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2022 Empirical Study:

Costs, Damages and Duration in Investor-State Arbitration in the CEE Region

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Contents

Appendices

1. Introduction

This study examines over 100 investor-State cases, which involved countries of Central and Eastern Europe (CEE) as respondent States and were conducted under ICSID, UNCITRAL and other arbitration rules and gives 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.

The study builds on a global empirical study published in June 2021 and jointly conducted by Allen & Overy with the British Institute for International Law (Global study). The Global study, analysing over 400 investor-State cases and over 70 ICSID annulment decisions, offered 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 of that study analysed factors of potential relevance to costs of ISDS proceedings, including the choice of arbitration rules and the length of proceedings.

The current study analyses the same issues but focuses exclusively on investor-State cases involving a CEE country as a respondent State. Such cases amounted to almost a quarter of all cases analysed in the Global study. Throughout the study, the results of the analysis are not only compared with the Global study but comparisons are also made as between the individual CEE sub-regions (ie Central Europe, Eastern Europe, the Baltics and the Balkans, as defined in *Methodology* below).

The Global study noted the importance of understanding these issues. Concerns that costs and damages awarded in investor-State disputes have become excessive are of particular importance in the CEE region where respondent States face a significant number lower-value claims and investor-State arbitration has become a well-established dispute resolution method for disputes concerning foreign direct investment.

Tackling the high costs and 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 the Global study.

It is hoped that this more focused study will contribute to the debate on ISDS reform amongst stakeholders and the arbitration community in the CEE region.

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2. Executive summary

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

- Arbitrators have significant discretion in determining and allocating costs between parties in the absence of detailed guidance in the applicable arbitration rules.
- Compared to the global numbers, adjusted costs orders are more frequent and more paragraphs are devoted to costs in arbitral awards involving respondent States in the CEE region.

Party costs are similar for investors and respondent States in the CEE region

- For respondent States in the CEE region, the mean costs incurred in an ISDS proceeding are around US$3.7 million. The median figure is US$1.8m.
- For investors in cases against respondent States in the CEE region, the mean costs exceed US$3.8m. The median figure is US$2.2m.
- The highest mean costs are incurred by investors and respondent States in cases against the Eastern European respondent States (US$5.7m for investors and US$6.2m for respondent States).
- A similar trend can be observed in the median figures. Investor costs are highest in cases against the Eastern European and Baltic respondent States (US$3.2m). There is a significant gap between median costs of the Easter European respondent States (US$4.4m) and the remaining states from the CEE region (all below US$1.8m).
- Global numbers show a significant gap between investor costs and respondent State costs. This difference is substantially less significant in cases in the CEE region. This appears to be explained by considerably lower mean and median costs of investors in CEE claims compared to global numbers.
- The mean amount in dispute in cases against respondent States in the CEE region (US$248.6m) is less than a third of the global mean sum in dispute, even when excluding Yukos (US$817.3m). In terms of the mean figure, the greatest amounts in dispute involve cases against Eastern European respondent States ((US$516.8m). However, the median figures show cases against the Central European states as the most valuable (US$65.3m) which suggests that the mean figure is skewed by a few very high claims (*Generation Ukraine v. Ukraine, Micula v. Romania II, Tatneft v. Ukraine*).
- Although party costs generally increase with the amount in dispute, as would be expected, substantial costs have been sometimes incurred even for some low-value claims in the CEE region.

ICSID and UNCITRAL arbitrations cost about the same

- In contrast to the global numbers, the study found a significant difference in the party costs incurred or awarded by ICSID tribunals compared to UNCITRAL tribunals in cases against respondent States in the CEE region.
- Party fees incurred in ICSID arbitrations are significantly higher than fees incurred in UNCITRAL arbitration in CEE cases. For instance, median costs of investors are higher by US$1.7m in ICSID arbitrations.
- Tribunal costs in ICSID arbitrations and UNCITRAL arbitrations are broadly similar, with mean costs at US$741,000 and US$685,000, respectively (or US$643,000 and US$585,000 as median figures).
- Looking at the “all time” data, UNCITRAL tribunals in cases against respondent States in the CEE region have shown greater willingness to issue adjusted costs orders (76%) compared to ICSID tribunals (58%). Nevertheless, notwithstanding the differences in approach to cost allocation between the ICSID Rules, the 1976 UNCITRAL Rules and the 2010 UNCITRAL Rules, global numbers show that in the recent years this difference has almost been erased. ICSID tribunals have increasingly followed UNCITRAL tribunals in adopting a “costs follow the event” approach and adjusting both party and tribunal costs. This trend is also reflected in the CEE cases (in 9 out of 12 ICSID cases decided after June 2017 tribunals issued adjusted costs orders).

The prospects of recovering costs are high especially for successful investors

- 68% of all costs orders in cases against respondent States in the CEE region are adjustment orders, requiring the unsuccessful party to bear at least some portion of the costs of the successful party. This is higher than the global percentage of adjustment orders (58%)
- Successful investors against respondent States in the CEE region recover at least some costs in 82% of cases while successful respondent States from the CEE region recover at least some costs in 61% of cases. This disparity is more pronounced than in the global figures (63% and 53% for investors and respondent States, respectively).

The proportion of damages awarded compared to the amount claimed increases

- Most tribunals continue to significantly reduce the amount of damages claimed by investors. The median percentage of reduction (65%) roughly corresponds with the global numbers (67%). However, there are significant differences as between the individual CEE sub-regions.
- Among successful investors, the mean amount of damages claimed in cases against respondent States in the CEE region is significantly lower (US$214.5m) than the global numbers (US$1.5bn). The same applies to the mean amount awarded (US$61.5m as opposed to US$438m globally). The median figures confirm this discrepancy. Median amount of damages claimed by successful investors in CEE cases is US$60.2m compared to US$143.4m in global numbers.
- Globally, successful investors receive higher compensation than in the CEE cases. Median figures show that successful investors are awarded US$21.4m, twice as much than in the CEE cases (US$9.8m).

Investor-State arbitral proceedings are shorter compared to global average

- Proceedings against respondent States in the CEE region last on average three years and eight months. The median length is approx. five months shorter.
- The length of proceedings is broadly similar across the CEE sub-regions. However, cases against the Baltic states are the shortest, taking on average three years and two months.
- Proceedings in the CEE region are shorter than the global mean by some nine months.
- In general, ICSID proceedings against respondent States in the CEE region last for approximately four years and one month, while UNCITRAL proceedings conclude five months earlier. The mean length of SCC proceedings is the shortest (less than 2 years and 5 months) but based on a small data pool of 13 cases.
- Unsurprisingly, the general rule from the Global study applies also in the CEE cases - the higher the amount in dispute, the longer the proceedings.
- 36 of the 105 cases against respondent States in the CEE region involved bifurcation. 28 of them concerned bifurcation between the jurisdictional and merits phase.

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.

Almost 84% of the cases reviewed in this study (as compared to over 90% in the Global study) are governed by the ICSID Rules[1] or the UNCITRAL Rules.[2] This shows that arbitration other than under ICSID or UNCITRAL Rules (notably, under the SCC Rules) is more frequently invoked in cases against CEE respondent States. Also the share of UNCITRAL proceedings in cases against the CEE respondent States (36%) is more significant than globally where they amount to just one quarter of all investor-State arbitration cases. Consequently, investors filing claims against CEE states are either more willing to make use of non-ICSID arbitration rules where the applicable BIT so permits or ICSID arbitration is not provided for in the BIT or is unavailable (such as for example in the case of Poland).

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 ICSID proceedings.

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

1 Almost one half 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 89% 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.

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 proposed 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 proceedings or any part of it;

(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 approved the amended rules on 21 March 2022, and the updated rules will come into effect on 1 July 2022.

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.[11] 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.[12]

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.[13] 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.[14]

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. Proportionally, they are more frequent in cases against CEE respondent States (in particular Czech Republic and Moldova which each faced 4 claims under the SCC Rules) than globally.[15]

8 Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings, 20 January 2022.
9 Proposed Rule 52(1).
10 Proposed Rule 52(2).
11 1976 UNCITRAL Rules, Article 40(2).
12 1976 UNCITRAL Rules, Articles 38(d), 38(e).
13 2010 UNCITRAL Rules, Article 42(1). The rules mention "the costs of arbitration" without distinguishing between tribunal and legal representation costs.
14 2010 UNCITRAL Rules, Article 42(1).
15 13 out of 105 cases.

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.

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]

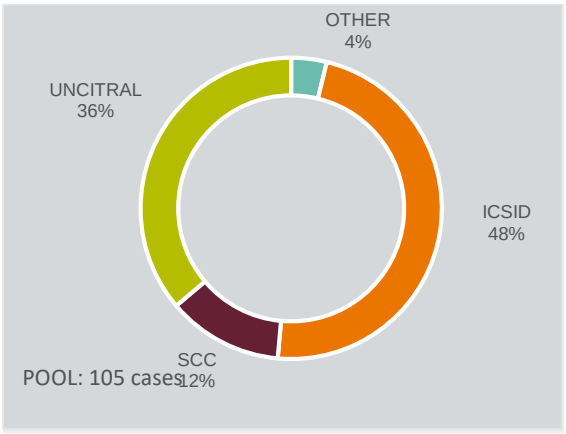

Figure 2: Comparison of cost-related provisions in major arbitration rules

	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, ie decisions including some or all of the studied data on party and tribunals costs or amounts claimed and awarded.

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

The Global study showed that 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.

Due to the smaller pool of cases, which is more easily distorted by outliers, we have not looked at trends in costs over time. Instead, we have focused on comparing the global and CEE figures as well as the figures as between the four respective CEE sub-regions (see *Methodology*).

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 (eg 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

According to the Global study, investors' party costs generally exceeded respondent States' in the cases considered. This difference is particularly large when looking at mean figures (US$6.4m for investors compared to US$4.7m for respondent States). We noted that this 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.

In contrast, the difference is considerably less significant with respect to the CEE cases. The mean numbers show that party costs of investors (US$3.8m) roughly correspond to the costs of respondent States (US$3.7m). Median numbers also do not show a significant a gap (US$2.2m and US$1.8m for investors and States, respectively).

While the mean figures are more easily skewed by a small number of outliers given the smaller pool of CEE cases,[20] the smaller gap between costs of investors and respondent States and their overall lower amount as compared to the global figures are nevertheless telling – both investors and respondent States are more cost-sensitive than the global average.

[20] This is especially true when focusing on figures from the CEE sub-regions with small pool of analysed cases.

