British Institute of International and Comparative Law

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2021 Empirical Study:

Costs, Damages and Duration in Investor-State Arbitration

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1. Introduction

This study examines over 400 investor-State cases conducted under ICSID, UNCITRAL and other arbitration rules, and over 70 ICSID annulment decisions, giving a comprehensive account of how long ISDS proceedings last, how much they cost, how tribunals allocate those costs as well as the amounts of damages awarded.

It offers an empirical insight into the current position of costs incurred by parties in investor-State arbitrations and also changes in tribunals' practice in fixing and allocating such costs. In addition to a quantitative focus, the authors analyse factors of potential relevance to costs of ISDS proceedings, including the choice of arbitration rules and the length of proceedings. This study aims to serve as a reference point for those involved in investor-State arbitrations as well as policymakers considering the reform of the ISDS system.

The importance of understanding these issues cannot be overestimated. Some States have expressed concerns that costs and damages awarded in investor-State disputes have become excessive, causing difficulty for those with limited financial resources. This is especially so when respondent States are often required to pay lawyers, experts and arbitrators substantial sums using public funds to defend claims initiated by foreign investors – often resourceful multinational corporations. For investors, particular those with relatively modest claims, the high costs and long duration of ISDS proceedings may deter them from pursuing legal action against States and undermine their access to justice. Related concerns may affect the legitimacy and sustainability of the ISDS system.

It is therefore in the interests of both investors and States to see greater certainty on how long ISDS proceedings last, what they cost and how tribunals approach allocation of costs. Tackling high costs and the extended duration of ISDS proceedings remains part of the agenda of the UNCITRAL Working Group III which is considering the reform of investor-State dispute settlement. The working group's policy paper on procedural efficiency of ISDS (A/CN.9/WG.III/WP.153) has drawn heavily on the 2017 version of this study.

Building on two earlier studies conducted by Allen & Overy for 2012 and 2017, this expanded and updated study jointly conducted with BIICL hopes to inform stakeholders of the practical developments, generate discussion and contribute to the debate within the arbitration community and among policymakers.

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2. Executive summary

Costs have become a more prominent issue in investor-State arbitration

- Arbitrators have significant discretion in determining and allocating costs between parties in the absence of detailed guidance in the applicable arbitration rules.
- The past three years saw a more frequent use of adjusted costs orders and a doubling of the number of paragraphs devoted to costs in arbitral awards.

Party costs have decreased over the past three years

- For respondent States, the mean costs incurred in an ISDS proceeding are around US$4.7 million. The median figure is US$2.6m.
- For investors, the mean costs exceed US$6.4m. The median figure is US$3.8m.
- The mean costs of investors have decreased by 3% (from US$7.4m in 2017 to US$7.2m in 2020) whereas the mean costs of respondent States have fallen by 15% (from US$5.2m to US$4.4m over the same period).
- A similar trend can be observed in the median figures. Investor costs have remained roughly at the same level (with a slight reduction from US$4.2m in 2017 to US$4.1m in 2020), while respondent State costs dropped by 32% (from US$3.4m to US$2.3m).
- This appears to reverse the trend identified in the 2017 Study, which observed a narrowing of the gap between investor costs and respondent State costs, and an increased willingness of respondent States to spend on legal representation in amounts similar to investors.
- The mean amount in dispute increased by nearly a half over the past three years when excluding Yukos from the calculations. Although party costs generally increase with the amount in dispute, substantial costs are sometimes incurred even for low-value claims.

ICSID and UNCITRAL arbitrations cost about the same

- The study found no significant difference in the party costs incurred or awarded by ICSID tribunals compared to UNCITRAL tribunals.
- Tribunal costs in ICSID arbitrations and UNCITRAL arbitrations are also broadly similar, with mean costs at US$958,000 and US$1.05m, respectively (or US$745,000 and US$775,000 as median figures).
- Notwithstanding the differences in approach to cost allocation between the ICSID Rules, the 1976 UNCITRAL Rules and the 2010 UNCITRAL Rules, tribunals have in recent years shown a similar willingness to issue adjusted costs orders (although the types of adjustments they make vary). This confirms our observation in the 2017 Study that ICSID tribunals have increasingly followed UNCITRAL tribunals in adopting a “costs follow the event” approach.

The prospects of recovering costs have improved

- 75% of all costs orders published between 2017 and 2020 are adjustment orders, requiring the unsuccessful party to bear at least some portion of the costs of the successful party. This compares with just 43% as at the 2013 Study, and 64% between 2013 and 2017.
- This reflects a continuation of the trend observed in the 2017 Study, at which point some 51% of costs orders included an adjustment. The figure was 43% in the 2012 Study.
- Successful investors recover at least some costs in 62% of cases while successful respondent States recover at least some costs in 53% of cases.

ICSID *ad hoc* committees approach costs of annulment proceedings considerably differently

- The mean costs of an applicant in an annulment proceeding are US$1.3m (median: US$885,000). The mean costs of a respondent State in an annulment proceeding are US$1.4m (median: US$982,000).
- Success in an annulment application remains rare. Less than 15% of annulment applications from 2017 to 2020 resulted in the annulment (full or partial) of a tribunal award.
- Annulment committees typically adjust only the costs of the *ad hoc* committees while parties bear their own legal costs and expenses. Only 20% of adjusted costs ordered issued in respect of annulment proceedings adjusted party costs.

The proportion of damages awarded compared to the amount claimed increases

- Generally, the higher the amount in dispute, the longer the proceedings. Indeed, claims in excess of US$1bn on average last almost eight years. 29 of the 110 cases from June 2017 to May 2020 involved bifurcation.
- Most tribunals continue to significantly reduce the amount of damages claimed by investors. Among successful investors, the mean amount of damages claimed stands at US$1.5bn while the mean amount awarded is just US$438m (the median figures being US$143m and US$21m, respectively).
- The study notes a modest increase in the proportion of damages awarded compared to the amount claimed over the last three years (from 29% to 36%). Overall, the higher the amount in dispute, the greater the discount investors can expect on the claimed amount even where they succeed on the merits.
- Parties may still sometimes incur substantial costs for lower value claims or in short arbitral proceedings.

Investor-State arbitral proceedings are taking longer

- Recent proceedings last one year and six months longer than those which decisions were published before 2017. However, the increase in median length is less significant (by less than six months).
- In general, ICSID proceedings last for approximately four years and eight months, while UNCITRAL proceedings conclude five months earlier. The median length, however, suggests that the difference in length is not significant.

3. Rules governing costs in investment arbitration

As most investment treaties and international investment agreements provide little guidance on costs, arbitration rules play an important role in shaping the costs of an investment arbitration. For example, arbitration rules may impose caps on fees and set out the principles for allocating costs so as to limit excessive spending by both tribunals and parties' legal representatives. Most arbitration rules have clear provisions on the determination of institutional costs, administrative fees and tribunal fees but leave the questions on costs allocation and party costs in the hands of tribunals and the parties.

More than 90% of the cases reviewed in this study are governed by the ICSID Rules[1] or the UNCITRAL Rules.[2] The ICSID and UNCITRAL Rules take significantly different approaches to fixing and apportioning arbitration costs.

ICSID Rules

Chapter VI of the ICSID Convention, together with the Administrative and Financial Regulations, regulates costs of an ICSID proceeding.

In an ICSID arbitration, a tribunal determines the fees and expenses of its members within limits established by the Administrative Council and after consultation with the Secretary-General. The tribunal can request (or parties can agree to) higher rates of remuneration.[3] Arbitrators are entitled to receive up to US$3,000 for each day of meetings or other work performed in connection with the proceedings.[4]

ICSID also charges US$25,000 as a fixed fee for lodging requests and an annual administrative charge of US$42,000.[5]

Although costs of legal representation usually form the bulk of costs incurred by parties, the ICSID Convention merely states that, absent agreement between the parties, the tribunal shall assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom those expenses shall be paid.

The drafters of the ICSID Convention originally intended to require that each party bear its own costs consistent with the approach in State-State disputes.[6] However, this principle was not adopted and the drafters eventually decided to leave the decision on costs allocation entirely at the discretion of tribunals.[7] Consequently, neither the ICSID Convention nor the current ICSID Rules offer any guidance on costs allocation.

The undesirability of the lack of clear guidance on apportionment of costs under its rules was recognised by ICSID in its Working Paper No. 4 released in February 2020. The paper proposes several amendments to the existing ICSID Rules, including with respect to costs.[8] Notably, tribunals will have to consider, among other relevant factors:

(i) the outcome of the proceeding or any part of it;

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1 Around two-thirds of the cases considered in this study were governed by the ICSID Arbitration Rules or the ICSID Additional Facility Rules. Insofar as costs apportionment and tribunal fees are concerned, both ICSID Arbitration Rules and ICSID Additional Facility Rules take the same approach in all material respects. Accordingly, for the purposes of this report, the ICSID Arbitration Rules and the ICSID Additional Facility Rules are discussed together and referred to as the ICSID Rules.

2 79% of the UNCITRAL cases reviewed in this study are decided under the 1976 UNCITRAL Rules.

3 ICSID Convention, Article 60.

4 ICSID Schedule of Fees, Regulation 14 of ICSID Administrative and Financial Regulations.

5 ICSID Schedule of Fees, Regulation 16 of ICSID Administrative and Financial Regulations.

6 ICSID, History of the ICSID Convention, Vol. i, at 275–6 (1970) (First Draft (Doc. 43), Preliminary Draft (Doc. 24), and Working Paper (Doc. 6)).

7 ICSID, History of the ICSID Convention, Vol. ii-2, at 873 (1968); Schreuer, ICSID Commentary, p. 1228.

8 ICSID Working Paper #4, Proposal for Amendment of the ICSID Rules, Volume 1, February 2020.

(ii) the conduct of the parties during the proceedings, including the extent to which they acted in an expeditious and cost-effective manner and complied with relevant rules, orders and decisions;

(iii) the complexity of the issues; and

(iv) the reasonableness of the costs claimed.[9]

The proposed amendments also require tribunals to award costs to the party prevailing on objections for manifest lack of legal merit unless the circumstances justify a different allocation.[10] Member States to the ICSID Convention are expected to vote on the proposed amendments shortly as the amended ICSID Rules were scheduled for adoption in early 2021.[11]

UNCITRAL Rules

By contrast, the UNCITRAL Rules have always followed the "costs follow the event" principle at least to some extent since the first version published in 1976.

Article 40(1) of the 1976 UNCITRAL Rules provides that the costs of arbitration "*shall in principle be borne by the unsuccessful party*". However, "*costs of legal representation and assistance*" are expressly excluded from this general principle. Instead, the tribunal is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.[12] Specifically, on party costs, tribunals are required to fix and approve the travel and other expenses of witnesses, and determine whether the amount of costs for legal representation and assistance claimed by the successful party (if any) is reasonable.[13]

Under Article 39 of the 1976 UNCITRAL Rules, arbitrators may only recover a reasonable amount of fees and expenses, taking into account "*the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case*".

The 2010 UNCITRAL Rules retain the requirement that tribunal costs should be reasonable at Article 41(1). In addition, an UNCITRAL tribunal must inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply, immediately after its constitution. Unlike an ICSID tribunal, an UNCITRAL tribunal is not restricted from charging beyond a specified amount for a full day of work performed in connection with the proceedings.

More importantly, the 2010 UNCITRAL Rules extend the general principle that arbitration costs shall be borne by the unsuccessful party to legal costs and other costs incurred by the parties in relation to the arbitration.[14] However, a tribunal may still apportion those costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.[15]

As arbitrations commenced under the UNCITRAL Rules are *ad hoc* proceedings, there is no administrative charge (unless the parties separately agree to request an administering body to provide registry services).

Other rules and principles

The SCC Rules are the third most popular set of rules for investment arbitrations. Our study shows that the costs of arbitrating an investment dispute under the SCC Rules are the lowest of the top five options. One of the reasons contributing to the lower costs of proceedings under the SCC Rules may be the incorporation of cost saving measures into the rules and the institution's practices. Pursuant to Article 50 of the SCC Rules, an SCC tribunal has to consider the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances when deciding costs allocation. Moreover, Appendix 4 of the SCC Rules sets limits on arbitrator fees and administrative charges are calculated on a sliding scale, which gradually increases based on the amount in dispute.

9 Proposed Rule 62(1).
10 Proposed Rule 62(2).
11 Introduction to Working Paper # 4, para. 6.
12 1976 UNCITRAL Rules, Article 40(2).
13 1976 UNCITRAL Rules, Articles 38(d), 38(e).
14 2010 UNCITRAL Rules, Article 42(1). The rules mention "the costs of arbitration" without distinguishing between tribunal and legal representation costs.
15 2010 UNCITRAL Rules, Article 42(1).

Neither the ICSID Rules nor the UNCITRAL Rules provide relevant factors to decide on cost allocation. However, the decisions of tribunals suggest that such factors include relative success on the various issues in dispute, procedural misconduct, complexity and novelty of legal issues, gravity of any breaches by the State, local law of the respondent State, proportionality of incurred costs or equitable concerns.[16] Rules for apportionment can apply to party costs, tribunal costs or both (see Section 4.2 below).

