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VIA EMAIL ONLY: [ICSIDsecretariat@worldbank.org](mailto:ICSIDsecretariat@worldbank.org)

Ms. Meg Kinnear, Secretary-General  
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### **Commentary on Draft ICSID Rules**

Dear Secretary-General Kinnear:

I write regarding the ongoing ICSID Rules and Regulations Process and provide you with my commentary in connection with the public consultation process.

I have conducted extensive empirical work in connection with the costs of investment treaty arbitration (ITA). In March 2019, Oxford University Press will publish my book *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*. The publishers have kindly permitted me to provide selected extracts (without footnotes) of the draft final chapter of the book to inform your ongoing efforts.

The book contains multiple findings that affect ICSID's rule reform.

First, as the book identifies in multiple chapters, it is vital to offer a suite of options for resolving investment disputes and managing different kinds investment conflict. One of the strengths of the ICSID Revision process is its implicit appreciation of expanding, refining, and adapting dispute resolution tools. Offering multiple methods—particularly mediation or fact-finding—to supplement or provide alternatives for managing existing disputes is fundamental, as it has the capacity to facilitate efficiency, cost-savings, and party autonomy. *See also Investor-State Disputes: Prevention and Alternatives to Arbitration: Proceedings of Symposium held on 29 March 2010* (United Nations Conference on Trade and Development, UNCTAD/WEB/DIAE/IA/2010/8 (2011), <http://bit.ly/1nCFwC>). There would, however, be core benefits to flushing out the mediation rules in more detail and creating a working group to establish protocols, guidelines, or “best practices” for investment-treaty mediation both to guide mediator discretion and to manage stakeholder expectations about the process. Likewise, while current proposals do not focus on creating a standing small-claims adjudicative facility, such an entity could enhance cost-effectiveness and promote access to justice.

Second, various chapters explore the ongoing challenges of tribunals providing both legal authority and reasoning for their cost assessments; the book identifies the importance of ensuring tribunals identify the criteria affecting cost determinations at an early stage to guide party conduct and promote expectation management. As arbitration costs can be somewhat large, particularly compared to amounts awarded, providing explanations for material fiscal exposure is sound, enhances transparency of adjudication, and promotes rule-of-law values. ICSID's proposals properly emphasize that tribunals have the power to make early cost assessments, although my data reflected that was something tribunals rarely did in practice. Relatedly, ICSID is proposing an obligation to provide express reasoning of costs in the final Award. Both of these reforms are sensible, and welcome, innovations.

I was pleased to see ICSID identify specific factors for tribunals to consider when deciding to shift costs, as this is a decided improvement from the status quo. It was, however, unfortunate that potentially desirable cost-shifting factors were omitted. To facilitate an evidence-based approach to reform, the book empirically analyzed factors for assessing costs, identifying what tribunals have actually done in practice. Given the continued challenge of tribunals under-analyzing cost decisions, clear articulation for cost assessments to promote values that reward useful party conduct or socially desirable norms can guide party behavior and tribunal discretion. Should ICSID wish to provide more transparency and guidance, it should expand the list of pre-articulated factors for assessing costs in line with the factors analyzed in the research, rather than the more limited initial list which may simply offer a new guise to facilitate the continued use of somewhat open-ended discretion.

As parties' legal costs dramatically outweighed the scale of tribunal and administrative costs, it would also seem reasonable for ICSID to differentiate actively between the two cost types. While the August 2018 proposals lump together all cost variables, there is value in making a clear demarcation and then using the different cost elements strategically. For example, where there is a need to send a strong signal about desirable conduct or norms, there should be more active control of parties' legal costs, which are the larger thumb on the scale; but where gentler incentivization is appropriate, then tribunal and administrative expenses are the better lever. Distinguishing between costs provides an opportunity to incentivize behavior more effectively.

Third, to ensure that the incentives related to costs are not just theoretical, it is fundamental for ICSID to provide the express authority for tribunals to order security for costs. This eliminates any remaining doubts as to the powers of the tribunal. The rules, however, should not automatically default to order security for costs, as the power must be exercised with due consideration of the particularities of each case. As chapter 9 identifies, to explore the efficacy of security for costs, it would be prudent to create a working group that seeks to analyze factors that are most fundamental in creating fair and workable decisions, as there can be large deviations among the identity of claimants, the nature of respondents, and the disputes involved. Such variation requires some flexibility and an appreciation of the nuance of individual situations.

Finally, as the book demonstrated that the only variable reliably associated with all types of ITA costs—namely investors' legal costs, states' legal costs, and tribunal and other administrative costs and expenses—was time, more should be done to streamline time in hopes of decreasing costs. For example, ICSID's proposal expressly permits (but does not mandate) a Case Management Conference (CMC). Yet, CMCs are a strategic opportunity to impose time management obligations and set expectations, and failure to take advantage of this tactical moment is unfortunate. Requiring at least one (but permitting more) CMCs provides a fundamental opportunity to streamline the adjudication

clock. Chapter 8 provides regression models that explore other variables reliably associated (or not) with the various ITA costs, including repeat player counsel, energy disputes, bifurcation, and the presence of separate opinions among others. While a full discussion is beyond the scope of this cover letter, a general theme that emerges is that ICSID may wish to consider, similar to the U.S. Advisory Committee on the Federal Rules of Civil Procedure, forming a transnational working group to provide insights supporting potential revisions or the establishment of guidelines or best practices, particularly for time efficiency and cost containment. I understand that ICSID already has a *Practice Notes for Respondents in ICSID Arbitration* and Volume 3 (page 977) states that ICSID proposes to “develop best practice notes and guidelines to complement” the new Arbitration Rules and Additional Facility Rules. This is a useful step and may benefit from establishing a more permanent working group to facilitate regular updates and a broader perspective.