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

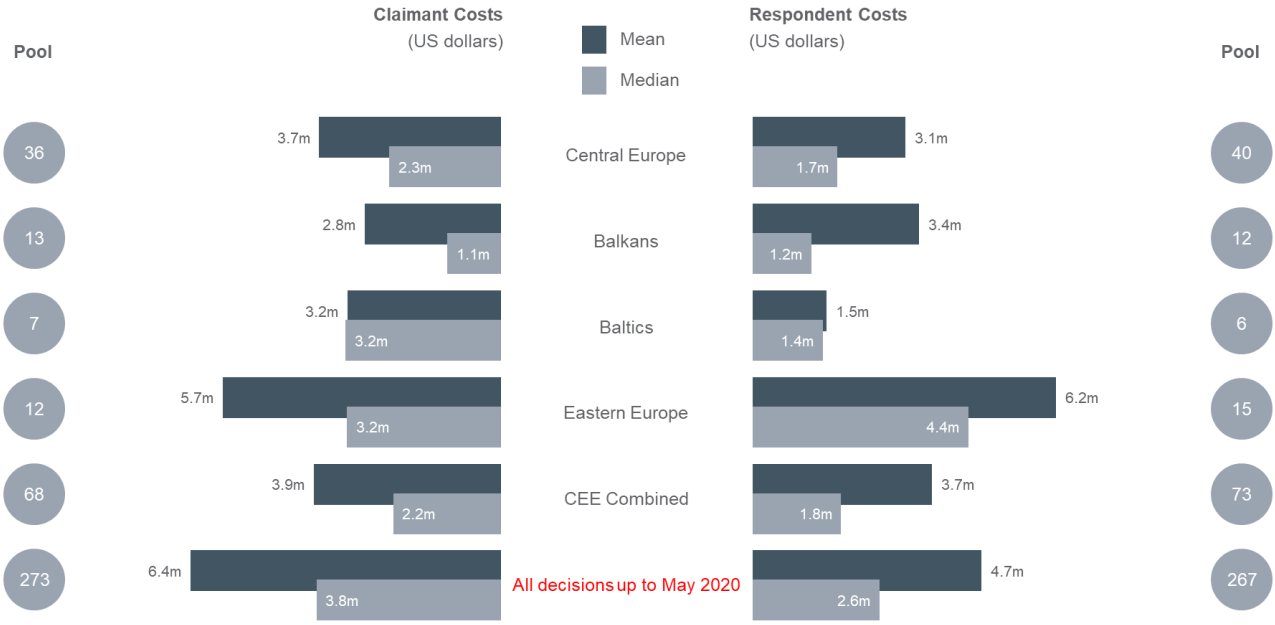

Figure 4: Mean and median costs incurred by investors and respondent States by arbitration rules

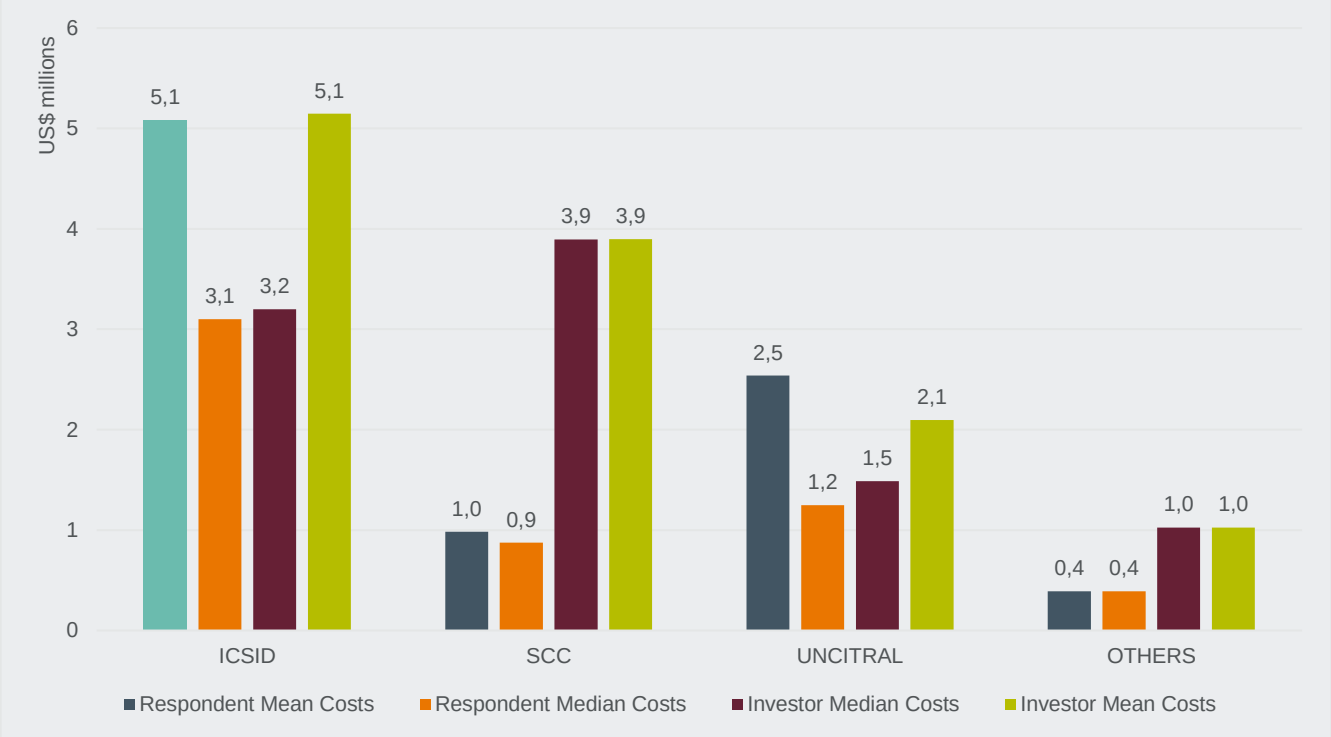

Figure 3 shows that the combined mean and median costs of investors and respondent States in the CEE cases are significantly lower compared to the global numbers. In particular, the average costs of investors in the CEE cases are 40% lower than the overall average. For respondent States, they are lower by more than 21%.

Interestingly, in cases against the Balkan and Eastern European States, the numbers show that respondent States spend more in party fees than investors. The slightly higher costs of the respondent States in the Balkans can be explained by the high party costs of

Bulgaria in *Plama v. Bulgaria*,[21] which skewed the overall average. The Eastern European region witnessed more cases in which costs of the respondent States were substantially higher than claimants' costs.[22]

On closer analysis of the CEE cases, numerous factors tend to contribute to increases in party and tribunal costs, including in particular the following:

- Long duration of the case and unsuccessful attempts to oppose jurisdiction by respondent States,[23]
- Bifurcation,[24]
- Length of hearing and the absence of a pre-hearing conference,[25]
- Complexity of issues raised,[26]
- Provisional measures requests,[27]
- Time-wasting tactics and failure to meet deadlines,[28]
- Number of submissions by each party, including irrelevant and unsolicited submissions,[29]
- *Amicus curiae* submissions,[30]
- Counterclaims by the respondent State,[31]
- High number of procedural orders, failure to agree on schedule for submission of written pleadings or on the presiding arbitrator,[32]
- Change of counsel in the course of proceedings,[33]
- Burdensome document production requests,[34]
- High number of witness statements and expert reports[35]
- Extensions of time resulting in further submissions by the parties,[36]
- Deficiencies in presentation of the case by the parties,[37]
- Attempts to disqualify arbitrators or counsel of one of the parties,[38]

On the other hand, and as would be expected, costs were significantly lower where the case was terminated early due to failure to pay advance on costs or where the respondent State did not participate in the proceedings.[39]

As for the applicable arbitration rules, the figures show that, irrespective of the individual CEE sub-regions, parties incur highest costs in ICSID proceedings. This is because some of the most costs-demanding cases in the CEE region were conducted under the ICSID Arbitration

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21 Bulgaria's costs amounted to US$13.2m compared to just US$4.7m in costs incurred by the claimant. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24.

22 *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, *Ömer Dede and Serdar Elhüseyni v. Romania*, ICSID Case No. ARB/10/22.

23 *Anglia Auto Accessories Ltd. V. Czech Republic*, SCC Case No. V 2014/181, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, *Hrvatska Elektropivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20.

24 *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8.

25 *William Nagel v. Czech Republic*, SCC Case No. 049/2002, A.*M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15.

26 *Photovoltaic Knopf Betriebs GMBH v. Czech Republic*, PCA Case No. 2014-21.

27 *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. *ARB/97/4, Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

28 *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17.

29 *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Servings & loan, Ltd. V. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, *Hrvatska Elektropivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24.

30 *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17.

31 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1.

32 *PL Holdings S.a.r.l. v. Poland*, SCC Case No. 2014/163, *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13.

33 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, *Invesmart v. Czech Republic*, UNCITRAL.

34 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, *Ioan Micula, Viorel Micula and others v. Romania (II)*, ICSID Case No. ARB/14/29.

35 *Invesmart v. Czech Republic, UNCITRAL, Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22.

36 *Invesmart v. Czech Republic*, UNCITRAL

37 *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL.

38 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.

39 *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova (I)*, SCC Case No. 093/2004, *Václav Fischer v. Czech Republic*, PCA Case No. 2019-37, *Swembalt AB, Sweden v. The Republic of Latvia*, UNCITRAL.

Rules.[40] Unlike ICSID and UNCITRAL, SCC proceedings in Figure 4 show a considerable difference between the costs of investors (US$3.9m) and respondent States, which are almost four times lower (US$983.1k).[41] This can be partly explained by the small pool of SCC cases for which relevant data are available. The data was thus influenced by two cases against Poland where Poland relied on its internal legal team while the claimants were represented by international law firms.[42] Figures 5 and 6 show the difference in costs of ICSID and UNCITRAL proceedings, which is most pronounced in cases against the Central and Eastern European countries.

Figure 5: Mean and median costs incurred by investors and respondent States in ICSID proceedings