Figure 1: Arbitration rules applied in investor-State arbitrations (up to May 2020)[17]

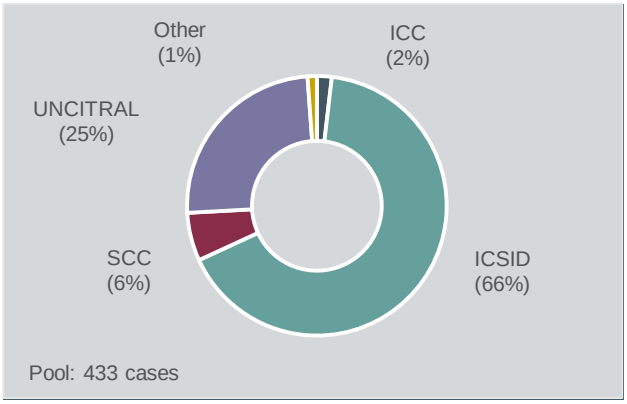


Figure 2: Comparison of cost-related provisions in major arbitration rules

	ICSID Rules[18]	1976 UNCITRAL Rules	2010 UNCITRAL Rules	SCC Rules
Arbitrator fees	US$3,000 per day of meetings or other work performed in connection with the proceedings (Schedule of Fees, Article 5 of the Additional Facility Rules[19])	Reasonable arbitrator fees (Article 39)	Reasonable arbitrator fees and expenses (Article 41) Duty to inform the parties as to how it proposes to determine its fees and expenses (Article 41)	Subject to minimum and maximum fees, which are in turn determined by a fixed amount for each level of amount in dispute plus a percentage of the amount in dispute at a reverse sliding scale (Appendix IV)
Institutional fees	Lodging fee – US$25,000 (Schedule of Fees, Article 3(3) of the ICSID Additional Facility Arbitration Rules) Administrative charge – US$42,000 per annum (Schedule of Fees)	None	None	Registration fee – €3,000 Administrative fee – a fixed fee plus a percentage of the amount in dispute at a reverse sliding scale (Appendix IV)
Allocation of costs	Tribunal discretion (Article 61(2) ICSID Convention, Article 58 of the ICSID Additional Facility Arbitration Rules)	Costs follow the event for arbitration costs (Article 40(1)) Tribunal discretion for legal costs (Article 40(2))	Costs follow the event and other factors (Article 42)	Costs follow the event and other factors (Article 50)

16 Noah Rubins, *The Allocation of Costs and Attorney's Fees in Investor-State Arbitration*, ICSID Review, pp. 126-129.

17 Note the diagram includes only decisions used for the purpose of this study, i.e. decisions including some or all of the studied data on party and tribunals costs or amounts claimed and awarded. Cases listed under "ICSID" also include cases decided under the ICSID Additional Facility Arbitration Rules.

18 Note that this category includes cases under both the ICSID Arbitration Rules and ICSID Additional Facility Rules.

19 According to the ICSID Additional Facility Rules, Regulations 14 through 16, 22 through 30 and 34(1) of the Administrative and Financial Regulations of the Centre shall apply, *mutatis mutandis*, in respect of fact-finding, conciliation and arbitration proceedings under the Additional Facility. This includes fee of tribunal members for work performed in connection with the proceedings.

4. Costs in Investor-State Arbitration

4.1 Costs incurred by parties

Although arbitration proceedings have become more expensive, the pace of costs increases has slowed in recent years. This is particularly marked for respondent States as they appear to have become more cost sensitive and adopted measures to promote efficiency in responding to investors' claims.

This Section 4.1 discusses two types of costs in investor-State arbitration:

- **Party costs** comprise fees and expenses of legal counsel, as well as any fees and expenses of witnesses and experts, costs of travel to the hearing venue, translations and other related costs.
- **Arbitration or tribunal costs** comprise fees and expenses of the tribunal and any administrative costs paid to the arbitral institution (e.g. registration fees, administrative charges) for the management and administration of the arbitral proceedings. Advances on costs deposited by parties are usually used to settle this type of costs.

Party Costs

Investors' party costs generally exceeded respondent States' in the cases considered. This is true of both the mean and median figures and likely reflects the fact that investors bear the burden of proof and often incur higher costs in gathering evidence and formulating their claims. Respondent States are also generally more cost sensitive. Often, they use public tenders to select counsel for the proceedings with costs being a significant if not the determinant factor. In some instances, respondent States rely on their own internal counsel. This can significantly reduce the costs of legal representation.[20]

The gap observed between investors' and respondent States' party costs is significant, with both mean and median investor costs amounting to almost double the equivalent costs for the respondent State in the past three years (i.e. decisions published between June 2017 and May 2020). However, the difference is less marked when all decisions are considered together, with respondent States likely to spend US$1.8m less than investors in an investment arbitration on average.

[20] In *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40), Italy was represented by its government counsel. The respondent State won on merits, incurring roughly over US$400,000 as compared to US$1.8 m by the investor, in a 4-year proceeding. This is the cheapest arbitration for respondent States in the past three years.

Figure 3: Mean and median party costs of investors and respondent States in investor-State disputes

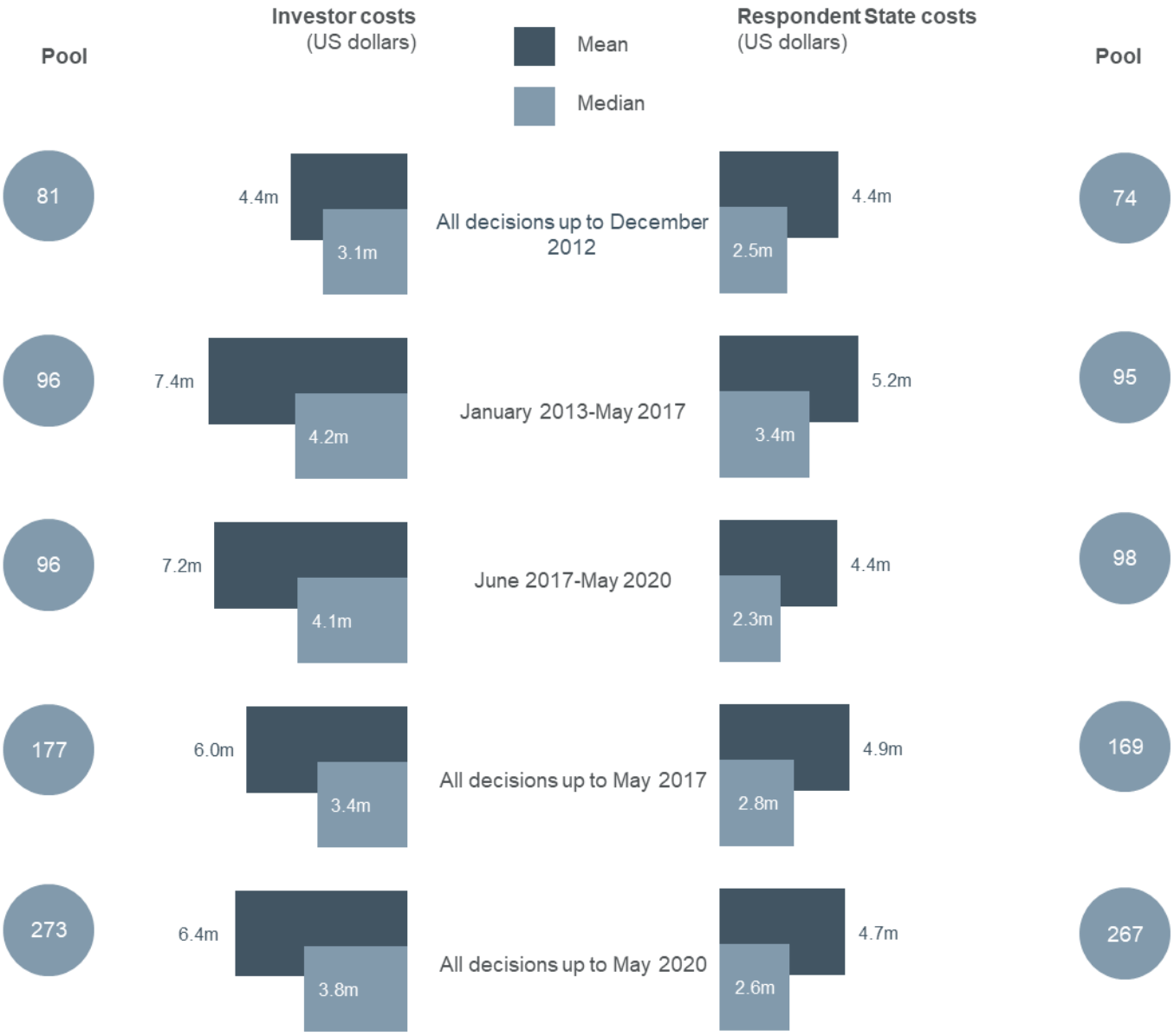


Figure 4: Changes in mean and median party costs incurred by investors and respondent States across the reporting periods (in US dollars)

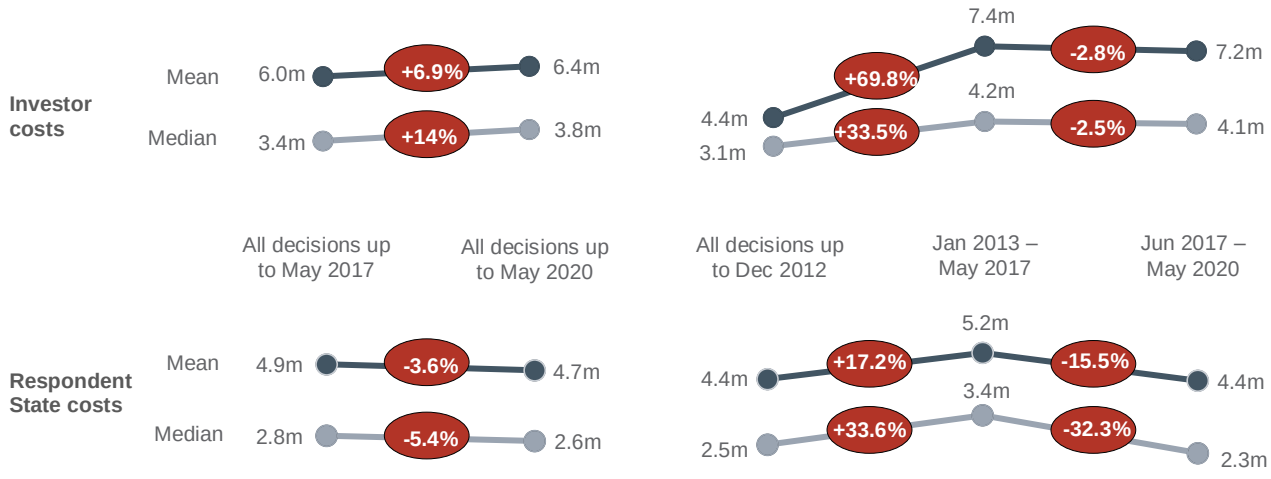
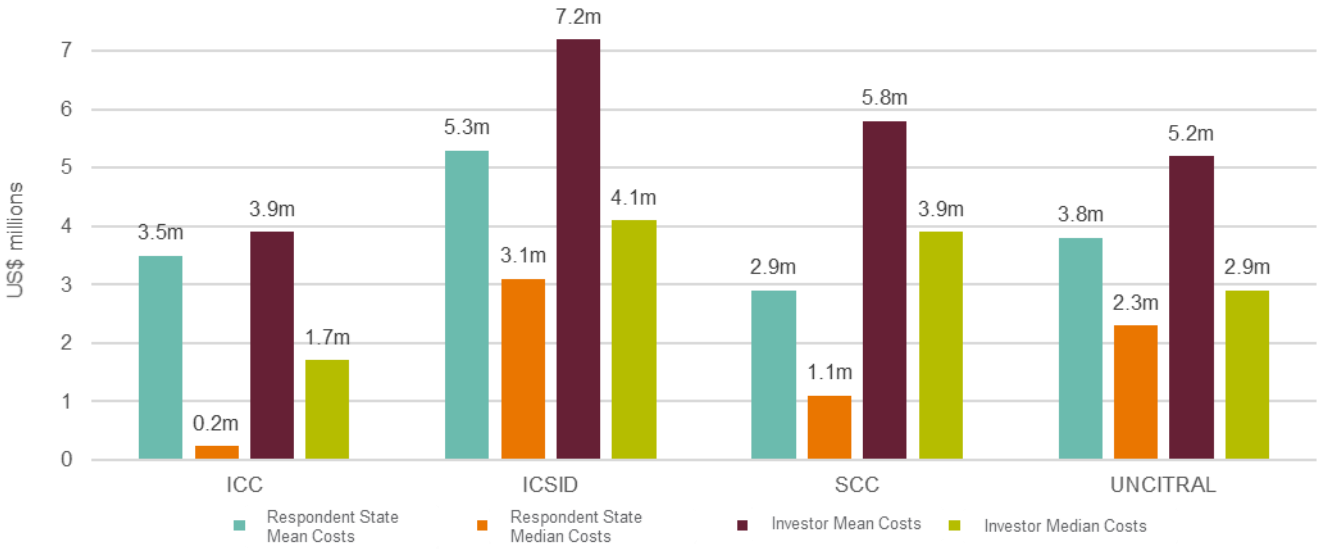


Figure 5: Mean and median costs incurred by investors and respondent States by arbitration rules



While investor costs remain on average higher than respondent State costs, overall party costs have decreased in the past three years as compared to the amounts spent between January 2013 and May 2017. This is evident from the decrease in the mean investor and respondent State costs from May 2017 – while the decrease in investor party costs was negligible (3%), respondent States experienced a much more significant decrease in costs (15%), which was even more pronounced in the median costs (32%). This finding stands in stark contrast to the observation in the 2017 report when both investor and respondent State median costs increased significantly by 34% when compared against costs incurred in decisions published prior to January 2013.

Whether the recent drop in party costs represents a permanent change in investment arbitration remains unclear. When the dataset from the past three years is viewed together with all the older cases published before June 2017, one continues to recognise an upward trend in the mean and median costs incurred by investors.

- Investors paid approximately 20% more (both mean and median costs) as compared to three years ago.
- The costs of legal representation for investors rose by more than US$0.7m looking at median costs.

For respondent States, the overall costs have decreased (by 10% mean and 18% median). As demonstrated in Figure 3 above, average (mean) costs incurred by respondent States after June 2017 are around US$0.5m lower than before June 2017.

As noted in the 2017 Study, one has to bear in mind that the mean figures are easily skewed by a small number of mega-claims.[21] Nonetheless, the increase in median investor costs and decrease in median respondent State costs remain telling – investor costs remain on the rise while respondent State costs have dropped. It remains to be seen whether this trend will continue in the future.

Tribunal costs

Tribunal costs remained relatively stable in the past three years as compared to the changes observed in party costs, with the mean tribunal costs increasing by 2% to US$953,000 and the median tribunal costs increasing by 4% to US$0.74m (*see Figure 6*).

Neither the ICSID Rules nor the UNCITRAL Rules appear to offer a significant cost advantage insofar as tribunal costs are concerned. While the mean tribunal costs of ICSID tribunals exceed that of UNCITRAL tribunals from June 2017 to May 2020, the difference is a mere US$35,000. Conversely, the median tribunal cost of ICSID tribunals in this period is lower than the median tribunal costs for UNCITRAL by US$37,000.
This suggests that there is no real disparity between tribunal costs under the ICSID Rules and the UNCITRAL Rules and the divergence identified in the 2012 Study (with UNCITRAL tribunal costs being higher) appeared to have been closed.