I hope this is helpful, and please feel free to contact me with any questions.

Kind regards,



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Selected Draft Extracts from Chapter 9:

Susan D. Franck

*Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*  
(forthcoming March 2019 with Oxford University Press)

**Chapter 9: The Way Forward**

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I. The Costs Baseline

Chapter 6 demonstrated ITA costs were non-trivial and relatively high (particularly counsel cost), creating access to justice and equality of treatment challenges. The combined cost of all parties' lawyers, arbitrators, and related expenses was roughly [using 2011 inflation-adjusted figures] US\$10-11 million on average and a median net cost of around US\$6 million. Compared to outcomes in Chapter 5, costs were proportionately large. Yet, despite the scale of fiscal risk in disputes affecting state sovereignty, and in contrast with damage explanations, tribunals regularly failed to particularize basic ITA costs. Fully appreciating ITA's costs requires evolutionary assessments, as the gaps mean that drawing conclusive inferences is improper.

The large relative values warrant increased attention by tribunals, parties, and other stakeholders to ensure both investors and states are treated fairly and not unduly burdened. For parties with fewer resources, the sheer scope of costs creates barriers in accessing justice and fully pursuing their claims or defenses should they be unable to pay lawyers, arbitrators, or institutions. Small and economically disadvantaged investors, with few economic resources and minimal political capital, may be unable to generate incentives facilitating a negotiated resolution before initiating arbitration; lack of resources may translate into abandoning potential claims or accepting the consequences of illegal state behavior. Likewise, states with limited economic resources may have real challenges accessing and paying for quality counsel (particularly where local currencies have material exchange rate fluctuations)—or otherwise having to make a “Sophie’s Choice” between financing social projects or paying defense lawyers, especially when pitted against well-financed and politically well-positioned investors. Meanwhile, there may be situations where amounts at stake are sufficiently small that, despite the seriousness of an investor’s claim or a state’s need for a clear ruling their conduct comports with international law, sheer economics means disputes capable of repetition, yet evading review, may never reach adjudication. ITA costs are, in this respect, the dull knife that cuts both ways.

ICSID’s 2018 proposals are a step in the right direction, as they create obligations making clear that parties and arbitrators have responsibilities to control costs. ICSID explains that its proposed “new rule establishes general duties for the parties and Tribunal, including equality of treatment of the parties, acting in an expeditious and cost-effective manner”. Specifically, tribunals must “treat the parties equally and provide each party with a reasonable opportunity to present its case” and both parties and arbitrators must “conduct the proceeding in an expeditious and cost-effective manner.” Yet, ICSID’s guidance is that tribunals and parties “should discuss any appropriate means to expedite a case early in the process”.

The devil, however, will be in the details. It remains to be seen precisely what this new duty requires, and how violations of the duty will be managed. While the proposal suggests arbitrators should consider party violations when assessing costs, it is an open question as to how violations of *arbitrator* duties will be assessed and addressed. ICSID should offer details about this general standard, define the duty's scope, establish a working group to explore best practices for meeting the duty, and identify how arbitrator transgressions will be addressed—including fee disgorgement or commensurate sanctions, whether by a separate body or the ICSID Secretary-General. Another way to address economic imbalance could involve creating a standing small claims facility for low-value disputes to resolve conflicts in a cost-efficient, streamlined manner.

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## II. Enhancing Costs Transparency

Despite their materiality, ITA costs receive short shrift. Having demonstrated the substantial amounts and proportions involved, Chapter 6 observed over 95% tribunals failed to address costs in a meaningful way before final awards and identified regular gaps in basic cost information tribunals provide. Meanwhile, Chapter 7 revealed, despite improvements since ITA's inception, tribunals still fail to provide full rationalization—namely legal authority and rationale—for cost allocations. Given informational gaps, the fundamental point is: understanding ITA costs fully and accurately necessitates more data, requiring transparency from parties, institutions, and arbitrators. Since the book focuses on data from public awards, this section primarily puts arbitrators under the spotlight and focuses on transparency gaps requiring redress.

First, tribunals predominantly made cost decisions in final awards and hardly ever offered advance guidance about anticipated approach to costs and cost-shifting. This failure is a material missed opportunity. As they can render cost decisions before the end, tribunals failed to capitalize on opportunities to generate incentives and “nudge” constructive behavior. Early assessments, particularly interim orders, could provide immediate costs guidance and incentivize behavior, enabling parties to understand how tribunals anticipate using cost-related discretion. Advance articulation is a neutral, process-driven guidepost requiring application with equal measure with the goal of saving time and costs for everyone; as such, it should neither be a basis of party complaint nor arbitrator challenge.

Lucy Reed has argued that tribunals should explain their objectives for cost allocations to encourage efficiency and “apply them at the beginning of the [ITA] process as a management tool.” Recently, ICSID had the foresight to propose a behavioral nudge, namely expressly stating that tribunals “may at any time make interim decisions on the costs of any part of a proceeding.” Combined with the new duty for parties and tribunals to “conduct the proceedings in an expeditious and cost-effective manner”, ICSID's proposal generates a strong incentive for early costs consideration. To avoid breaching their duty, parties have an incentive to request tribunals address cost issues early; arbitrators have clear power to act early on cost containment in support of their own obligations. By placing emphasis on early costs guidance—rather than relegating it to the

mental background—ICSID beneficially uses the availability heuristic to situate early assessment at the mental foreground for direct application.

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There are no institutional rules that *prohibit* arbitrators from providing early and clear guidance about anticipated approaches to costs. Tribunals should actively use non-final awards or interim procedural orders strategically to offer parties clear and transparent guidance about principles upon which tribunals will exercise their mandate to address ITA costs.

