Allocation of Costs in ICSID Arbitration a Continuing Challenge to International Law

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Abstract

Investment disputes arise from time to time between investors and host states. In the event of such disputes, investors may turn to the International Center for Settlement of Investment Disputes[3] *for arbitration. One of the issues that can (still) arise during ICSID arbitration proceedings is the allocation of costs. Allocation of costs is a crucial aspect of any dispute resolution process, and ICSID arbitration is no exception. This article will show that a specific practice has been created in ICSID arbitration and outline the different approaches and principles used by ICSID arbitral tribunals when allocating costs. At the same time, the emphasis is placed both on possible problems of interpretation that may arise, as well as on some proposals to modify the investment treaties, so that the specific arbitration rules can be helped again by the treaty. For this article, a comparative research method was used that allowed a meta-analysis of the relevant arguments that can lead to a well-founded reasoning. Mostly primary sources were used, which were supplemented with secondary sources.*

Keywords: *international investment, ICSID, treaties, investment arbitration, costs.*

JEL Classification*:* F21, J52, K33

1. Introduction

In this matter, an auxiliary practice was formed that led even without being a source of law, to the manifestation of some tendencies. They are based on certain stated or implicit reasoning or principles of procedural application (often invisible to the parties) that can lead to considerable differences. Faced with these aspects, theorists have often pointed out that a suitable arbitration practice in this matter must enjoy a solid foundation that supports predictability[4].

Under the generic name of "ICSID Regulations and Rules" we find: Administrative and Financial Regulations; The rules of the institutions; Conciliation rules; and the Arbitration Rules, as amended by the ICSID Board of Directors and which entered into force on July 1, 2022. Even if the ICSID specific rules appeared in 2022 in a new version, it seems that this problem of cost allocation does not seem to have much chance of being fully clarified, especially if we are talking about the tribunals that should

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[3] ICSID is the acronym used in this article for the International Center for Settlement of Investment Disputes.
[4] Rovine, Arthur W, *Allocation of Costs in Recent ICSID Awards*, in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration*, Ed. Oxford, 2015, pp. 658-688.

argue their decisions regarding costs[5]. From a simple comparison, however, we notice that the 2006 version of the rules did not contain the expression of *cost allocation* nor some provisions, as we will develop in the following. The new rules come with certain specifications that constitute a step forward. Under them, ICSID requires advance payments from the parties at various stages of the proceedings, payments intended to cover the Tribunal's fees and expenses and ICSID's administrative expenses. In this matter, the general rule was maintained according to which the parties are equally responsible for these payments (minus the annulment procedure). Also, the parties in arbitration are individually responsible for their own costs, such as the one made with lawyers, for example. These provisions are joined by Rule 53 regarding Security of costs and where, in the final sentence of the ICSID Arbitration Rules, it is provided that: "(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party's request". Again, the 2022 rules also state that "the Tribunal has a broad discretion to allocate costs between the parties in the final award (...) Such decision shall form part of the award"[6]. This last provision means that the decisions on costs will be memorialized in the Award and become binding and enforceable[7]. The provisions contained in art 53 and 54 of the Convention, as they are formulated and corroborated with the others that we will present below, determine a single hypothesis: namely that the Tribunal must, without exception, justify the decision in the considerations of cost allocation. In this way, all parts of the Decision can be binding on the parties. Otherwise, the reasoning is that the unjustification of the distribution of expenses can also constitute a reason on which to base one of the reasons for the annulment of the Decision if it refers to an essential argument that can be strengthened including by invoking a lack of justification for the allocation of costs, according to the Convention.

These discretionary powers left to the Tribunal are complemented by the fact that most investment treaties do not contain provisions regarding the allocation of costs or provide that the tribunal has the freedom to adopt a different approach, which has happened in practice[8]. Without going into the details regarding the possibility of the

[5] In 2022 the ICSID Arbitration Rules (new version) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention. The ICSID Arbitration Rules are supplemented by the ICSID Administrative and Financial Regulations. The ICSID Arbitration Rules apply from the date of registration of a Request for arbitration until an Award is rendered and to any post-Award remedy proceedings. See the rules here: https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf, accessed on 13.02.2023. The version of the ICSID Rules from 2006 can be read by comparison here: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf, accessed on 14.02.2023.