Consistent with the 2012 and 2017 Studies, SCC tribunals have the lowest tribunal costs among the three major sets of arbitration rules for investor-State arbitrations. This is despite an increase in the mean and median tribunal costs for SCC tribunals from June 2017 to May 2020 by 20% and 126%, respectively. Although the pool of investor-State cases administered by the SCC remains small (with just seven cases in the past three years), it is notable that the sums in dispute in SCC cases are now comparable to those under UNCITRAL and ICSID Rules (with each SCC decision published between June 2017 and May 2020 involving claims worth over US$11.7m). As the fees of SCC tribunals are calculated by reference to the amount in dispute, the increase in SCC tribunal costs – in particular the median costs – reflects a significant jump in the amounts claimed before SCC tribunals (though noting that the 2017 figures have been significantly skewed by low-value claims).[22]

[21] For instance, the costs of the investors and the respondent States in *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 stand at US$63.8m and US$54.9m, respectively.

[22] Specifically, several SCC claims commenced by Russian investor Yury Bogdanov against Moldova: see, for example, *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), Final Arbitral Award, dated 30 March 2010, where the investor claimed damages of only US$60,000.

Figure 6: Average tribunal costs by arbitration rules

	Mean tribunal costs	Pool	Median tribunal costs	Pool
Pre-June 2017				
ICSID	US$0.92m	87	US$0.75m	87
UNCITRAL	US$1.09m	60	US$0.80m	60
SCC	US$0.46m	18	US$0.24m	18
Others	US$1.05m	2	US$1.05m	2
Combined (i.e. all rules)	US$0.93m	167	US$0.71m	167
June 2017-May 2020				
ICSID	US$1.04m	53	US$0.76m	53
UNCITRAL	US$1.00m	27	US$0.80m	27
SCC	US$0.56m	7	US$0.54m	7
Others	US$1.01m	9	US$0.77m	9
Combined (i.e. all rules)	US$0.99m	96	US$0.75m	96
All-time data				
ICSID	US$0.96m	140	US$0.76m	140
UNCITRAL	US$1.05m	87	US$0.78m	87
SCC	US$0.50m	25	US$0.44m	25
Others	US$1.02m	11	US$0.77m	11
Combined (i.e. all rules)	US$0.95m	263	US$0.74m	263

Impact of the length of proceedings on costs

Section 6 of this report reveals that the mean length of proceedings after June 2017 has increased by more than one and a half years to five years and six months (albeit with a less significant increase in the median length from 3.7 years to 4.1 years). An increase in the duration of proceedings would generally be expected to increase the costs for both parties.

However, as Figures 3 and 4 above demonstrate, there has only been an increase in mean and median investor costs while the mean and median respondent State costs have in fact decreased. Meanwhile, tribunal costs have risen only marginally.

Figure 7 below captures the relationship between the duration of proceedings and costs of the parties. The Y-axis depicts the total party costs of investors and respondent States while the X-axis shows the length of proceedings. Each case is plotted on the graph based on these two inputs.

The chart suggests a loose correlation between party costs and length of proceedings: the longer the dispute, the higher the party costs. However, this is only in broad terms; in a significant number of cases parties incurred high costs in a short period of time, or relatively low costs in long, protracted proceedings.[23]

[23] The latter scenario could be due to suspensions of proceedings during which no cost was incurred, rather than cost efficiency. For example, in *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, a proceeding lasting less than two years, the investor incurred over US$5.5m while the respondent State incurred around US$5m.

Figure 7: Total party costs incurred by investors and respondent States by length of proceedings

Impact of bifurcation on costs

Tribunals have granted bifurcation requests in around a quarter of cases since June 2017. Our data show that the mean party costs in bifurcated proceedings (including those which resulted in dismissal of the claims after the first part of the process) are higher than those in non-bifurcated proceedings by 85% for investors and 79% for respondent States. The same is true of mean tribunal costs. This finding may suggest that overall, the additional costs of counsel and arbitrators participating in two separate hearings in cases where a jurisdictional objection is ultimately rejected following bifurcation outweigh the costs savings in those cases where the claims are dismissed on jurisdictional grounds. However, it must be borne in mind that some cases were bifurcated on quantum issues, and the more complex and high value cases were more likely to be bifurcated in this manner.[24]

However, the difference is less significant in the median figures. Data show that the median investor costs are lower in bifurcated proceedings than in non-bifurcated proceedings by 10% while the median respondent State costs are 33% higher in bifurcated proceedings than in non-bifurcated proceedings.

[24] The authors are aware of four investor-State cases bifurcated on quantum and actually reaching a separate quantum decision. The amounts in dispute in those cases were US$83m, US$443m, US$11bn and US$30bn.

Out of the 29 bifurcated disputes in which decisions were published after June 2017, seven cases were bifurcated such that the merits were decided before quantum,[25] and 22 cases were bifurcated such that jurisdictional issues were separated from the merits. Overall, nine bifurcated cases resulted in early termination of the proceedings.

Figure 8: Number of Investor-State arbitration proceedings bifurcated from June 2017 to May 2020

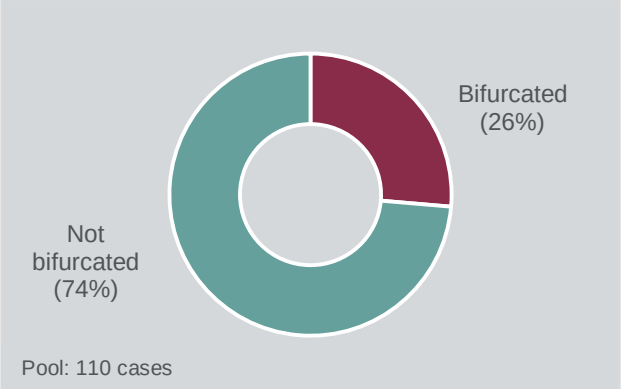
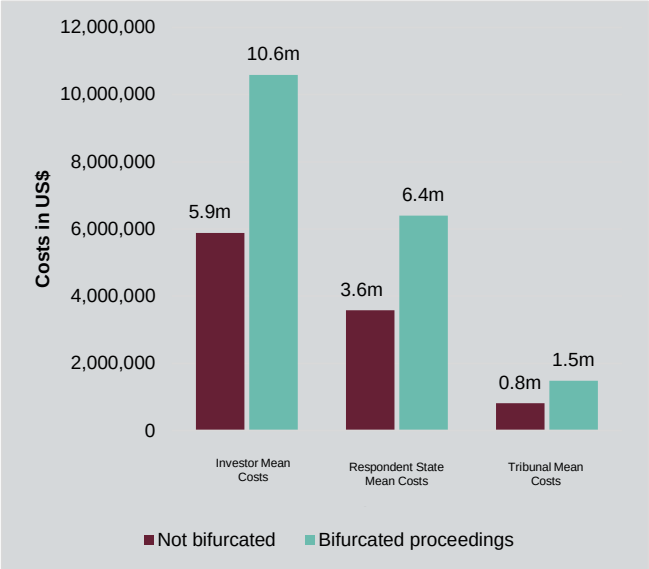


Figure 9: Relationship between costs of proceedings and bifurcation of proceedings from June 2017 to May 2020

Mean costs		Median costs	Pool
Bifurcated proceedings			
Investor costs	US$10.6m	US$3.7m	27
Respondent State costs	US$6.4m	US$2.7m	28
Tribunal costs	US$1.5m	US$0.8m	24
Non-bifurcated proceedings			
Investor costs	US$5.9m	US$4.2m	69
Respondent State costs	US$3.6m	US$2.2m	70
Tribunal costs	US$0.8m	US$0.7m	68

Figure 10: Impact of bifurcation on mean costs (from June 2017 to May 2020)



[25] Of these seven cases, two were dismissed on merits and five proceeded to a quantum phase.

4.2 Apportionment of costs

Costs apportionment has become a more prominent issue in recent years. Before May 2017, tribunals on average devoted only 10.4 paragraphs in their final awards to discuss costs. This number has now doubled to an average of 20.4 paragraphs.

When it comes to apportionment of costs, traditionally the preferred approach was "pay your own way". As identified in the 2012 and 2017 Studies, there has been a gradual shift in investment arbitral practice towards recognising the "costs follow the event" principle or the "relative success" approach (*see Glossary*). Subject to any mandatory provisions in the arbitral rules (as discussed in Section 3 above), it is for tribunals to decide whether to award party costs, tribunal costs or both to the successful party, following one of these three approaches.

This Section analyses 432 costs decisions. Prior to 2013, 56% of the costs orders were unadjusted (i.e. each party had to bear its own costs). The proportion of unadjusted costs orders fell to 36% from January 2013 to May 2017. Since June 2017, tribunals have continued to favour issuing adjusted costs orders. From June 2017 to May 2020, less than 23% of tribunals ordered parties to bear their own costs. Taking into account all decisions as of the cut-off date of this report, 58% of all investment tribunals issued an adjusted costs order. That shows a clear trend of tribunals shifting towards costs adjustment.

Figure 11 Costs adjustments in cases up to December 2012

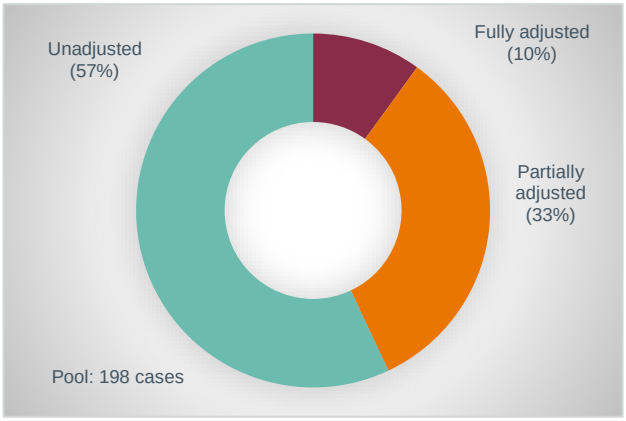


Figure 12: Costs adjustments in cases from January 2013 to May 2017

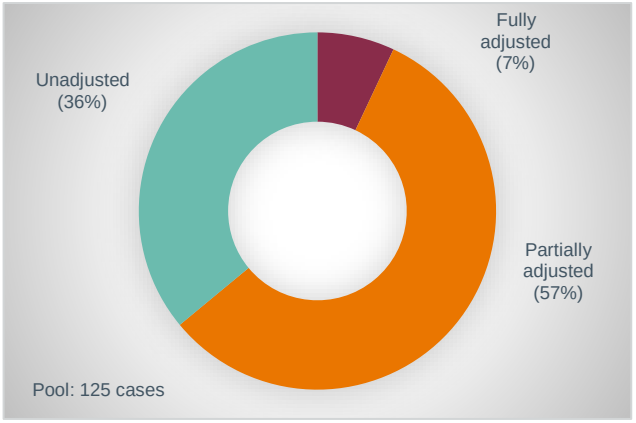


Figure 13: Costs adjustments in cases from June 2017 to May 2020

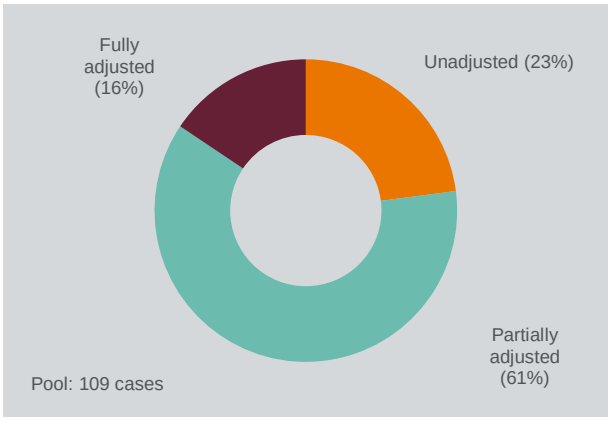
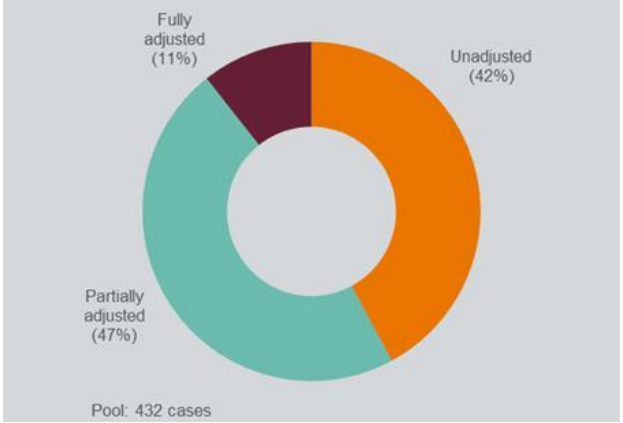
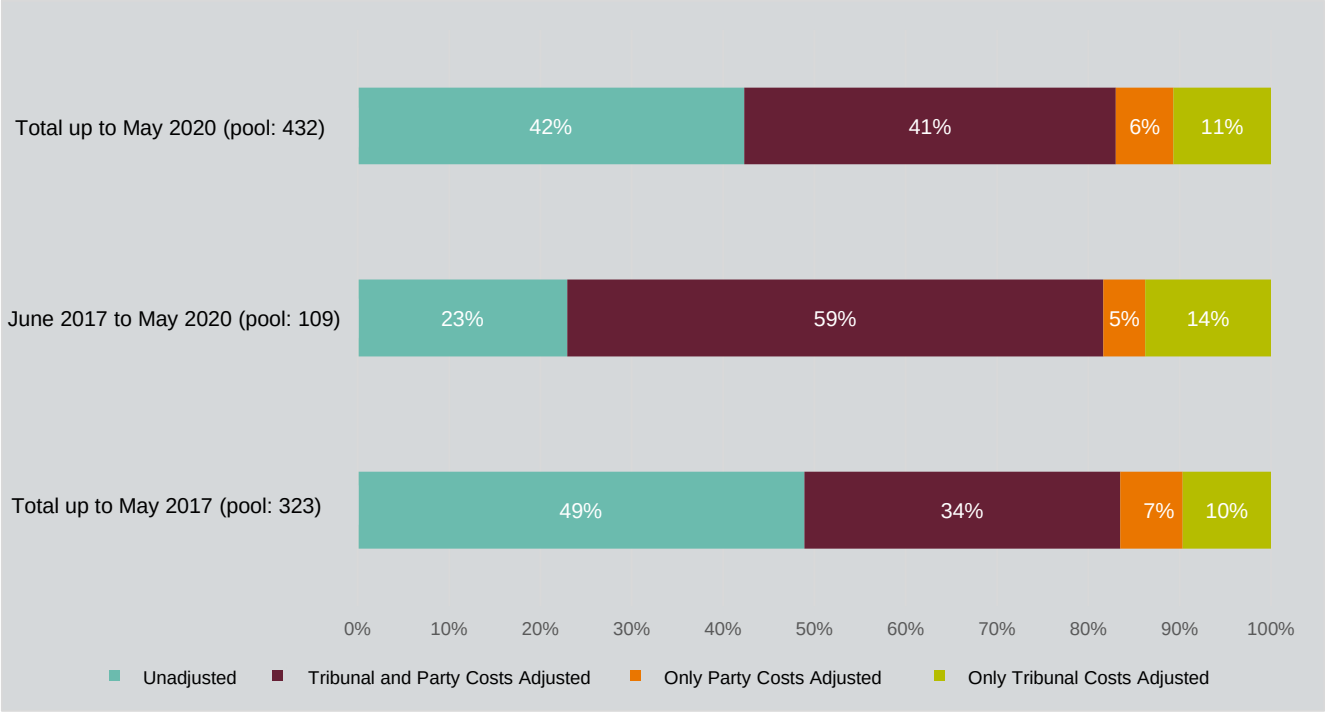


Figure 14: Adjustments of costs in all decisions up to May 2020



Of the 109 cases made public with data on costs adjustments since June 2017, 58% (i.e. 64 cases) adjusted both party and tribunal costs (at least to some degree). This is more than three quarters of all adjusted costs orders in this period (84 decisions). Before June 2017, tribunals adjusted both tribunal and party costs in just two-thirds of adjusted costs orders (111 out of 166 adjusted costs orders).

