates shall apply, or in which cases the one is more appropriate than the other. In the absence of such provisions, it is largely at the discretion of the tribunal to make a decision in the specific case.

Interest multiplies the amount a state needs to pay to the investor. In *Wena v. Egypt*, the tribunal awarded US$11 million in interest, an amount that exceeded the awarded net compensation of US$8 million.[25] In *Kardassopoulos v. Georgia,* Georgia was ordered to pay US$30 million in interest, twice the awarded net sum (US$15.1 million).[26] In both cases, the tribunals granted compound interest.[27]

While simple interest means that the same net value owed to the claimant is taken as the basis for interest calculations over several years, compound interest is charged on the net value plus already accrued interest, i.e., "the claimant receives interest upon interest" (Gotanda, 2007, p. 5). For example, if the net sum of compensation is determined as US$10 million and a simple interest rate of 6 per cent per year is applied for 15 years, the compensation increases to US$19 million. Over the same time span, an annually compounded interest rate of 6 per cent results in US$24 million. In other words, "the award of compound interest may have important consequences for the debtor, who may face unforeseen financial hardship when condemned to pay compound interest" (Grisel, 2014, p. 226). Seen from a different point of view, it has been argued that compound interest is the "standard business norm" and that it is therefore more appropriate to compensate investors on this basis (Gotanda, 2004).[28]

[19] See also Sornarajah (2010, pp. 208-210).

[20] This view is supported by the works of the International Law Commission, which states in Article 38.1 of its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts: "Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result." However, commentary (1) clarifies: "Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case." See also Nikièma (2013, p. 8).

[21] See for instance Canada–Tanzania BIT (2013), Article 10; and China–Republic of Korea-Japan Investment Agreement (2012), Article 11.

[22] Japan–Philippines Economic Partnership Agreement (2006), Article 95.

[23] India–Mozambique BIT (2009), Article 5.

[24] Finland–Vietnam BIT (2008), Article 4.

[25] *Wena Hotels Ltd.* v. *Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award.

[26] *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18), Award.

[27] See supra note 31 and 32.

[28] See also Ripinsky & Williams (2008, p. 383).

It appears that over the past 10 years a trend emerged among tribunals in investment treaty arbitration to award compound rather than simple interest rates,[29] particularly in cases finding direct or indirect expropriation (Newcombe & Paradell, 2009, p. 397). This is remarkable insofar as in 2001, the commentary to Article 38 (Interest) of the International Law Commission's Draft Articles on State Responsibility considered that "[t]he general view of courts and tribunals has been against the award of compound interest."[30]

The existence of a trend towards the application of compound interest rates is supported by a sample of 43 decisions rendered in favour of the investor between 1990 and 2010 (see Table 2). Overall, there were twice as many decisions awarding compound interest than those awarding simple interest.[31] The data further indicates that, prior to 2005, awards of simple interest were nearly as common as awards of compound interest. However, decisions from 2005 onwards show a tendency towards granting compound interest on the amounts of compensation. In the majority of the selected decisions interest started to run from the date of the expropriation, the treaty violation or the "act" at issue. In a few cases, the interest was awarded from the date of the notice of arbitration or the date of previous awards (e.g., in local courts).

TABLE 2: TYPE OF INTEREST AWARDED OVER TIME

	SIMPLE INTEREST AWARDED	COMPOUND INTEREST AWARDED	TOTAL (NUMBER OF DECISIONS)
1990–2004: decisions	8	10	18
2005–2010: decisions	5	20	25
Total (number of decisions)	**13**	**30**	**43**

Source: IISD table based on data from Sabahi (2011)[32]

Generally, tribunals did not provide lengthy explanations as to why they opted for compound rather than simple interest, or for the inverse. For instance, the *Metalclad* tribunal only briefly noted that it awarded 6 per cent interest, compounded annually, "[s]o as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place,"[33] while the tribunal in *Middle East* concluded that compound interest was appropriate "to make the compensation 'adequate and effective.'"[34] However, while this appears increasingly rare, between 2008 and 2009, tribunals in several cases decided to compensate claimants at a simple interest rate. The tribunal in *Saipem v. Bangladesh a*warded the simple interest rate that was determined in an earlier International Chamber of Commerce (ICC) award on which Saipem based its claim.[35] In the Desert Line case, the tribunal ordered the implementation of a Yemeni arbitral award and considered 5 per cent simple interest rate "appropriate."[36] The respondent state, Yemen, had argued that compound interest was contrary to its domestic law.[37]

[29] See Sabahi (2011, pp. 152-153); see also Grisel (2014, pp. 226-230).
[30] See also Grisel (2014, p. 227).
[31] A more recent study covering awards between 2000 and 2012 counts 39 awards granting compound interest vis-à-vis 11 granting simple interest. See Grisel (2014, p. 228).
[32] See Annex 2 in Sabahi (2011, pp. 197-215). In contrast to Sabahi's table contained in Annex 2, the IISD chart only presents data on decisions in investment treaty disputes in which tribunals awarded compensation and specified interest rates. It does not include eight contract cases and six treaty cases without compensation and/or specified interest rates.
[33] *Metalclad v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, para. 128.
[34] *Middle East Cement Shipping and Handling Co v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award, para. 175. See further Banifatemi (2010, p. 203).
[35] *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award, paras. 212 and 85.
[36] *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, para. 295.
[37] Ibid., para. 294.

In *Duke Energy v. Ecuador*, the tribunal reasoned that Ecuadorian law prohibited compound interest.[38]

The decisions in *Desert Line* and *Duke Energy* affirmed the relevance of domestic compensation standards, namely those prohibiting compound interest, in the context of investment treaty arbitration (Grisel, 2014, p. 230). However, in *Occidental v. Ecuador* and *Wena v. Egypt* the investment tribunal decided not to follow domestic law that prescribed simple interest; instead, they granted compound interest. The *Occidental* tribunal considered that "compound interest is the norm in recent expropriation cases under ICSID."[39] The tribunal determined a pre-award interest that amounted to about half a billion U.S. dollars, bringing the total amount of compensation to US$2.3 billion.[40] The tribunal in *Wena* stated that "an award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations."[41] The *Wena* annulment committee instituted at Egypt's request confirmed the tribunal's decision, determining that the tribunal had authority to award such interest.[42]

A tribunal's decision between simple and compound interest can have significant cost implications for respondent states. However, in the absence of formulations in investment treaties that provide clear guidance to investment tribunals, it is difficult to predict how a tribunal will decide in a specific case. As illustrated by the above examples, in past cases tribunals have also been divided on whether to apply domestic law on interest. Furthermore, the level—not only the type—of interest rates is an important and controversial issue that is often left open by investment treaties.

Addressing future investment treaty making, the recently drafted Model BIT Template of the Southern African Development Community (SADC) encourages its member states to determine the type and level of interest payable on an amount of compensation (SADC, 2012, p. 25). While this template recommends a provision that specifies the payment of simple interest, other approaches are imaginable for states that wish to increase clarity on this issue in future treaties (e.g., specifying which circumstances justify simple or compound interest).

[38] *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, para. 457.

[39] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/11), Award, para. 840. See also Grisel (2014, p. 232).

[40] The tribunal granted "rate of 4.188% per annum, compounded annually from 16 May 2006 until the date of this Award." See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/11), Award, para. 876.

[41] *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Award, para. 129. See also Banifatemi (2010, p. 203).

[42] *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, para. 53.

5.0 Arbitration Costs

The cost of arbitration includes fees for arbitrators, administration, legal representation and experts. According to a recent OECD survey, both disputing parties faced average total costs of US$8 million (OECD, 2012, p. 18). One example for arbitration costs considerably above this average is the recently decided *Yukos* case. The three claimants' costs for legal representation amounted to some US$80 million,[43] the respondent's to US$31.5 million[44] and the tribunal's fees, administrative and related costs to US$11 million for both disputing parties.[45] This exceeds the costs that arose in other expensive proceedings such as the *Abaclat* case. From 2008 to August 2010, the jurisdictional phase of the arbitration, the claimants disclosed costs of US$28 million and Argentina of US$12 million; the disputing parties spent a total of US$40 million on law firms, legal experts, related expenses and ICSID costs.[46] In arbitrations between *Fraport* and *Philippine International Air Terminals Co.* (PIATCO) with the Philippines,[47] the defendant state is reported to have incurred legal costs of over US$50 million.[48]

Very few publicly available awards provide a detailed accounting of legal and arbitration costs.[49] Consequently, comprehensive information on the costs of more than 200 concluded investment treaty arbitrations is not available. However, a 2007 report of the ICC Commission on Arbitration provides some insights into the distribution of costs between the three main components: it found that legal expenses for counsel and experts on average accounted for about 82 per cent of the total costs for both parties, arbitrators' fees for 16 per cent and institutional costs for 2 per cent (ICC, 2007). It was suggested that this cost distribution generally holds true not only for investment treaty arbitrations conducted at the ICC International Court of Arbitration (ICC Court), but also other arbitral institutions such as ICSID, the Permanent Court of Arbitration (PCA) and SCC.[50] A more recent study suggests that the share of legal costs may even exceed 90 per cent of total costs, determining that the disputing parties' costs for lawyers and experts average US$9 million as compared to US$750,000 for arbitrators' fees and institutional charges (Hodgson, 2014a; 2014b).