[6] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Chapter VI: Cost of Proceedings, art. 61 (2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

[7] Articles 53 and 54 of the ICSID Convention plus Arbitration Rule 52(3) and (4).

[8] Bühler, W., Costs, in Trenor, J.A. (ed.*), Global Arbitration Review: The Guide to Damages in International Arbitration*, David Samuels, London, 2016, p. 253; see also Schreuer, C., *The ICSID Convention: A Commentary*, 2nd ed., 2009; or Donovan, D.F., *Allocation of Costs*, in Kinnear, M., and Others (eds.), *Building International Investment Law: The First 50 Years of ICSID*, 2015, Kluwer Law International, pp. 555-566, apud Finizio Steven, Kalelioğlu Cem and Ludwig Marie-Hélène, *Allocation of Costs*, article published in Jus Mundi on December 13, 2022, available here: https://jusmundi.com/en/document/publication/en-allocation-of-costs, accessed on 14.02.2023.

parties to set these aspects through separate agreements (*inter alia)*, we note that the inclusion of precise provisions in investment treaties or in treaties with provisions regarding investments, would support the removal of any ambiguities that affect up to after all, the uniformity of the relevant jurisprudence. "Investment arbitration practice has shown that uncertainty about the precise scope of dispute resolution clauses often leads to protracted jurisdictional battles"[9]. This proposal comes against the background of some initiatives by some big state players in investments to update the investment treaties, which is an opportunity to establish the problem of cost allocation[10].

Based on ICSID arbitration rules: "The Tribunal shall request that each party file a statement of its costs and a written submission on the allocation of costs before allocating the costs between the parties."[11]

"In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including: (a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed. (2) If the Tribunal renders an Award pursuant to Rule 41(3), it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs. (3) The Tribunal may make an interim decision on costs at any time, on its own initiative or upon a party's request. (4) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award."[12]

However, Chapter IV entitled: Conduct of the Proceeding. Rules. Orders and Decisions, includes in its provisions the obligation to justify any decisions, including, understanding that this also applies in the case of cost allocation: "(1) The Tribunal shall make the orders and decisions required for the conduct of the proceedings. (2) Orders and decisions may be made by any appropriate means of communication, shall indicate the reasons upon which they are made, and may be signed by the President on behalf of the Tribunal. (3) The Tribunal shall consult with the parties prior to make an order or decision it is authorized by these Rules to make on its own initiative."[13]

Another additional argument for the motivation of the cost allocation decisions is those given by the examination of the special circumstances that the Court does. Or any examination of this kind includes certain reasonings that should tend towards a precision of mathematical evaluation, in which case any absence of reasons is excluded. We note that from now on, the parties must expect the reasons to be presented by the Tribunal, whenever it issues a decision regarding costs.

Therefore, the updated version of the rules gives hope for a regulation according to the needs identified in the previous practice.

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[9] August Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, „Asia Pacific Law Review", 21:1, 2013, pp. 3-26, DOI: 10.1080/10192557.2013.11788264.

[10] See, for example, China's initiative to update investment treaties due to restrictive clauses. More details can be found in Juan Du, *Restrictive ISDS clauses under Chinese BITs: interpretations and implications for China*, „Asia Pacific Law Review", 30:2, 2022, pp. 382-400, DOI: 10.1080/10192557.2022.2085411.

[11] Rule 51. Statement of and Submission on Costs from new version of ICSID Arbitration Rules.

[12] Rule 52. Decisions on Costs from new version of ICSID Arbitration Rules.

[13] Rule 27, ibid.

2. Approaches and principles used by ICSID arbitral tribunals when allocating costs

Until now, the investment arbitration system has suffered several criticisms, among which can be listed: the lack of an appeal mechanism (here is, however, a procedure to set aside judgments when "significant" procedural errors have been made, which could not be the case for a lack of reasons for a decision to allocate costs[14]); the growing number of inconsistent decisions; the defective reasoning of the courts that directly affects the fairness, predictability and even reliability of the system; but also the rule of law[15].