Figure 15: Number of awards with adjusted costs orders by reporting period



Costs adjustments are also used against investors who bring unmeritorious claims. Up until 2013, tribunals awarded at least part of their costs only to 38% of successful respondent States (compared to 53% of successful investors). From June 2017 to May 2020, 76% of successful parties (including both investors and respondent States) received an adjusted costs order. In recent years, successful respondent States are equally likely to receive adjusted costs orders as successful investors (both investors and respondent States receive adjusted costs orders on approximately 75% of occasions).

Tribunals also appear more ready to scrutinise the reasonableness of costs claimed by parties, with only 17 fully adjusted costs orders issued between June 2017 and May 2020. Such scrutiny is to be welcomed, as it may deter excessive spending. Successful investors are by 10% less likely to receive a fully adjusted costs order than successful respondent States which may reflect the higher costs that investors tend to incur.

Figure 16: Costs orders – successful investors

	June 2017–May 2020		Pool	Up to May 2017		Pool
When investor wins						
Unadjusted Costs Order	10	20%	50	59	42%	139
Adjusted Costs Order	38	76%	50	80	58%	139
Party Only	1	2%	50	15	11%	139
Tribunal Only	5	10%	50	17	12%	139
Party and Tribunal	32	64%	50	46	33%	139
Unspecified	0	0	50	1	1%	139
When investor wins						
Partial Costs Adjustment	34	89%	38	69	86%	80
Full Costs Adjustment	4	11%	38	11	14%	80

Figure 17: Costs orders – successful respondent States

	June 2017–May 2020		Pool	Up to May 2017		Pool
When respondent State wins						
Unadjusted Costs Order	15	27%	56	98	53%	184
Adjusted Costs Order	41	73%	56	86	47%	184
Party Only	3	5%	56	7	4%	184
Tribunal Only	9	16%	56	14	8%	184
Party and Tribunal	29	52%	56	66	35%	184
When respondent State wins						
Partial Costs Adjustment	30	73%	41	66	77%	86
Full Costs Adjustment	11	27%	41	18	23%	86

Figure 18: Adjusted costs orders by successful party (all decisions up to May 2020)

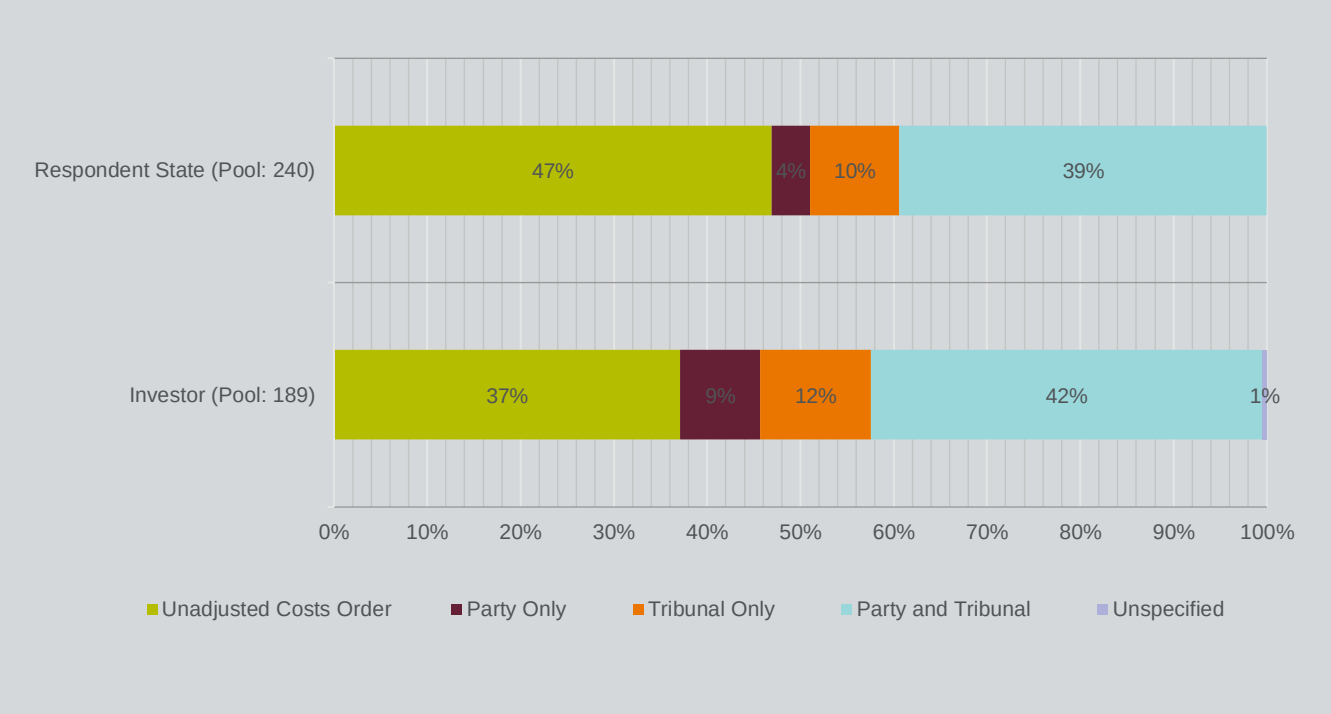


Figure 19: Full and partial adjusted costs orders (successful investors)

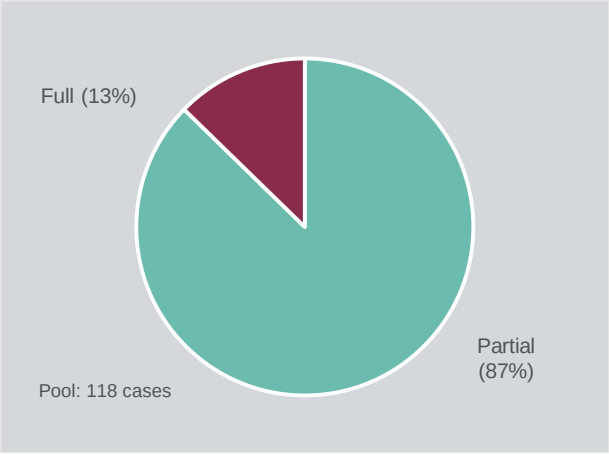
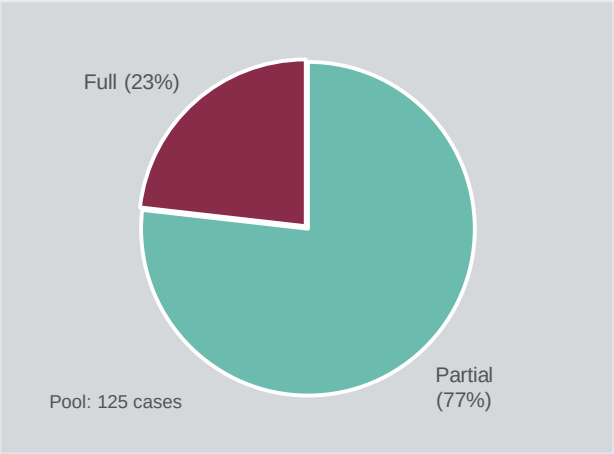


Figure 20: Full and partial adjusted costs orders (successful respondent States)



Both ICSID and UNCITRAL tribunals have shown increased willingness to make costs adjustments. Since June 2017, tribunals have adjusted costs in around 75% of cases under both arbitration rules (and, individually, 75% of ICSID tribunals and 77% of UNCITRAL tribunals have made adjusted costs orders). UNCITRAL tribunals are more likely to issue fully adjusted costs orders than ICSID tribunals.

Figure 21: Adjusted costs orders by arbitration rules

	June 2017–May 2020		Pool	Prior to June 2017		Pool	Combined		Pool
Unadjusted Costs Order (ICSID)	16	**25%**	63	124	**55%**	224	140	**49%**	287
Adjusted Costs Order (ICSID)	47	**75%**	63	100	**45%**	224	147	**51%**	287
Party Only (ICSID)	3	5%	63	16	7%	224	19	7%	287
Tribunal Only (ICSID)	4	6%	63	16	7%	224	20	7%	287
Party and Tribunal (ICSID)	40	63%	63	67	30%	224	107	37%	287
Unspecified (ICSID)	0	0%	63	1	0%	224	1	0%	287
Partial (ICSID)	41	**87%**	47	83	**83%**	100	124	**84%**	147
Full (ICSID)	6	**13%**	47	17	**17%**	100	23	**16%**	147
Unadjusted Costs Order (UNCITRAL)	7	**23%**	30	23	**30%**	76	30	**28%**	106
Adjusted Costs Order (UNCITRAL)	23	**77%**	30	53	**70%**	76	76	**72%**	106
Party Only (UNCITRAL)	1	3%	30	5	7%	76	6	6%	106
Tribunal Only (UNCITRAL)	9	30%	30	10	13%	76	19	18%	106
Party and Tribunal (UNCITRAL)	13	43%	30	37	49%	76	50	47%	106
Unspecified (UNCITRAL)	0	0%	30	0	0%	76	0	0%	106
Partial (UNCITRAL)	15	**65%**	23	44	**83%**	53	59	**78%**	76
Full (UNCITRAL)	8	**35%**	23	9	**17%**	53	17	**22%**	76

Figure 22: Adjusted costs orders by arbitration rules

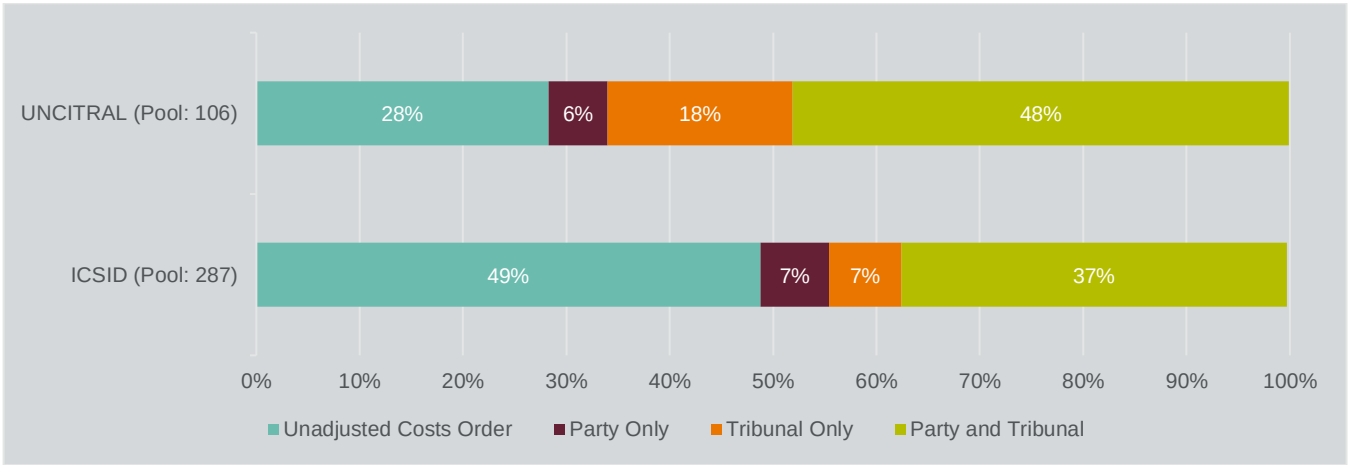


Figure 23: Full and partial adjusted costs orders (ICSID)