5.1 Third-party Funding

Due to the high costs of investment arbitration and awards of up to several billion U.S. dollars, this area of litigation has become a very attractive and lucrative market for the funding industry (OECD, 2012, p. 36). Although a relatively new phenomenon, the funding of investment treaty claims has quickly expanded. Facilitated by large law firms, claimants increasingly enter contingency fee arrangements directly with them, or into third-party funding agreements with specialized companies that provide financial resources for the litigation (including for legal fees). Both arrangements are typically in exchange for a 20 to 50 per cent share in the amount of compensation or settlement sum (OECD, 2012, p. 36). Over 20 funders and brokers are active in this area.[51] Today, claimants are offered such funding arrangements on a routine basis, but these means of arbitration financing are not at the defendant states' disposal.[52]

[43] *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, UNCITRAL (PCA Case No. AA 226), Final Award, para. 1887.
[44] Ibid., para. 1856.
[45] Ibid., para. 1869.
[46] *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, paras. 683 and 685.
[47] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) and *Philippine International Air Terminals Co. v. Republic of Philippines* (ICC).
[48] See Eberhardt & Olivet (2012, p. 15), Cabacungan (2011), and Diaz (2011).
[49] The OECD (2012, p. 18) specifies that only 28 out of 143 examined awards provided information about the arbitral fees and the parties' legal expenses. The remaining awards provided some (53 awards) or no information (62 awards).
[50] See OECD (2012, p. 18), and Scherer (2011).
[51] A list of funders and brokers can be found at http://www.international-arbitration-attorney.com/third-party-funders.
[52] However, in some very rare cases states may receive outside financial help from non-governmental organizations. For instance, the "Campaign for Tobacco-Free Kids" partly financed Uruguay's defense against the claim by tobacco giant Philip Morris. See De Brabandere & Lepeltak (2012, p. 6).

Technical and legal aspects aside, such funding agreements raise fundamental questions about the fairness of investor–state arbitration and have generated a contentious debate (Eberhardt & Olivet, 2012, pp. 56–63). On the one hand, proponents argue that litigation finance gives access to justice for companies that would otherwise not be able to pursue costly investment treaty arbitration. Critics, on the other hand, caution that the practice may encourage speculative claims to the detriment of respondent states and reduce the incentive to pursue remedies other than monetary compensation or reach a settlement. As a consequence, respondent states are potentially exposed to more cases, larger claims and greater costs, while claimants with third-party funding "face zero financial risk if they lose an arbitration" (Mann, 2013, p. 534).

5.2 Legal Costs

The disputing parties' legal costs consist of salaries for in-house lawyers, fees for external counsels, related expenses (e.g., for travel and communication) and costs for experts and witnesses. How many lawyers and hours are devoted to a case is arguably influenced by the amount in dispute and the complexity and length of the proceedings.

Since legal costs constitute the largest share in the parties' expenses, there has been some debate about the role of law firms in driving up investment treaty arbitration, damages claims and, eventually, arbitration costs. The OECD (2012) suggested that high costs might be due to the "increased role of large law firms that mobilise teams of lawyers using expensive litigation techniques borrowed from corporate litigation practices" (p. 19). Arbitration lawyers from the private sector typically charge several hundred dollars per hour; at top law firms the hourly fees can be up to US$1,000 (OECD, 2012, p. 19). A survey showed that currently the following three law firms are leading in representing claimants and respondents in investment treaty arbitration: Freshfields Bruckhaus Deringer with 123 treaty cases, White & Case with 37 cases and Curtis Mallet-Prevost Colt & Mosle with 29 cases (Global Arbitration Review, 2014).[53]

In addition to the costs for lawyers, parties have to bear "expenses related to witness and expert evidence" (ICC, 2007). Since experts increase legal costs and may decrease the efficiency of proceedings, the ICC Commission on Arbitration advises disputing parties to presume, at the outset, that "expert evidence will not be required" (ICC, 2007).

For respondent states, and especially for the developing countries among them, an important issue is how to keep legal costs down, while maintaining an adequate defence. It may occur that avoiding external counsel could reduce costs for legal representation, since salaries for government lawyers in developing countries are, *a priori*, significantly lower than fees for international arbitration lawyers in the private sector. However, it is uncertain whether a team of competent in-house lawyers is necessarily less expensive than external counsel.

While some frequent respondents such as Canada and Argentina have successfully built up extensive in-house expertise in investment treaty arbitration,[54] and are represented only or mostly by government attorneys, the Argentinian example also shows that the process involved considerable expenses (e.g., for human resources, training of staff and access to legal materials) and created on-going costs, at the expense of budgets for other areas (Gottwald, 2007, p. 255). If the number of actual and expected cases is high, cost rationales for internal defence may play out in the long run (although evidence is not available), but Argentina's efforts were also motivated by the strategic

[53] In 2011, King & Spalding instead of Curtis Mallet-Prevost Colt & Mosle ranked third. See Eberhardt & Olivet (2012, pp. 20–23).

[54] Argentina's efforts responded to the surge of cases filed against it in 2003. Canada improved its defence capacity following its experiences with NAFTA Chapter 11 arbitrations. See Gottwald (2007, pp. 263-264) and Poulsen, Bonnitcha, and Yackee (2013, p. 45).

consideration that its own legal capacity could be useful to "adopt a consistent, unified position on key issues likely to arise in all the arbitration cases arising out of the emergency economic measures" (Gottwald, 2007, p. 264).

The Argentinian example illustrates the general obstacles to creating internal defence capacity. In-house capacities need to be built up over years; in other words, they cannot be created immediately when a treaty claim arises (ibid., p. 255). Defence against investment treaty claims will often require hiring new personnel with legal expertise in this special area of litigation and training existing legal staff. While fees for external lawyers are paid on a case-by-case basis, i.e., only when the need arises, the employment of specialized in-house lawyers creates continuous expenses for the government budget. Continuous costs for specialized staff are difficult to justify for governments that have never or rarely been defendants in investment treaty arbitrations. Examples of trained government lawyers quitting the public service in order to work for private law firms (Eberhardt & Olivet, 2012, p. 29) could also be taken into account when weighing the costs and benefits of internal defence against investment treaty claims.

At the same time, there might be strategic reasons for governments to seek outside counsel from law firms specialized in investment treaty arbitrations, for example, because they have inside knowledge and long-standing experience in representing both claimants and respondents, and some of their lawyers may also have acted as arbitrators[55]—all of which could provide advantages in the litigation (Gottwald, 2007, pp. 252–253).[56]

An essential problem for developing countries that face investment treaty claims (particularly least developed or low-income countries) is that they may have no such choice: an in-house legal defence team may not be available nor external counsel affordable. In case of a treaty claim, they have to rely on a limited number of government lawyers even if they do not possess expertise in this area of litigation (Gottwald, 2007, pp. 261–262). Since investment treaty arbitration involves a state party as the defendant and the amounts at stake are usually high, some scholars call for the international community to establish a legal assistance centre for developing countries that could provide affordable access to the legal expertise that is needed for an adequate defence against treaty claims (Gottwald, 2007).

It remains open whether and how respondent states can reduce legal costs without compromising their defence. Given that an average arbitration proceeding takes three years and eight months (Hodgson, 2014c) and assuming that costs for lawyers increase the longer an arbitration proceeding is on-going, ways to streamline the arbitration process and reduce the length deserve consideration by the international community, arbitral institutions and their respective constituents. At the same time, the value of alternatives to arbitration and dispute prevention, including the cost implications of such approaches, need to be assessed further.