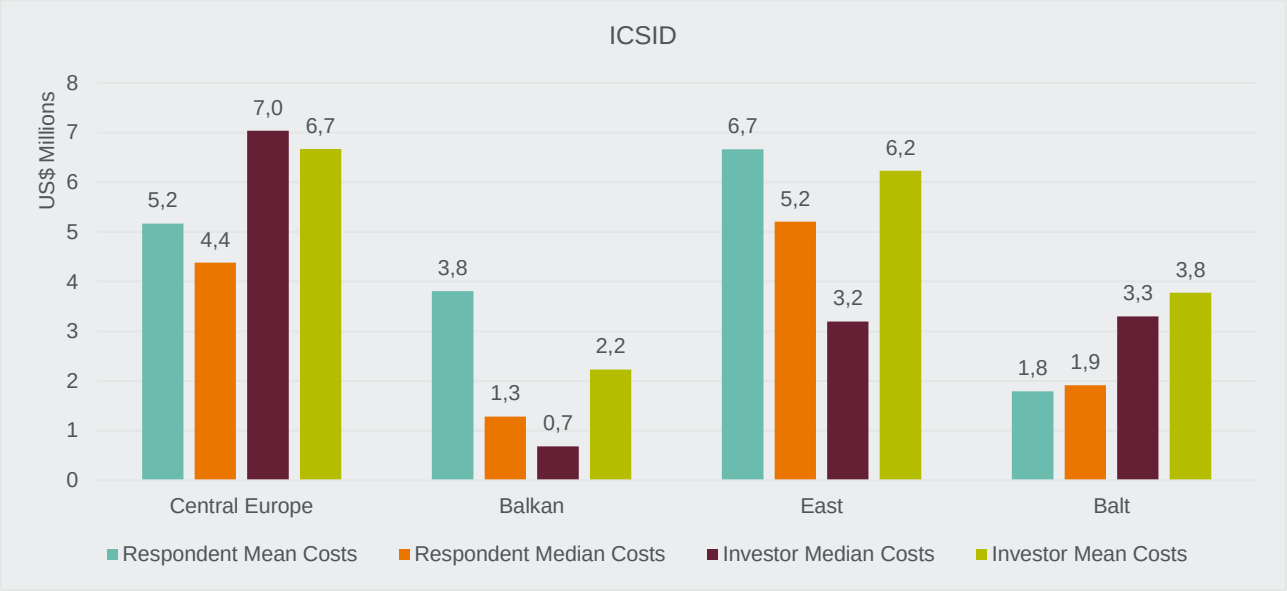
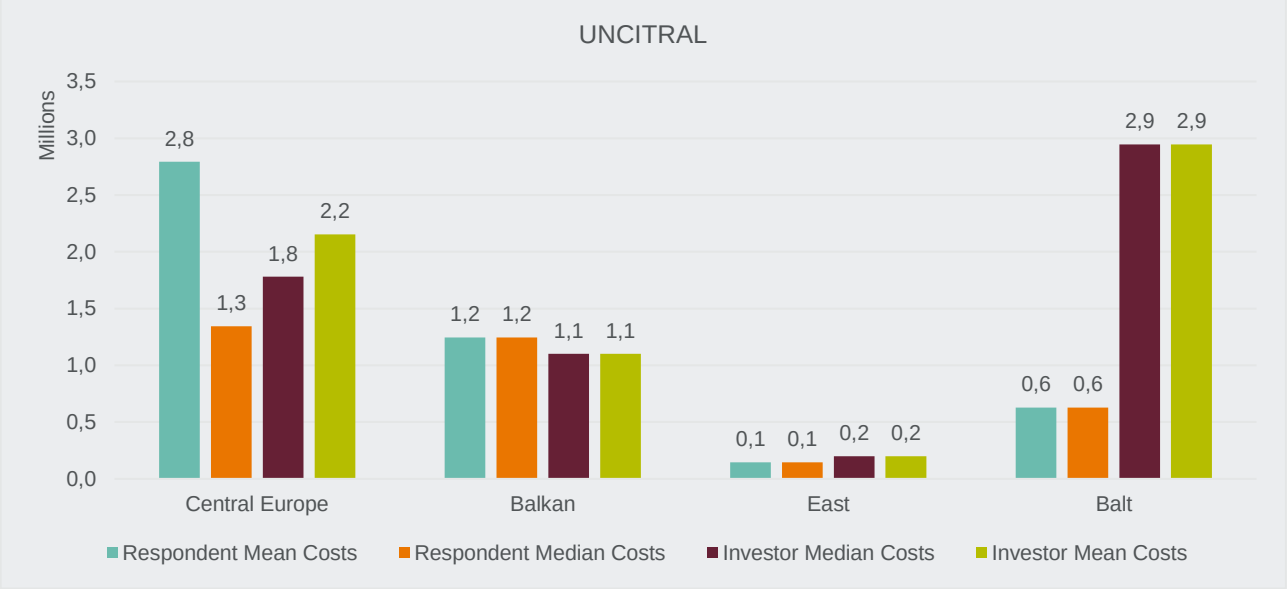


Figure 6: Mean and median costs incurred by investors and respondent States in UNCITRAL proceedings



40 *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, *Hrvatska Elektropivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20.

41 Note, however, that in respect of the SCC Rules, party fees of investors are available only in five cases.

42 PL *Holdings S.a.r.l. v. Poland*, SCC Case No. 2014/163 and *Griffin v. Poland (GPF GP S.à.r.l v. Poland)*, SCC Case No. 2014/168. Note that in *PL Holdings v. Poland*, a significant part of claimant's costs consisted of expert fees and expenses.

Tribunal costs

The Global study showed that neither the ICSID Rules nor the UNCITRAL Rules appear to offer a significant cost advantage insofar as tribunal costs are concerned. The same applies to cases against the CEE respondent States. While the mean tribunal costs of ICSID tribunals exceed that of UNCITRAL tribunals, the difference is a mere US$57,000. The median tribunal costs of ICSID tribunals are higher than the median tribunal costs for UNCITRAL by US$59,000.

Also consistent with the Global study, SCC tribunals have the lowest tribunal costs among the three major sets of arbitration rules for investor-State arbitrations. Almost all of the SCC cases took less than three years to decide and the majority concerned amounts in dispute substantially below the average in the CEE region,[43] although the amounts in dispute have been increasing in recent years such that they are now comparable to those under the UNCITRAL and ICSID Rules. However, as already noted, the pool of investor-State cases administered by the SCC is comparably small, and the figures are thus more easily distorted.

Figure 7: Average tribunal costs by arbitration rules

	Central Europe	Pool	Balkans	Pool	Baltics	Pool	Eastern Europe	Pool	CEE	Pool
Mean Tribunal Costs	US$642.7k	43	US$766.7k	8	US$531.8k	7	US$609.5k	16	US$638.4k	74
Median Tribunal Costs	US$573.4k	43	US$684.9k	8	US$544.1k	7	US$352.9k	16	US$554.3k	74
Mean ICSID Tribunal Costs	US$633.7k	12	US$785.8k	6	US$614.0k	4	US$996.7k	6	US$741.3k	28
Median ICSID Tribunal Costs	US$636.7k	12	US$684.9k	6	US$601.5k	4	US$726.2k	6	US$643.2k	28
Mean SCC Tribunal Costs	US$490.8k	6	-	0	US$315.7k	1	US$150.2k	6	US$320.1k	13
Median SCC Tribunal Costs	US$359.0k	6	-	0	US$315.7k	1	US$47.2k	6	US$209.7k	13
Mean UNCITRAL Tribunal Costs	US$683.4k	25	-	0	US$475.5k	2	US$834.7k	3	US$684.7k	30
Median UNCITRAL Tribunal Costs	US$599.6k	25	-	0	US$475.5k	2	US$343.7k	3	US$584.6k	30

[43] See eg *State Enterprise "Energorynok" (Ukraine) v. The Republic of Moldova*, SCC Arbitration V (2012/175) or Bogdanov cases against Moldova.

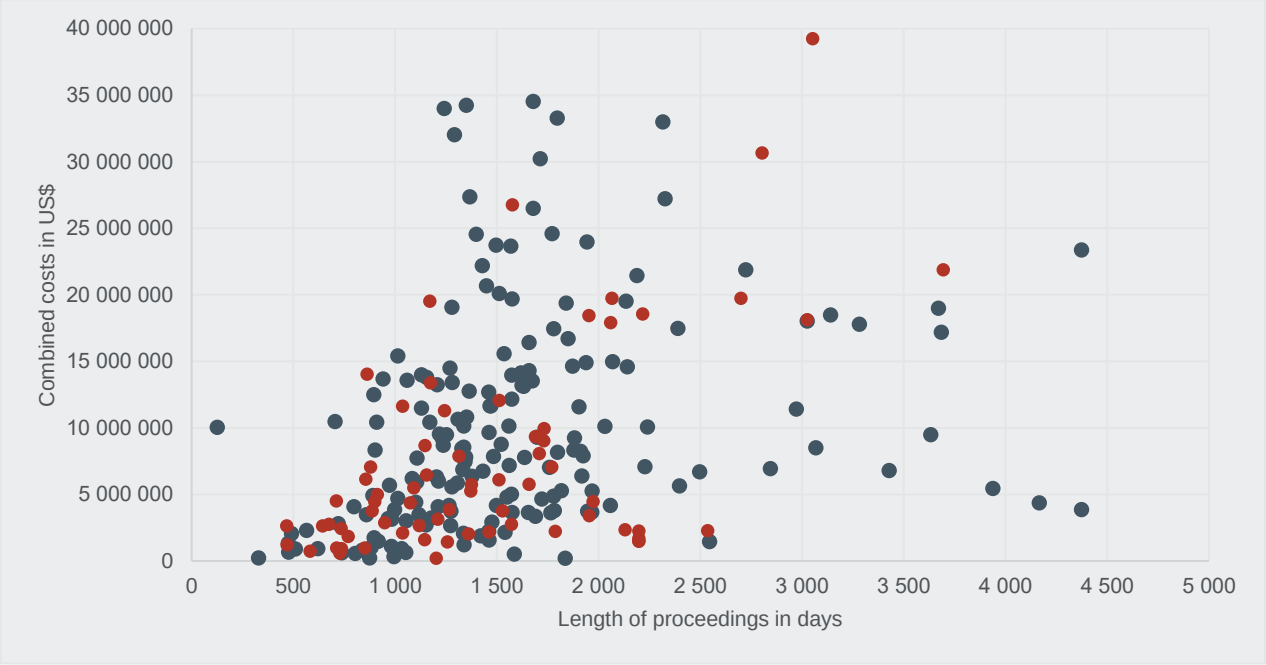
Impact of the length of proceedings on costs

An increase in the duration of proceedings would generally be expected to increase the costs for both parties. Given that the mean length of proceedings in cases against the CEE respondent States is shorter than the global average (see Section 6), it would be expected that the party fees incurred in these proceedings would also be on the lower side of the spectrum.

Figure 8 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. Cases against the CEE respondent States are marked in red.

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 number of CEE cases parties incurred high costs in a short period of time. At the same time, costs were relatively low in long, protracted proceedings in a higher number of CEE cases. For instance, although the proceedings in *Photovoltaic Knopf v. Czech Republic* took more than six years, the total party costs amounted to a relatively low amount of US$1.5m.[44] This corresponds to our finding that parties in cases against CEE respondent States generally incur lower costs as compared to the global average.

Figure 8: 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 34% of cases against CEE respondent States. 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 31% for investors and more than 58% for respondent States. The same is true of mean tribunal costs. This finding confirms the findings of the Global study 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. Unsurprisingly, some of the most

[44] *Photovoltaic Knopf Betriebs GMBH v. Czech Republic*, PCA Case No. 2014-21.

costs-demanding cases that were subject of this study were bifurcated and proceeded to the merits stage.[45]

The figures above include cases that were bifurcated on quantum issues.[46]

Out of 28 cases bifurcating the jurisdictional and merits phases, the case was dismissed for lack of jurisdiction in 12 instances. Out of eight cases bifurcating the merits and quantum phases, three proceeded to the quantum stage.

The difference is less significant in the median figures. The median investor costs are almost the same as in non-bifurcated proceedings. The median respondent State costs are only 16% higher in bifurcated proceedings than in non-bifurcated proceedings.