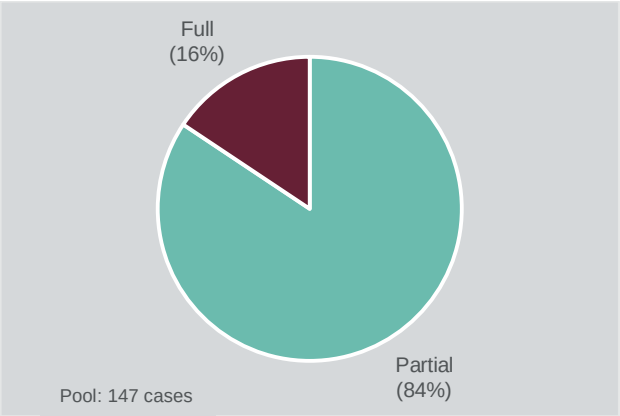
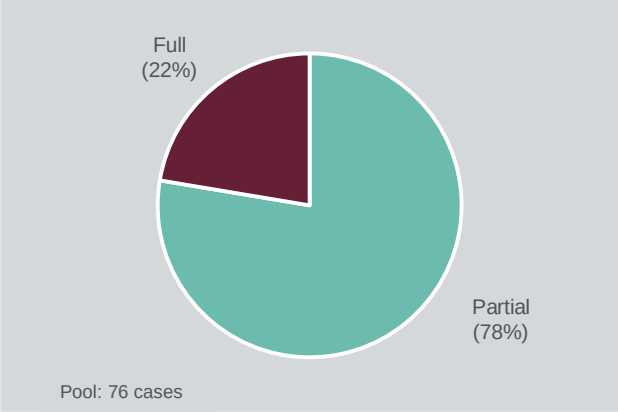
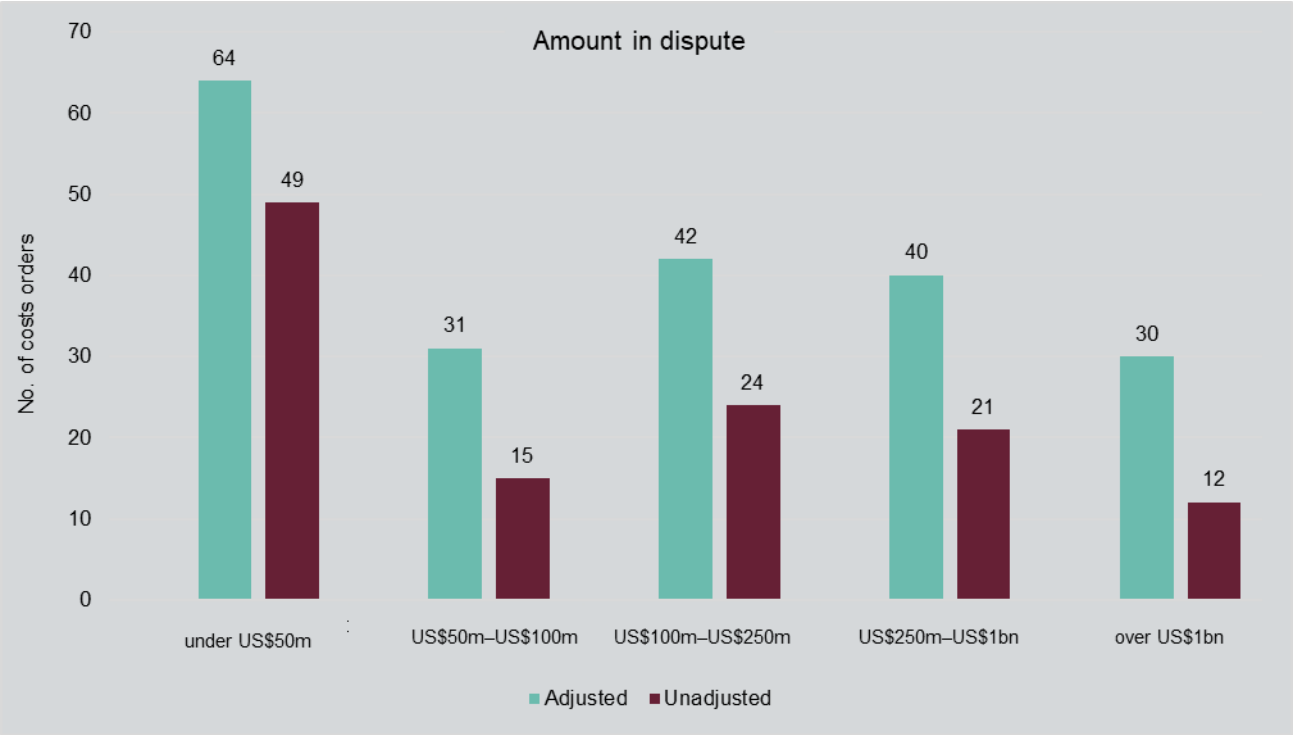


Figure 24: Full and partial adjusted costs orders (UNCITRAL)



Regardless of the amount in dispute, tribunals are more likely than not to issue adjusted costs orders. Nonetheless, in comparative terms, tribunals have been most willing to make unadjusted costs orders in smaller claims when the amount in dispute falls under US$50m (with 43% of costs orders being unadjusted). In claims with the amount in dispute over US$1bn unadjusted costs orders were issued in just 29% of cases.

Figure 25: Costs orders by the amount in dispute



4.3 Costs orders

The mean amount of costs awarded by tribunals from June 2017 to May 2020 has increased by more than US$1m, compared to the amount of costs awarded by tribunals before June 2017.

Figure 26: Average costs orders

	June 2017-May 2020	Pool	pre-June 2017	Pool	Combined	Pool
Mean Costs Order	US$4.2m	80	US$3.1m (excl. Yukos: US$2.5m)	120	US$3.5m (excl. Yukos: US$3.2m)	200
Median Costs Order	US$2.0m	80	US$1.6m	120	US$1.8m	200

As observed in Section 4.1 above, the difference between costs of ICSID proceedings and UNCITRAL proceedings has substantially narrowed. However, the mean costs awarded by ICSID tribunals remain higher than those awarded by UNCITRAL tribunals by approximately US$0.7m (median: approximately US$0.6m).

Figure 27: Costs awarded by arbitration rules

Rules	Mean costs awarded	Median costs awarded	Pool
ICSID	US$3.9m	US$2.1m	119
UNCITRAL	US$3.2m	US$1.5m	56
SCC	US$2.3m	US$1.3m	15
ICC	US$1.3m	US$1.0m	5

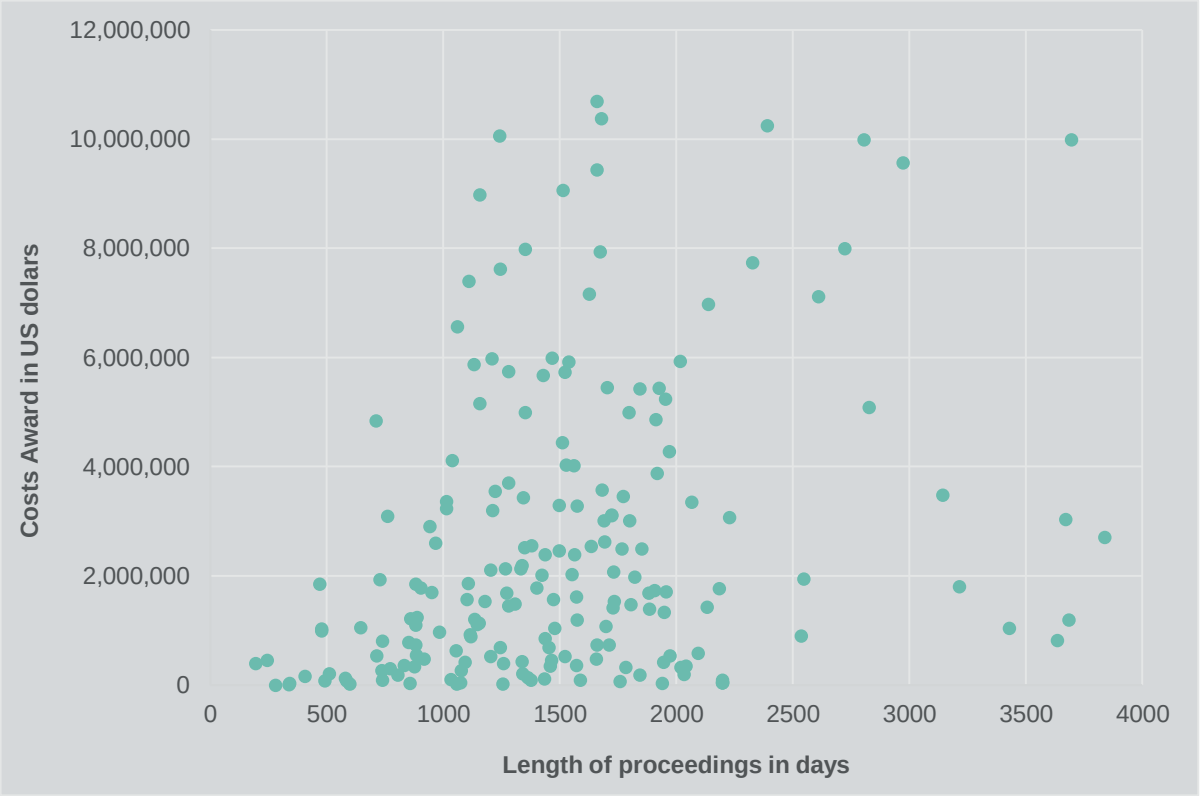
Also, of potential interest is that bifurcation of proceedings does not appear to affect the amount of costs awarded to the winning party. Although the mean amount of costs awarded in bifurcated proceedings is US$7.1m as compared to US$3m for non-bifurcated proceedings from June 2017 to May 2020, the median amount of costs awarded remains at around US$2m regardless of bifurcation. The substantial difference between mean and median reflects the relatively small pool of cases (23).

Figure 28: Costs awarded by outcome of bifurcation requests from June 2017 to May 2020

	Mean costs awarded	Median costs awarded	Pool
Bifurcated	US$7.1m	US$2.0m	23
Non-bifurcated	US$3.0m	US$1.9m	58

Figure 29 shows the correlation between the length of proceedings and awarded costs. Given the broad correlation observed between the length of the proceedings and actual party costs (i.e. the longer the proceedings, the higher the costs incurred, as discussed in Section 4.1 above), it is perhaps unsurprising that apart from a few exceptions winning parties are generally more likely to recover a higher sum of costs in longer proceedings.[26]

Figure 29: Costs ordered by length of proceedings



[26] For example, in *Peter Franz Vocklinghaus v. Czech Republic*, the proceedings took just 712 days and the investor had to pay the respondent State over US$4.8m in costs.

4.4 Annulment proceedings

Costs of annulment proceedings in ICSID arbitrations have also increased in the past three years. Mean costs of applicants for annulment increased by 29% and costs of respondent States to annulment applications rose by almost a quarter, as compared with equivalent figures taken from awards published before June 2017. Costs of *ad hoc* committees have also increased, albeit by around US$20,000 only over the three-year period.

Figure 30: Average party costs in annulment proceedings

	Applicant's party costs	Pool	Respondent State's party costs	Pool
Pre-June 2017				
Mean	US$1.3m	19	US$1.4m	18
Median	US$0.89m	19	US$0.98m	18
June 2017-May 2020				
Mean	US$1.4m	21	US$1.4m	22
Median	US$1.1m	21	US$1.2m	22

Figure 31: Average ad hoc committees' costs in annulment proceedings

	Costs of *ad hoc* committees	Pool
Pre-June 2017		
Mean	US$0.44m	12
Median	US$0.35m	12
June 2017-May 2020		
Mean	US$0.46m	17
Median	US$0.41m	17

Success in annulment applications remains very rare. According to official statistics from ICSID, from January 2011 to December 2020, only seven out of 84 applications succeeded, resulting in full or partial annulment of the underlying award.[27] Notwithstanding the low success rate of annulment applications, *ad hoc* committees remain generally reluctant to adjust party costs in the same manner as tribunals do in the main proceedings (see Section 4.2 above). Only 32% of the decisions published after June 2017 (seven out of 22 cases) adjusted both party and committee costs.

Ad hoc committees are more willing to adjust their own committee costs. Prior to June 2017, *ad hoc* committees made adjusted costs orders for committee costs on 32 occasions (62% of annulment decisions).[28] From June 2017 to 30 May 2020, 82% of annulment decisions contained a costs adjustment order. All of these costs adjustment orders adjusted the costs of the committee save for one exception (where the committee did not specify the nature of the costs adjusted).

27 ICSID 2020 annual report.
28 32 out of 52 annulment decisions (62%) adjusted committee costs, eight decisions (15%) also adjusted party costs.

Figure 32: Adjustments of costs in annulment proceedings from June 2017 to May 2020

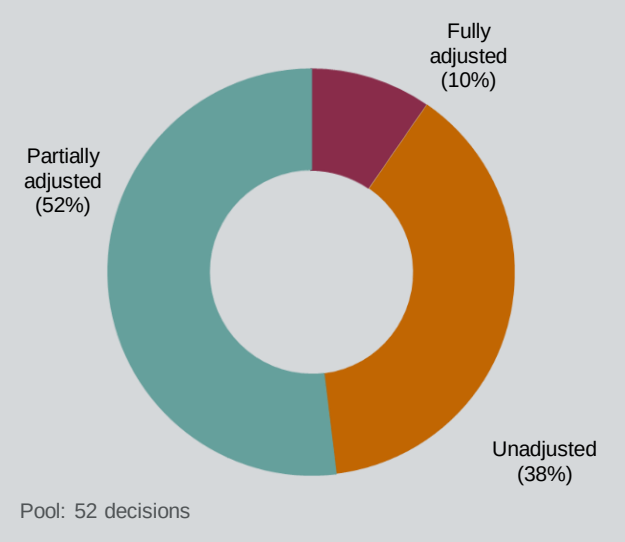
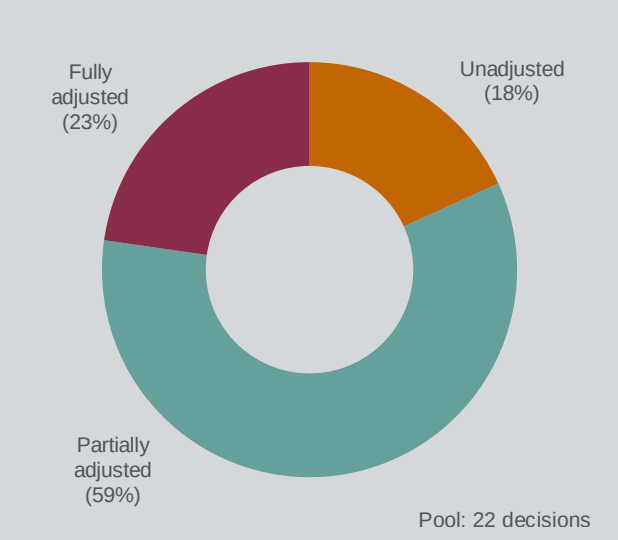


Figure 33: Adjustments of costs in annulment proceedings up to May 2017



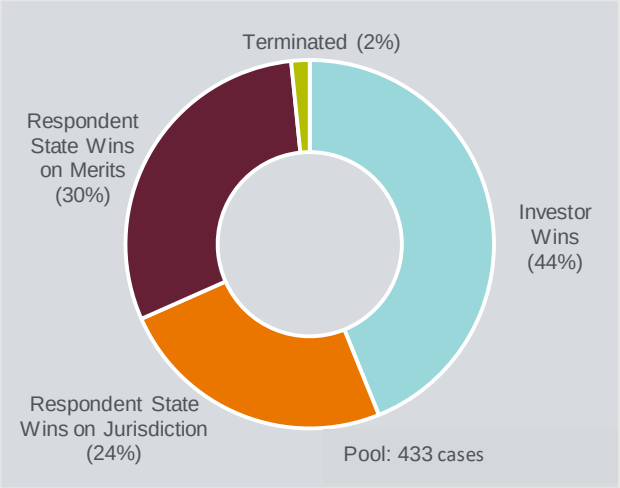
5. Amounts claimed and awarded

The relationship between the amount awarded and the costs of proceedings is an important parameter in determining the cost-effectiveness of investor-State arbitration for aggrieved investors.