5.3 Arbitrators' Fees

The relevant arbitration rules establish different methods for the determination of the level of arbitrators' fees. The ICSID fees for arbitrators are determined by the Secretary General[57] and are currently set at "US$3,000 per day of meetings or other work performed in connection with the proceedings" for each arbitrator (ICSID, 2013). To avoid

[55] Lawyers acting as arbitrators can use their publicity and inside knowledge to acquire clients. This hints at a fundamental problem of investment treaty arbitration: the dual role of arbitrator and counsel, which has implications for the perceived impartiality and independence of investment treaty arbitration. See Bernasconi-Osterwalder, Johnson & Marshall (2010).

[56] Before hiring a law firm, some countries conduct procurement processes that focus on the reduction of costs for the required legal services. See Hodgson (2014b, p. 2). In some jurisdictions, formal public procurement processes may be obligatory for external legal services that pass a certain financial threshold (e.g., in the case of China). For information on the use of internal and external counsel across 21 jurisdictions, see http://globalarbitrationreview.com/know-how/topics/66/investment-treaty-arbitration.

[57] See ICSID Administrative and Financial Regulations (2006), Regulation 14; ICSID Convention, Article 60.

that arbitrators try to agree on higher fees with the parties directly, since 2006, the ICSID schedule of fees requires such requests to be made through the ICSID Secretary-General (Born et al., 2006).

In arbitrations conducted under the Rules of the London Court of International Arbitration (LCIA) a maximum hourly fee of GBP 450 (approx. US$750) applies (LCIA, 2014). It is "advised by the Registrar to the parties" (LCIA, 2014). Only in exceptional cases can higher fees be fixed upon the recommendation of the Registrar, in consultation with the arbitrators and based on the parties' express consent. If compensated on the basis of the maximum fee, an arbitrator receives US$6,000 for an eight-hour working day—two times higher than the maximum daily fee at ICSID.

Under the UNCITRAL and PCA Rules tribunals fix their own fees in line with some soft conditions, e.g., the amount shall be "reasonable," "taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."[58] UNCITRAL adds that in those cases where there is an appointing authority that aims to apply a particular method for the determination of arbitrators' fees (e.g., a schedule based on the amount in dispute) the tribunal shall take it into account "to the extent that it considers appropriate in the circumstances of the case" (Article 41). A recent study that determined average tribunal costs in past cases and found that such costs are 10 per cent lower at ICSID than under UNCITRAL Rules (Hodgson, 2014b). It suggested that this difference was due to ICSID's fee cap of US$3,000 per day.

The arbitrators' fees in SCC proceedings are scheduled according to the amount in dispute and determined by the SCC Board, the governing body of the SCC Arbitration Institute, on this basis.[59] Also the ICC International Court of Arbitration and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) fix the fees based on a schedule for the amount in dispute.[60] The schedules provide for minimum and maximum fees for a specific range of amounts in dispute and leave a margin of discretion, not specifying the criteria for the exact fee. Table 3 provides examples of fees per arbitrator in a dispute involving US$100 million, according to the online arbitration cost calculators[61] and arbitration rules of three institutions. Given that investment treaty disputes are typically resolved by three arbitrators, the total fees for the proceeding are three times the amounts included in the table. For this amount in dispute, the ICC arbitrator fees are higher than those under the SCC and the CRCICA schedules.

TABLE 3: SCHEDULED FEES PER ARBITRATOR FOR AMOUNT IN DISPUTE OF US$100 MILLION

	MINIMUM FEE	AVERAGE FEE	MAXIMUM FEE	MULTIPLIER FOR THREE ARBITRATORS
SCC	EUR 45,000* (approx. US$62,500)	EUR 135,500* (approx. US$188,000)	EUR 226,000* (approx. US$313,800)	x2.2
ICC	**US$77,867**	**US$214,584**	**US$351,300**	x3
CRCICA	US$54,675	US$151,851	US$249,027	x3

Source: IISD table based on the institutions' arbitration rules and cost calculators

** Based on the rates for the tribunal's chairman. Each co-arbitrator receives 60 per cent of the rate.*

58 See UNCITRAL Arbitration Rules (2010), Article 40 and 41. See also PCA Arbitration Rules (2012), Article 40 and 41.
59 See SCC Arbitration Rules (2010), Appendix III (Article 2, and SCC Arbitrators' Fees Schedule).
60 See ICC Arbitration Rules (2012), Appendix III (Article 2, and Article 4); CRCICA Arbitration Rules (2011), Article 45, and Annex to the Rules (Table 2).
61 See ICC (2010), SCC (n.d.), and CRCICA (2011).

5.4 Administrative and Registration Fees

Administrative and registration fees are a relatively minor cost item for disputing parties. Nonetheless, cost differences exist between arbitral institutions. The SCC, ICC and CRCICA schedule exact administrative fees according to the amount in dispute, i.e., the charges accrue independent of the eventual length of the proceeding.[62] They also set a maximum "flat fee" or cap for claims above a certain threshold. ICSID, on the other hand, charges an annual administrative fee of US$32,000 for all disputes.[63] In addition to administrative charges, all institutions also require the payment of a registration fee, ranging between US$500 at CRCICA, several thousand U.S. dollars at the SCC, ICC, PCA and LCIA, and US$25,000 at ICSID. The LCIA applies hourly fees for administrative services determined by the LCIA Court.[64] The PCA also charges hourly fees for its registry services (PCA, n.d.). Since UNCITRAL does not itself administer disputes, the UNCITRAL Rules do not set out any amounts or guidance on administrative fees.[65]

For an amount in dispute of US$100 million, the CRCICA charges an administrative fee of US$50,000, the SCC EUR 41,900 (approx. US$58,200) and the ICC accounts for the highest administrative charges amounting to almost US$100,000.[66] For this amount in dispute, the total administrative fees at the ICC are three times larger than the ICSID annual charges of US$32,000.

The total average costs for a three-person tribunal, administrative and registration fees at the SCC, ICC and CRCICA will rarely exceed a million US dollars – only where investors claim more than US$500 million (see Table 4).[67]

TABLE 4: AVERAGE TRIBUNAL AND ADMINISTRATIVE COSTS BY AMOUNT IN DISPUTE (IN US$)

	100K	500K	1M	5M	10M	50M	100M	500M	1BN
SCC	23,429	56,381	84,195	174,980	228,858	338,559	443,266	N/A	N/A
ICC	35,544	94,936	139,851	307,016	397,366	612,966	742,966	1,170,966	1,545,966
CRCICA	6,500	15,001	30,000	198,503	263,103	395,203	506,553	803,553	1,174,803

Source: IISD table based on data from Flannery & Garel (2013). The data includes total average (not the minimum or maximum) costs for three arbitrators and administrative costs, including registration or filing fees.

Overall, it is difficult to determine the cost differences related to arbitrator and administrative expenses under the seven most commonly used arbitral rules that play a role in investment treaty arbitration, nor whether those institutions that charge arbitrator fees and administrative costs irrespective of amounts in dispute (e.g., ICSID) turn out to be less expensive than those that calculate costs based on the amount in dispute (e.g., SCC, ICC and CRCICA). This is contingent on the amount in dispute as well as the complexity and length of the arbitration.

In any event, the fact that investors determine the amount in dispute and choose the arbitration rules from the options contained in the applicable investment treaty seems to suggest that arbitration costs are somewhat outside of the respondent states' sphere of influence, as long as the treaty does not take a different approach.

[62] See SCC Arbitration Rules (2010), Appendix III (/Article 3, and Administrative Fees Schedule); ICC Arbitration Rules (2012), Appendix III (Article 2, Article 4 and Administrative Expenses Schedule); CRCICA Arbitration Rules (2011), Article 43, Article 44 and Annex to the Rules (Table 1).

[63] See ICSID (2013), and ICSID Administrative and Financial Regulations (2006), Regulation 16.

[64] See LCIA (2014), and LCIA Arbitration Rules (1998), Article 28.1.

[65] See UNCITRAL Arbitration Rules (2010), Article 40.

[66] See ICC (2010), SCC (n.d.), and CRCICA (2011).

[67] See Flannery & Garel (2013). The study compared the arbitration costs of 10 major arbitral institutions relevant in the area of commercial arbitration, including the Singapore International Arbitration Centre and the Dubai International Arbitration Centre. It also gives some indications for costs in treaty-based disputes; however, it examined only those institutions that schedule costs based on the amount in dispute, i.e., SCC, ICC and CRCICA, but not ICSID or UNCITRAL.

