Villanova University School of Law
School of Law Working Paper Series

Year 2009 *Paper* 144

Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations

John Y. Gotanda*

*Villanova University School of Law, gotanda@law.villanova.edu

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John Y. Gotanda

Abstract

The awarding of arbitration costs and attorneys' fees in international arbitrations is often arbitrary and unpredictable. In one recent investment arbitration where the tribunal deciding a case under the auspices of the international Centre for the Settlement of Investment Disputes (ICSID) had broad discretion to award costs and fees, the tribunal allocated arbitration costs evenly amongst the claimant and respondent and required each party to bear its own fees and expenses, even though the claimant prevailed. In another case where the claimant was successful on its substantive claim, the ICSID tribunal ordered the respondent to pay the claimant US$6 million for legal fees, but required the parties to bear the costs of the arbitration equally. And in still another recent investment arbitration the unsuccessful respondent was ordered to pay the costs of the arbitration, but each party was responsible for its own legal fees. These results are not unique to investment arbitrations; they can also be found in international commercial arbitrations.

The lack of uniformity in the awarding of costs and fees poses two major problems. First, arbitrary awards undermine the legitimacy of the dispute resolution system. Second, the lack of predictability may hinder parties from being able to settle the dispute and could rob arbitration of its efficiency. These problems are exacerbated in the international context because the costs and fees in transnational disputes can run into the millions of dollars. Indeed, in one recent celebrated arbitration, the costs and fees totaled over US$21 million.

This article examines the awarding of costs and fees in international commercial arbitrations and transnational investment disputes. My study finds that awards

of costs and fees are arbitrary and unpredictable under both systems. To remedy these problems, I propose two different approaches: one for ICSID tribunals and another for international commercial arbitrations. In the case of ICSID arbitrations, the parties should share equally the costs of the arbitration and bear their own legal expenses. In essence, I propose that ICSID adopt what has become known as the American Rule with respect to the awarding of costs and fees. This approach is needed to bring predictability to the field, provide greater administrative efficiency, and reduce the overall costs. In the case of international commercial arbitrations, I argue that parties should be free to select the method for resolving claims for costs and fees, including authorizing the tribunal to resolve such claims pursuant to the principle of "costs follow the event" or the "loser pays" rule. In this context, the adoption of the American Rule would not achieve the same administrative and economic benefits, and the principle of party autonomy calls for this different approach.

Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations

(Liber Amicorum for Bernardo Cremades, 2009)

By John Y. Gotanda*

I. Introduction

The awarding of arbitration costs and attorneys' fees in international arbitrations is often arbitrary and unpredictable. In one recent investment arbitration where the tribunal deciding a case under the auspices of the international Centre for the Settlement of Investment Disputes (ICSID) had broad discretion to award costs and fees, the tribunal allocated arbitration costs evenly amongst the claimant and respondent and required each party to bear its own fees and expenses, even though the claimant prevailed.[1] In another case where the claimant was successful on its substantive claim, the ICSID tribunal ordered the respondent to pay the claimant US$6 million for legal fees, but required the parties to bear the costs of the arbitration equally.[2] And in still another recent investment arbitration the unsuccessful respondent was ordered to pay the costs of the arbitration, but each party was responsible for its own legal fees.[3] These results are not unique to investment arbitrations; they can also be found in international commercial arbitrations.[4]

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* Professor of Law, Associate Dean for Academic Affairs and for Faculty Research, Director of the J.D./M.B.A. Program, Villanova University School of Law.

[1] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07 (Bangladesh/Italy BIT), Award, 30 June 2009, *available* at http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009_002.pdf.

[2] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 (Italy/Egypt BIT), Award and Dissenting Opinion, 1 June 2009, *available at* http://ita.law.uvic.ca/documents/WaguihElieGeorgeSiag-AwardandDissentingOpinion_002.pdf.

[3] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (UK/Tanzania BIT), Award, 24 July 2008, paras. 812-13, *available at* http://ita.law.uvic.ca/documents/Biwateraward.pdf .

[4] *See, e.g.*, Final Award in case no. 13278 (ICC), *reprinted in* 31 *Y.B. Com. Arb*.118 (2008) (claimant won and tribunal ordered claimant to bear 30% of the arbitration costs and the respondent to bear the remaining 70%, and required respondent to a portion of the claimant's legal fees); Final Award of 30 August 2005 (NAI 2005), *reprinted in* 32 *Y.B. Com. Arb*. 107 (2007) (claimant won 75% of its claims and tribunal ordered respondent to bear all costs of the arbitration and required each party to bear their own legal costs); Case no. 11307 of 2003, Final Award (ICC

The lack of uniformity in the awarding of costs and fees poses two major problems. First, arbitrary awards undermine the legitimacy of the dispute resolution system. Second, the lack of predictability may hinder parties from being able to settle the dispute and could rob arbitration of its efficiency. These problems are exacerbated in the international context because the costs and fees in transnational disputes can run into the millions of dollars. Indeed, in one recent celebrated arbitration, the costs and fees totaled over US$21 million.[5]

This contribution to the liber amicorum examines the awarding of costs and fees in international arbitrations. As the work of Bernardo Cremades has focused on both international commercial arbitration and transnational investment disputes, this paper compares the practice of awarding costs and fees under each. My study finds that awards of costs and fees are arbitrary and unpredictable under both systems. To remedy these problems, I propose two different approaches: one for ICSID tribunals and another for international commercial arbitrations. In the case of ICSID arbitrations, I advocate that the institution adopt a default rule providing for the parties to share equally the costs of the arbitration and bear their own legal expenses. In essence, I propose that ICSID adopt what has become known as the American Rule with respect to the awarding of costs and fees. This approach is needed to bring predictability to the field, provide greater administrative efficiency, and reduce the overall costs. In the case of international commercial arbitrations, I argue that parties should be free to select the method for resolving claims for costs and fees, including authorizing the tribunal to resolve such claims pursuant to the principle of "costs follow the event" or the "loser pays" rule. In this context, the

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2003), *reprinted in* 33 *Y.B. Com. Arb*. 24 (2008) (claimant prevailed, but tribunal divided equally the costs of the arbitration and ordered the parties to bear their own legal costs); Case no. 12421 / MS of 2005, Final Award (ICC 2005), *reprinted in* 33 *Y.B. Com. Arb*. 102 (2008) (claimant won on liability but was awarded only nominal damages and tribunal divided equally the costs of the arbitration and ordered the respondent to pay 70% of the claimant's legal costs).

[5] *See* PSEG Global Inc. v. Turkey, ICSID Case No. ARB/02/5, Award of 17 January 2007, paras. 353, *available at* http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf.

adoption of the American Rule would not achieve the same administrative and economic benefits, and the principle of party autonomy calls for this different approach.