Of the 110 decisions issued after June 2017, investors prevailed (i.e. succeeded on liability, regardless of the amount of damages awarded) in 47% of the cases. Respondent States prevailed in 52% of the cases, with 21% of the cases dismissed for lack of jurisdiction and 31% dismissed on merits.

These numbers are similar to pre-June 2017 figures when investors similarly prevailed in less than half of the occasions and about 26% of the cases were dismissed on jurisdiction.

Figure 34: Outcome of investor-State proceedings (all cases with costs decisions published by May 2020)



Between June 2017 and May 2020, the mean amount claimed by investors stood at US$1.1bn. This is well below the mean amount claimed in decisions published before June 2017. However, excluding the *Yukos* cases from the calculation,[29] the mean amount in dispute actually increased by 47% over the past three years. The mean figure remains inflated due to the presence of several high-value claims during the period from June 2017 to May 2020.[30] When the median figures are considered, the amount claimed by investors after June 2017 (US$108.5m) is similar to that claimed before June 2017 (at US$111m).

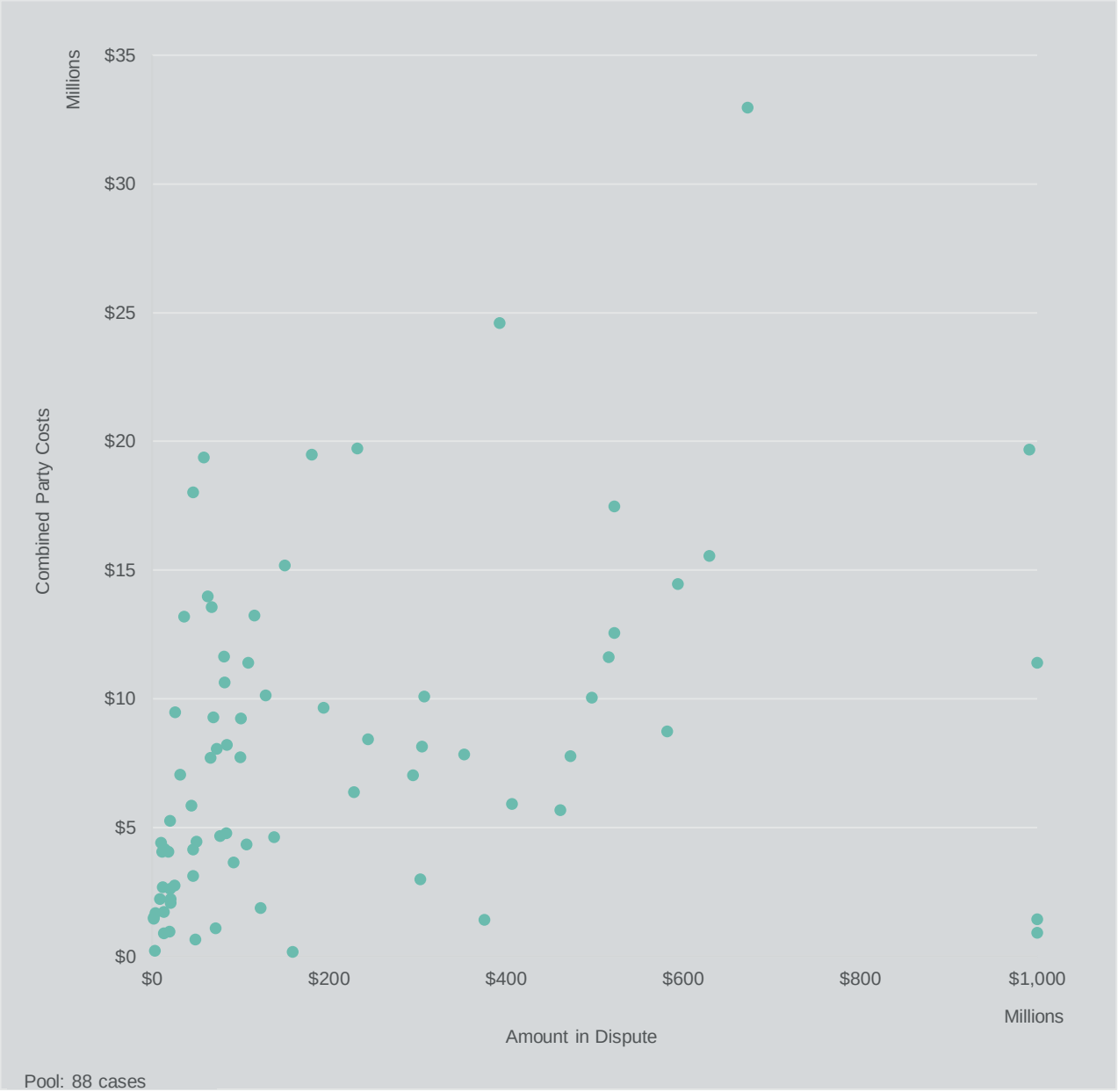
The following graph shows the relationship between the amount claimed by investors and the total party costs in cases between June 2017 and May 2020.[31] It confirms, perhaps unsurprisingly, that party costs generally increase with the amount in dispute. That said, recent data shows a significant chance of parties incurring substantial costs for low-value claims. This can be due to a myriad of factors, including the complexity of issues in dispute, jurisdictional challenges and procedural behaviour of the parties.

[29] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case. No. 2005-03/AA226, Final Award, dated 18 July 2014, awarding the investor damages in the amount of US$39.97bn and costs in the amount of €3,388,197 and US$47.9m; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, dated 18 July 2014, awarding the investor damages in the amount of US$1.846bn and costs in the amount of €156,476 and US$2.2m; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, dated 18 July 2014, awarding the investor damages in the amount of US$8.2bn and costs in the amount of €697,327 and US$9.84m.

[30] There are 16 cases from June 2017 to May 2020 in which the amount in dispute exceeded US$1bn. The claim with the highest value was *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, where the investors claimed US$30.3bn and were awarded US$8.5bn; this was followed by *Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A.*, ICC Case No. 20549/ASM/JPA (C-20550/ASM), where the amounts claimed and awarded were US$25.2bn and US$2bn, respectively; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, where the amounts claimed and awarded were US$10.9bn and US$4.1bn, respectively; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, where the amounts claimed and awarded were US$3.2bn and US$2bn, and *Ioan Micula, Viorel Micula and others v. Romania [II]*, ICSID Case No. ARB/14/29, where the amount claimed was US$2.1bn.

[31] For this analysis, the authors have only considered 88 cases for which data on both parties' costs were available and the amount claimed was less than US$1bn.

Figure 35: Total party costs by amount in dispute



Decisions before 2012 showed that investors tended to be more successful in low-value claims. The average amount in dispute in cases where the investor prevailed was US$166.4m while the average amount in dispute in cases where the respondent State prevailed was US$816.9m. It was noted that this appeared to be a result of a small number of vastly inflated claims, some of which were fraudulent and which were, of course, unsuccessful.

This trend reversed in decisions published between January 2013 and May 2017 – both the mean and median amounts in dispute were higher for cases in which the investor prevailed than when the respondent State won by 99% (although the mean amount was skewed by *Yukos*; if *Yukos* is excluded, the mean amount claimed in cases where the respondent State won is two times higher than those where the investor won).

From June 2017 onwards, the mean and median amounts in dispute remain consistently higher when the investor wins than when it loses.

Figure 36: Amounts in dispute by successful party

	June 2017-May 2020	Pool	Before June 2017	Pool	Combined	Pool
Mean amount in dispute where investor wins	US$1.8bn	49	US$1.3bn (excl. Yukos:US$415.1m)	123	US$1.5bn (excl. Yukos: US$804.5m)	172
Median amount in dispute where investor wins	US$227.7m	49	US$139.4m	123	US$143.4m	172
Mean amount in dispute where respondent State wins	US$287.0m	46	US$1.1bn	111	US$829.1m	157
Median amount in dispute where respondent State wins	US$65.8m	46	US$93.3m	111	US$83.1m	157

The mean amount awarded to a successful investor has risen by more than 184% to US$315.5m from June 2017 (excluding the effect of *Yukos* on the mean amount of pre-June 2017 awards). The doubling of the median figure over the past three years confirms the upward trend in the amount of damages awarded by investment tribunals.

When the amount of damages claimed is compared with the amount of damages awarded, one sees a modest increase in the amount of damages awarded out of the amount claimed, from a median percentage of 29% before June 2017 to 36% in the past three years.

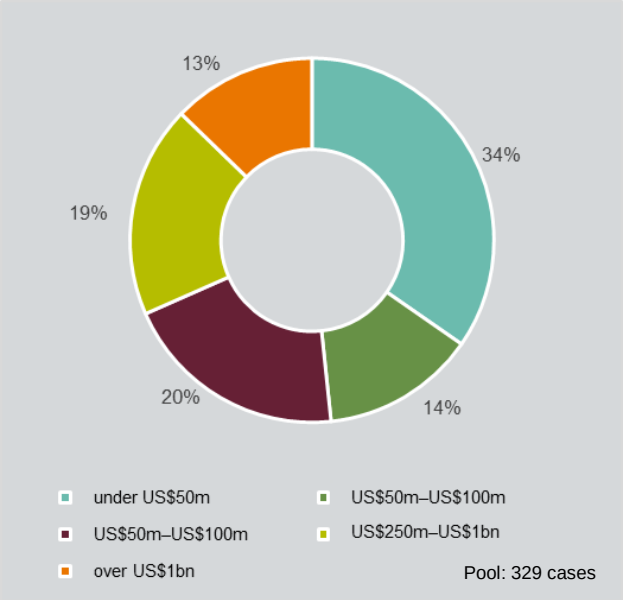
Figure 37: Average amounts of damages claimed and awarded

	June 2017-May 2020	Pool	Before June 2017	Pool	Combined	Pool
Mean Damages Claimed	US$1.1bn	95	US$1.2bn (excl. Yukos: US$719.3m)	234	US$1.16bn (excl. Yukos: US$817.3m)	329
Mean Damages Awarded	US$315.5m	53	US$486.1m (excl. Yukos: US$110.9m)	133	US$437.5m (excl. Yukos: US$169.5m)	186
Mean Percentage Awarded for the amount claimed	38%	49	37%	122	37%	171
Median Damages Claimed	US$108.5m	95	US$111.3m	234	US$110.3m	329
Median Damages Awarded	US$39.2m	53	US$19.9m	133	US$21.4m	186
Median Percentage Awarded for the amount claimed	36%	49	29%	122	33%	171

Costs of the proceedings and size of the dispute

One way to approach the relationship between the size of the dispute and the costs is to group the cases by the amount in dispute: (a) under US$50m; (b) between US$50m and US$100m; (c) between US$100m and US$250m; (d) between US$250m and US$1bn; and (e) over US$1bn. Of the 329 cases with data available, 34% of cases concern claims below US$50m.

Figure 38: Share of cases by amount in dispute



The table at Figure 39 below confirms the conventional understanding that the larger the amount in dispute, the higher the costs incurred by both investors and respondent States. By way of illustration, the mean investor costs for claims above US$1bn can be as high as 7 times as those for low-value claims of under US$50m. Similar trends can be observed with respondent State costs and tribunal costs. Although high-value claims do not necessarily involve complex factual and legal issues (which will naturally lead to higher legal costs), disputes worth billions of dollars often are more complicated (not least in quantum analysis) and parties may be more willing to spend substantial legal costs given the high stakes.

Figure 39: Average costs by the size of claims

	Mean costs	Median costs	Pool
Claims under US$50m			
Investor costs	US$2.6m	US$1.5m	62
Respondent State costs	US$2.2m	US$1.2m	61
Tribunal costs	US$0.5m	US$0.4m	64
Claims between US$50m and US$100m			
Investor costs	US$4.3m	US$3.7m	34
Respondent State costs	US$2.6m	US$1.6m	30
Tribunal costs	US$1.0m	US$0.9m	31
Claims between US$100m and US$250m			
Investor costs	US$5.4m	US$4.7m	49
Respondent State costs	US$4.9m	US$3.7m	44
Tribunal costs	US$0.9m	US$0.9m	48
Claims between US$250m and US$1bn			
Investor costs	US$8.6m	US$7.1m	48
Respondent State costs	US$5.4m	US$4.2m	45
Tribunal costs	US$1.2m	US$0.9m	56

	Mean costs	Median costs	Pool
Claims over US$1bn			
Investor costs	US$19m	US$11.8m	33
Respondent State costs	US$12.4m	US$6.2m	36
Tribunal costs	US$2.2m	US$1.6m	31

Figure 40: Median investor costs, respondent State costs and tribunal costs by amount in dispute