Investment arbitration also suffers from another disease that needs to be treated and that can affect both the motivations for decisions and the discretionary ability to take certain measures, such as those regarding costs. It is about the doubts that sometimes appear regarding the objectivity of the panel members. During these discussions it was presented for example, United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tires from China (US- Tires (China)) China stated that the panel did not act in accordance with Article 11 and did not "carried out an objective assessment" of matter', however, the Appellate Body concluded that, while the panel "could have provided more reasons to support its findings", it "did not consider any deficiency in the panel's analysis ... to be so serious as to amount to a non-objective evaluation of the matter before it"[16]. The value of this lack of reasons could further be noted in arbitrations when the panel analyses the allocation of costs.

The question that remains is: through what kind of precise regulations can such situations be avoided? Seen in this light, the updated ICSID rules from 2022 appear as a horizon that we only dream of reaching.

The principles of procedure or reasoning below have an increased value in the absence of other *hard law* provisions. Although the applicable rules have undergone recent changes, the issue analysed here may still suffer from problems of interpretation based on the competence that was left to the court in making decisions regarding the issue of cost allocation. That is why we consider it useful to analyse the rationales presented in this chapter, from which we can distinguish, first of all, two general rationales: 1) "loser pays" or "costs follow the event" or "English Rule" as it is also called, or 2) "bear your own costs" or "pay your own way" or "American Rule", the

[14] See in general Dolzer, R. and Schreuer, C., *Principles of International Investment Law*, 2nd ed. (Oxford: OUP), 2012.

[15] Lisa Diependaele, Ferdi De Ville & Sigrid Sterckx, *Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System*, New Political Economy, 24:1, 2019, pp. 37-61, DOI: 10.1080/13563467.2017.1417362.

[16] World Trade Organization. Appellate Body, *Report of the Appellate Body, United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, AB-2011-4*, China, Appellant, United States, Appellee, European Union, Third Participant, Japan, Third Participant Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Third Participant Turkey, Third Participant Viet Nam, Third Participant. See more in Guiguo Wang, *The Belt and Road Initiative in quest for a dispute resolution mechanism*, „Asia Pacific Law Review", 25:1, 2017, pp. 1-16, DOI: 10.1080/10192557.2017.1321731.

underlying rule proportionality[17].

2.1. "**Cost follows the event**"

The "costs follow the event" principle is the most common approach used by ICSID tribunals when allocating costs in investment disputes. This principle provides that the party that is unsuccessful in the arbitration should bear the costs of the arbitration, including the legal fees and expenses of the successful party. The rationale behind this principle is that the successful party should not be burdened with the costs of the arbitration, as they have already incurred costs in pursuing their claim.

Under this principle, the successful party is entitled to recover its reasonable costs, including legal fees and expenses, from the unsuccessful party. The term "reasonable costs" refers to costs that are necessary and reasonable in the circumstances of the case. The successful party must provide evidence of the costs it has incurred, and the tribunal will make a determination as to whether the costs are reasonable and whether they were necessary in the circumstances of the case.

The notion of "reasonable costs" is important because the ICSID Convention provides that each party to an arbitration shall bear its own costs, as well as an equal share of the costs and expenses of the tribunal. However, the tribunal may also order a different allocation of costs if it deems it appropriate, taking into account the circumstances of the case.

In determining what constitutes "reasonable costs", the tribunal will consider various factors, such as the complexity of the case, the amount in dispute, the conduct of the parties, and the reasonableness of the fees charged by the parties' representatives. The tribunal will also take into account any cost-shifting agreements or provisions in the relevant arbitration rules.

Overall, the notion of "reasonable costs" is aimed at ensuring that the costs of an arbitration are proportional to the value and complexity of the dispute, and that parties are not unfairly burdened with excessive or unnecessary expenses.

While the "costs follow the event" principle is the most common approach used by ICSID tribunals, it is not an absolute rule. The tribunal has discretion to depart from the principle in exceptional circumstances, such as where a party has engaged in conduct that has contributed to the costs of the arbitration, or where there are particular circumstances that would make the application of the principle unfair.

In the recent case of *Bear Creek Mining Corporation v. Republic of Peru*[18], the tribunal applied the "costs follow the event" principle and ordered the Republic of Peru to pay the costs of the arbitration. The tribunal noted that the Republic of Peru was unsuccessful in the arbitration, and that Bear Creek had prevailed in its claims. The tribunal also noted that the costs claimed by Bear Creek were reasonable and necessary,

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[17] *2016 Chartered Institute of Arbitrators (CIArb) Guidelines on Cost Awards,* Preamble, para. 4; Bühler, *op. cit*., pp. 250-253; ICC Commission Report, *Decisions on Costs in International Arbitration*, ICC Disp. Resol. Bull., Vol.2/2015 ICC Report on Decisions on Costs, para. 13 and Appendix A.