5.5 Cost and Fee Allocation

Depending on the specific arbitral rules, the claimant has to advance 50 per cent of the expected arbitration costs covering either the whole proceeding or a specific period. The other half must be advanced by the respondent. Usually, the arbitration costs that are to be advanced comprise arbitrator and administrative fees; they may sometimes include expected expenses for experts or witnesses summoned by the tribunal but do not cover costs for the parties' legal representation. Under the rules of SCC, ICC and CRCICA the parties have to advance costs for the entire period in equal shares; they may sometimes be allowed to do so through bank guarantees or payment in instalments.[68] Under the ICSID Rules, the parties have to advance costs for periods of three to six months.[69] The UNCITRAL Rules allow tribunals to determine a deposit for advance costs to be paid by parties in equal shares.[70] As mentioned previously, on average arbitrators' fees and institutional charges remain below US$1 million and are relatively predictable.

An element of unpredictability is introduced through what is commonly referred to as "cost and fee shifting." While cost advances are usually borne by the claimant and respondent in equal shares and, a priori, each disputing party has to bear the costs for its own lawyers, the final cost and fee allocation can be based on a different principle of allocation. Tribunals can order a party to pay a part or all of the other party's legal and arbitration costs. Unlike tribunal costs and administrative fees, costs for legal representation typically involve several million U.S. dollars.

In general, the applicable arbitral rules and treaty provisions leave tribunals some discretion to allocate such costs as they find appropriate.[71] In some rare cases, BITs set out rules that limit cost shifting or disallow that the losing party bears all costs (e.g., Netherlands-Poland BIT, Article 12.9).[72] The arbitral rules of UNCITRAL (Rules, Art. 42), PCA (Rules, Art. 42) and CRCICA (Rules, Art. 46) stipulate that "in principle" the losing party has to pay for all legal and arbitration costs, but the tribunal may decide on a different cost allocation if that is "reasonable." The other arbitral rules remain vague on how arbitration costs shall be allocated. They either do not specify criteria for the cost allocation, as in the case of the ICSID Convention (Convention, Art. 61(2)), or refer to factors like the outcome of the case in terms of failure and success of claims, the parties' conduct or other "relevant circumstances."[73]

Although some arbitral rules incorporate a soft "loser pays principle" that is common in international commercial arbitration, empirical studies on treaty-based investment arbitration suggest that the allocation of arbitration costs and legal expenses does not generally follow this principle (Smith 2011, p. 780). Tribunals' practice is not fully consistent.[74] However, the most frequent pattern is that tribunals order the claimant and respondent to carry an equal share of arbitration costs and their own legal costs, irrespective of which party lost or won. This is also referred to as "pay-your-own-way" or the "American Rule." The other, less frequent pattern is that tribunals decide to shift arbitration costs, legal expenses or both fully or partly in favour of the winner following the "loser pays principle."

Data on 158 cost-allocation decisions in (mostly treaty-based) investment arbitrations until the end of August 2010 confirms the prevalence of the "pay-your-own-way" principle.[75] Most decisions did not feature any cost and fee shifting, i.e., arbitration costs were equally borne by both parties and each party was responsible for the payment of its own legal costs. Complete shifts in both legal and arbitration costs occurred only in 7.6 per cent of the cases (12

[68] See SCC Arbitration Rules (2010), Article 45.2; ICC Arbitration Rules (2012), Article 36.2; CRCICA Arbitration Rules (2011), Article 47.1.
[69] See ICSID Administrative and Financial Regulations (2006), Regulation 14(3).
[70] See UNCITRAL Arbitration Rules (2010), Article 43.1.
[71] See Smith (2011, p. 750). See also Sabahi (2011, pp. 158-162).
[72] See also Franck (2011, p. 773).
[73] See SCC Rules, Art. 43(5) and Art. 44; ICC Rules, Art. 37.4 and Art. 37.5; and LCIA Rules, Art. 28.4.
[74] See Franck (2011, p. 777) and Smith (2011, pp. 749–784).
[75] See Sabahi (2011, pp. 162-163 and pp. 216-234). The 158 decisions include "awards of costs and fees in arbitration awards as well as from other decisions, such as annulment decisions and requests for supplementary decisions where costs and/or fees were awarded."

decisions) (Sabahi, 2011, p. 163). Similar patterns were also identified in an evaluation of 49 publicly available awards prior to 2007 that contained cost decisions[76] and a recent study on awards and decisions until end 2012 (Hodgson, 2014b).

A general question that arises is whether the existing patterns of cost allocation are more beneficial to the claimants than the respondents, or the other way around. One study based on pre-2007 data showed that, in cases where tribunals shifted some costs to the losing party, losing investors and respondents were affected in nearly equal proportions (Franck, 2011, pp. 809–810). Yet tribunals' decisions not to grant any cost and fee shifting concerned winning states more frequently than winning investors, i.e., in those cases the states' cost burden was not reduced. This finding cautiously suggested that winning states did not equally benefit from cost shifting. An empirical study by a different author concluded that tribunals' decisions showed an "implicit partial one-way cost-shifting rule" (Smith, 2011) that put respondent states at a cost disadvantage: "When claimants win, they usually win partial reimbursement of either arbitral costs or attorneys' fees, but winning respondents usually bear their own burdens" (Smith, 2011, 756).[77] A more general criticism raised with regard to cost allocations is that decisions on costs are "unpredictable and inconsistent" (Gotanda, 2013, p. 422) and that tribunals rarely give reasons for a specific cost allocation.[78]

In conclusion, respondent states in most cases have to bear their own legal expenses (for lawyers) and half of the total arbitration costs—comprising fees for arbitrators and administration—no matter whether they are the winning or losing party. In addition, there are indications that states are slightly more likely to be ordered to pay a share of the investors' costs when the investor wins than when the inverse is the case.

[76] The data showed that 67.3 per cent (33 awards) did not feature cost and fee shifting (each party paid half of the arbitration costs and its own legal expenses) and in the remaining 32.6 per cent (16 awards) arbitration or legal costs where shifted partly or entirely to the other party. See Franck (2011, pp. 809-810).

[77] As another author put it, "[s]uccessful claimants are more likely to recover their costs than successful respondents." See Hodgson (2014c, p. 7).

[78] See Franck (2011, p. 777). See also Gaukrodger & Gordon (2012, p. 23).

6.0 Conclusions

Investor–state arbitration has moved to the centre stage of discussions on international investment law and policy.[79] Following the steady growth of investment arbitration over the past 15 years, states, academics and policy-makers are recognizing serious flaws in the system, including the perceived lack of independence and impartiality of arbitrators as well as the absence of appropriate review mechanisms for arbitral decisions.[80] Another issue of concern, which has been the focus of this paper, is the financial implications of investment arbitration, particularly for poorer countries.

Claims in the range of hundreds of millions—and at times billions—of U.S. dollars are not uncommon. However, losing such claims is not the only financial risk; even when they have successfully defended themselves, states are often liable for millions of dollars in arbitration costs. In addition, states' expectation of high costs and fear of large claims may also influence negotiating dynamics outside of the arbitration setting, providing claimants with leverage to demand compensation or other concessions in exchange for a settlement. How often investors have used threats of arbitration against governments remains a matter of speculation, but it can be assumed that they "occur much more frequently than actual cases" (Gallagher & Shrestha, 2011, p. 5).

At the same time, actual cases continue to be on the rise. In 2013 alone, investors sued host states at least 57 times under international investment treaties, bringing the total number of known cases to 568 at year's end (UNCTAD, 2014a). The costs of these arbitrations depend on a number of factors that are largely outside of the respondent states' control (e.g., the compensation claimed by the investor, the length and complexity of the proceeding).

Nonetheless, there are number of potential reforms to the system of investment arbitration that could bring costs down. For instance, it could be explored how to further streamline the arbitration process to reduce both legal and institutional costs. Related to this, it is worth exploring the steps that individual respondents or the international community could take to improve governments' defence capacities and thus reduce dependence on expensive external legal services. This could include the establishment of a legal assistance or an advisory centre for developing countries. Other issues for consideration include ways to discourage speculative or inflated claims. Finally, investment treaties or arbitral rules could be formulated to provide more guidance on tribunals' determination of the amount of compensation, the type and level of interest rates on compensation as well as cost allocation decisions.