II. Overview

A. Defining Costs and Fees in International Arbitrations

The costs of international arbitration are two-fold and consist of the costs of the proceeding and the costs of the parties.[6] The proceeding's costs generally include administrative fees, tribunal fees, and costs associated with the tribunal. The parties' costs are principally comprised of legal costs: attorneys' fees, expert fees and related expenses.[7]

Administrative fees involve filing costs and the tribunal's fees and expenses. In general, these expenses are greater for arbitrations than for court proceedings because the State subsidizes costs for the latter.[8] For example, the administrative fees for a US$10 million dispute before the International Chamber of Commerce (ICC) are US$51,400.[9] By contrast, the filing fee in the US District Court for the Southern District of New York is US$350.[10]

Tribunal fees consist mostly of the arbitrators' fees and are calculated by a variety of methods. One of the most prominent approaches assesses fees by the ad valorem method, which calculates the tribunal's fee as a fixed percentage of the total amount in dispute. The ICC

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[6] *See* F. Gurry, "Fees & Costs," 6 *World Arb. & Mediation Rep*. 233 (1995). A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, p. 469 (4th ed. 2004).
[7] *See* Redfern & Hunter, *op. cit.,* p. 270.
[8] *See* R. Kreindler, "Introduction," *Transnational Litigation*, p. 272 (1997).
[9] International Court of Arbitration, Cost Calculator, http://www.iccwbo.org/court/arbitration/display10/index.html (last visited June 9, 2009).
[10] *See* Southern District of New York Fee Schedule, available at http://www1.nysd.uscourts.gov/courtrules (last visited June 9, 2009). *See also* C. Drahozal, "Arbitration Costs and Forum Accessibility: Empirical Evidence," 41 *University of Michigan Journal of Law Reform* 813 (2008) (finding that "the upfront costs of arbitration [in U.S. domestic consumer and employment disputes] will in many cases be higher than, and at best be the same as, the upfront costs in litigation"). However, in England, court fees fund approximately 80% of the cost of operating civil and family courts, while the remaining 20% is financed by taxpayers. *See* R. Jackson, Review of Civil Litigation Costs: Preliminary Report, p. 63 (May 2009), *available at* http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

follows this approach. It determines arbitrators' fees by assigning different minimum and maximum percentages to each consecutive portion of the disputed amount.[11] For example, for a US$10 million dispute, the fee for each arbitrator would range from US$36,470 to US$176,000.[12] The ICC sets the exact amount within this range by considering the diligence of the arbitrators, time spent, and the rapidity of the proceeding and the complexity of the argument.

Other approaches for calculating the arbitrators' fees include the time spent method and the fixed fee method.[13] The time spent method allocates the arbitration fee according to an hourly rate, which is contingent on the size, prominence and intricacy of the arbitration.[14] According to the 2008 International Centre for Settlement of Investment Disputes (ICSID) fee schedule, arbitrators generally make US$3000 per day for work associated with the proceeding.[15] Additionally, the rules of the London Court of International Arbitration (LCIA) provide that an arbitrator's fee cannot exceed £350 per hour.[16] By contrast, the fixed fee method has been utilized in cases of great importance where the arbitrators are internationally known.[17] However, this approach often causes difficulty in fee assessment, because of the challenges associated with predicting the length of an upcoming arbitration.[18]

Other costs associated with arbitration are tribunal expenses, such as the costs of translators, stenographers, interpreters and the tribunal's experts.[19] Tribunal expenses, like administrative fees, are typically subsidized in court proceedings, but are ordinarily assumed by the parties in arbitration.

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[11] *See* Redfern & Hunter, *op. cit.,* p. 271.
[12] International Court of Arbitration, Cost Calculator, *op. cit*.
[13] *See* Redfern & Hunter, *op. cit.*, pp. 272-73.
[14] *Ibid.,* p. 272.
[15] ICSID, "Schedule of Fees for January 2008", http://icsid.worldbank.org (last visited June 18, 2009).
[16] LCIA Arbitration Rules, Costs, http://www.lcia-arbitration.com/, (last visited June 18, 2009).
[17] *See* Redfern & Hunter, *op. cit.,* p. 272.
[18] *Ibid.*
[19] *Ibid.,* p. 470.

The parties' costs consist of all expenses necessary to present their arguments. The parties' costs mainly include attorneys' fees. Other expenses include the parties' professional service fees such as technical advisers and experts, the parties' witness fees, and incidental costs such as secretarial fees, telephone facsimile and copying charges.[20]

Cost and fees in international arbitrations can be substantial. For instance, in *PSEG Global Inc. and Konya Ilgin Elektrik Uretim Ve Ticaret Limited Sirketi v. Republic of Turkey* the total arbitration and legal costs amounted to approximately US$ 21M.[21] Additionally, in *Plama Consortium Limited v. Republic of Bulgaria*, the unsuccessful claimant was ordered to pay (1) all of the arbitral expenses, amounting to approximately US$1 million, and (2) US$7M to respondent for legal costs (which amounted to approximately one half of respondent's claimed legal costs).[22]

B. Methods for Allocating Costs and Fees

1. Costs Follow the Event

Most jurisdictions apportion costs and fees between the parties according to the costs follow the event (CFE) method, which provides that the losing party pay the winning party's expenses.[23] Its purposes are to indemnify the winning party, reduce frivolous law suits, and punish the losing party for wrongfully bringing or defending an action. While traditionally this

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[20] *See* W. Craig et al., *International Chamber of Commerce Arbitration*, p. 393 (3d ed. 2000).
[21] *See* PSEG Global Inc. v. Turkey, *op. cit.,* para. 353. However, litigation before national courts can cost even more. For instance, Exxon claimed its attorneys' fees and costs amounted to US$70 million in the Valdez litigation. *See* In Re Exxon Valdez, No. 04-35182, 2009 U.S. App LEXIS 12713 (9th Cir. June 15, 2009).
[22] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 310-312, 324, *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf.
[23] *See* W. Pfennigstorf, "The European Experience with Attorney Fee Shifting," 47 *Law & Contemporary Problems*, p. 40 (1984); *See also* Engelmann, *The Roman Procedure, in A History of Continental Civil Procedure,* p. 271 (R. Millar ed. & trans., 1927).

method had a punitive component, it has not been viewed as violating public policy.[24] Today, it is well settled that the primary policy for CFE is to make the claimant whole.[25] Additionally, by increasing the costs of losing a case, parties are discouraged from bringing insubstantial claims.[26]

Article 394 of the Spanish Code of Civil Procedure illustrates the CFE method.[27] It provides that a losing party pay the prevailing party's costs and fees if (1) the winning party prevails on all claims, (2) the losing party fails on all claims, and (3) the court finds that the case did not raise significant factual and legal concerns.[28] In other countries, like Australia and Canada, courts enjoy broad discretion to award costs and fees; however, the prevailing practice is to shift costs to the losing party.[29]

With respect to the proportion of costs and fees that are shifted, courts typically award all allowable costs and fees to the winning party.[30] However, some courts award costs and fees in proportion to the claims won.[31] Moreover, in many countries, awards of costs and fees are subject to various restrictions. In Spain, for instance, a winning party may receive only costs

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[24] *See* J. Wetter & C. Priem, "Costs and Their Allocation in International Commercial Arbitrations," 2 *Am. Rev. Int'l Arb*., pp. 251, 329 (1991); *See also* G. Graham-Green, "Taxation of Costs in the Supreme Court," 49 *Arbitration,* pp. 319, 353 (1984).

