Investment Treaty Tribunals’ Divergent Approaches to Costs: Reflections Following Decisions in Two Cases Commenced Against the Republic of Turkey

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ABSTRACT

Turkey is one of the heaviest users of the investment treaty system, with more than twenty investor-state arbitrations involving Turkey or Turkish investors. These cases have contributed richly to investor-state jurisprudence. One particular issue in these cases, illustrated by the recent Tulip and Alapli decisions, is the approach of arbitral tribunals to costs allocation. Should each party pay its own costs in any event; should the losing party pay the winning party’s costs; or should some other approach prevail? This is not a mundane subject. Recent research suggests that the costs of the proceedings constitute a very substantial proportion of the amount of damages typically awarded. This article considers the approaches to costs allocation taken in Tulip and Alapli against the background debate on the proper approach to costs allocation in investor-state arbitration, and suggests various ways in which greater predictability could be introduced into the costs allocation process.

According to data compiled by the UN Conference on Trade and Development, since the early 2000s, the Republic of Turkey (Turkey) has been experiencing healthy flows of both inward and outward foreign direct investment (FDI).1 Turkey’s inward FDI stood at over USD 187 billion in 2012, amounting to nearly a quarter of its GDP.2 Turkey’s outward FDI also recorded a significant increase (from USD 5 billion in 2001 to USD 32 billion in 2013).3 It targets in large part a number of transition economies in the region, including Azerbaijan, Kazakhstan, Uzbekistan and Ukraine.4

This growth in FDI, which is testament to Turkey’s booming economy and increasing role in the region, is arguably facilitated by the impressive array of bilateral

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1 See UN Conference on Trade and Development, Investment Country Profiles: Turkey (2012).


3 Ibid.


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investment treaties (BITs) and other international investment agreements (IIAs) to which Turkey is party. As of August 2014, it was a state party to eighty-four treaties, which makes it one of the heavier users of these treaties. Such treaties typically provide a range of legal protections to investments made by (i) foreign investors in Turkey and (ii) Turkish investors abroad. Investment treaties also predominantly (though not invariably) provide the investor with a right to enforce its investment protection rights through recourse to international arbitration (‘investor-state’ arbitration), which has become a growing forum for the resolution of investment disputes.

The precise forum for these arbitrations is generally specified by the relevant BIT or IIA. Many of these disputes have been heard at the International Centre for Settlement of Investment Disputes (ICSID), which was established pursuant to the ICSID Convention specifically for the resolution of investor-state disputes. Others are conducted under (for example) the UNCITRAL Arbitration Rules or the Arbitration Rules of the Stockholm Chamber of Commerce (among other arbitral institutions).

Perhaps unsurprisingly, increasing investment flows both into and out of Turkey have translated into a growing number of investment disputes involving both foreign investments in Turkey and investments made by Turkish investors abroad. There have been over twenty such cases before ICSID alone. In a reflection of the growing presence of Turkish enterprises internationally, the majority of these cases (thirteen) were brought by Turkish investors, while a minority (eight) were against Turkey. These cases have made a significant contribution to investor-state jurisprudence, including in relation to ‘hot topics’ such as:

- the extent of the obligation to make an investment ‘in accordance with’ or ‘in conformity with’ the laws of the host state;
- the (thin) line between legitimate and illegitimate ‘treaty shopping’, i.e. the channelling of an investment through foreign subsidiaries to maximise the investment protection afforded by BITs.

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5 In total, Turkey has signed 89 BITs and 19 other IIAs. Globally, there were 2902 BITs and 334 other IIAs as at the end of 2013 (UNCTAD World Investment Report 2014, <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf>).

6 The most common protection standards include: (i) assurance of fair and equitable treatment, (ii) protection against expropriation absent prompt, adequate and effective compensation, (iii) protection from arbitrary or discriminatory measures, (iv) obligation on the host state to provide full protection and security, (v) obligation that investment/investor be treated no less favourably than investors of the host state or of a most-favoured third state (MFN), (vi) an undertaking by the host state to observe all of its obligations, which is also referred to as an ‘umbrella clause’ (and may extend to contractual obligations), and (vii) no restrictions on the transfer of funds.


8 The United Nations Commission on International Trade Law.

9 The Arbitration Institute of the Stockholm Chamber of Commerce.

10 Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 119.