While these measures may help to reduce the costs of investment arbitration, they do not respond to other, systemic faults in the current system of investment arbitration. Deeper reform options also need be explored, such as the establishment of an international investment court or an appeals mechanism.[81] Alternatives to investor–state arbitration, including at the national level, should also be further analyzed. States taking any of these steps will have to overcome stumbling blocks and opposition closely linked to the problem of costs: well-connected and prestigious actors at the core of the investment treaty arbitration system such as large law firms, litigation funders, prominent counsels and arbitrators who have important vested interests in maintaining the status quo. But ultimately, it is the states themselves, as the parties to the treaty, who will have the final word on reform.

[79] See UNCTAD (2014b) and OECD (2012).

[80] For a discussion of these issues, see Bernasconi-Osterwalder & Rosert (2014).

[81] See UNCTAD (2014b). For earlier works on the latter, see for instance Tams (2006) and Van Harten (2008).

7.0 References

Agencia Peruana de Noticias. (2013, August 27). *Peru's government budget for 2014 grows 9.7%*. Retrieved from http://www.andina.com.pe/ingles/noticia-perus-government-budget-for-2014-grows-97-472078.aspx

Banifatemi, Y. (2010). The Law Applicable in Investment Treaty Arbitration. In K. Yannaca-Small (Ed.), *Arbitration under international investment agreements: A guide to the key issues* (pp. 191-210). New York: Oxford University Press.

Bernasconi-Osterwalder, N., & Rosert, D. (2014, January). *Investment treaty arbitration: Opportunities to reform arbitral rules and processes.* IISD Report. Retrieved from http://www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf

Bernasconi-Osterwalder, N., Johnson, L. & Marshall, F. (2010). *Arbitrator independence and impartiality: Examining the dual role of arbitrator and counsel* (IISD). Retrieved from http://www.iisd.org/sites/default/files/pdf/2011/dci_2010_arbitrator_independence.pdf

Bjorklund, A.K. (2013). The Role of Counterclaims in Rebalancing Investment Law. *Lewis & Clark Law Review, 17*(2), 461-480.

Born, G. et al. (2006, April). *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules*. Retrieved from http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=90393

Cabacungan Jr., G.C. (2011, March 28). House to probe huge lawyers' fees in NAIA 3 case. *Philippine Daily Inquirer.* Retrieved from http://newsinfo.inquirer.net/breakingnews/metro/view/20110328-328066/House-to-probe-huge-lawyers-fees-in-NAIA-3-case

Cairo Regional Centre for International Commercial Arbitration (CRCICA). (2011). *Arbitration costs calculator* (rates of 2011). Retrieved from http://www.crcica.org.eg/feescalc.html

CEMEX. (2011, December 13). *CEMEX receives compensation for nationalization of CEMEX Venezuela* (Press release). Retrieved from http://www.cemex.com/MediaCenter/PressReleases/PressRelease20111213.aspx

De Brabandere, E., & Lepeltak, J.V. (2012, June 5). *Third Party Funding in International Investment Arbitration. Grotius Centre Working Paper No. 2012/1*. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078358

Diaz, J. (2011, March 24). Fraport to sue Philippines again on NAIA-3 case. *ABS-CBN News.* Retrieved from http://www.abs-cbnnews.com/business/03/24/11/fraport-sue-philippines-again-naia-3-case

Eberhardt, P., & Olivet, C. (2012, November). *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Brussels/Amsterdam: Corporate Europe Observatory and the Transnational Institute. Retrieved from http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf

Flannery, L., & Garel, B. (2013, January). Arbitration costs compared: the sequel. *Global Arbitration Review, 8*(1). Retrieved from http://globalarbitrationreview.com/journal/article/31092/arbitration-costs-compared-sequel/

Franck, S.D. (2007). Empirically evaluating claims about investment treaty arbitration. *North Carolina Law Review, 86*, 1-88.

Franck, S.D. (2011). Rationalizing costs in investment treaty arbitration. *Washington University Law Review, 88*, 769-852.

Franck, S.D. (2012). Review: The Public International Law Regime Governing International Investment by José E. Alvarez. *The American Journal of International Law, 106*(4), 890–896.

Gallagher, K.P., & Shrestha E. (2011, May). *Investment treaty arbitration and developing countries: A re-appraisal* (Global Development and Environmental Institute, Working Paper No. 11-01). Retrieved from http://ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf

Gaukrodger, D., & Gordon, K. (2012, December). *Investor–state dispute settlement: A scoping paper for the investment policy community* (OECD Working Papers on International Investment, No. 2012/3). Retrieved from http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf

Global Arbitration Review. (2014, January). *GAR 100 – 7th Edition*. Retrieved from http://globalarbitrationreview.com/surveys/survey/948/gar-100-7th-edition/

Goldhaber, M.D. (2013, July 1). Arbitration scorecard 2013: Treaty disputes. *The American Lawyer*. Retrieved from http://www.americanlawyer.com/id=1202607030938

Gotanda, J.Y. (2004). Compound interest in international disputes. *Oxford University Comparative Law Forum*. Retrieved from http://ouclf.iuscomp.org/articles/gotanda.shtml

Gotanda, J.Y. (2007, August). *A study of interest* (Villanova University School of Law Public Law and Legal Theory Working Paper No. 2007-10). Retrieved from http://ssrn.com/abstract=1005425

Gotanda, J.Y. (2013). Consistently inconsistent: The need for predictability in awarding costs and fees in investment treaty arbitrations. *ICSID Review, 28*(2), 420–437.

Gottwald, E. (2007). Leveling the playing field: Is it time for a legal assistance center for developing nations in investment treaty arbitration? *American University International Law Review, 22*(2), 237–275.

Grisel, F. (2014). Sources of investment law. In Z. Douglas, J. Pauwelyn & J.E. Viñuales (Eds.), *The foundations of international investment Law: Bringing theory into practice* (pp. 213-233). Oxford: Oxford University Press.

Hodgson, M. (2014a, January). Costs in investment treaty arbitration: The case for reform. *Transnational Dispute Management, 11*(1). Retrieved from http://www.allenovery.com/SiteCollectionDocuments/Costs%20in%20Investment%20Treaty%20Arbitration.pdf

Hodgson, M. (2014b, March 24). Counting the costs of investment treaty arbitration. *Global Arbitration Review.* Retrieved from http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf

Hodgson, M. (2014c, February 18). *Investment treaty arbitration: How much does it cost? How long does it take?* Retrieved from http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx

International Centre for Settlement of Investment Disputes (ICSID). (2013). *Schedule of fees* (effective January 1, 2013). Retrieved from https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main

International Chamber of Commerce (ICC). (2007). *Techniques for controlling time and costs in arbitration: Report from the ICC Commission on Arbitration*. Retrieved from http://www.icc-deutschland.de/fileadmin/ICC_Dokumente/ICC_arbitration_TimeCost_E.pdf

ICC. (2010). *Cost calculator*. Retrieved from http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Cost-and-payment/Cost-calculator/

London Court of International Arbitration (LCIA). (2014). *Schedule of arbitration costs* (effective January 1, 2014). Retrieved from http://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx

Maersk Oil. (2012a, March 9). *Maersk oil settles Algerian tax claims*. Retrieved from http://www.maerskoil.com/media/newsroom/pages/maerskoilsettlesalgeriantaxclaims.aspx

Maersk Oil. (2012b, April 2). *Approval of settlement of Algerian tax claims*. Retrieved from http://investor.maersk.com/releasedetail.cfm?ReleaseID=660988

Mann, H. (2013). Reconceptualizing international investment law: Its role in sustainable development. *Lewis & Clark Law Review, 17*(2), 521–544.

Newcombe, A., & Paradell, L. (2009). *Law and practice of investment treaties*. Alphen aan den Rijn: Kluwer Law International.

Nikièma, S.H. (2013, March). *Compensation for expropriation* (IISD Best Practices Series). Retrieved from http://www.iisd.org/pdf/2013/best_practice_compensation_expropriation_en.pdf

Ochoa, D. (2012, January 3). Las prioridades del Estado en el 2012. *La República*. Retrieved from http://www.larepublica.ec/blog/opinion/2012/01/03/las-prioridades-del-estado-en-el-2012/

Organisation for Economic Co-operation and Development (OECD). (2012). *Investor-state dispute settlement public consultation: 16 May–9 July 2012.* Retrieved from http://www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf

Permanent Court of Arbitration (PCA). (n.d.). *Schedule of fees and costs.* Retrieved from http://www.pca-cpa.org/showpage.asp?pag_id=1060

Poulsen, L.N.S., Bonnitcha, J., & Yackee, J.W. (2013). *Costs and benefits of an EU-USA investment protection treaty.* Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf

RIA Novosti. (2013, December 2). *Putin signs federal budget for 2014–16.* Retrieved from http://en.ria.ru/business/20131202/185222691/Putin-Signs-Federal-Budget-for-2014-16.html

Ripinsky, S., & Williams, K. (2008). *Damages in international investment law*. London: British Institute of International and Comparative Law.

