The purpose of investment treaties is to promote economic development by providing substantive protections for investors in respect of their investments in foreign jurisdictions. The role of investment treaty arbitration is to provide a meaningful remedy for investors in the event that those protections are breached. The remedy sought by investors is almost invariably monetary compensation with a view to restoring them to the financial position that would have existed if there had been no breach.

Investment treaties are therefore first and foremost a matter of economics. The decision as to whether to commence an arbitration claim is effectively a further investment decision based on an assessment of the relative risks and rewards. The costs of the investment arbitration process and how these costs are ultimately allocated between the disputing parties are therefore matters of considerable importance.

Moreover, the costs of investment treaty arbitration are significant. A recent study by the author of public awards and decisions provides empirical data in this regard.¹ This data is considered below. However, when it comes to the allocation of costs, the practice and reasoning of tribunals is diverse and often incoherent. This inconsistency is increased by different approaches taken in the UNCITRAL and ICSID Rules.

This chapter draws upon this study to consider costs in practice and the current approach of arbitration tribunals to allocation of costs. It makes a case for reform of investment arbitration practice, arguing for the establishment of a default position in the interests of fairness and predictability and further argues that the default approach should be ‘costs follow the event’ (CFTE) or ‘loser pays’. Finally, it will suggest how reform may be achieved in practice.

¹ The study examined cases with a public award or decision as at 31 December 2012. The results were published by the Global Arbitration Review (GAR) at http://globalarbitrationreview.com/journal/article/32513/counting-costs-investment-treaty-arbitration. The underlying data were published online at http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx.
1 Costs in Practice

The costs of an arbitration tribunal fall into two main categories: (1) the fees and expenses of the arbitral tribunal itself, along with any institution or appointing authority (Tribunal Costs); and (2) those of legal counsel, as well as any expert or factual witnesses (Party Costs).

The average Party Costs for Claimants and Respondents are in the region of U.S. $ 4.4 million and U.S. $ 4.5 million, respectively.\(^2\) To this can be added average Tribunal Costs of around U.S. $ 750,000. The average ‘all in’ costs of an investment treaty arbitration are therefore just short of U.S. $ 10 million.\(^3\) The median figure is notably lower, but still substantial, at around U.S. $ 6 million.\(^4\)

Considering that the average amount awarded to successful claimants is around U.S. $ 76 million (and the median just U.S. $ 10.5 million), costs may represent a substantial part of the financial outcome. Notwithstanding this, costs receive little attention from tribunals, with an average award devoting just six paragraphs to the subject of costs.

In exercising its discretion on the apportionment of costs, a tribunal has two main options. It can leave each party to bear its own Party Costs and 50% of the Tribunal Costs (Unadjusted Costs Order). Or it can order one party to pay the other side’s Party and pro-rata Tribunal Costs, whether in full (Fully Adjusted Costs Order) or in part (Partially Adjusted Costs Order). In a majority (56%) of cases, tribunals made an Unadjusted Costs Order. Around one-third (34%) of tribunals made a Partially Adjusted Costs Order and just 10% made a Fully Adjusted Costs Order.

The aggregated data conceal several interesting discrepancies. First, and consistent with the general perception,\(^5\) there appears to be a trend towards Adjusted Costs Orders: in pre-2006 decisions, tribunals adjusted costs in only

\(^2\) For precise results, see the abovementioned GAR article.
\(^3\) This figure is arrived at by adding the overall average figures for Claimant (data available in 73 cases), Respondent (66 cases) and Tribunal costs (70 cases). Full costs data (i.e., each of these three elements) was provided in very few cases, so using the overall data provided the best, albeit imperfect, approximation of average costs in each arbitration.
\(^4\) Comprising approximately U.S. $ 3.1 million (Claimant Legal Costs), U.S. $ 2.3 million (Respondent Legal Costs) and U.S. $ 600,000 (Tribunal Costs).
\(^5\) E.g., LG&E Energy Corp, LG&E Capital Corp. & LG&E Int’l Inc v. Argentine Republic ICSID Case No. ARB/02/1, Award, ¶ 112 (25 July 2007): “The Tribunal notes that Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules grant discretion to ICSID tribunals with regard to the award of costs. The Tribunal further notes that there is no uniform practice in treaty arbitration with regard to this matter. However, recently, tribunals have made recourse to the basic principle ‘costs follow the event’ or ‘loser-pays-rule’ according to which