11 Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, para. 117.
• the extent of the standard of ‘full’ (or ‘constant’) ‘protection and security’ and whether it extends beyond physical security;\(^\text{(12)}\)

• whether certain categories of ‘assets’, such as passively held shares\(^\text{(13)}\) or a right to commence arbitration,\(^\text{(14)}\) can qualify as protected investments;

• the approach of investor-state arbitral tribunals to allegations of fraud;\(^\text{(15)}\) and

• the extent of a most-favoured nation (MFN) clause and, in particular, whether it can extend to procedural provisions of the treaty, such as a requirement to litigate a dispute before local courts prior to commencing arbitration\(^\text{(16)}\) or a requirement that the host state consents to ICSID arbitration before it can be brought.\(^\text{(17)}\) It is interesting to note, in this context, that Turkey’s 2009 Model BIT expressly excludes the application of the MFN clause to ‘procedural rights’.\(^\text{(18)}\)

A further issue that has featured in investor-state cases involving Turkish FDI, and which is considered in more detail in this article, is the approach of investor-state tribunals to the allocation of the various costs of the proceedings between the parties. Such costs typically comprise (i) the parties’ own costs (Party Costs), which will include their legal fees and perhaps also the fees of their experts and fact witnesses, and (ii) the shared costs of the proceedings, such as tribunal fees, institutional fees and secretary fees (Arbitration Costs).\(^\text{(19)}\) This might seem a mundane subject, but empirical research has revealed that the costs of pursuing and defending investor-state arbitrations constitute a very significant proportion of the sums being awarded by tribunals in damages. A recent study shows that the average amount of damages awarded to successful investors was


\(^\text{13}\) Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Award (not public), 16 July 2012.

\(^\text{14}\) ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010, paras 117–120.

\(^\text{15}\) See Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 180; Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, paras 163, 171–172, 177 and 179; and Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 125.

\(^\text{16}\) See Kilic Insaat Ithalat Ibracit Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 7.9.1.

\(^\text{17}\) Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 96.

\(^\text{18}\) Turkish Model of Bilateral Investment Treaty, May 2009, Article 3.4(c) (‘Paragraphs 1 and 2 of this Article do not apply in respect of procedural rights laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is signatory’).

\(^\text{19}\) Party Costs in investment treaty arbitration average USD 4.5 million (with the figures being slightly higher for claimants) and Arbitration Costs average USD 750,000 (see M. Hodgson, ‘Costs in Investment Treaty Arbitration: The Case for Reform’, (2014) 11 TDM 1, p. 1). Note that categories of costs can, and often are, grouped in other ways. These alternative characterisations are not discussed here, as they bear no effect on the principles discussed and the conclusions reached in this article.
USD 76 million while the average amount of aggregate costs (Party Costs and Arbitration Costs) was nearly USD 10 million. The median figures, which discount the distorting effect of particularly large claims (and may therefore be more representative), stood even closer together, at USD 10 million and USD 6 million, respectively.

Earlier this year, the issue of costs allocation was considered in two unrelated proceedings brought against Turkey by Dutch investors: Tulip v Turkey and Alapli v Turkey. The latter was in fact a decision of an ICSID Annulment Committee on the question of whether an award of an arbitral tribunal should be annulled. Nevertheless, the same principles with respect to costs allocation should, in principle at least, apply.

Although both the tribunal in Tulip and the ad hoc Committee in Alapli ruled in Turkey’s favour, their approaches to assessing Turkey’s entitlement to recover the costs of the proceedings differed markedly. Their respective reasoning raises in microcosm the question of whether there should be a default approach to the allocation of costs in investor-state arbitration and, if so, what that default approach should be.

The remainder of this article (1) summarises the prevailing methodologies and the emerging trends in costs allocation in investor-state arbitration, (2) discusses the Tulip and Alapli decisions in this context and (3) identifies what path ought to be followed in future to increase the effectiveness of the investor-state arbitration regime.

I. SUMMARY OF THE PREVAILING APPROACHES TO COSTS-ALLOCATION IN INVESTOR-STATE ARBITRATION

In purely logical terms, there are two positions that an arbitral tribunal can take as its starting point when assessing how costs should be allocated. First, it can begin from the premise that a successful party is entitled to recover all of the costs that it reasonably incurred in pursuing or defending the claim. This is sometimes referred to as ‘loser pays’
or ‘costs follow the event’ (CFTE). The other possible starting point is that each party pays its own costs and shares equally in the Arbitration Costs. This can be called the ‘pay your own way’ approach (PYOW). PYOW is the recognised standard in the realm of inter-state disputes (where it is thought that awarding costs against a state could be regarded as an affront to its sovereignty) and, with investment arbitration being rooted in public international law, it was also the methodology usually applied in the early days of investor-state arbitration. CFTE, by contrast, is now the preferred approach in commercial arbitration cases and, in recent years, it has been gaining ground in investment treaty arbitration as well.