Sabahi, B. (2011). *Compensation and restitution in investor-state arbitration: Principles and practice*. Oxford: Oxford University Press.

Scherer, M. (2011, October 5). *Arbitral institutions under scrutiny* (Kluwer Arbitration blog). Retrieved from http://kluwerarbitrationblog.com/blog/2011/10/05/arbitral-institutions-under-scrutiny/

Sidley Austin LLP. (n.d.). *Representative engagements in investor-state arbitrations.* Retrieved from http://www.sidley.com/Recent-Investor-State-Arbitrations/

Smith, D. (2011). Shifting sands: Cost-and-fee allocation in international investment arbitration. *Virginia Journal of International Law, 51*(3), 749–784.

Sornarajah, M. (2010). *The International Law on Foreign Investment*. Cambridge: Cambridge University Press.

Southern African Development Community (SADC). (2012). *SADC Model Bilateral Investment Treaty Template with Commentary.* Retrieved from http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

Stockholm Chamber of Commerce (SCC). (n.d.). *How much is it?* Retrieved from http://www.sccinstitute.com/?id=23725

Tams, C.J. (2006, June). An appealing option? The debate about an ICSID appellate structure. *Essays in Transnational Economic Law No. 57.* Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413694

Tienhaara, K. (2011). Regulatory chill and the threat of arbitration: A view from political science. In C. Brown & K. Miles (Eds.), *Evolution in Investment Treaty Law and Arbitration* (pp. 606–627). Cambridge: Cambridge University Press.

United Nations Conference on Trade and Development (UNCTAD). (2012). *Expropriation* (UNCTAD Series on International Investment Agreements II). New York and Geneva: United Nations. Retrieved from http://unctad.org/en/docs/unctaddiaeia2011d7_en.pdf

UNCTAD. (2013). *Recent developments in investor-state dispute settlement (ISDS), Updated for the Multilateral Dialogue on Investment, 28-29 May 2013* (IIA Issues Note, No. 1). Retrieved from http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

UNCTAD. (2014a, April). *Recent developments in investor-state dispute settlement* (ISDS) (IIA Issues Note, No. 1). Retrieved from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

UNCTAD. (2014b, June). *Reform of the IIA regime: Four paths of action and a way forward* (IIA Issues Note, No. 3). Retrieved from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf

Van Harten, G. (2008, June). *A case for an international investment court. Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper*. Retrieved from http://ssrn.com/abstract=1153424

World Bank. (2003). *Global economic prospects 2004: Realizing the development promise of the Doha Agenda.* Washington: The International Bank for Reconstruction and Development/The World Bank.

8.0 Annex

TABLE A1: BILLION-DOLLAR CLAIMS IN INVESTMENT TREATY ARBITRATION (IN US$)

	AMOUNT SOUGHT (IN US$)	CASE/DISPUTING PARTIES	ARBITRAL INSTITUTION (RULES)/SITE	ARBITRATORS
1.	114 billion	Yukos Universal Limited (Isle of Man) v. Russian Federation, UNCITRAL (PCA Case No. AA 227); Veteran Petroleum Limited (Cyprus) v. Russian Federation, UNCITRAL (PCA Case No. AA 228); Hulley Enterprises Ltd. (Cyprus) v. Russian Federation, UNCITRAL (PCA Case No. AA 226)	Permanent Court of Arbitration (Ad hoc/ UNCITRAL)/The Hague	L. Yves Fortier; Charles Poncet; Stephen Schwebel
2.	50 billion	Renée Rose Levy and Gremcitel S.A. v. Republic of Peru (ICSID Case No. ARB/11/17)	ICSID/Washington, D.C.	Eduardo Zuleta; Raul Vinuesa; Gabrielle Kaufman-Kohler
3.	31.7 billion	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30)	ICSID/The Hague	Kenneth Keith; L. Yves Fortier; Georges Abi-Saab
4.	19 billion	Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL (PCA Case No. 2009-23)	Ad hoc (UNCITRAL)/The Hague	V.V. Veeder; Vaughn Lowe; Horatio Grigera Naon
5.	16.8 billion	Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)	ICSID/Paris	Gilbert Guillaume; Gabrielle Kaufmann-Kohler; Ahmed Sadek El-Kosheri
6.	16 billion	Orascom Telecom Holding S.A.E. (Egypt) v. People's Democratic Republic of Algeria	Ad hoc (UNCITRAL)/The Hague	Bernardo Cremades; L. Yves Fortier; Pierre Marie Dupuy
7.	10.5 billion	Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic (ICSID Case No. ARB/12/38)	ICSID	Claus von Wobeser; Brigitte Stern; Francisco Orrego Vicuña
8.	10.1 billion	Libananco Holdings Co. Limited v. Republic of Turkey (ICSID Case No. ARB/06/8)	ICSID/Washington, D.C., and Paris	Michael Hwang; Henri Alvarez; Frank Berman
9.	7 billion	Renée Rose Levy de Levi v. Republic of Peru (ICSID Case No. ARB/10/17)	ICSID/Washington, D.C.	Rodrigo Oreamuno; Bernard Hanotiau; Joaquim Morales Godoy
10.	5 billion	Anatolie Stati (Moldova), Gabriel Stati (Moldova), Ascom Group SA (Moldova), and Terra Trading Ltd. (Moldova) v. Republic of Kazakhstan	SCC/Paris	David Haigh; Sergei Lebedev; Karl-Heinz Böckstiegel
11.	5 billion	Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12)	ICSID	Albert Jan van den Berg; Vaughan Lowe; Charles Brower
12.	5 billion	Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35)	ICSID	Gabrielle Kaufmann-Kohler; Brigitte Stern; Albert Jan van den Berg
13.	3.4 billion	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11)	ICSID/Paris	L. Yves Fortier; David Williams; Brigitte Stern
14.	3.2 billion	Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2)	ICSID	Laurent Lévy; John Gotanda; Florentino Feliciano

	AMOUNT SOUGHT (IN US$)	CASE/DISPUTING PARTIES	ARBITRAL INSTITUTION (RULES)/SITE	ARBITRATORS
15.	3 billion	Maersk Olie, Algeriet A/S v. People's Democratic Republic of Algeria (ICSID Case No. ARB/09/14)	ICSID/Paris	Gabrielle Kaufmann-Kohler; Kamal Hossain; David Williams
16.	3 billion	Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/6)	ICSID/Washington, D.C.	Neil Kaplan; J. Christopher Thomas; Peter Tomka
17.	3 billion	Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/12/5)	ICSID	Juan Fernández Armesto; Francisco Orrego Vicuña; Bruno Simma
18.	2.67 billion	Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic (ICSID Case No. ARB/07/5)	ICSID/Washington, D.C.	Pierre Tercier; Santiago Torres Bernardez; Albert Jan van den Berg
19.	2.5 billion	Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1)	ICSID/Washington, D.C.	David Williams; Piero Bernardini; Pierre-Marie Dupuy
20.	2.5 billion	LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37)	ICSID/Washington, D.C.	V.V. Veeder; Charles Brower; Brigitte Stern
21.	2.5 billion	Mobile TeleSystems OJSC v. Republic of Uzbekistan (ICSID Case No. ARB(AF)/12/7)*	ICSID	Gavan Griffith; W. Michael Reisman; Albert Jan van den Berg
22.	Billions	Cyprus Popular Bank Public Co. Ltd. (Cyprus) v. The Hellenic Republic*	ICSID	N/A
23.	Billions	Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL (PCA Case No. 2012-12)	UNCITRAL case administered by PCA/ Singapore	Karl-Heinz Böckstiegel; Gabrielle Kaufmann–Kohler; Donald McRae
24.	2 billion	Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5)	ICSID/Paris	Gabrielle Kaufmann-Kohler; Brigitte Stern; Francisco Orrego Vicuña
25.	2 billion	Caratube International Oil Company LLP v. Republic of Kazakhstan (ICSID Case No. ARB/08/12)	ICSID/Paris	Karl-Heinz Böckstiegel; Gavan Griffith; Kamal Hossain
26.	2 billion	Agip Karachaganak B.V. (the Netherlands), BG Karachaganak LTD. (U.K.), Chevron International Petroleum Company (U.S.), Lukoil Overseas Karachaganak B.V. (the Netherlands), and Karachaganak Petroleum Operating B.V. (the Netherlands) v. Republic of Kazakhstan and SC NC KazMunaiGas	Ad hoc (UNCITRAL)	V.V. Veeder
27.	Up to 1.8 billion	Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/07/18)	ICSID/Washington, D.C.	William Park; Hamad Gharavi; Nahil El Araby
28.	1.6 billion	OAO Tatneft (Russian Federation) v. Ukraine	Ad hoc (UNCITRAL); PCA–BIT Arbitration/Paris	Francisco Orrego Vicuña; Charles Brower; Marc Lalonde
29.	1.6 billion	Chevron Corporation and Texaco Petroleum Corporation v. Ecuador, UNCITRAL (PCA Case No. 34877)	UNCITRAL	Charles Brower; Albert Jan van den Berg; Karl-Heinz Böckstiegel
30.	1.5 billion	CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/15)	ICSID/Washington, D.C.	Gilbert Guillaume; Robert von Mehren; Georges Abi-Saab

