I. INTRODUCTION

The enforcement of obligations under public international law is increasingly effectuated through mechanisms of international dispute resolution by fully- or quasi-adjudicatory bodies. The Dispute Settlement Body of the World Trade Organization and arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSIID Convention) are just two examples of the popularity of this development. When creating an adjudicatory enforcement mechanism for international law, States have to decide who has standing to file complaints before that body. The two basic alternatives are exclusive standing for States or including the possibility for actions by private parties: they have to make a choice between public versus private enforcement of international law.

International investment law has largely opted for private enforcement of international law. Under international investment treaties, a right of foreign investors to initiate investor-State arbitration has become the preferred enforcement mechanism, even though most bilateral and multilateral investment agreements also provide for...
inter-State dispute resolution. Compared to traditional means of enforcing public international law, this empowerment of private investors has accurately been described as a “change in paradigm in international investment law”.6

Unlike in regimes of public enforcement of international law, such as the WTO, where States dispose of the sole right to initiate compliance procedures, inducing effective compliance of States with their obligations under international investment treaties and taking action in case of their violation primarily depends on the investors’ willingness to initiate arbitration proceedings and to invoke the rights granted by such treaties. Apart from considerations about the potentially negative effects of a formal dispute on the investor’s long-term business interests and its reputation as a business partner, the decision to arbitrate will depend on a cost-benefit analysis that takes into account the potential outcome of the arbitration and the damages the investor expects to recover, as well as the risks and liabilities incurred by engaging in investor–State arbitration. An important aspect of this cost-benefit analysis is the allocation of the costs of arbitration, both the costs of the proceedings in the strict sense, like the arbitrators’ fees, and the costs of legal representation. Considering that these costs often amount to several million US Dollars,7 their allocation in the arbitral award becomes an increasingly important factor for the decision to arbitrate.

That the allocation of costs influences a plaintiff’s decision to bring a complaint has long been realised and extensively analyzed in the context of domestic legal systems, mainly with respect to civil litigation.8 While most national jurisdictions follow the so-called English Rule of “costs follow the event” or “loser pays” with respect to the costs of the proceedings and legal expenses,9 the United States and a few other jurisdictions

---

5 Formerly having been in the exclusive domain of diplomatic protection by the investor’s home State and subject to often disputed standards of customary international law, foreign investments are nowadays protected by bilateral and multilateral investment treaties that do not only stipulate substantive investors’ rights but most importantly provide for a direct right of action of foreign investors against the host State for the violation of the applicable international investment treaty. See generally, on international investment treaties, Dolzer/Stevens, Bilateral Investment Treaties (1995); Lowenfeld, International Economic Law, 474 et seq. (2002); Sornarajah, The International Law of Foreign Investment, 315 et seq. (2nd ed. 2004); Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 Recueil des Cours 251 (1997); Salacuse, Bri by Bri: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 International Lawyer 655 (1990). See, on the statistical development of investment treaty arbitration, United Nations Conference on Trade and Development (UNCTAD), Investor-State Disputes Arising from Investment Treaties: A Review, pp. 3 et seq. (2005); available at: wwwunctad.org/en/docs/itext20054_en.pdf.


7 UNCTAD, supra, footnote 5, pp. 8 et seq.


9 See, for example, Pfenningstorf, The European Experience with Attorney Fee-Shifting, 47 Law & Contemp. Probs. 37 (1984).