[18] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, decided in favor of the investor by Award from November 30, 2017: "Other remedy: Respondent shall pay, on the amount awarded (US $18,237,592), compound interest at a rate of 5% from the date of publication of Supreme Decree 032, until date of payment. Also, it shall reimburse Claimant 75% of its arbitration costs, plus compound interest at a rate of 5."

and that there were no exceptional circumstances that would justify departing from the "costs follow the event" principle.

In another recent case, *Cargill, Incorporated v. Poland*[19], the tribunal departed from the "costs follow the event" principle and ordered that the costs of the arbitration be split between the parties. The tribunal noted that both parties had contributed to the costs of the arbitration, and that neither party should bear the full costs of the arbitration.

2.2. Proportionality

The "Proportionality" principle is another approach that ICSID tribunals may use when allocating costs in investment disputes. This principle seeks to ensure that the costs of the arbitration are proportionate to the value of the dispute, taking into account the nature and complexity of the case.

Under this principle, the tribunal will take into account various factors when determining the allocation of costs. These factors may include the amount in dispute, the complexity of the case, the time and resources expended by the parties, and the conduct of the parties throughout the arbitration. The goal is to ensure that the party that incurs the majority of the costs is the one that stands to benefit the most from the outcome of the arbitration.

In the recent case of *TECO Guatemala Holdings, LLC v. Republic of Guatemala*[20], the tribunal applied the principle of proportionality when allocating costs. The tribunal noted that the dispute concerned a relatively small amount, and that the case was not particularly complex. The tribunal also noted that both parties had engaged in conduct that contributed to the costs of the arbitration. The tribunal ultimately ordered that each party bear its own costs, finding that it would be disproportionate to order one party to pay the costs of the other.

In another recent case, *RSM Production Corporation v. Saint Lucia*[21], the tribunal also applied the principle of proportionality. The tribunal noted that the amount in dispute was relatively small, and that the case was not particularly complex. The tribunal also noted that RSM had prevailed on some of its claims, but not on others. The tribunal ultimately ordered that RSM bear 75% of the costs of the arbitration, and that Saint Lucia bear 25% of the costs. The tribunal found that this allocation of costs was proportionate to the value of the dispute and the outcome of the arbitration.

In conclusion, this principle seeks to ensure that the costs of the arbitration are proportionate to the value of the dispute, taking into account the nature and complexity of the case. The application of this principle depends on the specific facts and circumstances of each case, and the tribunal will take into account various factors when determining the allocation of costs.

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[19] *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, decided in favour of investor - Award dated 29 February 2008, paras 694, 695.

[20] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, decide in favor of investor. Award dated 19 December 2013; Decision on the Claimant's Request for a Supplementary Decision dated 16 October 2020; "Claimant is entitled by way of damages to recover 'pre-sale interest' up to the date of the sale on 21 October 2010, in the sum of US$ 838,784. Respondent shall reimburse 75% of Claimant's costs."

[21] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014.

2.3. Conduct-based allocation

The "conduct-based allocation" principle is another approach that ICSID tribunals may use when allocating costs in investment disputes. Under this principle, the tribunal will consider the conduct of the parties throughout the arbitration when determining the allocation of costs. The goal is to allocate costs based on the conduct of the parties and to discourage parties from engaging in conduct that unnecessarily increases the costs of the arbitration.

This approach is designed to incentivize parties to conduct themselves in a manner that is reasonable and efficient throughout the arbitration process. If a party engages in conduct that unnecessarily prolongs the arbitration, or if a party engages in conduct that is dishonest or unethical, the tribunal may allocate a greater share of the costs to that party. Conversely, if a party conducts itself in a reasonable and efficient manner, the tribunal may allocate a smaller share of the costs to that party.