Figure 9: Number of Investor-State arbitration proceedings bifurcated in cases against CEE respondent States

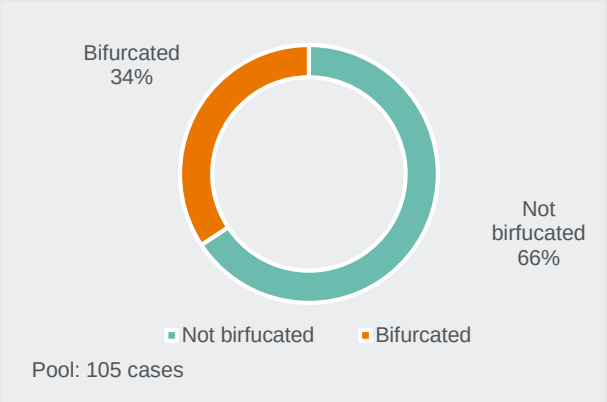
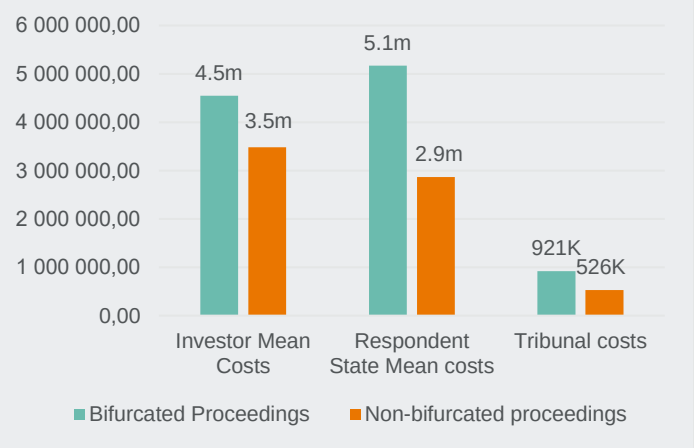


Figure 10: Relationship between costs of proceedings and bifurcation of proceedings in cases against the CEE respondent States

	Mean Costs	Median costs	Pool
Bifurcated proceedings			
Investor costs	US$4.5m	US$2.2m	24
Respondent State costs	US$5.1m	US$1.9m	26
Tribunal costs	US$921.2k	US$739.1k	21
Non-bifurcated proceedings			
Investor costs	US$3.5m	US$2.3m	44
Respondent State costs	US$2.9m	US$1.6m	47
Tribunal costs	US$526.4k	US$501.4k	53

Figure 11: Impact of bifurcation on mean costs



45 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24.

46 Eight out of 36 bifurcated cases were bifurcated on quantum.

4.2 Apportionment of costs

In the Global study, we observed a shift from the traditionally preferred approach ("pay your own way") 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. In particular, since June 2017 more than 75% of all costs orders were adjusted.

This Section analyses 105 costs decisions involving the CEE respondent States. The figures show that 32% of the costs orders were unadjusted (ie each party had to bear its own costs). This is slightly more than the global average since June 2017. However, this has to be understood against the background that this study covers also earlier decisions, issued prior 2010, when tribunals were less focused on costs and adjusted costs orders were less common.

Taking into account all decisions as of the cut-off date of this report (which is the same as the cut-off date of the Global study), 68% of all investment tribunals issued an adjusted costs order. This is 10% more than the global average. Looking at the sub-regional numbers, cases against respondent States in the Eastern European sub-region have the highest portion of unadjusted costs orders (43%). This is notable given that most of these awards were issued after 2010 when there was otherwise a noticeable shift to adjusted costs orders. Further, although parties in cases against Eastern European respondent States incur the highest party costs, as noted above, tribunals nevertheless seem less inclined to issue an adjusted costs order.

Figure 12: Adjustments of costs in all decisions against CEE respondent States

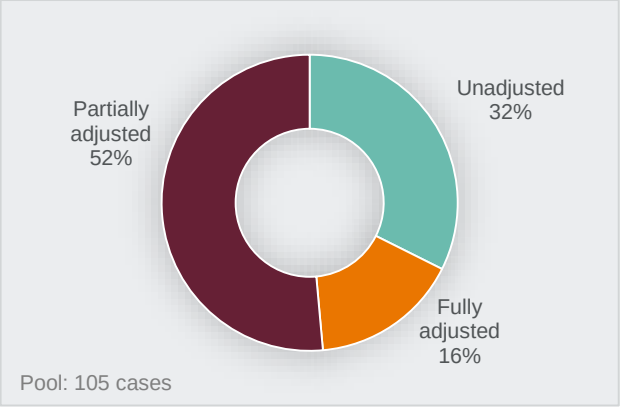


Figure 13: Adjustments of costs in all decisions against Central European respondent States

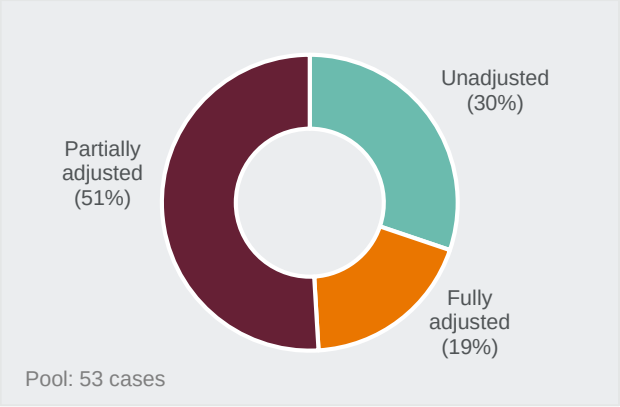


Figure 14: Adjustments of costs in all decisions against respondent States in the Balkans

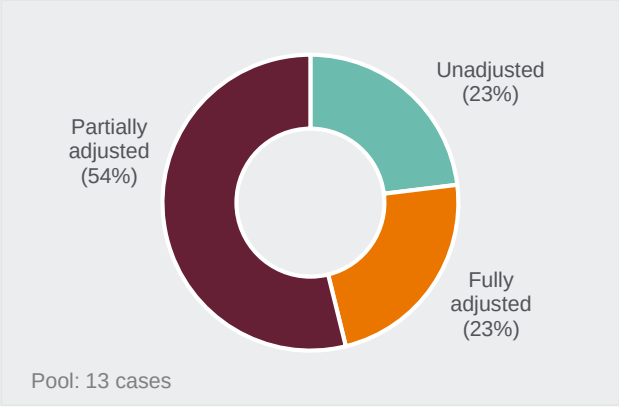


Figure 15: Adjustments of costs in all decisions against Eastern European respondent States

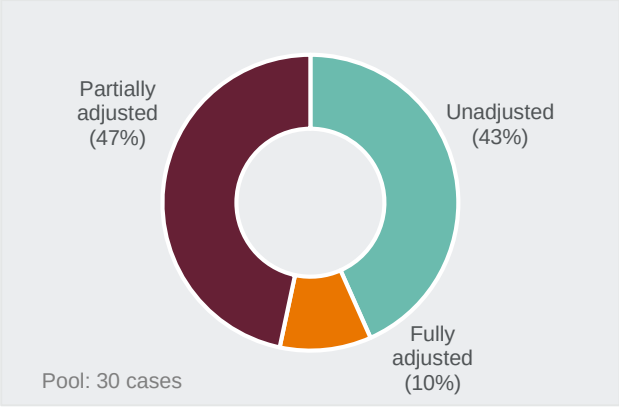


Figure 16: Adjustments of costs in all decisions against Baltic respondent States

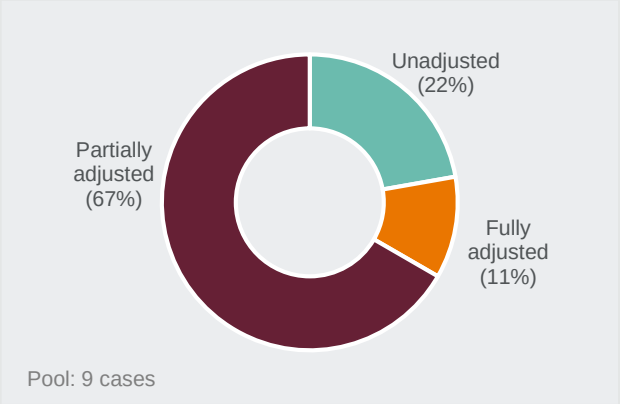
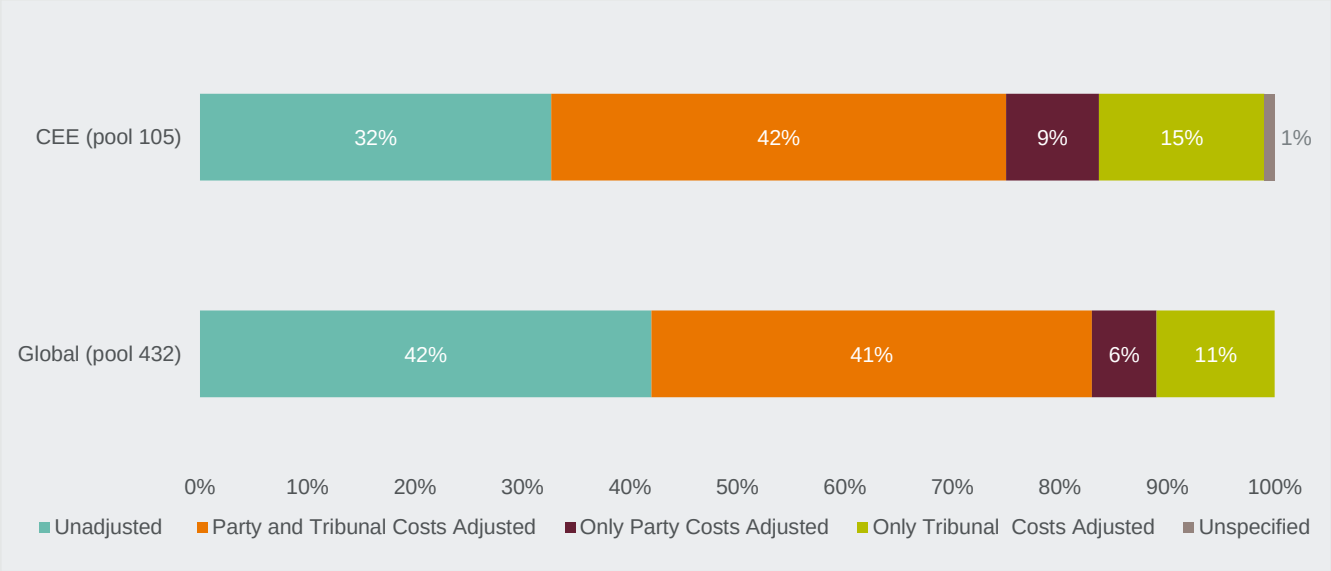


Figure 17 shows a similar percentage of costs adjustment orders in respect of both party and tribunal costs at the CEE and global level. Only tribunal or only party adjusted costs orders are more frequent in CEE cases than globally.

Figure 17: Number of awards with adjusted costs orders



Successful investors in CEE cases are much more likely to receive an adjusted costs order (82%) than successful respondent States (61%). Note however that this gap significantly narrowed in recent years as we observed in the Global study. Taking into account the global numbers, from June 2017 to May 2020, 76% of successful parties (including both investors and respondent States) received an adjusted costs order.

Tribunals generally scrutinise the reasonableness of costs claimed by parties. In total, only 17 fully adjusted costs orders were issued in cases against CEE respondent States. Although one would expect fully adjusted costs orders to be issued in cases where one party prevails in all of its claims or objections, the data shows that this is not always the case.[47] Nevertheless, some successful respondent States received a fully adjusted costs order despite losing the jurisdictional phase but prevailing on merits.