[25] *See* T. Rowe, "The Legal Theory of Attorney Fee Shifting: A Critical Overview," 1982 *Duke L.J*. 651, pp. 653-54.

[26] *See* Fleischman Distilling Corp. v. Maier Brewing Co., 386 *U.S*. 714, 718 (1967) (citing Oelrichs v. Spain, 15 Wall. 211, 231 (1872)).

[27] "Ley de enjuiciamiento civil," art. 394 (Tecnos Editorial, 2008).

[28] *Ibid.*

[29] *See* Cie Price Ltee v. Deniso Lebel Inc. [1996] R.J.Q. 2085 (C.A.) (Ques); Hospitality Corp. of Manitoba Inc. v. North Am. Bldg. Ltd. [1994] 70 W.A.C. 292, 95 Man. R. (2d) 292 (C.A.) (Man.); Vipond v. Sisco [1913] 14 D.L.R. 129 (Ont. S.C.); Ritter v. Godfrey (1919) 2 K.B. 47; Donald Campbell & Co. v. Pollak (1927) A.C. 732; Morosi v. Mirror Newspapers Ltd. (1977) 2 N.S.W.R. 749; E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd. (1982) 3 W.L.R. 245. For a detailed examination of litigation costs under the English system, see R. Jackson, Review of Civil Litigation Costs: Preliminary Report (May 2009), *available at* http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

[30] *See* E. Schwartz, "The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*,"* 4 *Bull. ICC Int'L Ct. Arb.,* p. 21 (1993) (noting that in England the general rule is that all allowable costs shall be borne by the unsuccessful party).

[31] *See ibid.* (stating that Germany, Switzerland and Austria allocate costs in proportion to the outcome of the case); Wetter & Priem, *op. cit.,* p. 274 (explaining that Sweden allocates costs "inter parties on a sliding scale proportionate to the assessment by the court of the claims made by the parties").

equivalent to one-third of the amount claimed in the action.[32] In other countries, such as Germany, the amount of fees that may be awarded is set pursuant to a mandatory schedule.[33]

Many countries extend the CFE method to arbitration.[34] For example, laws in England and Mexico state that the tribunal should award costs according to CFE.[35] Specifically, the English Arbitration Act provides "unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that this principle is not appropriate in relation to the whole or part of the costs."[36]

The CFE method is also incorporated into many arbitral rules. For instance, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) state that the arbitration costs "shall in principle be borne by the unsuccessful party" tribunal; however, the tribunal has broader discretion in allocating legal costs.[37] Similarly, the LCIA Rules gives the tribunal the authority to shift costs and stipulates that awards should be proportioned based on the relative successes of the parties.[38]

Other rules, while not explicitly granting cost shifting, authorize tribunals to do so. For instance, according to ICSID's General Procedural Provisions Rule 28, unless the agreement states otherwise, the tribunal may award "the fees and expenses of the tribunal and the charges

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[32] *See* F. Pombo, *Doing Business in Spain* § 23.01[5][iv] (1996).

[33] *See* Zivilprozeßordnung [ZPO] (Ger.).

[34] *See* J. Gotanda, *Supplemental Damages in Private International Law*, pp. 153-73 (1998) (surveying national laws on the awarding of costs and fees in arbitration).

[35] See Arbitration Act, 1996 § 61(2) (Eng.), *reprinted in 2 Halsbury's Statutes of England and Wales 71* (4th ed. 1996) (providing that in the absence of a contrary agreement, "the tribunal shall 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"); Cod.Com., art. 1454 (Mex.) (stating that, subject to exceptions, the costs of the arbitration shall be borne by the losing party).

[36] *See* English Arbitration Act (1996) Section 61(2).

[37] *See* UNCITRAL Arbitration Rules, Art.40(1), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

[38] *See* London Court of International Arbitration (LCIA) Rules art. 28.4 provides:

> Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its order on both arbitration and legal costs on the general principle that costs should follow the result of the award or arbitration except where it appears to the Arbitral Tribunal that in the particular circumstances this approach is inappropriate.

for the use of the facility for the Centre."[39] Additionally, although the ICC Rules do not recommend a basis for awarding costs, they do give the tribunal the discretion to allocate expenses.[40]

2. The American Rule

In contrast to the CFE approach, the American Rules provides for each party to pay for its own expenses.[41] This approach is mainly followed in the U.S.[42] When the U.S. Supreme Court adopted the American Rule in 1796, it set forth three reasons for the practice.[43] First, such an award may be viewed as punishing losing parties, which may be unfair because legal outcomes are uncertain. Second, increasing the losing parties' costs may deter the poor from bringing suit. Third, shifting costs may increase time, expense and the difficulty of proof. However, even in the U.S., the American Rule is far from absolute.[44] Over two hundred federal statutes allow for attorneys' fees awards.[45] Additionally, U.S. courts generally allow fee shifting for malicious claims and when the parties' agreement allows for it.[46]

In domestic U.S. arbitrations, tribunals traditionally follow the American Rule with respect to arbitration and legal costs.[47] On the federal level, while the Federal Arbitration Act (FAA) is silent on awarding costs and fees, many courts have held that arbitrators seated in the U.S. in domestic arbitration under the FAA cannot allocate these items unless the agreement

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[39] *See* ICSID Convention, Regulations and Rules, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm (follow Part F; then follow Part III, Rule 28). (last visited June 10, 2009).
[40] *See* Born, *op. cit.,* p. 2497.
[41] *See* Alaska Pipeline Co. v. Wilderness Soc'y, 421 *U.S.* 240 (1975). For a discussion of attorneys' fees in the United States, see R. L. Rossi, *Attorneys' Fees* (1973 & Supp. 1994); 10 C. Wright et al., *Federal Practice and Procedure* § 2675 (1983).
[42] *See* J. Gotanda, "Awarding Costs and Attorneys' Fees in International Commercial Arbitration," 21 *Mich. L. Rev.,* p. 10 n.39 (1999).
[43] Arcambel v. Wiseman, 3 U.S. 306 (1796).
[44] *See ibid.*; Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Oelrichs v. Spain, 83 U.S. 211 (1872).
[45] *See* Wetter & Priem, *op. cit.,* p. 284.
[46] *See* Gotanda, *op. cit.,* p. 13.
[47] *See* T. Oehmke, *Commercial Arbitration*, § 123:01 (1997).