In the recent case of *Burlington Resources, Inc. v. Republic of Ecuador*[22], the tribunal applied the conduct-based allocation principle when allocating costs. The tribunal noted that the conduct of the parties had contributed to the costs of the arbitration. The tribunal found that Ecuador had engaged in conduct that was unreasonable and had unnecessarily increased the costs of the arbitration. As a result, the tribunal ordered Ecuador to pay a greater share of the costs of the arbitration.

In another recent case, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*[23], the tribunal also applied the conduct-based allocation principle. The tribunal noted that both parties had engaged in conduct that had contributed to the costs of the arbitration. However, the tribunal found that Indonesia had engaged in conduct that was more unreasonable than Churchill Mining and Planet Mining. As a result, the tribunal ordered Indonesia to pay a greater share of the costs of the arbitration.

In conclusion the tribunal will take into account the behavior of the parties when determining the allocation of costs and will aim to allocate costs in a way that incentivizes parties to conduct themselves in a reasonable and efficient manner throughout the arbitration process.

2.4. Splitting the costs

In some cases, ICSID tribunals may order that the costs of the arbitration be split between the parties. This approach is typically used in cases where both parties have been partially successful in the arbitration or where both parties have engaged in conduct that has contributed to the costs of the arbitration.

In the recent case of *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*[24], the tribunal ordered that the costs

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[22] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), decided in favour of investor, Decision on Reconsideration and Award dated 7 February 2017.

[23] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, decided in favour of State, Award dated 6 December 2016.

[24] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, decided in favour of investor, Award dated 29 January 2016.

of the arbitration be split between the parties. The tribunal noted that both parties had contributed to the costs of the arbitration, and that neither party should bear the full costs of the arbitration.

Finally, we observe how this whole problem can be systematized as a question of rights, obligations and limits. In investment arbitration, the attention is channeled on several levels: the attitude of the Tribunal, of the parties and the attitude of the states mainly.

Regarding the attitude of the states, it can be noted in general that it is important that there are no excessive and unjustified interferences with arbitrations based on investment treaties, because this fact can affect the reputation of the state as a subject that respects the international rule of law and international adjudication for the peaceful and depoliticized settlement of international disputes[25]. In this international framework, certain legal and normative limitations have been observed in the competence of the states over the investment dispute resolution mechanism. There are states where local (national) courts have jurisdiction over all disputes and legal entities and where problems specific to the monist or dualist system arise. Here "the separation of powers, the rule of law, transparency and accountability are constitutionally rooted, which limits the state's competence to agree to investor arbitration"[26].

Regarding the attitude of the parties, the theory is rich, therefore we will focus on some issues related to the court.

In resolving arbitration disputes, the courts are not bound only by the specific rules of the court. An important role is played by the general and special principles of international investment law. A new principle in the field of international investments but present in other fields of law such as EU law, is the imposition of the principle of legal certainty (the application of the law to a specific situation must be predictable); in the same situation is the principle of correlation of regulatory systems[27]. In their synergy, the principles provide legal and interpretive bases both for completing conventional and customary law, as well as for covering the gaps[28].

Investment arbitration remains an alternative jurisdiction with a private character. In the administration of this jurisdiction, the litigating parties and the competent arbitral tribunal may establish rules of procedure derogating from the common law, provided that the respective rules are not contrary to public order and the imperative provisions of the law.

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[25] For few examples see *Prabhash Ranjan & Pushkar Anand, Indian courts and bilateral investment treaty arbitration,* „Indian Law Review", 4:2, 2020, pp. 199-220, DOI: 10.1080/24730580.2020.1732693.

[26] Dominic Npoanlari Dagbanja, *Constitutionalism and local remedies rule as limitations on investor-state arbitration: perspectives from Ghana*, „Oxford University Commonwealth Law Journal", 17:1, 2017, pp. 110-143, DOI: 10.1080/14729342.2017.1332902. See also: Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 3rd ed, Cambridge University Press, 2010, p. 36 and Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle*, 2nd ed, Hart Publishing, 2012, pp. 12–18.

[27] Cristina Elena Popa Tache, *Introduction to International Investment Law,* Ed. Adjuris International Academic Publisher, Bucharest, 2020, pp. 128-169. Specific aspects can be found in Cătălin-Silviu Săraru, Maria Grzymisławska-Cybulska, Kajetan Górny, *Romanian, Polish and German judge disqualification in disputes of administrative litigation,* in „Juridical Tribune - Tribuna Juridica", Volume 7, Special Issue, October 2017, pp. 6-25.