	AMOUNT SOUGHT (IN US$)	CASE/DISPUTING PARTIES	ARBITRAL INSTITUTION (RULES)/SITE	ARBITRATORS
31.	1.44 billion	HICEE B.V. v. The Slovak Republic, UNCITRAL (PCA Case No. 2009-11)	Ad hoc (UNCITRAL)/The Hague	Sir Franklin Berman; Charles Brower; Peter Tomka
32.	1.34 billion	Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29)	ICSID	Lawrence Collins; David Williams; Philippe Sands
33.	1.292 billion	Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1)	ICSID/Washington, D.C.	Giorgio Sacerdoti; Luis Herrera Marcano; Henri Alvarez
34.	1.2 billion	Oxus Gold (U.K.) v. Republic of Uzbekistan, Navoi Mining & Metallurgical Kombinat, and State Committee of Uzbekistan for Geology & Mineral Resources	Ad hoc (UNCITRAL)/ Geneva	Pierre Tercier; Brigitte Stern; Marc Lalonde
35.	1.2 billion	Sudapet Company Limited v. Republic of South Sudan (ICSID Case No. ARB/12/26)	ICSID	Campbell McLachlan; David Williams; Gavan Griffith
36.	1.2 billion	Suez S.A., Sociedad General de Aguas de Barcelona (France), and Vivendi SA (Spain) v. Argentine	ICSID/Washington, D.C.	Jeswald Salacuse; Gabrielle Kaufmann-Kohler; Pedro Nikken
37.	1.2 billion	Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/04/6)	ICSID/Paris	Vaughan Lowe; Charles Brower; Brigitte Stern
38.	1.159 billion	Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/9)	ICSID/Washington, D.C.	William Rowley; Guido Santiago Tawil; Brigitte Stern
39.	1.1 billion	Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/16)	ICSID/Paris	Pierre Tercier; Daniel Price; Toby Landau
40.	More than 1 billion	Apotex Holdings Inc. and Apotex Inc. v. United States of America (ICSID Case No. ARB(AF)/12/1)	ICSID/New York	V.V. Veeder; J. William Rowley; John Crook
41.	More than 1 billion	International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo (ICSID Case No. ARB/10/21)*	ICSID/Washington, D.C.	Pierre Tercier; Brigitte Stern; Horacio Grigera Naon
42.	1 billion	ABCI Investments Limited v. Republic of Tunisia (ICSID Case No. ARB/04/12)	ICSID	Brigitte Stern; Piero Bernadini; Francisco Orrego-Vicuna
43.	1 billion	Ampal-American Israel Corporation and others v. Arab Republic of Egypt (ICSID Case No. ARB/12/11)	ICSID	L. Yves Fortier; Francisco Orrego Vicuña; Campbell McLachlan
44.	1 billion	Yosef Maiman, Merhav (mnf) Ltd. (Israel), Merhav Ampal Group Ltd. (Israel), and Merhav Ampal Energy Holdings Limited Partnership (Israel) v. Arab Republic of Egypt	Ad hoc (UNCITRAL)	Donald McRae; W. Michael Reisman; Christopher Thomas
45.	1 billion	AWG Group Ltd. v. The Argentine Republic, UNCITRAL	Ad hoc (UNCITRAL)	Jeswald Salacuse; Gabrielle Kaufmann-Kohler; Pedro Nikken
46.	1 billion	CC/Devas LTD. (Mauritius), Devas Employees Mauritius Private Limited (Mauritius), and Telcom Devas Mauritius Limited (Mauritius) v. The Republic of India	Ad hoc (UNCITRAL)	Marc Lalonde; David R. Haigh; Anil Dev Singh

	AMOUNT SOUGHT (IN US$)	CASE/DISPUTING PARTIES	ARBITRAL INSTITUTION (RULES)/SITE	ARBITRATORS
47.	1 billion	Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/11/12)	ICSID/Washington, D.C.	Piero Bernardini; Stanimir Alexandrov; Albert Jan van den Berg
48.	1 billion	Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH v. Slovak Republic (ICSID Case No. ARB/12/7)	ICSID	J. Christopher Thomas; Zachary Douglas; Toby Landau
49.	1 billion	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (ICSID Case No. ARB/09/1)	ICSID/Washington, D.C.	Thomas Buergenthal; Henri C. Álvarez; Kamal Hossain
50.	1 billion	Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1)	ICSID/Washington, D.C.	Klaus Sachs; Lord Leonard Hoffman; Stanimir Alexandrov
51.	1 billion	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26)	ICSID	Andreas Bucher; Campbell McLachlan; Pedro Martínez Fraga
52.	1 billion	Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20)	ICSID/Paris	Laurent Lévy; Stanimir Alexandrov; Georges Abi-Saab

Source: IISD table based on data from Goldhaber (2013).

** Two of the listed claims might be based on contracts rather than on investment treaties (Mobile Telesystems v. Uzbekistan and International Quantum Resources v. DR Congo). One listed treaty claim has not been registered with ICSID to date (Cyprus Popular Bank v. Greece).*

TABLE A2: AWARDS IN FAVOUR OF THE INVESTOR (IN US$ W/O INTEREST)

	YEAR (FINAL AWARD)	CASE NAME	RULES	AMOUNT AWARDED (IN US$ W/O INTEREST)
1.	2012	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (ICSID Case No. ARB/06/11)	ICSID	1,769,625,000
2.	2013	Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others	CRCICA	935,000,000
3.	2004	Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic (ICSID Case No. ARB/97/4)	ICSID	Approx. 867,195,498 SKK 24,796,381,842)
4.	2003	CME v. Czech Republic	UNCITRAL	269,814,000
5.	2005	France Telecom v. Lebanon	UNCITRAL	266,349,600
6.	2007	Siemens v. Argentina (ICSID Case No. ARB/02/8)	ICSID	237,838,439
7.	2007	BG Group Plc v. Argentina	UNCITRAL	185,285,486
8.	2006	Saluka Investments B.V. v. The Czech Republic	UNCITRAL	181,000,000**
9.	2006	Azurix I v. Argentina (ICSID Case No. ARB/01/12)	ICSID	165,240,753
10.	2012	EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23)	ICSID	136,138,430
11.	2005	CMS Gas Transmission Company v. Argentina (ICSID Case No. ARB/01/8)	ICSID	133,200,000
12.	2007	Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)	ICSID	128,250,462