While CFTE or PYOW can provide a default position, various factors may, and often do, lead tribunals to make more nuanced costs orders. Such factors commonly include the relative success of the parties on various points in dispute, a party’s conduct (or misconduct) during the arbitral process (e.g. in bringing unmeritorious claims or improper procedural applications), whether reasonable efforts were made to settle the case, and the proportionality of the costs incurred by the prevailing party.

On the other hand, tribunals often do not make the conceptual distinction between CFTE and PYOW. Sometimes, they seem to choose one approach or the other not as a matter of principle, but as a result of the circumstances of the case and the conduct of the parties. In other cases, they have provided no, or no clear, explanation at all for their costs orders. Thus, it appears that some tribunals do not follow any firm

26 CFTE is the default approach taken by English courts and, for that reason, is also known as the ‘English rule’.

27 The PYOW approach is favoured in particular in U.S. jurisprudence and is often referred to as the ‘American rule’.

28 See e.g. Article 64 of the Statute of the International Court of Justice, which provides ‘Unless otherwise decided by the Court, each party shall bear its own costs.’


31 Some commentators treat such departures as another methodology altogether and term it the ‘factor-dependent’ or ‘mixed’ approach. Conceptually, a ‘mixed’ approach can also be regarded as an extension or modification of either the PYOW or the CFTE approaches and, for the sake of simplicity, the authors treat it as such in this article.


33 Cementownia ‘Nowa Huta’ S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, para. 177. Perhaps the correct interpretation of the decision is that the tribunal regarded PYOW as the default position and simply characterised an adjustment of that position (i.e. a costs-shifting order) as an application of CFTE.

34 Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 441 and Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 215 (in both cases the tribunals simply indicated that they took into account the ‘circumstances of the case’).
methodology when considering the issue of costs and, instead, assess the issue on the basis of fairness or equity on a case-by-case basis.

One possible factor behind the diversity of approaches is a difference between the provisions on costs in the two predominant sets of arbitral rules governing investor-state disputes. The UNCITRAL Rules provide that CFTE is the default position\(^{35}\) while the ICSID Rules give the tribunal discretion to adopt any methodology it sees fit and do not specify any factors that may be relevant in the exercise of that discretion.\(^{36}\) It therefore comes as no surprise that tribunals constituted under the UNCITRAL Rules are more inclined than ICSID tribunals to adopt the CFTE principle.\(^{37}\)

However, the difference between the UNCITRAL Rules and the ICSID Rules is not the only reason for different approaches being taken. Very different outcomes can emerge from tribunals applying the same arbitral rules. UNCITRAL tribunals sometimes opt for a PYOW approach in spite of the default position under the UNCITRAL Rules, and ICSID tribunals can take very different approaches to costs allocation. For example, both the Tulip and Alapli arbitrations were conducted under the ICSID Rules. In both cases, Turkey was entirely successful in defending the claims made against it, yet costs were allocated in very different ways.

II. THE TULIP AWARD AND ALAPLI ANNULMENT DECISION

The tribunal in Tulip took a PYOW approach. It began by referring\(^{38}\) to Article 10(6) of the Turkey-Netherlands BIT,\(^{39}\) which provides for the application of a PYOW methodology as the default approach. Although this provision appears to require the application of a PYOW methodology, the tribunal should not have applied it because Article 10 only applies to disputes between the Contracting Parties (i.e. Turkey and the Netherlands);\(^{40}\) it is Article 8 of the Turkey-Netherlands BIT that governs investor-

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35 This is the case insofar as the 2010 edition of the Rules is concerned, see Article 42(1) (‘The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case’). The previous version of the UNCITRAL Rules (dating back to 1976) specified that CFTE should be applied to Arbitration Costs (which were quite broadly defined and included certain witness and expert evidence costs) and that the apportionment of Party Costs was entirely in the tribunal’s discretion (see Articles 38-40 of the 1976 UNCITRAL Rules).

36 See Article 61(2) of the ICSID Rules (‘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’).


38 See Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014, para. 463.

39 Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, Ankara, 27 March 1986, entered into force 1 November 1986 (the Turkey-Netherlands BIT).