[28] P. Guggenheim, *Traite de droit internațional public*, vol. I, 2nd ed., Librairie Georg, Genève, 1996, pp. 296-297.

Case	Common Costs	Legal Fees	Who prevailed	Reasoning	Rule
Impregilo S.p.A. v. Argentine Republic (ICSIDCase No. ARB/07/17)	Respondent	Each with their own	Claimant	Claimant prevailed in the annulment proceedings initiated by Respondent. However, the annulment committee did not find Respondent's claims were frivolous, so it only held Respondent liable for the common costs.	Costs follow the event, mitigated
Caratube International Oil Company LLP v. Republic of Kazakhstan (ICSID Case No. ARB/08/12)	Claimant	Each with their own	Respondent	Respondent prevailed in the annulment proceedings initiated by Claimant. However, the annulment committee did not find Claimant's claims were frivolous, so it only held Claimant liable for the common costs.	Costs follow the event, mitigated
Renée Rose Levy de Levi v. Republic of Peru(ICSID Case No. ARB/10/17)	Claimant	Each with their own	Respondent	Respondent prevailed on the merits. However, the tribunal did not award Respondent's request for moral damages. The tribunal thus decided to makeClaimant bear the common costs but to leave legal fees "where they fell".	Costs follow the event, mitigated
Emmis International Holding, B.V., Emmis RadioOperating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary (ICSID Case No. ARB/12/2)	50/50	Each with their own	Respondent	Respondent won on jurisdictional grounds. However, the tribunal found that Claimant advanced new and reasonable arguments, that neither party created additional costs due to its litigation tactics and, accordingly, decided against awarding Respondent costs and legal fees.	Costs lie where they fall
El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15)	Respondent	Each with their own	Claimant	Claimant won in the annulment initiated by Respondent. However, the annulmentcommittee did not think Respondent's objections were frivolous, so it decided to mitigate Respondent's liability for Claimant's costs.	Costs follow the event, mitigated
Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)	50/50	Each with their own	Claimant	Claimant won in a significant portion of its claims, but Respondent prevailed in one jurisdiction exception. The tribunal considered the conduct of the Parties and decided to apply a "costs lie where they fall" approach.	Costs lie where they fall
HOCHTIEF Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/07/31)	Respondent (mitigated)	Respondent (mitigated)	Claimant	Claimant won in most of its claims. Respondent was ordered to reimburse Claimant for 75% of the costs and legal fees. The reduction of 25% was due to the fact that Claimant lost a portion of its claims.	Costs follow the event, mitigated
Iberdrola Energía, S.A. v. Republic of Guatemala (ICSID Case No. ARB/09/5)	50/50	Each with their own	Respondent	Respondent won against Claimant's request for an annulment of the original award. However, the Annulment Committee found that Claimant's grounds werenot completely unfounded, but that it could not revise the decision due to the limited scope of the annulment remedy in the	Costs lie where they fall

				ICSID Convention. Therefore, the tribunal decided to apply the "costs lie where they fall" approach.	
OI European Group B.V. v. Bolivarian Republicof Venezuela (ICSID Case No. ARB/11/25)	Respondent	Respondent (mitigated)	Claimant	Claimant won the case. Respondent prevailed partially on the merits and quantum phase. Respondent was ordered to reimburse to Claimant 70% of its legal fees (including costs with experts).	Costs follow the event, mitigated
Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5)	Respondent (mitigated)	Respondent (mitigated)	Claimant	Claimant won the case. Respondent prevailed partially on the jurisdiction phase and on the quantum discussions in the merits phase. Costs and legal fees for thejurisdiction phase were divided 50/50 and Respondent had to pay Claimant USD 2.5 million as partial reimbursement for costs and legal fees in the merits phase.	Costs follow the event, mitigated
Renée Rose Levy and Gremcitel S.A. v. Republic of Peru (ICSID Case No. ARB/11/17)	Claimant	Claimant (mitigated)	Respondent	Respondent prevailed on jurisdiction grounds and asked for "costs follow the event". The tribunal found that Claimant had "abused the process" and that this justified an allocation of costs based on the "costs follow the event" rule. However, the tribunal found Respondent's bill was too high, so Claimant was ordered to reimburse to Respondent the same legal fees it paid its own counsel (difference of USD 3,728,129.18).	Costs follow the event, mitigated
Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/22)	50/50	Each with their own	Respondent	Respondent prevailed on jurisdiction grounds and asked for "costs follow the event". The tribunal found it would be unfair to apportion all burden in Claimant since Claimant had acted correctly throughout the arbitration.	Costs lie where they fall
PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea (ICSIDCase No. ARB/13/33)	50/50	Each with their own	Respondent	Respondent prevailed on jurisdiction grounds and asked for the application of "costs lie where they fall". Tribunal decided it could not decide overstep Respondent's request and therefore decided on a 50/50 allocation, noting there had been no abuse or wrongdoing on either party to justify a different allocation.	Costs lie where they fall
Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic (ICSID Case No. ARB/13/8)	50/50	Each with their own	Respondent	Respondent prevailed on jurisdiction grounds and asked for "costs follow the event". The tribunal found it would be unfair to apportion all costs and legal feesto Claimant since the case was not clear-cut and involved complex factual and legal issues.	Costs lie where they fall