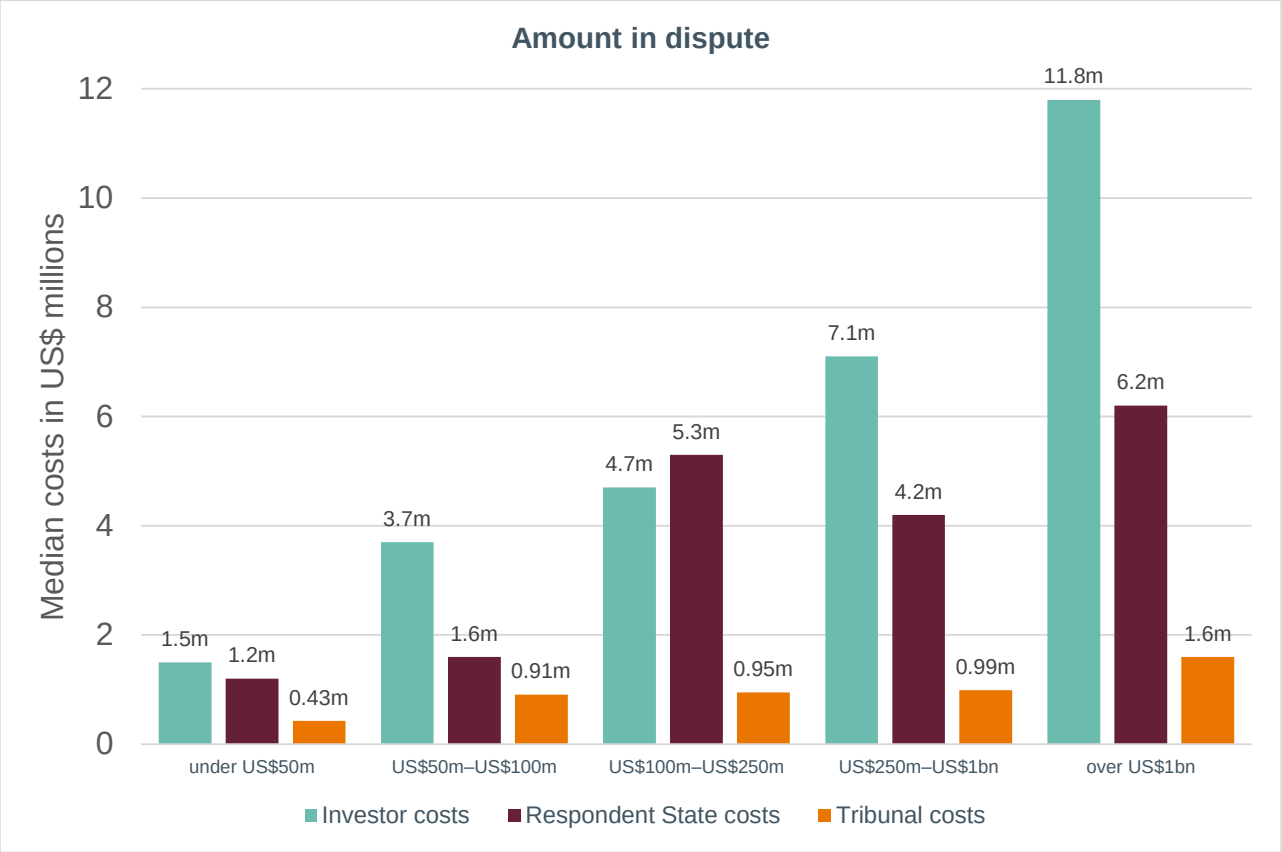


Figure 41 below shows that the higher the amount in dispute, the greater the 'haircut' investors can expect on the full amount of their claims even where they succeed (at least in part) on the merits. For disputes under US$50m, successful investors receive 51% of the claimed amount (mean). This percentage falls to 26% for claims above US$250m. This may reflect tribunals' discomfort with making very large awards against States or a tendency for investors to overvalue their claims in high-value disputes or both. On the other hand, costs orders increase with the amount in dispute (in line with party costs and tribunal costs increases).

Figure 41: Average amounts of damages and costs claimed and awarded by size of dispute

	Mean	Median	Pool
Claims under US$50m			
Damages claimed[32]	US$18.3m	US$17.9m	110
Damages awarded	US$9.4m	US$5.5m	48
Percentage awarded for the amount claimed	51%	31%	N/A
Costs awarded to investors	US$1.6m	US$571 K	56
Claims between US$50m and US$100m			
Damages claimed	US$73m	US$71.6m	46
Damages awarded	US$33m	US$31.3m	21
Percentage awarded for the amount claimed	45%	44%	N/A
Costs awarded to investors	US$3.2m	US$2m	25
Claims between US$100m and US$250m			
Damages claimed	US$163.8m	US$157.2m	69
Damages awarded	US$59.9m	US$43.4m	44
Percentage awarded for the amount claimed	37%	28%	N/A
Costs awarded to investors	US$3.3m	US$2.6m	33
Claims between US$250m and US$1bn			
Damages claimed	US$460.4m	US$402m	62
Damages awarded	US$118.2m	US$71.1m	38
Percentage awarded for the amount claimed	26%	18%	N/A
Costs awarded to investors	US$3.7m	US$2.8m	34
Claims over US$1bn			
Damages claimed	US$8bn	US$1.8bn	42
Damages awarded	US$2.1bn	US$96.4m	21
Percentage awarded for the amount claimed	26%	5%	N/A
Costs awarded to investors	US$5.8m	US$1.8m	23

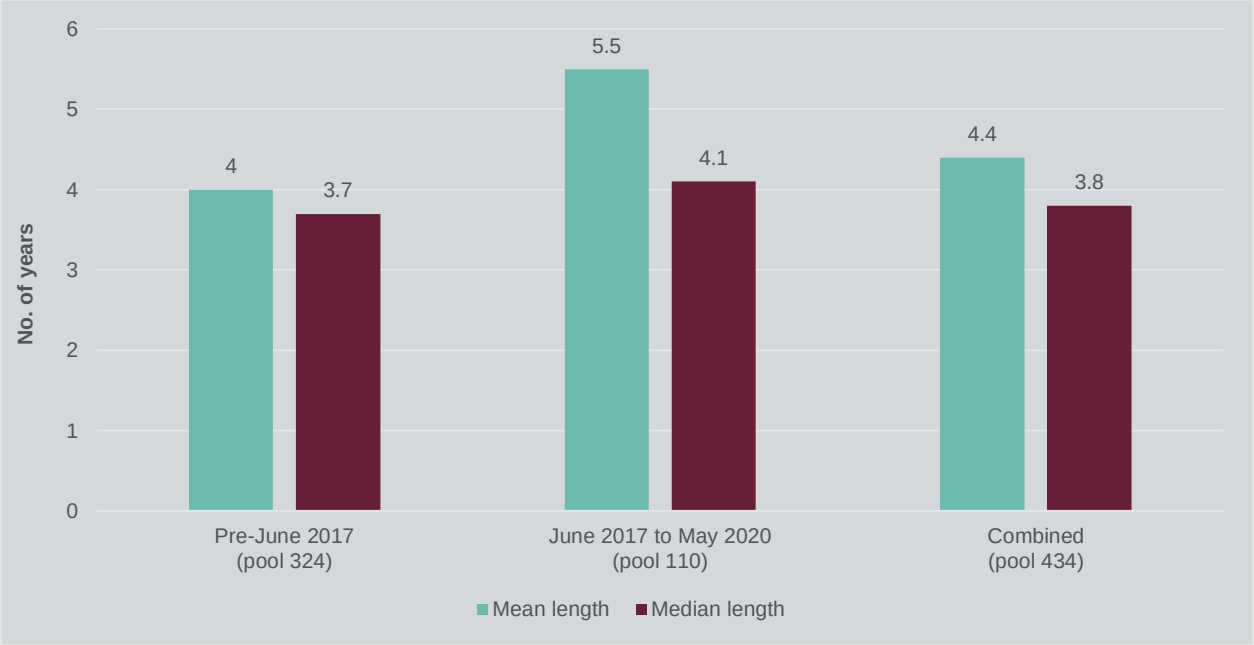
[32] Including also cases decided in favour of the respondent State.

6. Duration of proceedings

Of the 110 new cases published between June 2017 and May 2020, the mean length of proceedings is five and a half years. This means that recent proceedings last one year and six months longer than those which decisions were published before June 2017. However, notably the increase in median length is less significant (by less than six months).

Figure 42: Average length of investor-State proceedings

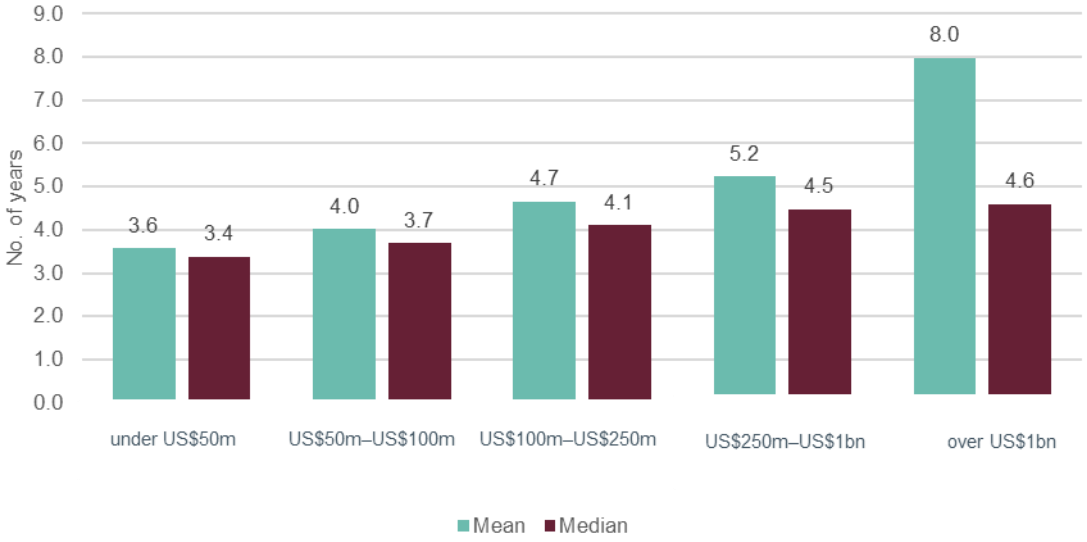
	Mean length	Median length	Pool
Pre-June 2017	4 years	3.7 years	324
June 2017 to May 2020	5.5 years	4.1 years	110
Combined	4.4 years	3.8 years	434



The mean duration of proceedings where the investor prevails is 1677 days (4.6 years). Cases in which the respondent State prevails are typically shorter by five months and last on average for 1530 days (4.2 years). This is of course impacted by respondent States' successful objections to jurisdiction in bifurcated proceedings. Overall, almost 25% of cases were dismissed for lack of jurisdiction (see Figure 34 above).

Duration of proceedings also correlates with the amount in dispute. As can be seen in Figure 43 below, the mean duration of the proceedings with claimed amounts in excess of US$1bn was approximately eight years (2912 days), which is more than double that of proceedings with claimed amounts below US$50m at approximately 3.6 years (1303 days). Looking at the median figures, the differences are not that stark as the difference in duration of proceedings decreases to approximately 1.2 years.

Figure 43: Average length of proceedings by amount in dispute



There does not appear to be any notable difference in the length between ICSID proceedings and UNCITRAL proceedings. The mean length of ICSID proceedings is approximately 4.5 years while the mean length of UNCITRAL proceedings is approximately 4.2 years. However, the median lengths confirm that the time difference between the two sets of rules is insignificant (with median duration of ICSID proceedings at 3.8 years and UNCITRAL proceedings at 3.9 years). The SCC continues to administer the shortest investor-State proceedings, consistent with the observation in Section 4.1 above that SCC tribunals incur the lowest costs, albeit with a much smaller case pool.

Figure 44: Mean and median length of proceedings by arbitration rules

Arbitration rules	Mean length	Median length	Pool
ICSID	4.6 years	3.8 years	287
UNCITRAL	4.2 years	3.9 years	105
SCC	2.8 years	2.8 years	26
ICC	2.7 years	2.6 years	7
Others	1.9 years	2 years	5

Figure 45: Average length of proceedings by arbitration rules

Bifurcated proceedings take longer to conclude than non-bifurcated proceedings (with the mean lengths of 2062 days (5.6 years) and 1962 days (5.4 years), respectively). The divergence becomes starker when median figures are taken, with bifurcated proceedings taking more than a year (386 days) longer than non-bifurcated proceedings to conclude.[33] This suggests that while bifurcation may save time in some instances where it results in early dismissal, overall, it tends to increase average proceeding lengths.

[33] Pool for bifurcated cases is 28 cases, 79 for non-bifurcated disputes.

Appendix 1

Methodology

This study was conducted in four phases:

Phase 1:

The authors began this study by identifying, locating and gathering publicly available decisions of tribunals in investor-State arbitrations on platforms such as the ICSID database, italaw, ISLG, Jus Mundi and UNCTAD. Allen & Overy conducted searches for each iteration of this study. In the 2012 Study, 221 decisions were located with a cut-off date of 31 December 2012. An additional 140 awards were covered in the 2017 Study with a cut-off date of 31 May 2017. This report adds another 110 awards with a cut-off date of 31 May 2020. In addition, the current study considers a total of 75 annulment decisions which were issued by ICSID *ad hoc* committees and were publicly available as of 31 May 2020.

Our searches looked for decisions which addressed, to some extent, questions concerning costs incurred by parties, damages awarded or costs awarded to the successful party, including findings of tribunals operating under bilateral and multilateral treaties, but excluding the decisions of specialised tribunals such as the Iran-United States Claims Tribunal. Partial awards or decisions which did not dispose of issues of costs or where all data on costs had been redacted were excluded.

Phase 2:

At phase 2, the authors set the research questions, conducted legal research, analysed and summarised relevant parts of the decisions on costs and compiled a spreadsheet with raw data on party and tribunal costs, amounts claimed and awarded, costs orders and other relevant categories.

Phase 3:

At phase 3, the authors performed calculations and conducted a quantitative analysis of the empirical data compiled at phase 2. The authors also gathered further qualitative information to supplement the research on the data.

This study primarily uses two metrics to analyse costs trends: the mean (i.e. the sum of all incurred costs or amounts awarded in the set of cases in question, divided by the number of cases) and the median (i.e. the middle value in the set of data in question). While each metric has its own advantages and disadvantages, the median may sometimes be a better indication of the ordinary value as the mean can be skewed by a few exceptionally high (or low) amounts.

Phase 4:

Finally, the authors performed a qualitative analysis on the data obtained in phase 3 and responded to the research questions.

Data inputs

Currency: Amounts stated in currencies other than US dollars are converted to US dollars using the exchange rate current on the day when the relevant tribunal issued the decision. Historical conversion rates are ascertained using the website https://www.xe.com/currencytables/. For convenience, all figures in this report are rounded to the nearest hundred thousand where appropriate.

Amount in dispute and damages awarded: We follow the approach adopted in the 2017 Study and select the figures which appear most likely to be accurate based on a reading of the relevant award. As with the 2017 Study, we have included pre-award interest (to the extent such interest has been quantified by the investor or can be calculated based on the information available in the award) but excluded post-award interest, in rendering the amounts claimed and amounts awarded. Further, on occasion some judgement has to be made to distinguish between "costs" (i.e. costs incurred in the present arbitral proceedings) and "damages" (i.e. costs incurred in separate but related litigation) which an investor also seeks to recover from the State. The authors acknowledge that complete comparability of the data is impossible and have balanced the risk of subjectivity against the need to maximise the data pool.