At a minimum, tribunals could easily “announce early in the proceedings which theory of cost allocation they will use in the matter or, at a minimum, what factors they will consider most important.” This transparency permits parties to appreciate the costs and benefits of their dispute resolution strategy and prevent the loss of valuable settlement opportunities. With early guidance, parties can understand the relative value of alternative methods of resolving disputes, rather than compounding existing challenges related to the uncertainty of general ITA outcomes. Although some arbitrators may worry taking a firm stand on costs may subject them to challenges in an era of guerilla tactics, such an approach is unwarranted when all stakeholders benefit from cost efficiencies. Reform at organizations like UNCITRAL warrants careful focus on costs. Early tribunal guidance has the potential benefit of protecting arbitrators from subsequent criticism, as parties should not be allowed to “have their cake and eat it, too” on cost containment. Namely, parties (and counsel) have less firm ground to complain about problematic costs when their own conduct drives costs. By placing parties on notice, offering parties space to agree upon cost rules, using discretion to provide guidance in the absence of agreement or applicable law, and following that guidance, tribunals can ensure they fulfill their duties and exercise their mandate with care.

Second, where tribunals provided fiscal information about costs and cost shifting, overall, they were somewhat sloppy. The data, particularly in Chapters 6 and 7, indicated that where tribunals specifically referenced costs—whether amounts, proportions, or rationalization—they offered minimal (or no) clarity on individual cost elements. Yet, party legal costs (PLC) and tribunal costs and expenses (TCE) are doctrinally distinct and of decidedly different magnitudes. The SCC, LCIA, SIAC, and 1976 UNCITRAL Arbitration Rules, make clear demarcations between those costs. In contrast, ICSID appears to be lumping costs together. In doing so, ICSID is missing a critical opportunity, namely to offer different incentivization for different arbitration costs, which are of a decidedly different scale. As parties’ costs are the heavy thumb on the scale as reflected in figures in Chapter 6, if ICSID wishes to send a “strong” signal, then targeting PLC is appropriate; whereas if a lighter touch is desired, incentivizing through TCE is preferable. While, in theory, ICSID’s proposals do not prohibit tribunals from taking this approach, the blunt treatment—without an express practice direction or explanation of best practices—risks cognitively depleted arbitrators ignoring the potential value of the demarcation. The better course, like front-loading interim costs orders and making ideas cognitively available, is to expressly identify the distinction *ex ante*. Such precision creates opportunities for tribunals to redress past gaps and promotes the clarity and transparency of cost-related decision-making.

Third, tribunals provided little information on fiscal costs and proportions, making precise identification of PLC and TCE challenging. To redress the gap and ensure information is available (thereby promoting procedural justice through transparency), creating precise default obligations about what tribunals should include in cost determinations is fundamental. In this respect, ICSID made a core stride forward with two proposals, first mandating that tribunals “shall request that each party file a statement of costs before allocating the costs of the proceedings” and then requiring “all decisions on costs are reasoned” in the award. One would have thought these elements would be best practices, but data in Chapters 4, 6, and 7 reflect that tribunal practice has not matched aspirations, suggesting a legal nudge is warranted. Using hard law—whether through treaties, arbitration rules, or party agreement—to mandate inclusion of precise costs information promotes transparency, clarity, predictability, and rule-of-law. Obtaining complete cost information also means derivative data becomes available for more complete empirical analyses and better assessments of potential cost implications.

Other stakeholders may wish to require tribunals to provide full cost details in awards to redress the activity of some (but not all) tribunals and to establish best practices. Neither the Mauritius Convention nor UNCITRAL Transparency Rules address cost-related transparency. Building from Atul Gawande's *Checklist Manifesto*, which advocates creating checklists for professionals in stressful occupations subject to cognitive depletion, one might imagine creating checklists about what tribunals should provide, requiring transparency about ITA costs. This need not require tribunals providing 200-pages of details on cost assessments; rather, it could identify streamlined, detailed, efficient, and normatively desirable costs information. States could mandate what costs data is required in investment treaties. Likewise, parties could come to agreements about what tribunals must provide in their cost assessments after a dispute has arisen, and institutions could include obligations for what must be included in awards, including each arbitrator stating his/her separate costs in the award. ICSID's mandate for itemized arbitrator costs aids efficiency and accuracy. When arbitrators know their fees will be subject to individual scrutiny, this creates an incentive to be careful and precise with billing. [. . .]

As a final point, given incomplete information from arbitrators, as guardians of their holistic information, institutions administering ITA can and should take a lead in providing information on ITA costs. [. . .] One hopes that ICSID's suggested transparency reforms, along with its renewed commitment to publishing data, will lead to publishing average, median, or (perhaps more ambitiously) quartile breakdowns of party, tribunal, and administrative costs. As Hans Rosling's *Factfulness* admonishes, most of the world's variance is found between gaps; and having a sense of variance in holistic data (and how variance changes) is fundamental to having an accurate and constructive view of reality.

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### III. Arbitration Costs and Appropriate Dispute Resolution

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Costs data suggests that alternatives to arbitration are warranted to provide more flexibility and expanded options. To the extent that investors, states, and counsel are economically rational actors (while recognizing people are predictably irrational but domestic politics impacts states' rational decision-making), stakeholders require data to aid appraisals of ITA's net value. Net value permits stakeholders to assess adjudicative options, like arbitration, explore viability of alternative processes for managing conflict to identify *Appropriate* Dispute Resolution (ADR) strategies. The objective should be to avoid disputes where possible, manage conflict when it arises, and engage in systematic consideration of dispute resolution options to "fit the forum to fuss." Part of making strategic choices involves understanding outcome probabilities given the variables involved and likely costs of pursuing different methodologies.