40 Article 10(7) of the Turkey-Netherlands BIT provides: ‘This Article [10] shall not be applicable to a dispute which has been submitted to and is still before [ICSID] pursuant to Article 8 of this Agreement’.
state disputes and that Article is silent on the allocation of costs. The Tulip tribunal then relied on Article 61(2) of the ICSID Convention to observe (correctly) that it had a ‘broad discretion to decide on the allocation of costs’.41

It appears from the Award that both parties requested that the tribunal adopt ‘the “costs follow the event” principle’,42 but the tribunal refused to follow that request. This was another controversial step in the tribunal’s reasoning, since arguably Article 61(2) of the ICSID Convention requires the tribunal to abide by an agreement between the parties as to the allocation of costs. The tribunal substantiated its decision by observing that:

[t]here is no rule in ICSID arbitration that ‘costs follow the event’, nor does the broad body of arbitral practice suggest that this is the approach which should be followed in ICSID arbitration proceedings. However, in the exercise of its discretion to allocate costs, the Tribunal has the authority to award all or part of a party’s costs of the arbitration and its legal fees and expenses.43

The tribunal decided to ‘partially... apply’ the CFTE approach by ordering the claimant to pay:

(a) USD 450,000 of the respondent’s share of Arbitration Costs because ‘the respondent ultimately prevailed’ in the proceedings;44 and
(b) USD 300,000 of the respondent’s costs in pursuing a jurisdictional objection which, even though the respondent was ultimately successful, was brought about by a failure of the claimant to proceed as clearly as it could have done.45

While the decision was characterised as a partial application of the CFTE approach, Turkey was awarded only USD 750,000 of its costs. Although this is not an insignificant sum, it was far from a full reimbursement: Turkey’s Party Costs alone comprised over USD 2 million and EUR 1.5 million.46 In substance, the tribunal’s approach represented a moderate departure from the PYOW approach. The case provides a concrete illustration of how, if the CFTE approach is not fully followed, an otherwise successful respondent State is likely to be left out of pocket.

In Alapli, the ad hoc Committee took a different interpretation of its discretion under Article 61(2) of the ICSID Convention. It stated that it was ‘guided by the principle that “costs follow the event” if there are no indications that a different approach is called for’. Thus, the Committee adopted the CFTE approach as a clear starting point for its costs.

41 Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014, paras 464-465.
42 Ibid., para. 465.
43 Ibid., para. 466.
44 Ibid., para. 467.
46 Ibid., para. 461.
The Committee found no indications that would warrant a departure from this default position; in particular, it noted that ‘both Parties and their counsel have conducted the proceedings diligently and efficiently’. In justifying the CFTE approach, it observed that the respondent State ‘has prevailed in totality. What is more, it has been forced to go through the [annulment] process and should not be burdened further by having to pay for its defense.’ It thereby articulated one of the main points emphasised by proponents of the CFTE approach: parties should not be financially disadvantaged if their opponents advance arguments that tribunals reject.

The Committee concluded that the applicant was to bear all the Arbitration Costs and all of Turkey’s Party Costs, amounting to USD 346,141.53 and USD 1,075,156.93, respectively (nearly USD 1.5 million in total).

There is an interesting contrast between the Committee’s decision on costs and the decision on costs of the tribunal in the underlying arbitration (the award remains confidential), in which Turkey had been equally successful. The tribunal in the original Award ‘ordered that each Party bear its own legal expenses and that the costs of arbitration be divided equally between the Parties’. Moreover, the Committee’s decision to adopt CFTE is noteworthy because annulment committees have shown a greater aversion than tribunals to take a CFTE approach. Roughly two-thirds of annulment decisions, regardless of whether the annulment application has been successful or not, have refused to apportion costs. This is counter-intuitive. An annulment proceeding is intended to be a ‘limited and exceptional recourse’ and the proliferation of unmeritorious annulment applications in recent years is often cited as one of the weaknesses of the investor-state arbitration regime. There is arguably good reason to discourage unsubstantiated applications through adverse costs orders.

**III. COMMENT**

The differences in reasoning and outcomes in the *Tulip* and *Alapli* decisions (and, it appears, between the award and the annulment decision in *Alapli*) illustrate that the discretion given to tribunals under Article 61(2) of the ICSID Convention can result in divergent outcomes. Although this problem is more acute in arbitrations conducted under ICSID Rules, statistics show that a degree of uncertainty is also present in cases decided by tribunals constituted under the (more prescriptive) UNCITRAL Rules.

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47 *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13 28, Decision on Annulment, 10 July 2014, para. 263.


53 M. Hodgson, ‘Costs in Investment Treaty Arbitration: The Case for Reform’, (2014) 11 *TDM* 1, p. 2. ICSID tribunals were prepared to shift at least a proportion of costs to the losing party in 36% of decisions analysed in the study. For tribunals constituted under UNCITRAL Rules this proportion stood at the (much higher) level of 69%.
The parties can therefore exert a (limited) degree of influence on the tribunal’s approach to costs by choosing one set of rules over the other at the outset of the arbitration, provided the investment treaty in question gives them that choice (and not all treaties do). It is counter-intuitive, and arguably undesirable, for a claim brought under a single investment treaty to lead to different costs outcomes depending on the arbitral rules chosen. Ultimately, it is difficult for the parties to an investment treaty arbitration to predict which approach to costs will be taken by ‘their’ tribunal.