The arbitral tribunal resolves the dispute based on the main contract and the rules legally applicable. Any arbitral decision will include the factual and legal reasons for the decision, and in the case of equity arbitration, the reasons that, under this aspect, establish the solution. In no situation can an institution of non-motivation be outlined, neither partially (or/and insufficiently) nor generally, because the arbitral decision is subject to substantive and formal conditions.

It is advisable to regulate an efficient clarification procedure regarding the meaning, extent or application of the provision of the decision, including when it includes conflicting provisions, any of the parties may ask the arbitral tribunal to clarify the provision or remove the conflicting provisions, without delay, through a well-regulated emergency procedure. Along with the relevant circumstances that I referred to in the introduction of this article,

This can be done in the same way as the procedure similar to the interim decision that I talked about in the introductory chapter.

3. Conclusions

The analysis that is the subject of this article leads both to the finding of a regulatory progress given by the new ICSID rules, but, at the same time, we can affirm that there is still room for more precise provisions. One of these would have been the insertion of the *express verbis* that any decision of the court regarding the allocation of costs must include the reasons on which it is based, although this fact can be deduced from the other provisions.

An aspect not to be neglected is that of helping the arbitration by including some provisions in the investment treaties, by which to regulate, at least in a general way, the problem of cost allocation, keeping, of course, the procedure of analysing the relevant circumstances that I referred to in the introduction of this article,

ICSID jurisprudence has proven that it can clarify problems of interpretation and has supported the identification of some elements used by the investor and the host state both in terms of specifying them in bilateral contracts and in the development of the actual investment[29]. These perspectives have been and continue to be beneficial for international investment law both conventionally and as a "corpus" of principles and norms[30]. The states have at their disposal all the levers in order to proceed with a regulation as precise as possible, which will remove the obstacles that appear in the way of the settlement of investment disputes[31]. The first cornerstone of investment arbitration is the protection of international investments. Any other obstacle encountered on the way to the fulfillment of this main function must be removed.

Investment arbitration is in a permanent evolution where it becomes essential to

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[29] Tarald Laudal Berge & Taylor St John, *Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws*, „Review of International Political Economy", 28:3, 2021, pp. 584-610, DOI: 10.1080/09692290.2020.1719429. See in general Antonio Parra, *The History of ICSID*, 2nd ed., Oxford, 2017.

[30] Cristina Elena Popa Tache, *Principles of international law of investments, recognition and trajectory*, "Juridical Tribune - Tribuna Juridică", Volume 7, Special Issue 1, October 2017, pp. 153-163.

[31] See Stephan Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement* in M Waibel, A Kaushal, K-H L Chung and C Balchin (eds), *The Backlash Against Investment Arbitration*, London: Kluwer Law International, 2010, p. 29.

adapt the rules even during the game, when the need for more adapted and precise regulations is established from practice. It is important that this permeability exists and is maintained.

As has often been stated in theory when discussing new perspectives, it is important to have that exercise "to establish a clear road map of the necessary reforms" in order to maintain arbitration as a whole or as an appropriate forum of the collective input of practitioners and institutions alike to arrive at effective and practical conclusions[32].

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