#### A. The Dispute Resolution Calculus and Cognitive Illusions

Focusing on fiscal elements, a dispute resolution calculus requires assessment of: relative success, likely amounts awarded, cost of counsel, cost of tribunals, and likelihood of cost-shifting to determine whether the costs of pursuing the dispute over multiple years is worth the theoretical benefit. Or, in Spanish: ¿Vale la pena?

Chapters 5-6 offer base rate data, placing ITA's relative value in context. For all final cases (including cases where investors lost), the average award in 2011-inflation adjusted terms was around US\$16.6 million, meaning average total PLC and TCE costs were roughly 60% of average awards. Reframed to focus on the subset of claims where investors obtained a damage award, the average amount awarded of US\$45.6 million, meaning average total PLC and TCE was around 22% of average awards. Meanwhile, Chapters 6-7 demonstrated that the baseline for when and how tribunals shifted costs remained relatively uncertain, with a reliable (but not guaranteed) pattern that winning investors reliably obtained more beneficial cost shifts than winning states. The only certain fiscal risk was: parties paid up-front costs of their lawyers and advances to arbitrators and institutions. Chapter 6 contains information average party costs. One might question whether those fees could be put to a better use and whether negotiated settlements could facilitate more cost-efficient results while placing control of outcomes squarely in parties' hands.

Where ultimate substantive outcomes and cost-shifting assessments are generally uncertain *ex ante*, costs data and possibility of a win (or risk of loss) offer baselines for decision-making. Investors may find it useful to incorporate the data, use it to judge risk, and have those assessments inform dispute resolution choices, including the most likely alternatives to negotiated settlements. Cognitive illusions could facilitate investors' incentives to settle. As Chapter 2 explains, when claimants are faced with the low probability of a gain, cognitive illusions of positive framing and loss aversion facilitate investors being inclined to actively pursue adjudication; whereas, if there is a medium-to-high probability risk—which Chapter 5 suggests is likely given large claims—investors' predictable incentive should be to settle and take a lower, but certain, outcome.

The ultimate focus should be on crafting appropriate dispute resolution. Mediation, negotiation, or working with an ombuds office (or a lead government agency), particularly when combined with Dispute Systems Design to identify methodologies for channeling conflict, provide

core infrastructure supporting alternatives for extracting value from dispute resolution, decreasing direct costs, avoiding indirect costs (like diverting key personnel from productive activities), and maintaining relationships, particularly when investors continue to do business within the state or region. Approaching conflict management with a broad perspective and eye towards effective use of adjudication alternatives has resolved disputes about government conduct, regulatory conflicts, and public policy issues, including environmental disputes. A broader perspective on conflict management, searching for appropriate tools, opens doors to dispute prevention and fostering relationships that constructively promote investment retention and expansion in collaboration with local communities.

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#### IV. Opportunities for Decreased Costs

Presuming alternative methodologies—including negotiation, ombuds, mediation, absorbing the loss, or walking away from conflict—are inapplicable, the fundamental question is how to decrease costs of the existing adjudication system provided by thousands of treaties and foster efficiency, provide a balanced playing field, and demonstrate rule-of-law norms. As Chapters 4 and 8 revealed, cost and time walked hand-in-hand. While time was the only variable reliably predicting investors' costs, states' costs, and tribunals' costs, other variables were uniquely linked with cost elements. This section explores different normative opportunities that may control (but may not always curtail) costs and provide enhanced cost predictability. Given ICSID's ongoing prevalence as an ITA forum—and because it addressed multiple issues that offer a springboard for others considering innovations to treaties or institutional rules—ICSID's proposed revisions are worthy of particular focus. This section first explores ICSID's proposed revisions before addressing other opportunities for cost containment.

##### A. Procedural Innovations: Exploring Reform through the Lens of ICSID Rule Revision

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#### 1. Expedited Rules, Case Management Conferences, and Timetable Compliance

Core procedural innovations could achieve cost savings by decreasing dispute resolution time. ICISD's proposed a new set of Expedited Arbitration Rules is one of the most innovative and constructive elements. Parties could opt into these rules, streamlining timetables and imposing page limitations on submissions. While a material shift for ICSID, the recommendations accord with other institutions implementing expedited procedures. In theory, these procedures can be used for both high and small value disputes to decrease costs; and with evidence submissions potentially running into thousands of exhibits and terra-bytes of data, such streamlining may save counsel and tribunals considerable time and costs by requiring a more exacting focus.

A second innovation involves working within ICSID's existing framework. While the mandatory First Session is still held within 60 days of tribunal constitution, to move matters along, ICSID proposed requiring tribunals issue a procedural order within 15 days of the First Session. The proposed rules expressly permit case management conferences (CMCs) to narrow the issues and contested facts. CMCs are not, however, mandatory under ICSID's proposed rules, with CMCs only indirectly referenced in discussion items for the First Session. The situation is somewhat ironic, as ICSID's Working Paper encourages parties to be proactive in case management, briefly referring to issuing a guidance note with case management techniques. While a step towards injecting procedural efficiency, further procedural opportunities to narrow the dispute's focus—rather than facilitating a free-for-all that muddies core issues by flooding the record, thereby requiring the tribunal to invest more time and costs—is warranted. This suggests at least one, if not more, CMCs should be mandatory. If parties wish to sacrifice time and fiscal efficiency, they can certainly agree to do so during a CMC; but they then stand on less solid footing to complain about the time and costs of proceedings.