Greater predictability would clearly be desirable. Given the involvement of States in investor-state arbitration, there is a public interest in ensuring that the allocation of States’ resources to the costs of investor-state arbitration are subject to reasonably predictable parameters – to a greater extent, it is hoped, than Turkey experienced in the *Tulip* and *Alapli* decisions. Proponents of the PYOW approach might argue that using taxpayer funds to defend unsubstantiated claims should be viewed by policymakers as a necessary cost of encouraging FDI flows. However, taxpayer sentiment is likely to take a different view: that such costs represent an unjustifiable burden for the public purse. The private actors who use investor-state arbitration to settle their investment claims also have a strong interest in greater predictability, which would allow them rationally to make strategic decisions as to the conduct of the dispute, its financing, and proposing or evaluating any settlement efforts. This is of particular relevance to those investors who may contemplate resorting to arbitration to vindicate smaller claims; in such cases a successful claim accompanied by an order for each party to bear its own costs may prove a Pyrrhic victory.

However, any proposal for greater predictability in the allocation of costs must first identify what consistent principle of costs allocation tribunals should adopt, and justify that choice. Greater predictability seems unlikely to emerge as a result of a particular approach to costs assessment gaining general acceptance, at least in the foreseeable future. As explained above, tribunals currently adopt a wide range of different approaches, although the CFTE approach seems to be rising in popularity. In the authors’ view, a CFTE approach is preferable: it ensures that parties which have defeated cases that have been held to be unjustifiable do not suffer any loss as a result of doing so; it arguably discourages frivolous claims; and it should encourage settlement, given the risk of an adverse costs order if an unmeritorious position is pursued as far as an award. Nevertheless, there are strong proponents of other approaches, and no uniform approach is likely to gain general acceptance soon.

If an approach to costs allocation with broad acceptance were to emerge, the question would then arise as to how it should be implemented to achieve greater consistency in ICSID arbitrations (where the problem of unpredictability is particularly prevalent). There are various ways in which this could be achieved, although they are not without difficulty. Some ideas are set forth below, broadly with the most comprehensive and most ambitious proposals first and perhaps the most practical and plausible suggestions last:

1. In theory, the ICSID Convention, which establishes the tribunal's discretion with respect to costs in ICSID cases, could be amended, although in practical terms this is highly unlikely to be achievable.
2. More plausible is that states amend their treaties to provide that CFTE should apply. Some states are doing this. For example, the draft Free Trade Agreement between the EU and Canada provides for a default CFTE rule. However, most arbitrations relate to existing treaties which are usually silent on how costs should be allocated, and which are unlikely to be amended.

3. A more attractive and plausible way forward, therefore, is likely to be an amendment to the ICSID Arbitration Rules to include a default CFTE rule, although it is unclear whether the ICSID Administrative Council, which controls the Rules, would be willing to implement an amendment that would have the effect of (arguably) fettering the discretion established by Article 61(2) of the ICSID Convention.

4. A further alternative is for a set of guidelines to be developed for tribunals to apply when they have discretion as to the allocation of costs (not unlike guidelines as to other aspects of arbitral practice published by the IBA and UNCITRAL, among others). However, this too appears impractical. Given the range of approaches currently applied by tribunals, it would appear that no ‘best practice’ guidelines could be identified and recorded in this way.

5. More prosaically, tribunals could substantiate their costs orders more fully so that a body of jurisprudence emerges which may lead to greater consistency in time.

6. Finally, the tribunal could seek to establish at an early stage in an arbitration what principle of costs assessment should apply, either by seeking the parties’ agreement as to the appropriate approach, or by way of procedural order.

There are signs of growing dissatisfaction with the unpredictability of the current costs regime in investor-state arbitration, such as the inclusion of costs rules in treaties and a growing body of academic and practitioner commentary on the subject. The investor-state arbitration regime has a high profile at the moment, with a vigorous political debate on matters such as whether it should be included in the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US and the Trans-Pacific Partnership between various states on the Pacific Rim. The regime therefore has to be sensitive to criticisms that, for example, States’ resources are being applied towards defending arbitrations with no certainty about whether those resources can be recovered. There is, therefore, some prospect of reform. What is less clear is what form that reform may take although, as explained above, there are at least a number of possible ways forward.