explicitly provides for it.[48] On the local level, many American states have adopted the Uniform Arbitration Act (UAA) or a revised version of it, which provides that "[u]nless otherwise provided for in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."[49] Therefore, arbitral costs awards may be shifted; however, tribunals have ruled that attorneys' fees may not be awarded unless the agreement or an applicable statute states otherwise.[50]

In recent years, arbitrators have shifted costs and fees in a number of instances. For example, arbitrators may award costs if the agreement allows for it.[51] Additionally, tribunals may shift costs and fees if provided for in the applicable law or arbitral rules.[52] For instance, the American Arbitration Association (AAA) rules authorize the arbitrators to allocate the fees, expenses and compensation of the tribunal as they deem fit and to shift attorneys' fees "if all parties have requested such an award or it is authorized by law or their arbitration agreement."[53] Moreover, a number of states have adopted rules that allow for allocating costs and fees in international arbitrations.[54] For instance, in international arbitrations, a California statute states that "in making an award for costs the arbitral tribunal may include as costs … legal fees and expenses."[55] By contrast, in domestic arbitrations in California, each party pays its own pro rata

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[48] *See* Born, *op. cit.,* p. 2492.
[49] Uniform Arbitration Act § 10, 7 U.L.A. 250 (1997).
[50] *See* Gotanda, *op. cit*. *See also* Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., 882 P.2d 1274, 1277-79 (Ariz. 1994) (upholding the arbitration award, but striking down the attorneys' fee award because the UAA clearly delineates that attorneys' fees are only awarded if provided for in the parties' arbitration agreement).
[51] *See* Gotanda, *op. cit.,* pp. 12-13.
[52] *Ibid.,* p. 13..
[53] *See* Commercial Arbitration Rules and Mediation Procedures, Rule 43(d), *available at* http://www.adr.org/sp.asp?id=36094 (last visited June 29, 2009). With regard to administrative fees, tribunal expenses and arbitrator compensation, Rule 43(c) states that "the arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate."
[54] *See, e.g.,* Cal. Civ. Proc. Code § 1297.318 (West 1998); Fla. Stat. Ann. § 684.19(3)-(4) (West 1996); Haw. Rev. Stat. § 685D-7 (Michie 1996); Tex. Rev. Civ. Stat. Ann. art. 249-31, §§ 6-8 (West 1996).
[55] See *Cal. Civ. Pro. Code* § 1297.318 (West 1988 & Supp. 1999).

expenses including arbitrators' costs, unless the agreement provides otherwise.[56] In addition, though attorneys' fees are generally unavailable in domestic arbitration, arbitrators may award them if a party has acted in bad faith.[57]

III. Awards of Costs and Fees in International Arbitrations

The conventional wisdom holds that in international arbitrations, tribunals follow the CFE approach in accordance with the practice of most countries.[58] Unfortunately, there exists very little empirical data on the subject.[59] A few limited studies have found that the conventional wisdom may not be true, and recent decisions seem to indicate that awards of costs and fees are often arbitrary and unpredictable.

With respect to international commercial arbitrations, one study of ICC awards rendered between 1989-1991 found that in 81% of the cases where the claimant prevailed, the respondent was ordered to pay all or most of the arbitration costs. However, in only 50% of the same cases, were the respondents ordered to pay some portion of the claimant's legal fees.[60]

A number of recent international commercial arbitrations, published in the 2007 and 2008 *Yearbooks of Commercial Arbitration*, indicate similar conclusions, but also suggested that awards can be quite arbitrary. For example, out of the six ICC cases where the claimant was successful, some amount of costs and fees were awarded to the winning party in five of those cases.[61] However, of those five cases, three awards allocated a greater percentage of arbitral

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[56] *See Cal. Civ. Pro. Code* § 1248.2 (West 1988).
[57] *See* Widell v. Wolf, 43 *F.3d* 1150 (7th Cir. 1994) (bad faith exception); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 *F.2d* 1056 (9th Cir. 1991) (same).
[58] *See* World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/07, 4 October 2006, *available at* http://www.investmentclaims.com/decisions/WDF-Kenya_Award.pdf; M. Weiniger & M. Page, "Treaty Arbitration and Investment Dispute: Adding up the Costs," 1:3 *Global Arb. Rev*., p. 44 (2006).
[59] This is not surprising as one of the hallmarks of international arbitration is that it affords parties a private means for resolving disputes. *See* G. Born, *International Commercial Arbitration*, vol. 1, p. 87 (2009).
[60] Y. Derains & E. Schwartz, *A Guide to the New ICC Rules of Arbitration*, pp.431-44 (1998).
[61] *See, e.g.,* Award in case no. 12127 of 2003 (ICC 2003), *reprinted in* 31 *Y.B. Com. Arb.* 82 (2008), Final Award in case no. 13278 (ICC 200_), *reprinted in* 31 *Y.B. Com. Arb*. 118 (2008), Case no. 12421 / MS of 2005, Final Award

costs than legal fees.[62] Two recent awards rendered under the auspices of the Netherlands Arbitration Institute (NAI) also favored allocating arbitration costs over legal fees. In both cases, the successful parties were awarded all arbitration costs, but they received only part or none of their legal fees. This trend includes tribunals deciding international commercial disputes under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC).[63] One study found that CIETAC tribunals awarded arbitration costs in approximately 90% of the three hundred awards studied, while attorneys' fees were only awarded in 28% of those cases.[64]

With respect to investment arbitrations, in 2007, Susan Franck published a study of 102 international investment arbitration awards, fifty of which contained decisions for costs. However, only seventeen of those quantified the award of costs and fees.[65] Franck found that the average award for tribunal costs was US$581,332.70. She also found little variation between the awards for private parties and governments.[66] With respect to attorneys' fees, thirteen of the fifty-four decisions that mentioned legal costs shifted those costs.[67] But only eleven of the thirteen cases quantified the attorneys' fee award, with an average of US$655,407.[68] Lastly, private parties paid nearly twice as much in attorneys' fees as compared with governmental

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(ICC 2005), *reprinted in* 33 *Y.B. Com. Arb*. 102 (2008), Final Award on jurisdiction in case no. 11663 of 2003, *reprinted in* 32 *Y.B. Com. Arb*. 107 (2007), Final Award in case no. 12172, *reprinted in* 32 *Y.B. Com. Arb*. 85 (2007).