A somewhat “softer” approach to procedural timetables involves putting pressure on parties. ICSID proposed that parties have a duty to comply with tribunal orders; and the draft rules provide that, where parties act *after* the expiry of a time limit, those activities “shall be disregarded” unless there are “special circumstances justifying the delay”. Yet it is unclear what justifies “special circumstances,” meaning the rule remains flexible; and creative counsel can generate arguments as to what makes each instance unique. To prevent potential mischief, ICSID or a delegated working group should explore guidelines for distinguishing between normal and abnormal situations. Additionally, parties can agree to extend time periods fixed by the ICSID Secretary-General or the Rules; and prior to time limits expiring, a party can unilaterally—but with valid reasons—request an extension beyond tribunal-imposed time limits.

Another of ICSID's proposed changes focuses on tribunal compliance with timelines, presumably holding arbitrators' feet to the fire to ensure that the tribunal or administration is not the core source of delay (or undue cost). The proposals obligate tribunals to fix time limits for completing procedural steps where there are gaps. A core innovation requires tribunals to decrease the gap in rendering an award, as the proposals state tribunals “shall deliberate . . . immediately after the last written or oral submission.” Likewise, there are timing obligations, including requiring arbitrators to render decisions within: 60 days after the last submissions for petitions that a dispute manifestly lacks legal merit, 180 days after the last submissions for preliminary objections to jurisdiction, and 240 days (or eight months) for all other matters. These figures provide a cognitive anchor that, hopefully, can shift tribunal behavior in a constructive direction.

Yet, anchoring can be pernicious. As data suggested average gaps between hearings and awards of 10 months, it is unfortunate that arbitrators could receive *eight months* for rendering decisions. [. . .] ICSID's proposal does little to move the needle or incentivize more efficient arbitral decisions. If anything, it entrenches the status quo, rather than shortening periods. It also creates a potentially perverse situation where, by identifying a lengthy period, tribunals may be intuitively drawn to ensuring their awards “fill the space” and are rendered after eight months. While the Working Paper thoughtfully notes that fixed and overly harsh timetables could endanger

the underlying award and fail to address unique complexities, the proposal still falls flat. One would hope that, even with a voluminous record (theoretically addressing merits, damages, and costs) tribunals could write up decisions in at least six (preferably three to four) months. Moreover, even the eight-month period has built in temporal expansion, as tribunals have an obligation to use “best efforts to meet [] time limits” imposed by the ICSID Rules, and the proposal fails to provide texture as to what “best efforts” means. When “special circumstances” prevent tribunals from complying with their required deadlines, they simply advise parties of the delay, rather than suffering a penalty for procedural deviations. One might hope that ICSID could consider, for example, imposing a shorter time period, a reward for early completion, or considering fee reductions for delay, particularly for arbitrators receiving exceptions to ICSID’s standard fee of US\$375 per hour. Other options might involve providing data on timetable compliance and costs for individual arbitrators, thereby aiding parties in identifying arbitrators with preferred efficiency and case-management skills.

## 2. Bifurcation Norms

ICSID also proposed a new rule on bifurcation. Imposing some reform on bifurcation, to nudge more prudent use of time and potentially decrease costs, is prudent given the data. ICSID’s own analysis of bifurcated cases in 2015-2017 suggested bifurcation is not necessarily the best option for all cases, as many (but not all) bifurcated cases were considerably longer. Chapter 4 likewise demonstrated that case length was reliably longer in bifurcated cases, while Chapter 8 revealed investors’ legal costs and tribunal costs could be meaningfully higher in bifurcated cases. The data suggest bifurcation is ripe for consideration as an area of reform.

ICSID has proposed time periods for parties making bifurcation requests, requiring tribunal responses within 30 days, with tribunals retaining power to bifurcate proceedings *sua sponte*. When making bifurcation decisions, tribunals “shall consider all relevant circumstances, including whether bifurcation would materially reduce the time and cost of the proceeding.” ICSID’s Working Paper suggests automatic bifurcation was not warranted, as each case is unique and ICSID caselaw has “uniformly held there is no presumption in favor of bifurcation.” If the goal is to eliminate unnecessary time, the data in this book lends supports the conclusion that automatic bifurcation is unwarranted; but likewise, an inability to bifurcate could be problematic. The challenge, however, is to identify the relevant factors supporting efficient (rather than costly) bifurcation. reduce time. ICSID thoughtfully identified factors for consideration—including whether jurisdiction is closely intertwined with the merits, capable of resolving the dispute, or frivolous. The commentary has the benefit of highlighting potentially negative effects of bifurcation, enabling parties to manage their own expectations.

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Bifurcation research should be an area for ongoing scrutiny about relevant factors to identify cases most likely to benefit from bifurcation to develop working practices for tribunals and to guide party’s making strategic decisions, which risk back-firing and generating longer proceedings rather than streamlined ones.

### 3. Non-Disputing Parties

ICSID has proposed rules about participation and costs of Non-Disputing Parties (NDPs). ICSID's proposal ensures that there is a broad opportunity for observation of hearings and NDP participation. This choice was sensible, as Chapter 4 revealed the dominance of state NDPs and Chapter 8 was unable to detect reliable increases (or decreases) in cost or times when NDPs (or NGOs) were present.

Given the potential assistance to adjudication quality, the normative value of transparency, and the importance of mirroring rule-of-law values in ITA—where the data fails to reveal a reliable derivative cost increase—such interventions seem sensible and warranted. ICSID also proposed safeguards to ensure NDPs are not incentivized to unduly burden the process and add real value. Specifically, tribunals should “ensure that non-disputing party does not disrupt the proceeding or unduly burden or unfairly prejudice either party.” ICSID identifies conditions tribunals can impose including: the filing date; the format, scope, and length of submission; and “the payment of funds to defray the increased costs” attributable to NDP participation. This should, in theory, ensure the value of enhanced NDP participation need not disproportionately encumber the process, particularly the proposal to require fiscal contributions from NDPs. It would be useful to have greater guidance about factors promoting effective and quality participation, as the Working Paper has thus far only suggested that where an “NDP might have a commercial purpose or financial capacity to contribute”, tribunals might consider financial contributions appropriate.