[47] See eg *Energoalians TOB v. Republic of Moldova*, UNCITRAL, Award, 23 October 2013 or *WJ Holding Limited v. Transdniestrian Moldovan Republic*, ICC Case No. 21717/MHM, Award, 6 June 2018.

Such scrutiny is to be welcomed, as it may deter excessive spending. Successful investors are 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.[48]

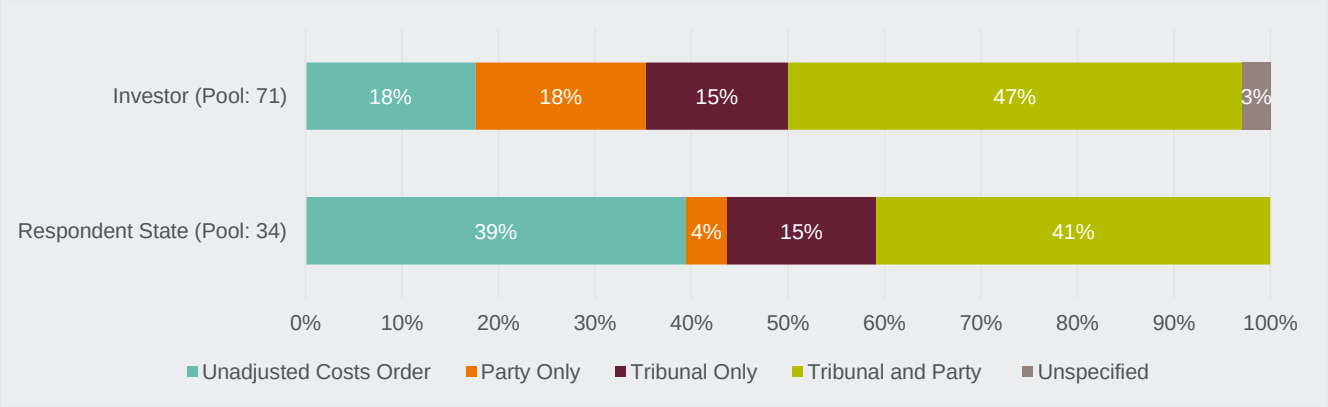
Figure 18: Costs orders – successful investors

	CEE		Pool	Global June 2017 – May 2020		Pool
When investor wins						
Adjusted Costs Award	28	82%	34	38	76%	50
Unadjusted Costs Award	6	18%	34	10	20%	50
Party only	6	18%	34	1	2%	50
Tribunal only	5	15%	34	5	10%	50
Party and tribunal	16	47%	34	32	64%	50
Unspecified	1	3%	34	0	0%	50
When investor wins – Adjusted costs awards						
Partial	23	82%	28	34	89%	37
Full	5	18%	28	4	11%	37

Figure 19: Costs orders – successful respondent States

	CEE		Pool	Global June 2017 – May 2020		Pool
When State wins						
Adjusted costs award	43	61%	71	41	73%	56
Unadjusted costs award	28	39%	71	15	27%	56
Party only	3	4%	71	3	5%	56
Tribunal only	11	15%	71	9	16%	56
Party and tribunal	29	41%	71	29	52%	56
Unspecified	0	0%	71	0	0%	56
When State wins – Adjusted costs awards						
Partial	31	72%	43	30	73%	41
Full	12	28%	43	11	27%	41

Figure 20: Adjusted costs orders by successful party in cases against CEE respondent States



[48] Fully adjusted costs orders were issued in just 18% of cases in which investors prevailed. They were issued in 28% of cases in which respondent States prevailed.

Figure 21: Full and partial adjusted costs orders (successful investors) in cases against CEE respondent States

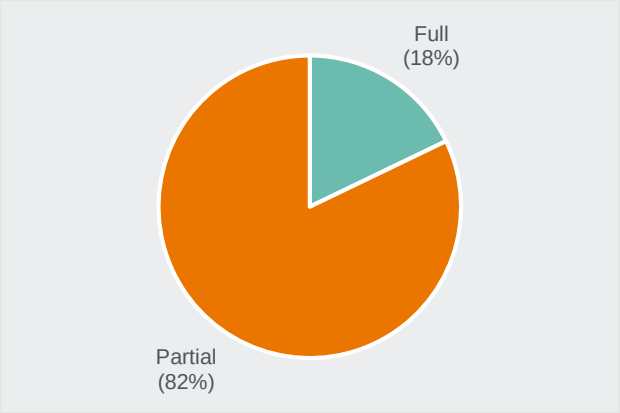
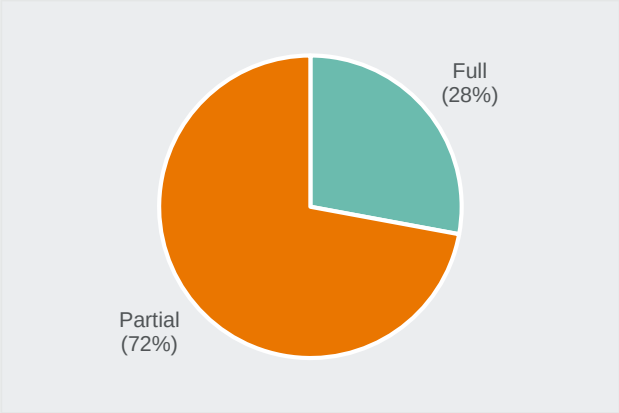


Figure 22: Full and partial adjusted costs orders (successful investors) in cases against CEE respondent States



UNCITRAL tribunals are more likely to issue fully adjusted costs orders than ICSID tribunals. This can be seen both at the CEE as well as global level. However, since June 2017, over 75% of costs order were adjusted under both ICSID and UNCITRAL Rules.

Figure 23: Adjusted costs orders by arbitration rules in cases against CEE respondent States

	CEE		Pool	Datapoint	CEE		Pool
Adjusted Costs Order (ICSID)	29	58%	50	Adjusted Costs Order (UNCITRAL)	29	76%	38
Unadjusted Costs Award (ICSID)	21	42%	50	Unadjusted Costs Award (UNCITRAL)	9	24%	38
Party Only (ICSID)	5	10%	50	Party Only (UNCITRAL)	2	5%	38
Tribunal Only (ICSID)	2	4%	50	Tribunal Only (UNCITRAL)	8	21%	38
Party and Tribunal (ICSID)	21	42%	50	Party and Tribunal (UNCITRAL)	19	50%	38
Unspecified (ICSID)	1	2%	50	Unspecified (UNCITRAL)	0	0%	38
Partial (ICSID)	23	79%	29	Partial (UNCITRAL)	20	69%	29
Full (ICSID)	6	21%	29	Full (UNCITRAL)	9	31%	29
	Global		**Pool**		**Global**		**Pool**
Adjusted Costs Order (ICSID)	140	49%	287	Adjusted Costs Order (UNCITRAL)	30	28%	106
Unadjusted Costs Award (ICSID)	147	51%	287	Unadjusted Costs Award (UNCITRAL)	76	72%	106
Party Only (ICSID)	19	7%	287	Party Only (UNCITRAL)	6	6%	106
Tribunal Only (ICSID)	20	7%	287	Tribunal Only (UNCITRAL)	19	18%	106
Party and Tribunal (ICSID)	107	37%	287	Party and Tribunal (UNCITRAL)	50	47%	106
Unspecified (ICSID)	1	0%	287	Unspecified (UNCITRAL)	0	0%	106
Partial (ICSID)	124	84%	147	Partial (UNCITRAL)	59	78%	76
Full (ICSID)	23	16%	147	Full (UNCITRAL)	17	22%	76

Figure 24: Adjusted costs orders by arbitration rules in cases against CEE respondent States

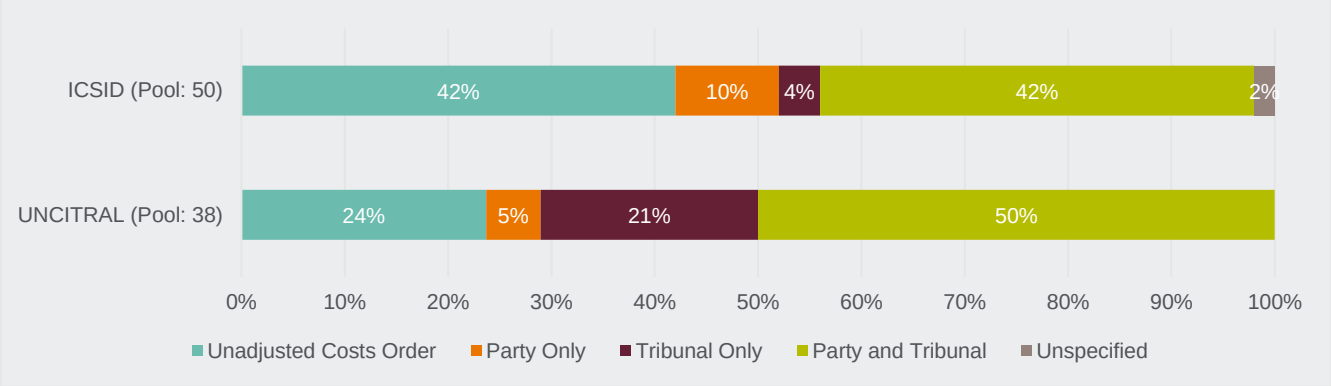


Figure 25: Full and partial adjusted costs orders (ICSID in cases against CEE respondent States