[62] *See* ICC No. 12127, *op. cit.* (the losing Respondent was ordered to pay 5/6 of the arbitral costs, while only paying 2/3 of the legal costs); ICC No. 13278, *op. cit.* (the losing Respondent was ordered to pay 70% of the arbitral costs and less than that percentage in legal costs).

[63] CIETAC Arbitration Rules states that "[t]he arbitral tribunal has the power to decide in the award, according to the specific circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing its case." *See* CIETAC Arbitration Rules, *available at* http://www.Cietac.org.cn/English/rules/rules.htm.

[64] See J. Gotanda, "Monetary Remedies in International Arbitration: A Comparison Between International Commercial Disputes and International Investment Disputes (forthcoming 2010).

[65] *See* S. Franck, *op. cit.,* pp. 68-69.

[66] *See ibid.,* p. 69.

[67] *See ibid.*

[68] *See ibid.*

parties. However, given the limited data this finding suggests that governments' expenses in defending international investment arbitrations are perhaps not as large as previously believed.[69]

Recent investment arbitration awards show no uniform practice concerning the award of costs and fees. In cases where the respondent prevails, many ICSID tribunals have ordered the parties to share equally the costs of the arbitration and to assume their own legal costs.[70] For example, in *World Duty Free Company Limited v. Republic of Kenya* and *Helnan International Hotels v. Egypt*, the tribunal dismissed the claimants' claims, but declined to award the respondent any costs and fees. Instead, it required claimant and respondent to share the costs of the arbitrations and to bear their own legal costs.[71] However, in *International Thunderbird Gaming Corporation v. the United Mexican States*, the tribunal rejected the claimant's allegations of breach of treaty and required the claimant to pay 75% of the costs and fees.[72] In addition, in *Telenor Mobile Communications v. Republic of Hungary*, the tribunal dismissed all claims for lack of jurisdiction and ordered the claimant to reimburse the respondent for both its contributions to the cost of the arbitration and its legal costs, which totaled approximately US$1.4 million.[73]

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[69] *See ibid.,* pp. 69-70.

[70] *See* Aguaytia, Jan de Nul N.V., L.E.S.I. SpA, Aguaytia Energy LLC v. Republic of Peru, ICSID Case No. ARB/06/13, Award, 11 December 2008, *available at http://ita.law.uvic.ca/documents/AguaytiaAward_001.pdf;* Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008, *available at http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf* ; L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria, ICSID Case No. ARB/05/3, Award, 12 November 2008, *available at* http://ita.law.uvic.ca/documents/LESIAward.pdf ; *Continental Casualty Company v. Argentina,* ICSID Case No. ARB/03/9, Award, 5 September 2008, *available at* http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf ; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic,* ICSID Case No., Award, 6 June 2008, *available at* http://ita.law.uvic.ca/documents/MetalparAwardEng.pdf ; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19. Award, 3 July 2008, *available at* http://ita.law.uvic.ca/documents/HelnanAward.pdf .

[71] *See World Duty Free Company Limited, op. cit; Helnan International Hotels, op. cit.*

[72] International Thunderbird Gaming Corporation v. Mexico, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, *available at http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf.*

[73] *See* Telenor Mobile Communications v. Republic of Hungary, ICSID Case No. ARB/04/15, 13 September 2006, *available at* http://www.worldbank.org/icsid/cases/awards.htm. In that case, the tribunal stated its decision was

In cases where the claimant has prevailed, the results have been more diverse. Some tribunals have required parties to split arbitration costs and bear their own attorneys' fees. For example, in *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, the tribunal ordered the respondent to pay claimant approximately US$5.6 million. However, it ruled, "[i]n the exercise of its discretion in matters of allocation of costs and considering all circumstances of this case, the Tribunal finds it fair that the parties bear the costs of the arbitration equally and that each party bears its own legal and other costs."[74] Similarly, in *Duke Energy International Peru Investments No. 1, Ltd. v. Peru*, the tribunal awarded the claimant approximately US$18.4 million in damages, but ordered each party to bear its own legal costs.[75]

Other tribunals have resolved claims for arbitration costs or legal costs, or both, based on the principle of costs follow the event. For example, in *ADC Affilliate Limited v. Hungary*, the tribunal awarded the successful claimants US$7.6 million to cover their costs and expenses in the arbitration.[76] In *PSEG Global Inc. v. Republic of Turkey*, the tribunal ordered the respondent to bear 65% of the total legal costs and fees, amounting to US$13.6 million, and the claimant to bear the remaining 35%, amounting to US$7.3 million.[77] However, the tribunal in *Siemens A.G. v. Argentine Republic* divided the arbitration costs between the parties on a 75%-25% basis, but required each party to bear its own legal costs.[78] Similarly, in *Azurix Corp. v. Argentine Republic*, the tribunal determined that Argentina breached the bilateral investment treaty (BIT)

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based on both the principle of costs follow the event and on the fact that the claimant had engaged in misconduct during the arbitration.

[74] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No ARB/04/19, Award of 18 August 2008, para. 490, *available at* http://ita.law.uvic.ca/documents/DukeEcuadorAward_003.pdf.

[75] *Duke Energy International Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award of 25 July 2008, para. 490, *available at http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-334-2008.pdf*. In that case, the parties had agreed to share equally the costs of the arbitration.

[76] ADC Affilliate Limited v. Hungary, ICSID Case No. ARB/03/16, 2 October 2006, *available at* http://www.worldbank.org/icsid/cases/awards.htm.

[77] *See PSEG Global Inc., op. cit.*

[78] *See Siemens A.G., op. cit.*

and thus owed the claimant US$165 million for the fair market value of the concession. However, it required each party to be responsible for its own costs and counsel fees, but ordered the respondent to bear most of the fees and expenses of the tribunal.[79]

In some cases, tribunals award only legal fees or only tribunal costs. However, this practice has not been uniform. Nor has there been any apparent reason for the distinction. This inconsistency is visible in two recent 2009 ICSID arbitrations. In *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, the claimants were successful on their substantive claims and the respondent was ordered to pay approximately US$74.6 million in damages. With respect to costs and fees, however, the tribunal awarded the claimants US$6 million for their legal costs, but ordered the claimants to bear half of the arbitration costs and respondents to bear the remaining half. In reaching its decision on costs and fees, the tribunal commented: "Tribunal has also taken due note of the decisions made by previous ICSID Tribunals, in light of which it appears that the practice of such Tribunals has not been uniform and that the present Tribunal therefore has a broad discretion to apportion costs."[80] By contrast, in *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, the tribunal decided to

[79] *See Azurix v. Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006, *available at* *http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf*. And in the *Desert Line Projects* arbitration, the tribunal divided the arbitration cost on a 70/30 percent basis, but required respondent to pay claimants US$400,000 for legal fees. *See* Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008, *available at* http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf . In the *Rumeli Telekom* arbitration, the tribunal ordered the parties to equally bear the costs of the arbitration, but the respondent was to pay 50% of the claimant's legal costs. *See* Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, *available at* http://ita.law.uvic.ca/documents/Telsimaward.pdf .