### 4. Security for Costs

While costs can be fiscally serious, it is vital that complying with tribunal cost determinations be a real requirement, rather than a theoretical obligation. To help make costs and payment for cost-shifting a tangible risk, it is vital to provide clear rules and cost enforcement opportunities. To this end, another critical innovation by ICSID's was to create an express rule in support of costs-enforcement, so all parties treat costs seriously. [ . . . ] Such an approach is sensible and provides an opportunity for case-specific assessment of the value of the interim relief, rather than mandates security for costs in every case or leaves a legal void suggesting that security for costs is inappropriate in every case.

As a unique form of preliminary relief, ICSID's proposal helpfully regularizes security for costs, identifies the remedy can be warranted, provides guidance for making requests, and offers decision timetables. Yet, it does little by way of guiding adjudicative authority, simply suggesting that tribunals consider a “party's ability to comply with any adverse decision on costs” and “any other relevant circumstances.” On one hand, it notably fails to include availability of third-party funding (TPF) as part of required consideration for possible compliance (and whether funding covers adverse cost awards); but on the other hand, it does not require the party requesting the security to demonstrate irreparable harm, urgency, or the necessity of the security, which are high thresholds possibly preventing the imposition of preliminary relief.

While ICSID's Working Paper observes that lack of assets alone will not justify granting security, it identified scope for procedural flexibility, noting "there must be other circumstances present, such as a history of noncompliance with legal orders or bad-faith." Intriguingly, those other factors are framed to focus upon investor conduct—not states. This focus, rather than looking at the merits, decreases the risk that dissatisfied parties will perceive arbitrators as biased and use it as a basis for challenge. [ . . . ] ICSID's proposal also has a "stick" to ensure cost orders are taken seriously, as proceedings may be suspended or discontinued for compliance failures. As it provides clarity on enforcement and reflects costs are serious—combined with the ongoing duty to treat parties equally and consider cost-efficiency—the proposed rule provides an key opportunity to put economic incentives at the foreground of strategic decision-making.

It would, however, be constructive to form a working group that explores the factors that are most fundamental in creating a fair and workable decision. These may be a function, for example, of economic resources and/or previous compliance (or non-compliance) with core legal obligations. One might imagine that the capitalization or the scope of indebtedness may be factors for consideration. Likewise, compliance with domestic regulatory investigations or decisions of international adjudicative bodies, availability of reserve funds and/or legal authority to pay security if necessary, or an established record of ethical violations by a party's in-house or external counsel, might also be indicators of potential compliance risk. Nevertheless, given that there is a great deal of variation in the identity of claimants, the nature of respondents, and the disputes involved, such variation requires some flexibility and an appreciation of the nuance of individual situations. The better course is, having established a clear rule permitting security for costs, ICSID should task a working group to explore the factors that contribute to effective and ineffective determinations for ongoing reform opportunities.

B. Additional Opportunities for Reform: Advisory Committee on Rules Reform, Pleading Obligations, Attorney Regulation, and Energy Disputes

There were areas, however, where ICSID has *not* proposed rules but where data suggest value in potential reform to save time and costs. Should ICSID be unable to explore these matters during its revision process, states and other institutions could explore these when negotiating treaties or considering the future of investment dispute resolution. More realistically, somewhat like the U.S. Advisory Committee on the Federal Rules of Civil Procedure that offers guidance, ICSID could form a transnational working group to provide insights supporting potential revisions or the establishment of guidelines or best practices, particularly for time efficiency and cost containment.

First, procedural reform should both impose good-faith pleading obligations and require early expert witness evidence in support of damage calculations. Chapter 5 revealed large amounts claimed but relatively small proportions of claims awarded. Should parties "weaponize" findings in this book and previous research to benefit from the cognitive illusion of anchoring, which affects international arbitrators' damage awards, one can imagine some investors artificially inflating claims by 300% to address the gap. Such a result serves no rule-of-law value. Rather, puffery creates an artificial, irrelevant, or manipulative anchor, which risks tainting by association the considered damage claims from investors who meticulously identify real economic harm.

Chapter 8 also revealed a reliable link between investors amounts claimed and tribunal costs (but not parties' legal costs). As investors' claims temporally precede tribunals incurring costs, the reliable link creates a risk that, not only will a sub-category of investors be incentivized to make unduly inflated claims, those same larger claims will facilitate larger tribunal costs. For this reason, beyond articulating cost-shifting standards at the beginning to provide constructive incentives, it would be worthwhile for ICSID to require parties support their damage claims at the outset, with expert reports and/or appropriate documentation. For example, a preliminary expert request could accompany the Request for Arbitration identifying the amount claimed, the economic basis, and the modeling behind the estimate. Claimants should be in a position to know the scope and extent of their own damages, particularly when they are making the decision to pursue adjudication, meaning they should be able to efficiently provide the information; and states bringing counter-claims should likewise be able to substantiate their claimed damages. This recommendation mirrors reforms successfully implemented in response to high-value asbestos litigation, where early focus on damages streamlined adjudication.

[. . .]

Second, there is value in increasing focus on regulating attorneys during ICSID arbitration or providing requirements for attorneys competent to arbitrate before ICSID. The data suggests potential value in shifting a focus to counsel, as previous research identified reliable links between repeat player (RP) counsel and ITA outcomes, and Chapter 8's insights that RP counsel were linked with higher ITA costs, particularly for investors' counsel and tribunal costs.