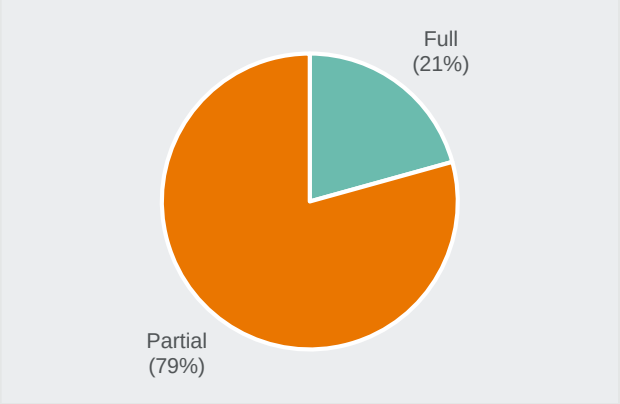
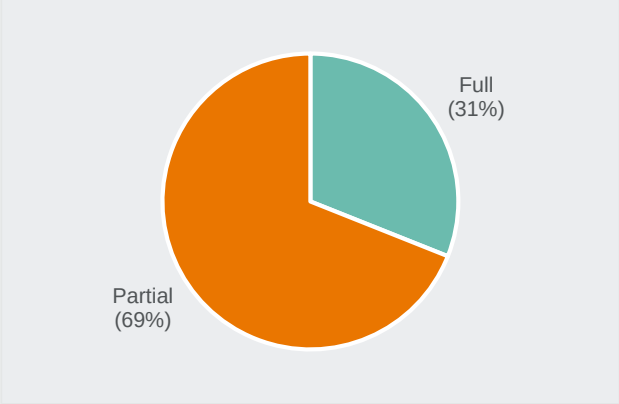
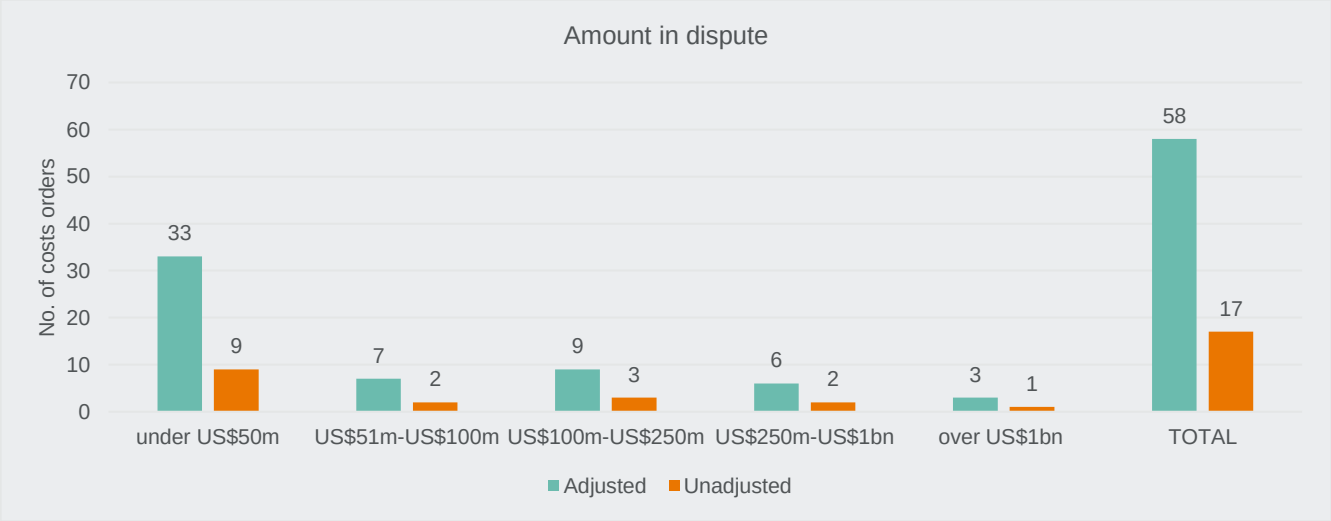


Figure 26: Full and partial adjusted costs orders (UNCITRAL) in cases against CEE respondent States



In the Global study, we observed that tribunals have been most willing to make unadjusted costs orders in smaller claims when the amount in dispute falls under US$50m (49 out of 113 costs orders were unadjusted). However, such trend is not observed in cases against CEE respondent States. In those cases, adjusted costs orders are at least three times more frequent than unadjusted orders, regardless of the amount in dispute. Unadjusted costs orders are highest in cases with an amount in dispute under US$50m, which can be explained by the prevalence of such disputes in the CEE region.

Figure 27: Costs orders by amount in dispute in cases against CEE respondent States



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4.3 Costs orders

As noted in Section 4.1 above, costs incurred by parties in cases against CEE respondent States are comparably lower than the overall mean and median costs of parties. As a result, the mean amount of costs awarded by tribunals in cases against CEE respondent States is also lower compared to the global numbers (mean costs order being US$3.5m and median costs order being US$1.8m).

Figure 28: Average costs orders in cases against CEE respondent States

	Central Europe	Pool	Balkans	Pool	Baltics	Pool	Eastern Europe	Pool	CEE combined	Pool
Mean Costs Order	US$1.9m	30	US$2.1m	9	US$1.9m	7	US$1.0m	10	US$1.8m	56
Median Costs Order	US$920.4k	30	US$1.1m	9	US$1.7m	7	US$453.5k	10	US$852.3k	56

A comparison of these figures with mean and median party costs in Section 4.1 shows a significant difference between claimed and actually awarded party costs. It is generally not clear from the costs orders how tribunals arrive at the amount of costs to be recovered by the winning party, with only certain factors or principles guiding their decision being mentioned. Some tribunals do not give any reasons for their decision notwithstanding the significance of the legal fees incurred.

Tribunals give various reasons for reducing costs awarded to the successful party. In *EURAM v. Slovakia*, the tribunal noted that Slovakia prevailed only in some of its jurisdictional objections, that both parties exceeded the scope of the submissions allowed by the tribunal and that the costs claimed by Slovakia were far in excess of those of the Claimant.[49] Slovakia was thus awarded just 19% of its costs. Relative success of Poland in its jurisdictional objections was given as the reason for reducing the costs awarded to the claimant also in *Griffin v. Poland*.[50] In *Oostergetel v. Slovakia*, the tribunal highlighted the discrepancy between the amounts expended by the respective parties. It considered that it would not be fair to let the losing party – Oostergetel - pay for Slovakia's decision to invest such a high amount in its legal representation. Consequently, the successful respondent State was awarded costs similar to those incurred by the claimants.[51] Fraudulent misrepresentation by the losing party was considered an important factor in costs allocation in *Plama v. Bulgaria*.[52]

As observed in Section 4.1 above, there is a significant difference in costs of ICSID and UNCITRAL proceedings. The mean costs awarded by ICSID tribunals are almost double those awarded by UNCITRAL tribunals. The same is true of median figures.

Figure 29: Costs awarded by arbitration rules in cases against CEE respondent States

Rules	Mean	Median	Pool
ICSID	US$2.7m	US$1.7m	22
SCC	US$723.7k	US$63.4k	7
UNCITRAL	US$1.4m	US$724.1k	24
Other	US$494.2k	US$367k	3

The Global study showed that bifurcation of proceedings did not appear to affect the amount of costs awarded to the winning party. The median amount of costs awarded remained at around US$2m regardless of bifurcation. However, looking solely at cases against CEE respondent States, the difference between costs awarded in bifurcated and non-bifurcated proceedings is significant. The mean amount of costs awarded in bifurcated proceedings is US$3m as compared to US$1.5m for non-bifurcated proceedings. Looking at median figures, successful parties are awarded almost three times more in bifurcated proceedings than in non-bifurcated proceedings.

49 *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on costs, paras 53-63.
50 *GPF GP S.à.r.l v. Poland*, SCC Case No. 2014/168, Final Award, 29 April 2020, paras 599-603.
51 *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, paras 336-340.
52 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras 321-322.

Figure 30: Costs awarded by outcome of bifurcation requests in cases against CEE respondent States

	Mean costs awarded	Median costs awarded	Pool
Bifurcated	US$3m	US$1.5m	11
Non-bifurcated	US$1.5m	US$544.9k	45

Figure 31 shows the correlation between the length of proceedings and awarded costs. Cases against CEE respondent States are marked in red. The global figures confirmed that, apart from a few exceptions, winning parties are generally more likely to recover a higher sum of costs in longer proceedings. However, with a few exceptions, the CEE cases are unusually located low on the vertical axis. This shows that awarded costs are generally lower than the global average notwithstanding the duration of the proceedings.

Figure 31: Costs ordered by length of proceedings in cases against CEE respondent States

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.

Respondent States prevailed in approximately 54% of the cases which were analysed in the Global study. In the 105 cases against CEE respondent States analysed in this study, respondent States prevailed in 65% of the cases. This is mainly due to the extraordinarily high success rate of the Central European (73%, with 51% cases won on the merits and 22% won on jurisdiction) and Balkan States (69%, with 38% cases won on the merits and 31% won on jurisdiction).

Figure 32: Outcome of investor-State proceedings (all cases against CEE respondent States)

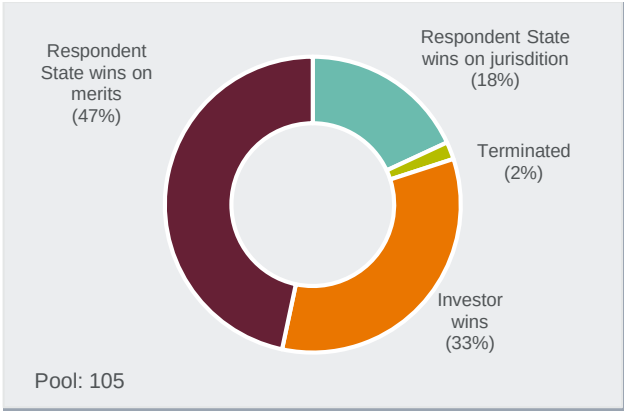


Figure 33: Outcome of investor-State proceedings (all cases against Central European respondent States

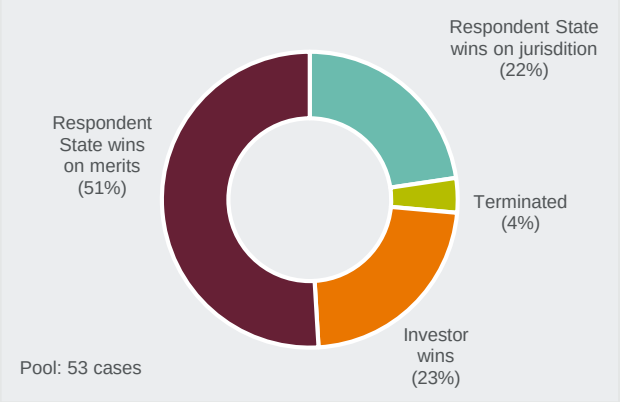


Figure 34: Outcome of investor-State proceedings (all cases against respondent States in the Balkans)

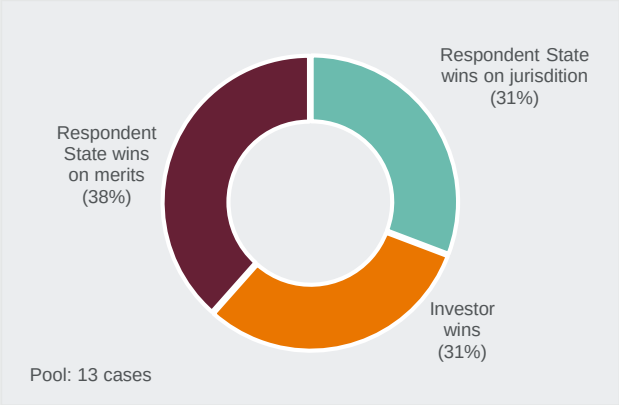


Figure 35: Outcome of investor-State proceedings (all cases against Eastern European respondent States)

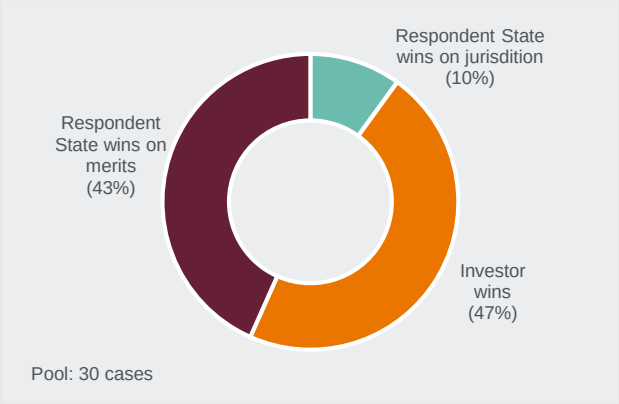
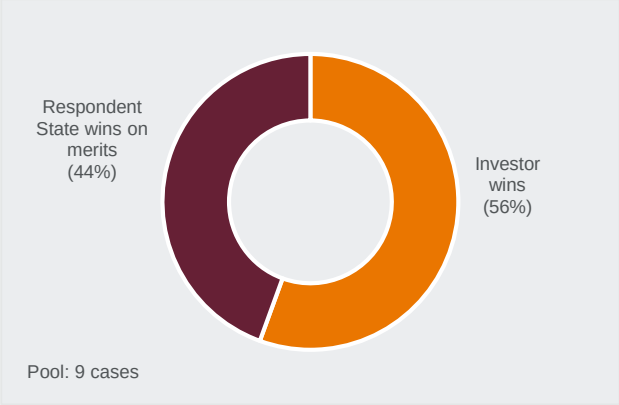


Figure 36: Outcome of investor-State proceedings (all cases against respondent States in the Baltics)



The amount claimed in cases against CEE respondent States is well below the global average. In the 75 CEE cases where the relevant data was available, the mean amount claimed was US$248.6m compared to the global

average of US$1.1bn. Even after excluding *Yukos*, the global mean amount claimed is US$817.3m, which is still three times more than the CEE average.