[80] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 617, *available at* *http://ita.law.uvic.ca/documents/WaguihElieGeorgeSiag-AwardandDissentingOpinion_000.pdf.* There, the tribunal ruled that Egypt violated the Italy-Egypt bilateral investment treaty by illegally expropriating an investment belonging to Mr. Waguih Elie George Siag and Mrs. Clorinda Vecchi.

allocate only tribunal costs to the winning party and not legal fees because the respondent, the Republic of Zimbabwe, faced economic hardships during that period.[81]

A number of tribunals have ordered the payment of costs and fees as a sanction for misconduct, for example, asserting spurious claims or engaging in bad-faith litigation.[82] For instance, in *Phoenix Action Ltd. v. The Czech Republic,* the tribunal characterized the claimant's behavior as "an abuse of the international investment protection regime" and ordered it to pay all the costs and fees.[83] And in *Plama Consortium Limited v. Bulgaria,* the tribunal rejected all of the claimant's substantive claims and found that the claimant had engaged in misconduct during the arbitration. The tribunal ordered the claimant to bear all the fees and expenses of the tribunal and to pay respondent US$460,000 on account of Respondent's advance on costs as well as US$7 million for respondent's legal costs and fees.[84]

IV. The Proposals

Because there is no uniform practice for awarding costs and fees in international commercial arbitrations and in international investment disputes, similarly situated parties have received vastly different awards. More importantly, this state of affairs has made it impossible for parties to predict with any degree of certainty the results of their claims for costs and fees.

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[81] Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6 (Netherlands/Zimbabwe), Award, 22 April 2009, *available at* http://ita.law.uvic.ca/documents/ZimbabweAward.pdf . There, ICSID ordered the government of Zimbabwe to compensate a group of Dutch Nationals for land that it expropriated from them under Zimbabwe's controversial land reform policy, which violated the Netherlands-Zimbabwe BIT.

[82] See, e.g., M. Weiniger & M.Page, "Treaty Arbitration and Investment Disputes: Adding up the Costs," 3 *Glob. Arb. Rev.*, p. 44 (2006).

[83] Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (Israel/Czech Republic) Award 15 April 2009, *available at http://ita.law.uvic.ca/alphabetical_list.htm.* There, Phoenix Action Ltd. purchased two companies, Benet Praha and Benet Group, which were involved in ferroalloys and were under criminal investigation for a violation of custom duty violations. Phoenix Action Ltd. argued that the long litigation process which persisted after it acquired ownership constituted a denial of justice. Ultimately, the tribunal dismissed the claim on jurisdictional grounds stating that Phoenix Action Ltd. bought the companies for the sole purpose of exploiting the Israeli-Czech Republic BIT.

[84] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf.

As the United States Supreme Court recently noted, predictability is essential to a fair and well functioning adjudicatory system.[85] This is especially true with respect to international arbitration. To the extent that results are unpredictable, parties may view arbitration as unfair and fail to choose it as a means of resolving disputes.[86] In addition, lack of predictability discourages parties from settling cases and thus reduces the efficiency of the system.[87] As one commentator explained:

> [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. Furthermore, a party should be in a position to reasonably predict the level of financial risk that it will incur in an arbitration, and the conditions it needs to satisfy to make a good claim for costs…. Knowing the mechanisms of a given arbitration cost system, and the impact of its application … may … help a party decide in a particular case whether it should file counterclaims, advance the arbitration costs in lieu of the other party, or simply discontinue the proceedings.[88]

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[85] *See* Exxon Shipping Co. v. Baker, 54 U.S.__ (U.S. Sup. Ct. 2008).

[86] S. Franck, "Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Disputes" *Appeals Mechanism in International Investment Disputes,* p. 48 ("If, for example, tribunals exercise discretion to shift arbitration costs under the applicable rules—but they do not explain either the legal authority for or their rationale for making a decision—parties may question the fairness and basis of the determination.").

[87] *See generally* G. Born, *International Commercial Arbitration in the United States* 5-8 (1994) (noting that neutrality and predictability are essential aspects of arbitration). *See also* R. Posner, *Economic Analysis of Law* § 21.10, p. 629 (5th ed. 1998); G. Priest & B. Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.*, pp. 1, 16–17 (1984) (noting litigation is higher in uncertain legal contexts).

[88] M. Buhler, "Costs in ICC Arbitration: A Practitioner's View," 3 *Am. Rev.,* p. 116, 151-52 (1992).

Moreover, the lack of predictability hinders counsel from advising clients on the most prudent course of action. These problems are exacerbated in investment arbitrations, where parties on average spend millions of dollars to resolve a dispute before ICSID and awards are often published.[89]

I believe that these problems can be remedied in investment arbitrations by the adoption of a default rule[90] that provides for the parties to divide equally the costs of the arbitration and for each to bear its own attorneys' fees and costs.[91] In other words, I propose that ICSID tribunals essentially follow the American Rule. Four reasons support this proposal.

First and foremost, it would provide a clear rule, thus bringing much needed predictability to the area. While the CFE method has in theory the benefit of making a party whole for the expense in prosecuting or defending valid claims, its administration is premised on subjective criteria and broad discretion on the part of tribunals.[92] This deficiency has ultimately

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[89] *See* ICSID Online Decisions and Awards http://icsid.worldbank.org/ICSID/FrontServlet. *See also* Investment Treaty Arbitration (ITA), New Awards, Decisions and Orders, http://ita.law.uvic.ca/. As Thomas Wälde pointed out, while there is no formal stare decisis in ITA, precedent nevertheless plays an important role. See Thomas Wälde, "Remedies and Compensation in International Investment Law," Transnational Dispute Management, Vol. 2, Issue #5, Nov. 2005.

[90] *See* W. Park, "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion," 19(5) *Mealey's International Arbitration Report*, p. 3 (2004) ("[A]rbitral institutions should give serious consideration to adopting provisions with more precise procedural protocols to serve as default settings for the way arbitrations should actually be conducted.").

[91] This method would not upset the authority of a tribunal to award costs and fees against a party who has acted in bad faith or engaged in other litigation misconduct. *See, e.g.,* Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (Israel/Czech Republic) Award 15 April 2009, *available at* *http://ita.law.uvic.ca/alphabetical_list.htm*; Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award of 27 August 2008, *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf. Indeed, the power to award costs and fees in such situation is well settled even in jurisdictions following the American Rule. *See* Gotanda, "Damages in Private International Law," 326 *Recueil des cours*, p. 280 (2007).