	YEAR (FINAL AWARD)	CASE NAME	RULES	AMOUNT AWARDED (IN US$ W/O INTEREST)
13.	2008	Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16)	ICSID	125,000,000
14.	2007	Enron Corporation and Ponderosa Assets LP v. Argentina (ICSID Case No. ARB/01/3)	ICSID	106,200,000
15.	2007	Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3)	ICSID	105,000,000
16.	2011	Chevron Corporation and Texaco Petroleum Corporation v. Ecuador, UNCITRAL (PCA Case No. 34877)	UNCITRAL	77,739,697
17.	2009	Cargill, Incorporated v. United Mexican States (ICSID Case No. ARB(AF)/05/2)	ICSID AF	77,329,240
18.	2006	ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16)	ICSID	76,200,000
19.	2009	Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt (ICSID Case No. ARB/05/15)	ICSID	74,550,795
20.	2004	Occidental Exploration and Production Company v. Ecuador (LCIA Case No. UN3467)	UNCITRAL	71,533,649
21.	2012	Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2)	ICSID	60,368,993
22.	2008	Corn Products International, Inc. v. United Mexican States (ICSID Case No. ARB (AF)/04/1)	ICSID	58,386,000 (incl. interest)*
23.	2006	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1)	ICSID	57,400,000
24.	2013	Abengoa, S.A. y COFIDES, S.A. v. United Mexican States (ICSID Case No. ARB(AF)/09/2)	ICSID	43,500,000**
25.	2011	El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15)	ICSID	43,030,000
26.	2009	Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand)	UNCITRAL	Approx. 41,350,416 (EUR 29.21 million)
27.	2012	SGS Société Générale de Surveillance S.A. v. Republic of Paraguay (ICSID Case No. ARB/07/29)	ICSID	39,025,951
28.	2008	National Grid v. Argentina	UNCITRAL	38,800,000
29.	2007	Eastern Sugar v. Czech Republic (SCC No. 088/2004)	UNCITRAL	Approx. 34,247,285 (EUR 25,400,000)
30.	2007	Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5)	ICSID AF	33,510,091
31.	2012	Achmea B.V. v. The Slovak Republic (PCA Case No. 2008-1) (formerly Eureko B.V. v. The Slovak Republic)	UNCITRAL	Approx. 28,467,763 (EUR 22 million)**
32.	2011	Impregilo S.p.A. v. Argentine Republic (ICSID Case No. ARB/07/17)	ICSID	21,294,000
33.	2008	Desert Line Projects LLC v. Republic of Yemen (ICSID Case No. ARB/05/17)	ICSID	Approx. 19,049,064 (YER 3,585,446,554 + US$1 million)
34.	2007	Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia (ICSID Case No. ARB/04/6) (formerly OKO Osuuspankkien Keskuspankki Oyj and others v. Republic of Estonia)	ICSID	Approx. 16,948,640 (EUR 8,520,350 + US$4,459,844.81)

	YEAR (FINAL AWARD)	CASE NAME	RULES	AMOUNT AWARDED (IN US$ W/O INTEREST)
35.	2000	Metalclad v. United Mexican States (ICSID Case No. ARB(AF)/97/1)	ICSID	16,685,000*
36.	2008	Cargill, Incorporated v. Republic of Poland (ICSID Case No. ARB(AF)/04/2)	UNCITRAL	16,300,000**
37.	2010	Ioannis Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18)	ICSID	15,100,000
38.	2010	Ron Fuchs v. Republic of Georgia (ICSID Case No. ARB/07/15)	ICSID	15,100,000
39.	2010	Intersema Bau AG v. Libya	UNCITRAL	12,623,214**
40.	2012	Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23)	ICSID	11,306,741
41.	2010	Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States (ICSID Case No. ARB(AF)/04/3)	ICSID	10,941,885
42.	2009	Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6)	ICSID	Approx. 10,694,005 (EUR 8,220,000)
43.	2007	PSEG Global Inc., The North American Coal Corporation (NACC), and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5)	ICSID	9,061,479
44.	1997	American Manufacturing and Trading v. Zaire (Congo) (ICSID Case No. ARB/93/1)	ICSID	9,000,000*
45.	1999	Biederman v. Kazakhstan	SCC	8,890,000
46.	2011	Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18)	ICSID	8,717,850
47.	2009	Sistem Mühendislik Inșaat Sanayi ve Ticaret A.Ș. v. Kyrgyz Republic (ICSID Case No. ARB(AF)/06/1)	ICSID	8,500,000
48.	2000	Wena Hotels Ltd. V. Egypt (ICSID Case No. ARB/98/4)	ICSID	8,061,897
49.	2009	Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7)	ICSID	Approx. 6,304,378 (US$5,883,770.80, US$265,000.00 + EUR 110,995.92)
50.	2003	AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan (ICSID Case No. ARB/01/6)	ICSID	5,900,000
51.	2007	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (ICSID Case No. ARB/01/7)	ICSID	5,871,322
52.	2008	Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador (ICSID Case No. ARB/04/19)	ICSID	5,578,566
53.	2003	Tecnicas Medioambientales Tecmed v. United Mexican States (ICSID Case No ARB(AF)/00/2)	ICSID AF	5,533,017
54.	2012	Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland	UNCITRAL	Approx. 5,126,750 (EUR 3.9 million)
55.	2011	White Industries Australia Limited v. The Republic of India	UNCITRAL	Approx. 4,780,254 (AUD 4,585,180 + US$84,000)
56.	2002	S.D. Myers Inc. v. Canada	UNCITRAL	Approx. 3,832,112 (CAD$6,050,000)
57.	2010	RosInvestCo UK Ltd. v. Russian Federation (V 079 / 2005)	SCC	3,500,000
58.	2012	Marion Unglaube v. Republic of Costa Rica (ICSID Case No. ARB/08/1)	ICSID	3,100,000
59.	2010	Alpha Projektholding GmbH v. Ukraine (ICSID Case No. ARB/07/16)	ICSID	2,979,232

	YEAR (FINAL AWARD)	CASE NAME	RULES	AMOUNT AWARDED (IN US$ W/O INTEREST)
60.	2003	Nykomb Synergetics v. Latvia	SCC	Approx. 2,966,836 (LVL 1,600,000)
61.	2008	Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9)	ICSID	2,800,000
62.	2000	Swembalt AB v. Latvia	UNCITRAL	2,506,235
63.	1998	Sedelmayer v. Russia	SCC	2,350,000
64.	2002	Middle East Cement Shipping and Handling Co v. Arab Republic of Egypt (ICSID Case No. ARB/99/6)	ICSID	2,190,430
65.	2012	Renta 4 et al v Russian Federation (SCC Case No 24/2007)	SCC	2,026,480
66.	1995	Saar Papier v. Poland I	UNCITRAL	Approx. 1,617,774 (DEM 2.3 million)
67.	2012	Antoine Goetz and Others v. Burundi (ICSID Case No. ARB/01/2)	ICSID	Approx. 1,220,255 (US$1 million + EUR 175,000)
68.	2005	Petrobart v. Kyrgyzstan (Arb. No. 126/2003)	SCC	1,130,859
69.	2002	Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1)	ICSID AF	Approx. 928,350 (MXN 9,464,627.50)
70.	2011	Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6)	ICSID	786,306
71.	1998	FEDAX N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3(1)	ICSID	598,950
72.	2001	Pope & Talbot v. Canada	UNCITRAL	461,566
73.	1990	Asian Agricultural Products Ltd. v. Republic of Sri Lanka (ICSID Case No. ARB/87/3)	ICSID	460,000
74.	2012	Swisslion DOO Skopje v. Macedonia, former Yugoslav Republic of (ICSID Case No. ARB/09/16)	ICSID	Approx. 430,005 (EUR 350,000)
75.	2000	Emilio Agustin Maffezini v. The Kingdom of Spain (ICSID Case No. ARB/97/7)	ICSID	Approx. 155,404 (ESP 30 million)
76.	2010	Yury Bogdanov v. Republic of Moldova (SCC Arbitration No. V (114/2009))	SCC	Approx. 38,468 (MDL 475,386.41)
77.	2005	Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova	SCC	Approx. 24,642 (MDL 310,000)
78.	2010	ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/08/2)	ICSID	0 (zero compensation)
79.	2008	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22)	ICSID	0 (zero compensation)
80.	2013	Luigiterzo Bosca v. Lithuania	UNCITRAL	0 (zero compensation)
81.	2010	Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan (SCC Case No. V (064/2008))	SCC	0 (zero compensation)
82.	2009	Nordzucker v. Poland	UNCITRAL	0 (zero compensation)
83.	2001	Ronald Lauder v. Czech Republic	UNCITRAL	0 (zero compensation)

Source: IISD table based on UNCTAD,[82] Investment Treaty Arbitration (italaw.com) and Investment Arbitration Reporter (iareporter.com). The data sample consists of 83 awards in favour of the investor rendered between 1990 and 2013, which were publicly available as of September 1, 2013. Awards rendered in currencies other than US$ were converted to their US$ value on the date of the award using the XE currency converter available at http://www.xe.com/currencytables/ and the OANDA currency converter, available at http://www.oanda.com/currency/converter/.

** Amount without interest is not available. ** Award is not public and may include interest.*

[82] The UNCTAD Investor–State Database as well as UNCTAD IIA Issues Notes from 2010 to 2013, available at www.unctad.org/iia.

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