Significant differences remain also using median figures. The median amount claimed in CEE cases (US$36.3m) amounts to just one third of the median amount claimed globally (US$110.3m). Several CEE cases concerned amounts in dispute around US$2m or less (the extreme being three of the Bogdanov cases against Moldova, which concerned claims worth less than US$170,000),[53] showing that investors are willing start investment-treaty proceedings despite the relatively low value of their claims.

Also of significance are the difference between individual CEE sub-regions. If it were not for some high-value claims against Eastern European respondent States, the mean amount claimed would be substantially lower. For instance, the amount in dispute in *Micula v. Romania* exceeded the mean amount in dispute in CEE cases more than eight times. The amount in dispute in *Generation Ukraine v. Ukraine* was more than 28 times the mean amount in CEE cases.

Figure 37: Amounts claimed by CEE sub-region

	Central Europe	Pool	Balkans	Pool	Baltics	Pool	Eastern Europe	Pool	Combined	Pool
Mean Amount Claimed	US$158.6m	32	US$62.3	10	US$60.1	9	US$516.8	24	US$248.6	75
Median Amount Claimed	US$65.3	32	US$21.9	10	US$31.1	9	US$41.5	24	US$36.3m	75

The following graph shows the relationship between the amount claimed by investors and the total party costs in cases published between June 2017 and May 2020. Cases against CEE respondent States are again marked in red. It confirms that the majority of CEE cases concern comparably smaller amounts in dispute and parties incur lower legal fees.

Nevertheless, exceptions exist where substantial costs are incurred on 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. In *Plama v. Bulgaria*,[54] parties spent almost US$18m in total in circumstances where the amount claimed was US$122.3m. High costs were incurred due to, among others, bifurcation of the proceedings, long duration of the case, failure to disclose important information by one the parties, misrepresentation in the merits phase and the delay and expense associated with provisional measures requests.[55] In *EDF v. Romania*,[56] the parties' total costs amounted to almost US$27m while the claimant sought US$132.6m in damages. The high costs were partially caused by delayed appointment of the presiding arbitrator and long-drawn document production phase.[57] Similarly, in *Rompetrol v. Romania*,[58] parties' total costs amounted to almost US$20m whereas the amount in dispute was US$139.4m. In that case, the high costs were attributed to certain issues that arose in the document production phase, an unmeritorious challenge to the claimant's counsel as well as bifurcation, with hearings involving examination of several witnesses and experts.[59]

53 See eg *Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V 2015/014, *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova (I)*, SCC Case No. 093/2004, *Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova (IV)*, SCC Case No. V091/2012, *Yury Bogdanov v. Republic of Moldova (III)*, SCC Arbitration No. V (114/2009).

54 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24.

55 Ibid., paras 318-321.

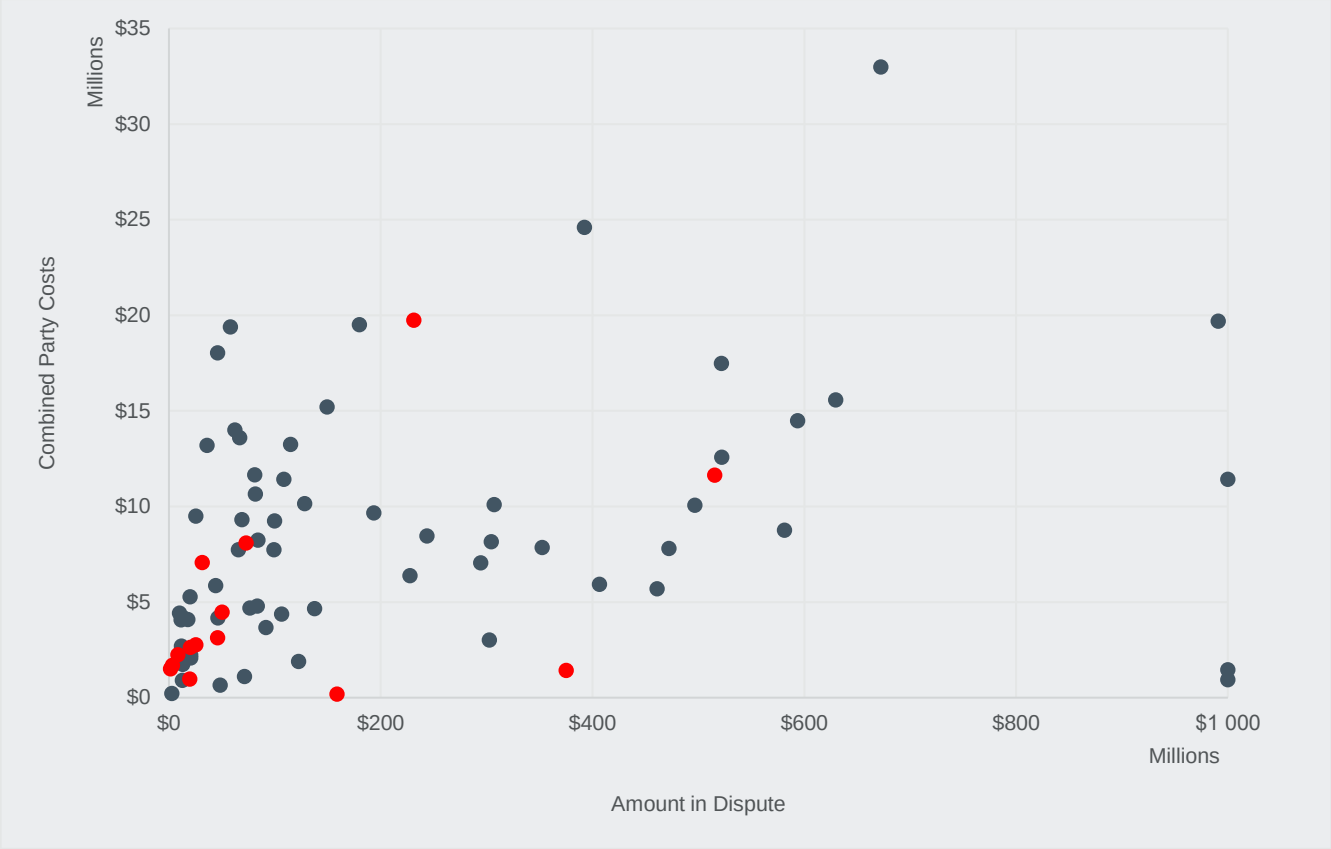
56 *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13.

57 Ibid., paras 16-29.

58 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3.

59 Ibid., paras 13-15, 297.

Figure 38: Costs in proceedings by amount in dispute



The mean amount in dispute is higher in cases in which respondent States prevail. However, median figures show that amounts in dispute are significantly higher when the investor wins than when it loses. This corresponds to the trend in median figures in decisions published since January 2013 that was observed in the Global study.

Figure 39: Amounts in dispute by successful party

	CEE	Pool	Global 2017 - 2020	
Mean amount claimed where claimant wins	US$214.5m	30	US$1.8bn	49
Median amount claimed where claimant wins	US$60.2m	30	US$227.7m	49
Mean amount claimed where respondent wins	US$271.3m	45	US$287m	46
Median amount claimed where respondent wins	US$30.9m	45	US$65.8m	46

The mean amount awarded to a successful investor in cases against CEE respondent States is US$61.5m. This is more than seven times lower than the mean amount awarded in all cases that were the subject of the Global study (US$437.5m). However, when *Yukos* is excluded from the calculations, the difference is less significant (with mean damages awarded globally amounting to US$169.5m). When the amount of damages claimed is compared with the amount of damages awarded, broadly the same percentage reduction (63%) is observed in the CEE cases as is the case globally.

There are numerous reasons why damages are reduced, but they always depend on the particular circumstances of the case. For instance, in *UAB v. Latvia* the tribunal deemed the claimant's case on lost profits focusing on proven losses as unfounded. This is because those losses had many causes and did not flow solely from breaches of the BIT, which led to a significant reduction in

the amount of compensation.[60] Failure to submit evidence relevant to the key question of causation resulted in rejection of the lost profits claim and subsequently substantial haircut also in *WJ Holding v. Transdniestrian Moldovan Republic*.[61] In another case where damages were significantly reduced, the tribunal disagreed with the valuation method of shares forming the investment and instead derived the amount of compensation from the initial share purchase price which the claimant had paid.[62]

Substantial differences exist between the CEE sub-regions. Cases against the Central European States involve the highest amount in dispute (in median figures, see above Figure 37) and also highest damages awarded (in both mean and median figures).

Figure 40: Average amounts of damages claimed and awarded

	CEE	Pool	Global	Pool
Mean damages claimed	US$248.6	75	US$1.16bn (excl. Yukos: US$817.3m)	329
Mean damages awarded	US$61.5m	31	US$437.5m (excl. Yukos: US$169.5m)	186
Mean percentage awarded for the amount claimed	37%	29	37%	171
Median damages claimed	US$36.3m	75	US$110.3m	329
Median damages awarded	US$9.8m	31	US$21.4m	186
Median percentage awarded for the amount claimed	35%	29	33%	171

Figure 41: Average amounts of damages claimed and awarded (CEE sub-regions)

	Central Europe	Pool	Balkans	Pool	Baltics	Pool	Eastern Europe	Pool
Mean damages claimed	US$158.6m	32	US$62.3m	10	US$60.1m	9	US$516.8m	24
Mean damages awarded	US$151.9m	10	US$8.9m	5	US$6.7m	4	US$26.4m	12
Mean percentage awarded for the amount claimed	48%	9	26%	5	51%	4	28%	11
Median damages claimed	US$65.3m	32	US$21.9m	10	US$31.1m	9	US$41.5m	24
Median damages awarded	US$31.3m	10	US$8.0m	5	US$2.7m	4	US$8.7m	12
Median percentage awarded for the amount claimed	40%	9	5%	5	48%	4	19%	11

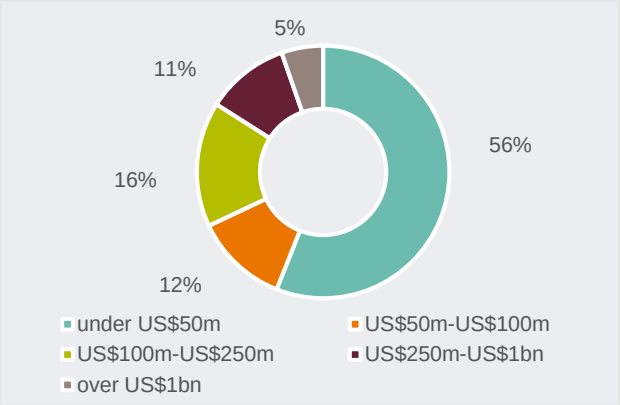
Costs of the proceedings and size of the dispute

We have adopted the same approach as in the Global study and divided 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 75 cases against CEE respondent States where data is available, 56% of cases concern claims below US$50m. There are just four cases with an amount in dispute exceeding US$1bn.[63] This confirms that cases against CEE respondent States generally involve lower amounts in dispute.