[92] Some may argue that providing arbitrators with broad discretion to award costs and fees enables the tribunal to tailor its award of costs and fees to fit the circumstances of the case. As Rusty Park Points out, discretionary power has its downsides: "flexibility is not an unalloyed good; and arbitration's malleability often comes at an unjustifiable cost." Park, *op. cit.,* p. 4; *see also* J. Uff, "predictability in International Arbitration," *in International Commercial Arbitration: Practical Perspectives*, p. 151 (2001).

resulted in similarly situated parties being treated differently.[93] Thus, the need for a bright line rule outweighs the theoretical benefit of the CFE approach – to make the prevailing party whole for the costs of litigating.

Second, along the same lines, this practice would provide greater administrative efficiency. Adopting the American Rule would eliminate the need for parties to brief and argue the issues of costs and fees and, correspondingly, tribunals would not need to devote time to determining whether a party "won" and how much it should award to the successful party in costs and fees.[94]

Third, adopting this method may have the effect of reducing the overall costs of resolving disputes before ICSID.[95] As commentators have pointed out, in contrast to the American Rule, the CFE method gives the parties the incentive to spend more money because larger damages at stake.[96] Under the CFE method, parties' costs theoretically increase as they take into account the

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[93] Susan Franck notes that inconsistent ruling may lead parties to believe that they are being treated unfairly. She supports treating similar cases the same because "it promotes perceptions of fairness and supports the legitimacy of the process." *See* S. Franck, "Challenges Facing Investment Disputes," *op. cit.,* p. 48.

[94] In fact, Professor John Leubsdorf argues that the American Rule may have become popular in the United States after the breakdown of attorneys' fees regulation in the early nineteenth century because it was easier to administer. He claims that after the American Revolution, lawyers were no longer under government control and had the freedom to charge clients large amounts. Professor Leubsdorf concludes that without any governmental limitations on costs "the American rule became institutionalized because attorneys no longer had to push to recover their fees from the defeated party." J. Leubsdorf, "Toward a History of the American Rule on Attorney Fee Recovery," 47 *Law & Contemp. Probs*., p. 9 (1984).

[95] As Judge Richard Posner has pointed out, when parties have less information about how their case will be decided, they are more inclined to litigate as opposed to settle. Therefore, more precedent brings about more certainty and settlements, which decreases overall costs because settling is less expensive than litigation. *See* R. Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," 53 *U. Chi. L. Rev*., pp. 366-393 (Spring 1986). In addition, studies indicate that where both parties are optimistic about their chances of prevailing, settlement is less likely to occur under the costs follow the event system. *See* R. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," 2(2) *Journal of Legal Studies* (1973); S. Shavell, "Suit, Settlement and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs," 11(1) *Journal of Legal Studies* (1982).

[96] *See generally* R. Cooter & D. Rubinfeld, "Economic Analysis of Legal Disputes and their Resolution," 27 *J. Econ Lit.*, p. 1067 (1989); D. Coursey and L.R. Stanley, "Pre-Trial Bargaining Behaviour within the Shadow of the Law: Theory and Experimental Evidence," 8(2) *International Review of Law and Economics* (1988); J. Hause, "Indemnity, Settlement and Litigation, or I'll be suing you," 18(1) *Journal of Legal Studies* (1989); K. Chen and J. Wang, ""Fee Shifting Rules in Litigation with Contingency Fees," 23 *Journal of Law, Economics and Organisation* (2007).

probability of paying the winning parties' costs and fees.[97] Arbitration costs may also increase, as fee shifting causes parties to argue over the amount of costs and fees that should be shifted to the losing parties.[98]

Fourth, the nature of investment disputes, as well as the involvement of governments, counsels against awarding costs and fees in investment arbitrations. Investment disputes often involve issues concerning whether a government is acting in its sovereign capacity,[99] and an award of costs against the government may ultimately be shouldered by its constituents, who may be in the weakest position to bear the financial burden.[100] As the late Thomas Walde pointed out in his separate opinion in *International Thunderbird Gaming Corp.*, imposing costs

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[97] As one commentator notes:

> From the defendant's perspective, the value of a case is the expectation of the total of its defense costs, what is paid in damages, and what is paid for the plaintiff's costs; this equals the total of the costs multiplied by the probability of having to pay minus the probability of defense costs times the probability of the defense winning. Without fee shifting, the defendant's case value is its costs plus the amount of damages times the probability of having to pay those damages.

H. Kritzer, *op. cit.*, p. 355.

[98] *Ibid.,* p. 362. It should be noted that some studies have found that more cases of low merit tend to be brought under the American Rule. However, the CFE method may deter some claimants who have relatively strong claims from pursuing them because they fear cost liability. *See* J. Hughes & E. Snyder, "The English Rule for Allocating Legal Costs: Evidence Confounds Theory," 6 *Journal of Law, Economics and Organisation*, pp. 345-80 (1990); J. Hughes & E. Snyder, 28 *Journal of Law & Economics*, pp. 225-50 (1995); D. Coursey & L. Stanley, "Pre-trial Bargaining Behaviour Within the Shadow of the Law: Theory and Experimental Evidence," 8 *International Review of Law & Economics*, pp. 349-367 (1988).

[99] As Professor Franck notes:

> Beyond the effect experienced by a foreign investor or its shareholders, investment arbitration affects taxpayers of the host government as well as entities impacted by its legislative and regulatory choices. Excluding those impacted by the resolution of the investment dispute can foster a sense of unfairness and a lack of procedural justice. Particularly for democratic institutions with a tradition of giving the governed a voice in the process of government, this can lead to a backlash with financial and political costs.