While direct regulation of counsel practicing before ICSID or other bodies would be novel, the data suggest it is a promising area as, to the extent that counsel receive fees and the RPs can cost reliably more, it may be worthwhile ensuring that they have the proper capacity to practice before international tribunals, including avoiding dilatory tactics. There are, in fact, already soft law instruments to guide counsel conduct. The IBA Guidelines on Party Representation in International Arbitration provide a baseline with specific provisions suggesting lawyer misconduct should be a basis for shifting costs. There is nothing to prevent institutions, states, and investors from adopting these guidelines. Yet, while ICSID [. . .] and others recognize the IBA Guidelines for Conflicts of Interest for Arbitrators, there has not been the same focus on regulating attorneys' ethical conduct in ITA. Should we wish lawyers to engage in the highest standards of professionalism to model rule-of-law conduct, rather than engaging in guerilla warfare and bullying tactics, the time is ripe for conversations about regulating lawyers or changing their incentives to reward appropriate behavior of many counsel while addressing variance arising from misconduct. With the patchwork of counsel's comparative law obligations—anticipating rules *ex ante* applicable to transnational attorney conduct is challenging—meaning there is value in exploring direct regulation to create direct results.

Third, as data suggested energy disputes have unique characteristics, it may be worthwhile creating specific cost-containment protocols for energy disputes. Chapter 5 identified that claims in energy disputes were reliably higher than non-energy disputes; and while energy disputes were

not necessarily reliably associated with outcomes, Chapter 8 revealed that energy disputes *did* reliably predict one fundamental ITA cost, namely states' legal fees. Like the Energy Charter Treaty's rules or the AAA's support of energy-specific ADR, ICSID and others could implement specific rules or conflict management protocols for energy disputes. As some states make carveouts from investment protection for sensitive industries, states could explore measures to limit their arbitration risks—whether by narrowing substantive rights or managing procedural rights—or provide greater certainty on arbitration costs to reduce fiscal exposure. While the ultimate choice of treaty rights is a prerogative of sovereign states, the data suggest value in focusing upon energy disputes to identify strengths and weaknesses of the process.

### C. Separate Opinions: Balancing Costs and Outcomes

As a final matter, it is worthwhile identifying that ICSID failed to create rules in one area related to costs in a manner that is arguably appropriate, namely separate opinions. Although Chapter 4 failed to identify that separate opinions were reliably associated with increased (or decreased) case length or deliberative delay in rendering awards, Chapter 8 demonstrated how separate opinions *were* reliably associated with increased state legal fees. At first blush, states might be tempted to eliminate separate opinions in a bid to decrease their costs.

Yet doing so arguably destroys potential value for three reasons. First, other tests were unable to identify that other ITA costs were reliably higher when separate opinions were present, particularly investors' costs (which theoretically could be shifted to states) or the comparatively small tribunal cost. Second, separate opinions creating room for considered conversation about what is appropriate (or inappropriate) in the development of international investment law. Third, and perhaps more self-interestedly, when arbitrators rendered separate opinions, the majority opinion *benefitted states*, as states tended to win those disputes. Given the lack of reliable effect investors' and tribunals' costs, keeping the status quo of permitting separate opinions provides states' substantive value without impeding procedural justice.

## V. Changing Standards for Cost Assessments: Towards A Factor-Based Approach

In a legal vacuum with minimal hard law restraining or guiding tribunals, cost assessments are one of the last bastions of nearly unlimited, unfettered, and unpredictable tribunal discretion. As discussed earlier, tribunals rarely signaled in advance how they would use their discretion. Chapter 7 demonstrated how tribunals' costs rationalization, although improving slightly over time, remained relatively weak, and primarily relied upon untextured notions of equity and discretion to justify assessments while ignoring justice-based concepts like precedential concerns, equality of arms, settlement efforts, and public interest. While tribunals' cost allocations were uncertain, the only statistically reliable pattern demonstrated imbalance in ITA costs, namely investors (but not states) more often benefitted from cost-shifting when successful.

Given those patterns, stakeholders face a stark choice, namely whether or not they are content with the status quo. If historic practice is appealing, it is possible (but not guaranteed) that the baseline will continue with multiple implications. First, should states continue to

predominantly win cases, the overall pay-your-own-way baseline will likely continue. Yet substantive outcomes are by no means certain *ex ante*, which generates two sets of material risks—namely the scope of substantive recovery and scope of costs for which a party will be responsible. Second, where investors win or should investors begin winning in larger proportions after unmeritorious claims are weeded out (either by counsel, third-party funders, or legal barriers to arbitration), states could start experiencing more adverse consequences from cost assessments, particularly given the reliable pattern of investors more regularly benefitting from cost-shifting. As evidence suggested PLC shifts reliably increased over time, changing substantive outcomes could compound states' fiscal exposure. While investors and third-party funders may find those prospects appealing, states holding the pen in treaty negotiations may be less enthralled.

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ICSID has waded squarely into the debate. Acknowledging the ICSID Convention provides a costs baseline in ICSID Convention cases and the need to balance concerns of investors and states, ICSID's proposed a preliminary model that encourages enhanced cost rationalization and predictability. First, ICSID proposed an affirmative obligation for tribunals to include cost decisions in final awards and "ensure that all decisions on costs are reasoned." While relatively low-hanging fruit, stating this value expressly nudges costs decision-making in the right direction, offering textual authority to direct tribunals towards greater rationalization. Second, ICSID recommended a factor-dependent approach requiring consideration of outcomes (in whole or in part), party conduct during the arbitration (including expeditious and cost-effective behavior), issue complexity, and cost reasonableness.

[. . .]