Length of proceedings: We consider a proceeding to commence on the date of the request for arbitration or notice of arbitration and conclude on the date of the final award. This will necessarily include any period when the proceedings were suspended by the tribunal.

Appendix 2

Glossary

Bifurcation	The splitting of an arbitration into two distinct phases (typically jurisdiction/merits, or merits/quantum) so that certain issues can be decided first before the parties proceed to make submissions and the tribunal decide on other issues.
Costs adjustment	An order or direction of the tribunal requiring a party to pay some or all of another party's party costs and/or another party's share of the tribunal costs.
Costs follow the event	Also known as "loser pays", this approach allows the successful party to recover all reasonable costs incurred in connection with the arbitration from the losing party.
Costs of arbitration	The sum of party costs and tribunal cost.
Fully adjusted costs order	A costs decision whereby the tribunal orders one party to pay the other side's party costs and tribunal costs in full, sometimes known as "indemnity costs".
ICC Rules	The Rules of Arbitration of the International Chamber of Commerce. The version currently in force is the 2021 ICC Rules which came into effect on 1 January 2021.
ICSID	International Centre for Settlement of Investment Disputes, an international arbitral institution within the World Bank Group.
ICSID Additional Facility Rules	The Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID.
ICSID Convention	The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as the Washington Convention.
ICSID Rules	The Rules of Procedure for Arbitration Proceedings adopted by the Administrative Council of ICSID. For the purposes of this study, the ICSID Additional Facility Rules are considered part of and identical to the ICSID Rules.
ISDS	Investor-State dispute settlement.
Partially adjusted costs order	A costs decision whereby the tribunal orders one party to pay (part of) the other side's party costs and/or (part of) the tribunal costs.
Party costs	Costs incurred by a party in the conduct of an arbitration, including lawyers' fees, expert witness fees, expenses paid to witnesses, printing charges, travel expenses to the hearing venue, hearing venue expenses, etc. Costs and expenses incurred prior to the commencement of the arbitration may also be included and claimed as party costs.
Pay your own way	An approach to costs allocation whereby each party bears its own costs and tribunal costs are divided between the parties in equal shares.

Relative success apportionment	A modified version of the "costs follow the event" approach pursuant to which tribunals apportion costs based on the parties' relative success on the different issues raised during the proceeding.
SCC	The Stockholm Chamber of Commerce.
SCC Rules	The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The current version of the SCC Rules came into effect on 1 January 2017.
Tribunal costs	Costs and expenses of the arbitrators. For the purposes of this study, institutional costs (i.e. administrative fees and expenses charged by arbitration institutions) are also included as a type of tribunal costs.
Unadjusted costs order	A costs decision whereby the tribunal orders each party to bear its own party costs and share the tribunal costs.
UNCITRAL	The United Nations Commission on International Trade Law.
UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on International Trade Law. At present there are three versions of the UNCITRAL Rules, including: (i) the 1976 version; (ii) the 2010 version; and (iii) the 2013 version, which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.

Appendix 3

The authors

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Matthew Hodgson is an international arbitration specialist. He is qualified in England and Wales, Hong Kong and New York. He is also a Solicitor Advocate, with Higher Rights of Audience before the Senior Courts of England and Wales and the Courts of Hong Kong. He has acted in commercial disputes under all major arbitral rules including in relation to energy and infrastructure projects, financial instruments and private equity transactions, and in the telecommunications and technology sectors. He has represented investors and States (including Azerbaijan, Korea, Pakistan and Poland) in 15 investment treaty arbitrations. He represented investors in the first claim to find that a complex financial product is a protected 'investment' (Deutsche Bank/Sri Lanka) and the first successful ICSID claim against the Philippines (BDC). He has also sat as arbitrator in cases under the HKIAC, ICC and SIAC rules. Who's Who Legal 2021 says he is "*a mainstay of international arbitration in the Asia-Pacific market who is 'very knowledgeable and experienced at investment treaty disputes'*".

Professor Yarik Kryvoi

Senior Research Fellow in International Economic Law and Director of the Investment Treaty Forum, British Institute of International and Comparative Law

Professor Yarik Kryvoi is an academic, practitioner and policy adviser based in London specialising in international and comparative law, with a particular focus on dispute resolution and foreign investment law. He was admitted to the New York Bar in 2009 and was in private practice with leading law firms in Washington, DC, and London. He represented investors and States under various arbitration rules. Professor Kryvoi has published extensively and managed large-scale projects on international dispute resolution, international economic law, investment law as well as law and policy in the countries of the former Soviet Union, the Middle East and Asia. He is also listed as arbitrator by several institutions, including the Hong Kong International Arbitration Centre, Asian International Arbitration Centre and Shenzhen Court of International Arbitration. Professor Kryvoi is the course leader of the Institute's new online course International Investment Law and Dispute Resolution, available at **http://biicl.org/isds**.

Daniel Hrcka

Junior lawyer at Allen & Overy LLP

Daniel specialises in international arbitration. Daniel has participated in numerous commercial arbitration proceedings under the ICC, LCIA and UNCITRAL arbitration rules. He has also advised in investment treaty disputes under both ICSID and UNCITRAL rules. He has particular experience advising on the compatibility of EU law with investor-State arbitration. Daniel received his first degree at Charles University in Prague and is a Harlan Fiske Stone Scholar at Columbia Law School in New York.

Appendix 4

Allen & Overy International Arbitration Group

Allen & Overy's International Arbitration group advises a diverse range of corporates, financial institutions and governments on complex cross-border commercial and investment treaty arbitrations.

With arbitration experts, including leading advocates, spread across our global network of offices, we advise on the most pressing and complex disputes, wherever they arise. Our specialist team has experience representing clients in arbitrations under all the key rules, including the ICC, LCIA, HKIAC, SIAC, SCC and UNCITRAL Rules, as well as the ICSID Rules for investment arbitrations specifically.

Senior members of our team regularly sit as arbitrators and hold key positions with the leading arbitral institutions, as well as key legal associations like the IBA Arbitration Committee. Our experience and engagement put us at the heart of the arbitration community and allow us to most effectively represent our clients' best commercial interests.

Allen & Overy's international arbitration expertise spans the full range of sectors in which arbitration is used, including: energy and natural resources; construction and infrastructure projects; telecommunications; life sciences; banking and finance; and M&A and joint ventures. We conduct the advocacy in our clients' arbitration cases, delivering efficiencies and cost savings for our clients, while ensuring that those who have been involved from the start and know the best are also the advocates arguing the case before the tribunal.

Our investment arbitration and public international law specialists have extensive experience resolving disputes arising under bilateral and multilateral investment treaties. Recognised for our excellent track record of achieving successful outcomes for clients in these highly complex cases, we act at every stage of the investment arbitration process, from advising on options for resolving investment disputes at an early stage right through to enforcing or challenging awards, as well as advising on negotiated settlements. We are particularly known for our expertise in relation to the Energy Charter Treaty, having acted on around a sixth of all ECT claims brought, including the first-ever arbitration and the first-ever collective claim, respectively, under that Treaty.

We routinely represent both claimant investors and respondent States in arbitrations, as well as advising States on the negotiation and drafting of international investment agreements and on accession to multilateral treaties. We also advise our clients on the structuring of their transactions to achieve maximum protection for their investments.

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Our track record in investment treaty arbitration

Highlights of our investment treaty arbitration practice include representing

Investors

UniCredit in a claim against Croatia at ICSID, relating to Croatia's unilateral conversion of loans denominated in Swiss francs into loans denominated in euros, requiring the claimants to adjust the respective terms of contract with customers and convert loans. After securing success for our client at the jurisdictional stage, we settled the claim allowing our client to continue with its business in Croatia.

Nissan Motor Co Limited in its successful UNCITRAL Rules claim against India under the India-Japan Economic Partnership Agreement. The claim arose from the non-payment of incentives by the Indian State government of Tamil Nadu, which had been promised to the claimant under the agreement for building of a car plant. After success at the jurisdictional phase, we settled the case in exchange for a payment by India to Nissan in the region of US$200 million.

Two oil and gas majors on potential claims against a South East Asian State and its State-owned oil company on a multi-billion dollar dispute arising on two Production Sharing Contracts for the exploration, development and production of oil and gas located offshore. We successfully settled the dispute in return for a payment by the respondent government of US$800m.

Numerous **renewable energy investors,** including **Antin Infrastructure, RWE**, **Masdar** and **Bridgepoint Capital subsidiary Watkins Holdings** in a dozen separate ICSID claims against the Kingdom of Spain under the Energy Charter Treaty (the **ECT**) arising from retroactive reforms made by Spain to its renewable energy regulatory framework. We also acted for a group of investors, known as The PV Investors, in the first ever collective claim under the ECT and arising from the same background. To date we have more than €500m in damages awards for our clients, with several claims still pending.

A **global financial institution** on its successful claim against Sri Lanka for interfering with obligations in an oil hedging agreement between the bank and a State-owned oil company. The financial institution was awarded its claim in full, plus interest and its full legal costs. This is the first known investment treaty case to hold that a derivative can be a qualifying investment and a rare example of a claim being awarded in full.

States

The Islamic Republic of Pakistan in successfully defending two related UNCITRAL investment treaty claims, valued by the claimants at US$575m. The claims arose from alleged interference in gas import operations at the country's second biggest port. The tribunal dismissed the claims against our client, Pakistan, in their entirety and ordered the claimants to pay 90% of Pakistan's costs.

The United Arab Emirates in a claim brought by a UK national and relating to alleged investments in the infrastructure project in the UAE known as "The World". We successfully settled the claim on favourable terms. We also successfully defended the UAE from the first ever treaty claim it faced (valued by the claimant at US$2.5bn), and we currently act for it in relation to a pending claim brought by a Turkish construction company, which brought a claim relating to an infrastructure project.

The Kingdom of Morocco in two separate claims at ICSID, one relating to the State's only oil refinery and the other arising from a major transport infrastructure project.

The Republic of Poland in a €250m claim by a French pharmaceuticals group under the UNCITRAL Rules concerning alleged investments in the pharmaceutical sector. The claimant alleged that various intellectual property rights – including trademarks, rights to industrial processes, clientele and goodwill and copyrights – had been expropriated by Poland. The tribunal dismissed the majority of the claims, ultimately awarding less than 2% of the amount claimed by the investor.

The Sultanate of Oman in a claim brought at ICSID by Samsung Engineering in relation to alleged discriminatory treatment in connection with the bidding process to undertake major works on an ultimately State-owned refinery. We settled the claim.

“Highly regarded for its stellar track record in representing sovereign states and corporates in high-value investment treaty disputes.”

Chambers UK 2021, Dispute Resolution: International Arbitration

“Activity in high-profile ECT cases showcases its capacity to coordinate complex investor-state mandates between its breadth of offices.”

Chambers Europe 2021, Arbitration (International)

“World-class arbitration practice … Highly regarded for its expertise in investment treaty arbitrations. Experienced in arbitrations acting both for and against sovereign states and government bodies.”

Chambers China 2021, Dispute Resolution

A client emphasises the advantages of working with a team “which has unparalleled experience in the field of international arbitration and a strong ability to see the big picture”.

Chambers Asia Pacific 2021, Arbitration (International)

“The dedicated, long-established, London-based arbitration team at Allen & Overy LLP fields ‘brilliant and utterly professional lawyers, who are always focused on the underlying commercial issues and best interests of the client’.”

Legal 500 UK 2021, International Arbitration

Appendix 5

The British Institute of International and Comparative Law (**BIICL**)

The British Institute of International and Comparative Law (BIICL) is one of the leading independent research centres for international and comparative law in the world. Its high-quality research projects, seminars and publications encompass almost all areas of public and private international law, comparative law and European law.

Established in 1958 by Lord Denning, Sir Hersch Lauterpacht, Lord Shawcross and a number of other distinguished legal practitioners and academics, it works to develop and advance the understanding of international and comparative law as well as the rule of law in the UK and around the world. Through its work, it seeks to improve decision-making, which will help to make the world a better place and have a positive impact on people's daily lives.

Through the leadership of its Directors and the guidance of its Presidents, Lord Denning, Lord Goff, Lord Bingham, Dame Rosalyn Higgins and its current President, Lord Phillips, this independent institute, unaffiliated to any government, university or other institution, has become a world-leading authority on international and comparative law and the rule of law. BIICL's International and Comparative Law Quarterly was the first journal to offer the reader coverage of comparative law as well as public and private international law.

BIICL includes within it the innovative Bingham Centre for the Rule of Law, which has a particular focus on the many rules of law issues worldwide. The Institute further enhances its research activities through three specialist Forums: the Competition Law Forum, the Product Liability Forum and the Investment Treaty Forum. These expert groups draw their membership from leading lawyers with a serious engagement in these areas.

The Investment Treaty Forum (ITF) was founded as a part of BIICL in 2004 to serve as a global centre for serious high-level debate in the field of international investment law. The Forum is a membership-based group, bringing together some of the most expert and experienced lawyers, business managers, policymakers, academics and officials working in the field. Like BIICL itself, the Forum has a reputation for independence, even-handedness and academic rigour. The Forum membership is by invitation only.

Read more:

- British Institute of International and Comparative Law: **http://biicl.org**
- Investment Treaty Forum: **http://biicl.org/itf**

“Throughout its existence, BIICL has been a unique organisation, making a vital contribution to international security and prosperity by influencing debate, legal reform and policy making.”

Lord Neuberger of Abbotsbury, former President of the UK Supreme Court, Chair of the 60+ BIICL Appeal

“BIICL’s reputation for combining rigorous research and analysis with the practical application of the law, and the respect in which it is held by important stakeholders, made them an obvious partner for us.”

Michael Meyer, Head of International Law, British Red Cross

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Second edition, December 2017 (the **2017 Study**)

Matthew Hodgson and Alastair Campbell, "Damages and costs in investment treaty arbitration revisited", Allen & Overy, Global Arbitration Review (2017), available at ***https://www.allenovery.com/en-gb/global/news-and-insights/publications/investment-treaty-arbitration-cost-duration-and-size-of-claims-all-show-steady-increase***

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The views represented in this report are those of the authors and do not necessarily reflect those of Allen & Overy, its clients or BIICL.

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