

# Kluwer Arbitration Blog

## Colombia's National Agency for Legal Defense of the State Report on Costs in Investment Arbitration

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The 2022 report of Colombia's National Agency for Legal Defense of the State (the "**Agency**") provides insightful information about costs in investment arbitration (the "**2022 Report**"). Based on a statistical analysis, it (i) establishes current trends and criteria in connection with the allocation of costs in investment arbitration, and (ii) determines the average costs of an investment arbitration, thus providing parties with valuable information. Additionally, the study reveals that Colombia has accrued several decisions in its favor in the last two years, even though it has invested less in legal representation compared to other Latin American countries.

This article provides a brief description of the 2022 Report and summarizes its main findings. Specifically, the article addresses: (i) the standards currently used by investment tribunals to allocate costs; (ii) the average costs of investment arbitration; (iii) the outcome of these cases and their correlation with cost allocation; and (iv) the impact of treaty provisions on cost allocation.

### The 2022 Report

The 2022 Report is based on a database generated by the Agency, which includes 105 public awards issued between June 2017 and December 2021, with the purpose of determining some patterns in cost allocation. The report recognizes, however, that there is a substantial margin of uncertainty due to the arbitrators' discretion in assessing the significance and impact of different allocation of costs' criteria, such as (i) the parties' partial or shared success; (ii) the percentage of damages awarded in contrast to what was claimed; (iii) the complexity of the dispute; (iv) the frivolous nature of the claim, and (v) the applicable treaty's provisions on the allocations of costs (if any).

In the 2022 Report, the costs of arbitration are defined as follows: (i) the parties expenses, which include the costs of (a) legal representation, and (b) experts and witnesses, covering travel expenses and out of pocket expenses (such as printing and certified mail); and (ii) the tribunal costs, which encompass (a) the fees and expenses of the arbitrators, (b) administrative costs of the arbitration center, and (c) the costs of the tribunal's secretary and assistant.

Considering the above, the main findings of the report are summarized below:

### 1. Allocation of costs' standard:

- In deciding the allocation of costs in investment arbitration, tribunals are making less use of the “pay your own way” standard (each party bears its own costs, and the tribunal costs are equally divided between the parties). Instead, it is leaning towards the “costs follow the event” rule (the unsuccessful party must pay the other party’s expenses and the tribunal’s costs).

In fact, out of 105 cases in the sample, 78 awards totally or partially assigned costs to the losing party. This meant that the losing party had to bear all or some percentage of the costs of the other party.

In the remaining 27 cases, tribunals ruled that each party had to bear its own costs and fifty percent of the tribunal’s costs. However, as the report states, these decisions were not necessarily based on the “pay your own way” standard, but rather on other criteria such as the parties’ shared success (which is an expression of the “costs follow the event” standard).

- The costs of arbitration may be determined by how it is conducted. In that regard, appointment of arbitrators with high capacities to manage a case becomes important, as well as considering efficiency as criterion when selecting legal representation and experts. When structuring the procedural calendar, the convenience or not to bifurcating the procedure should be considered.

### 2. Average costs:

- The average total costs borne by each party in investment arbitration is approximately USD 6,241,367 (to cover the tribunal and the party costs).

In investment arbitration, there is a tendency for the average party costs (of both investors and States) to decrease.

According to the study, investor costs declined from USD 8,179,039 in 2017 to USD 6,722,656 in 2021, while State costs decreased from USD 6,309,098 in 2017 to USD 3,784,156 in 2021.

- Tribunal costs account on average for 9% of the total costs of the arbitration.

For the period 2017-2021, the average tribunal costs were USD 992,486. It included administrative costs and the arbitrators’ fees and expenses.

Tribunal costs have some stability while legal representation expenses may vary according to market conditions (supply and demand).

- Party costs constitute nearly 85 to 90% of the total arbitration costs.

On average, legal representation costs are higher for investors than for States. Indeed, the average cost of investor’s legal representation is USD 5,683,442, while the average cost for States is USD 3,492,142.

States may adopt different defense models. Three models have been identified: (i) engaging external counsel (typically international law firms); (ii) using their own internal defense teams, as is the case of Spain, Canada, and the United States; or (iii) employing a hybrid model, where a specialized State agency undertakes the defense of the State with the support of external counsel, as is the case of Colombia.

Colombia has invested considerably less in legal representation expenses than other Latin American countries. Colombia’s average legal representation expenses amount to USD 2,504,574, while the average for other Latin American countries is USD 5,626,881. This is an important difference if one considers that legal representation expenses constitute the most significant cost in international arbitration.

- The average expert costs are considerably higher for investors than for States. The average expert fees are USD 1,302,308 for investors and USD 849,758 for States. Colombia has spent a smaller amount in legal experts' costs than other Latin American countries, but very similar to the global environment. For the period 2017-2021, the average cost for expert fees incurred by Colombia was USD 957,340, while for other Latin American countries it amounted to USD 1,694,195. The average invested by the other, non-Latin American States was USD 849,758.

### 3. Awards

- In the analyzed sample, between 2017 and 2021, there were more favorable awards to States than unfavorable ones. States obtained 62 favorable awards versus 43 unfavorable ones with or without damages in favor of the investor.
- In cases in which the State wins, the probability of not allocating costs increases, the “pay your own way” formula prevails, while in awards in which the investor wins, the tendency is the opposite.

### 4. Regulation of allocation of costs in treaties:

- First-generation treaties (i.e. those concluded before 2010) usually adopt the “pay your own way” principle, while some of the second-generation treaties (those negotiated after 2010) include provisions to allocate costs in case of frivolous claims. Also, in second-generation treaties there is no clear intention of the contracting parties to adopt an allocation of costs under the “pay your own way” approach. In some cases, tribunals do not refer to treaty provisions, and there have been cases where the parties to the dispute have agreed not to apply the treaty provision relating to costs.
- The ICSID Rules grant arbitrators broad discretion for allocating costs. New rules in force since July 2022 establish the criteria to be considered for this purpose as:

*“(a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding, including the extent to which they have acted in an expeditious and cost-effective and complied with these Rules and the orders and decisions of the Tribunal; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed.”*

- The UNCITRAL rules of both 1976 and 2010 are guided by the trend of costs follow the event, granting ample discretion to the tribunal.

## Conclusion

Based on the 2022 Report, one may conclude that (i) the use of the “costs follow the event” standard has become increasingly common in investor-State arbitration; (ii) the conduct of the arbitration proceedings plays a significant role in cost allocation; accordingly, counsel, arbitrators, and experts selections are key in ensuring cost efficiency; (iii) the average party costs have decreased over time; (iv) this trend is likely to continue as more law firms offer their services in this area and their expertise allows them to offer more competitive rates; and (v) Colombia’s example demonstrates that efficient case management can lower costs and obtain favorable results.

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