[. . .] Chapter 6 explored the three paradigms for cost assessments, namely a loser-pays approach, a pay-your-own-way approach, and a factor-dependent approach. Each normative baseline has its own relative value.

The pay-your-own-way approach, which fails to ever shift costs, has certain benefits. First, normatively, requiring parties to be responsible for their respective fees and half of tribunal fees offers equality of treatment and mimics ITA's public international law roots. Second, it generates predictability that parties can use to orient their decisions. Knowing they will bear their own costs, parties will pursue the most efficient arguments and know likely tribunal costs. In contrast, a loser-pays rule involves greater stakes, decreased marginal costs, and may generate more adjudication costs, particularly as some experimental literature found that implementing "loser-pays" model increased average adjudication costs and efficiencies from reducing frivolous litigation or strategic attorney behavior did not occur. Third, self-liability for costs can facilitate settlement, with parties making informed choices about the net value of pursuing arbitration; whereas parties affected by cognitive illusions like optimism bias, confirmation bias, and loss aversion may view cost-shifting as an inducement to continue adjudication. Fourth, arbitrating costs adds an additional layer of argumentation, with parties compiling and briefing costs. Eliminating such briefing eliminates the costs of arbitrating costs. Finally, avoiding cost-shifting may prevent over-deterrence, which could

detrimentally influence sovereign regulatory choices or deter investors from productive investment decisions.

There are, however, drawbacks of the pay-your-own-way approach and potential benefits from a loser-pays rule. With worries about guerilla tactics in ITA and abusive behavior by parties and counsel, removing tribunal discretion can increase incentives for parties to engage in deleterious behavior during arbitration (knowing there will be no fiscal sanction) and fails to reward parties for success in reasonably pursuing or defending claims. While the loser-pays approach stands as the theoretical opportunity to deter unmeritorious litigation, there are challenges with identifying legal correctness (particularly without an appellate body), which likely permit the theoretical value from materializing. Meanwhile, cognitive illusions could affect judgments about likely success *ex ante*, making it difficult to distinguish among unmeritorious and reasonable claims. Optimism bias could skew parties' assessments of the merits of their positions; and representativeness, recency, and availability can skew counsel's assessment of relative success by focusing on cases that come readily to mind or because the dispute seems to mimic (or represent) a recent case—even though it may be unrepresentative in other material respects. Should stakeholders, however, focus on statistical base rates and variables linked with outcomes, the incentives of a loser-pays rule may function more effectively. Whether parties, counsel, and others can set aside their cognitive illusions, however, is another matter; and experimental research demonstrated that cognitive illusions influenced decisions by international arbitration experts.

[ . . . ]

A potential revolutionary alternative to the one-way loser-pays benefiting winning investors involves flipping the entire frame, namely implementing a one-way fee-shifting rule that operates in favor of only successful states. ICSID, in its effort to create a balanced playing field for all parties, might sensibly shy away from such an approach in its own rule amendments. Yet, as masters of treaty language, states could strategically disrupt the statistical pattern of a reliable pro-investor shift and re-orient the scales by providing a one-way cost-shifting rule that operates purely their benefit. The objective would be to generate disincentives for investors to bring claims, redress perceived inequalities in ITA by favoring states, promote enhanced state “policy space,” and create a *lex specialis* tribunals must follow.

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The third approach involves creating a normative framework for cost-shifting while guiding tribunal discretion using pre-articulated factors. This could include using various standards to justify cost-shifting, which is the approach ICSID now advocates.

[ . . . ]

The [factor-based approach . . . ] is the most normatively useful but also potentially most challenging, as it requires a sea change in states' approach to costs. A factor-based approach permits stakeholders to prioritize behaviors that they wish to encourage and “nudge” to maximize

desirable conduct. If states wish to caveat arbitrator discretion—providing more guidance to tribunals and increasing certainty—they can and should do so in treaties they negotiate and re-negotiate. States must expressly make a normative choice about factors identified as the most appropriate and compelling. Chapter 7 suggests the most “naturally” occurring factors were relative success, situational equities, and concern about party conduct during proceedings. These are, fundamentally, the three core factors ICSID has proposed using. Should states, however, wish to reinforce these factors, they can articulate these standards in treaties. If, however, states wish to incentivize other aspects—such as access to justice, social justice, or other fairness considerations—this means expressly incorporating additional factors like public policy or equality of arms. Likewise, if states wish to increase settlement opportunities, they could require tribunals to consider the cost implications of meritorious arguments or the social utility of claims or defenses during the proceedings.

One might imagine treaty text incorporating specific costs provisions, defining PLC and TCE, identifying parties' capacity to agree on costs, but providing a normative default. That default, like ICSID's proposed revisions, would require tribunals to identify factors affecting cost assessments at an early stage, permitting tribunals to assess costs at any stage, requiring all costs decisions to include references to legal authority and reasoning, and requiring transparency on cost details, particularly in final awards. States could then choose standards tribunals must use in allocating costs, including parties' relative success, whether cost-shifting would be equitable given parties' behavior during the arbitration, parties' settlement efforts, and policy factors states identify as central to their sovereign objectives.

Although nudging conduct cannot guarantee behavior or eliminate all discretion, it can encourage stakeholders to consider key variables—and recognize what discretion they have implicitly delegated to arbitrators. By establishing normatively desirable standards reflecting empirical knowledge about actual behavior, stakeholders can move beyond unbridled discretion to encourage useful behavior. Putting parties on notice about the utility of their behavior and the potential merits of claims and defenses provides opportunities to consider other forms of conflict management. Tribunals are also afforded guidance about states' original wishes and are bound by express mandates. While arbitrator discretion would remain, it would be directed towards streamlined variables that parties could use to order their conduct while promoting greater certainty and enhanced predictability.

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