S. Franck, "Challenges Facing Investment Disputes," *op. cit.,* p. 46.

[100] Some tribunals have been reluctant to shift significant costs and fees to countries experiencing financial and economic hardships. *See generally*, *Bernardus Henricus*, *op. cit.,* para. 147. In that case, the tribunal decided not to shift legal costs to the losing respondent-government, while, it nevertheless acknowledged that CFE is the general practice for allocating legal costs in international arbitration. The tribunal maintained that the CFE approach "would not be completely appropriate, in the present case, taking into account the situation in Zimbabwe in 2001/2002." *Ibid.* During this time period Zimbabwe experienced political and economic upheaval. Specifically, the composition of the Zimbabwe Supreme Court changed and it subsequently overturned an earlier decision holding a controversial Land Reform Programme unconstitutional. *Ibid.,* para. 33. *See also* Himpurna v. Indonesia, Final Award, 25 *Y,B. Com. Arb.,* pp. 106-07 (2000) (The tribunal declined to award legal costs because, among other things, the Respondent's failure to fulfill its obligation was due to severe economic and political developments.).

on losing investors may have the effect of undermining the very purpose of investment treaties and could "cast a chill over attempts" by small companies with fewer financial resources to seek the protections afforded by the treaties.[101]

With respect to international commercial arbitrations, however, I do not advocate the same approach. In this context, parties have greater ability to agree on how they want the issue of costs and fees to be decided. In investment arbitrations, parties often bring claims pursuant to a BIT or multilateral treaty that provides for arbitration of disputes under the ICSID Rules or ICSID Additional Facilities Rules. However, parties in international commercial arbitrations have the power via their contract to determine how the issue of costs and fees is to be resolved. For example, they may place a provision in their agreement providing for a tribunal to award costs and fees to the prevailing party in the event of a dispute. Alternatively, they may select a set of rules, such as the UNCITRAL Arbitration Rules, that provides that the costs of arbitration "shall in principle be borne by the unsuccessful party," while legal costs are left to the tribunal's discretion.[102] In addition, they may choose to have any disputes resolved pursuant to national laws or rules that provide for the awarding of costs and fees to the winning party. In other words, in international commercial arbitration, there is less of a concern over the need for a bright line rule because the parties can tailor the dispute to fit their particular needs or circumstances.

Similarly, in the commercial context, party autonomy would prevail over administrative efficiency.[103] That is, if parties agree that making a party whole through the CFE approach

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[101] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Separate Opinion, 26 January 2006, para. 142, available at http://ita.law.uvic.ca/documents/ThunderbirdSeparateOpinion.pdf .

[102] *See* UNCITRAL Arbitration Rules, *op. cit.*

[103] *See* Redfern & Hunter, *op. cit.*, p. 315. "Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations." *Ibid.;* see also Born, *op. cit.,* p. 2153 ("Indeed, it is

outweighs achieving any savings from the administration of the American Rule, then tribunals should respect that decision.[104]

In addition, in commercial contract disputes, it is perhaps easier to determine who is "the winning party" than in investment disputes, because the legal rules for determining liability and damages may be clearer than in the investment context. For example, United Nations Convention on Contracts for the International Sale of Goods (CISG) provides detailed rules for determining whether a breach of contract has occurred and the remedies for such breach. In addition, many of these rules, including the provisions on the calculation of damages, are based on principles found in many legal systems, and thus are familiar to parties and arbitrators. For example, where the contract has been avoided because of a breach and the aggrieved party has entered into a cover transaction, CISG article 75 provides for damages to be the difference between the contract price and any cover purchase or sale.[105] If the aggrieved party did not enter into a cover transaction, CISG article 76 allows for the recovery of the difference between the market price of the goods and the contract price.[106] Both remedies are commonly found in national laws, are relatively easy to apply, and result in predictable damages.

By contrast, in investment arbitrations involving expropriations, claimants may seek to recover the value of their business that has been taken. Determining damages in this circumstance is a much more complicated process; tribunals follow no consistent set of uniform rules. Indeed, in such a situation, tribunals may use one of three methods or a combination of

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fair to say that the parties' autonomy to select the substantive law governing their international commercial relations is a general principle of international law that provides one of the foundations of contemporary international commercial relations."); J. Gotanda, "Awarding Interest in International Arbitration," 90 *Am. J. Int'l L.*, p. 56 n.1 (1996) (stating that employing the parties' agreement as the primary authority "gives effect to the intent of the parties and furthers one of the fundamental characteristics of international commercial arbitration – the parties' freedom to agree upon the rules that will govern the resolution of their dispute.").

[104] *Cf.* R. Cooter, "Doing What You Say: Contracts and Economic Development," 59 *Ala. L. Rev.*, p. 1109 (2008).

[105] CISG, art. 75.

[106] CISG, art. 76.

them: (1) the asset-based approach; (2) the market-based approach; (3) the discounted cash flow (DCF) method. While the DCF method in theory provides an accurate method for calculating damages, in practice it can be difficult to apply because it involves determining the value of the business by projecting the net cash flows for a certain period in the future and then discounting them back to the present value as of the date of the wrongful act. This process involves many assumptions, estimates and other subjective criteria that ultimately may result in parties differing greatly on the amount of damages and decisions that seem arbitrary and inconsistent.[107]

Moreover, commercial disputes, particularly those involving the CISG, tend to involve much smaller sums than investment disputes, and thus legal fees tend to be much lower.[108] And because governments acting in their sovereign capacity is not an issue, awards of costs and fees in commercial disputes tend to be less controversial.[109]

V. Conclusion

In sum, my proposal advocates the adoption of the American Rule, with respect to the award of costs and fees in ICSID cases. This proposal would foster more predictable outcomes, greater administrative efficiency, and a reduction in overall costs. In addition, it would recognize that in some disputes, tribunals decide public policy issues that counsel against

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[107] *See* J. Gotanda, "Recovering Lost Profits in International Disputes" *36 Geo. J. Int'l L.61, 91-93* (2004); see also S. de Quidt P. Rees, "Methods of Valuation: Which Method For Which Case?," *Investment Treaty Law Current Issues III: Remedies in International Investment Law, Emerging Jurisprudence of International Investment Law* 61, 73 (Andrea K. Bjorklund, Ian A. Laird and Sergey Ripinsky eds., The British Institute of International and Comparative Law 2009) (stating that income-based approaches, like the DCF "are dependent on the availability of informatsion, in particular well-considered and reliable projections for the asset in question as of the valuation date" and the "information available may not be sufficiently robust to produce a reliable DCF analysis").

[108] *See* J. Gotanda, "Monetary Remedies in International Arbitration: A Comparison between International Commercial Disputes and International Investment Disputes," *op. cit.*

[109] However, due to the tremendous expense, cost and fee awards remain controversial in the investment arbitration context. *See* S. Franck, *op. cit.*, p. 18. In fact, in 2009, President Morales of Bolivia expressed his dissatisfaction with ICSID by conveying that "the average budget for a minor case which includes the fees of one and a half arbitrators, plus lawyers, experts and travel is about three million dollars. This cost may be marginal for giant corporations but impossible for small countries. Justice so priced is justice denied." President Evo Morales of Bolivia, "Peoples Rights Before Corporate Profits: Closing of the International Centre for Settlement of Investment Disputes (ICSID) and challenging free trade agreements in the road to build a just economic and social governance" (June 25, 2009).

awarding costs and fees to the prevailing party. These reasons, however, do not apply with the same force in transnational commercial disputes. In these cases, I would give the parties the ability to agree on appropriate rules for resolving cost and fee claims, including giving the tribunal the authority to apply the CFE method.