60 *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, paras 1130-1145.
61 *WJ Holding Limited v. Transdniestrian Moldovan Republic*, ICC Case No. 21717/MHM, paras 249-269.
62 *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, paras 607-609.
63 *Ioan Micula, Viorel Micula and others v. Romania [II]*, ICSID Case No. ARB/14/29, *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4.

In comparison, the global numbers show that the percentage of cases with an amount in dispute below US$50m was just 34%. 13% of cases concerned amount in dispute exceeding US$1bn.

Figure 42: Share of cases by amount in dispute



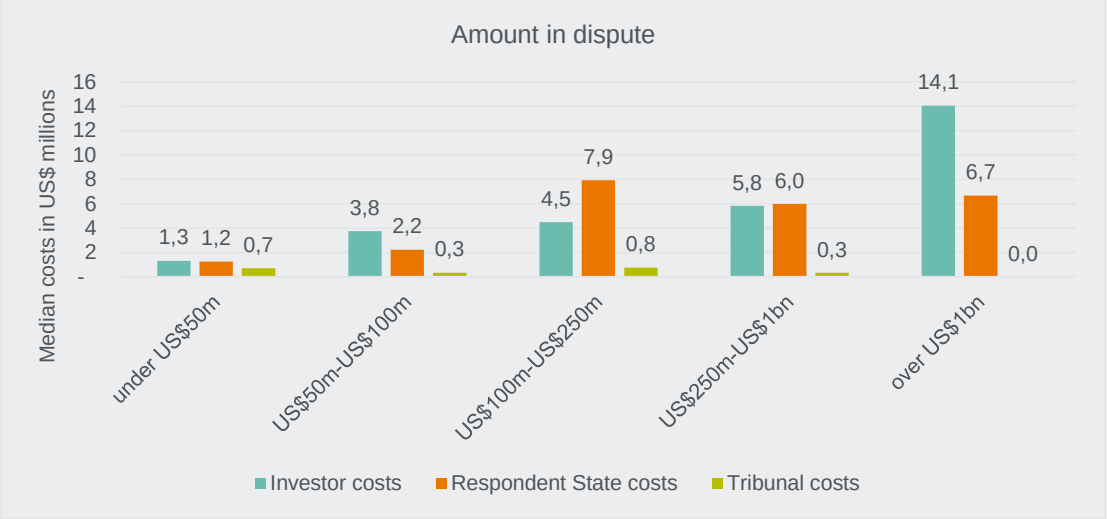
The table at Figure 43 below confirms the conventional understanding that the larger the amount in dispute, the higher the costs incurred by both investors and respondent States. The Global study showed that the mean investor costs for claims above US$1bn can be as high as seven times as those for low-value claims of under US$50m. Similar trends can be observed with respondent State costs and tribunal costs. The figures concerning the CEE cases are distorted by the small number of high-value claims. There are just nine cases that contain data on costs of investors and only ten cases that contain data on costs of respondent States incurred on claims over US$250m.

Nevertheless, the cases against CEE respondent States at least show a large gap between cases with an amount in dispute below US$50m and between US$100m and US$250m. Again, although high-value claims do not necessarily have to involve complex factual and legal issues (which will naturally lead to higher legal costs), disputes worth billions of dollars can become more complicated and parties may be more willing to spend substantial legal costs given the high amount at stake.

Figure 43: Average costs by the size of claims

Amount claimed		Claimant costs	Pool	Respondent costs	Pool
under US$50m	**Mean**	US$1.9m	27	US$1.0m	28
	Median	US$1.3m	27	US$1.2m	28
US$50m-US$100m	**Mean**	US$3.8m	7	US$2.7m	5
	Median	US$3.8m	7	US$2.2m	5
US$100m-US$250m	**Mean**	US$5.1m	11	US$7.7m	12
	Median	US$4.5m	11	US$7.9m	12
US$250m-US$1bn	**Mean**	US$8.2m	7	US$7.0m	7
	Median	US$5.8m	7	US$6.0m	7
over US$1bn	**Mean**	US$14.1m	2	US$7.2m	3
	Median	US$14.1m	2	US$6.7m	3

Figure 44: Median investor costs, respondent State costs and tribunal costs by amount in dispute



In the Global study, we observed 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 around the world receive 51% of the claimed amount (mean). This percentage falls to 26% for claims above US$250m.

These observations are also borne out in the CEE cases. In claims for less than US$100m, successful investors are likely to receive about one half of the claimed amount. However, this percentage falls significantly for high-value claims.

Figure 45: Average amounts of damages and costs claimed and awarded by size of dispute (cases against CEE respondent States)

		Amount claimed	Amount awarded	% amount awarded out of the amount claimed	Costs award
under US$50m	Mean	US$17.1m	US$8.1m	47%	US$1.3m
	Median	US$16.1m	US$5.3m		US$430.0k
US$50m-US$100m	Mean	US$82.4m	US$42.8m	52%	US$3.0m
	Median	US$83.7m	US$37.3m		US$1.9m
US$100m-US$250m	Mean	US$151.6m	US$15.1m	10%	US$1.7m
	Median	US$141.5m	US$7.9m		US$2.1m
US$250m-US$1bn	Mean	US$451.7m	US$141.9m	31%	US$2.4m
	Median	US$390.3m	US$144.5m		US$1.5m
over US$1bn	Mean	US$2.9bn	US$489.6m	17%	US$7.6m
	Median	US$1.8bn	US$489.6m		US$7.6m

Nevertheless, there are examples of a substantial reduction in damages also in some low-value claims. In *Lemire v. Ukraine*, the claimant was awarded just US$8.7m as compared to US$46.7m originally claimed.[64] In *Arif v. Moldova*, the tribunal awarded the claimant just US$2.8m as compared to US$36.4m claimed.[65] Similarly, in *Swisslion v. FYROM*, the claimant was awarded just US$430,000 as compared to US$23.4m claimed on the grounds that the claims for denial of justice and expropriation were dismissed on the merits and the respondent State was accountable only for reputational damage caused by certain actions of local authorities.[66]

[64] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18.
[65] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23.
[66] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, paras 337-350.

6. Duration of proceedings

Of the 104 published cases against CEE respondent States in respect of which data is available, the mean length of proceedings is three years and eight months. This means that proceedings against CEE respondent States are, on average, eight months shorter than the global average. However, notably the increase in median length is less significant (by less than six months).

Figure 46: Average length of investor-State proceedings

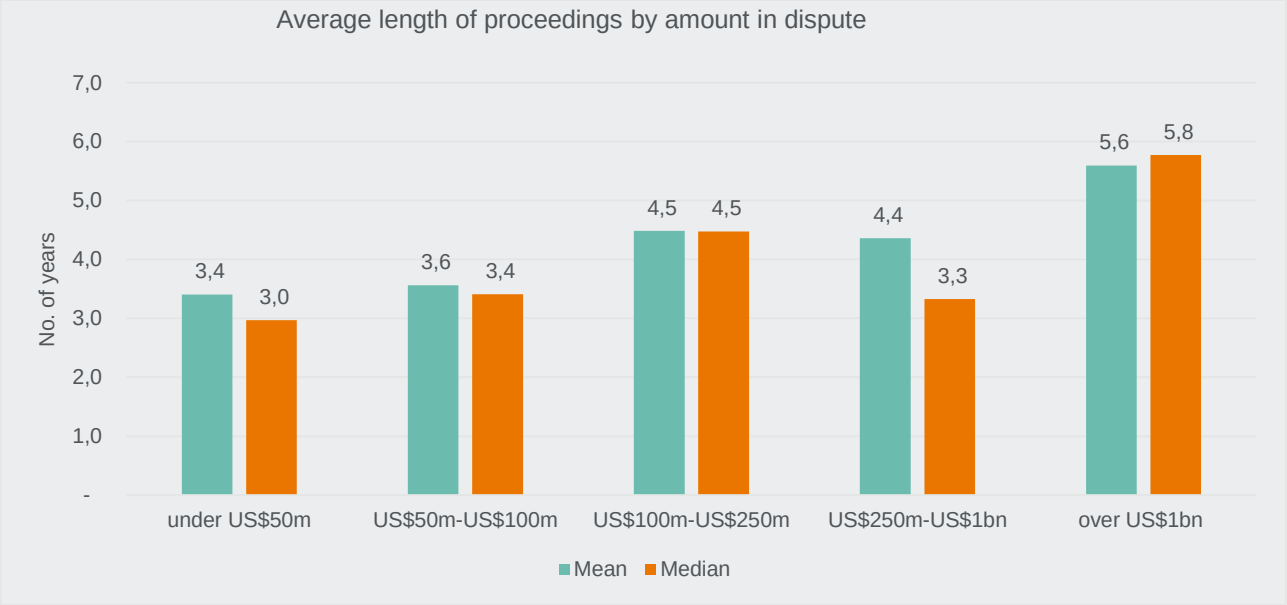
	Mean length	Median length	Pool
Central Europe	3.6 years	3.2 years	53
Balkans	4.1 years	3.4 years	12
Eastern Europe	3.7 years	3.6 years	30
Baltics	3.2 years	3.2 years	9
CEE	3.7 years	3.3 years	104
Global	4.4 years	3.8 years	434

Duration of proceedings should correlate with the amount in dispute. There is indeed a difference in mean duration of cases with amount in dispute below US$100m (with the longest duration of 3.6 years) and cases with amount in dispute over US$100m (up to 4.5 years excluding some high-value cases over US$1bn). Nevertheless, similarly to the Global study, the differences are not that stark on the median figures. Parties cannot expect that claims for high amounts will necessarily take longer than low-value claims. For example, the median duration of cases over US$250m is shorter than the median duration of cases over US$100m.

For instance, in *CME v. Czech Republic*[67] the proceedings took slightly over 3 years, although the claim was for USD $495m. Similarly, in *Eureko v. Poland*[68], which involved a claim of over USD$700m, the tribunal issued its award in less than three years (although the quantum stage was deferred and the case was subsequently settled). In *Vigotop v. Hungary*[69], the tribunal dismissed the claimants' USD$395m claim in three years.

To the contrary, the proceedings in *Antaris Solar v. Czech Republic*[70] took almost five years although the claim was for only USD$14.3m. In *Tradex v. Albania*[71], the tribunal took more than four years to find Albania liable in a claim for approximately USD $2.7m.

Figure 47: Average length of proceedings by amount in dispute

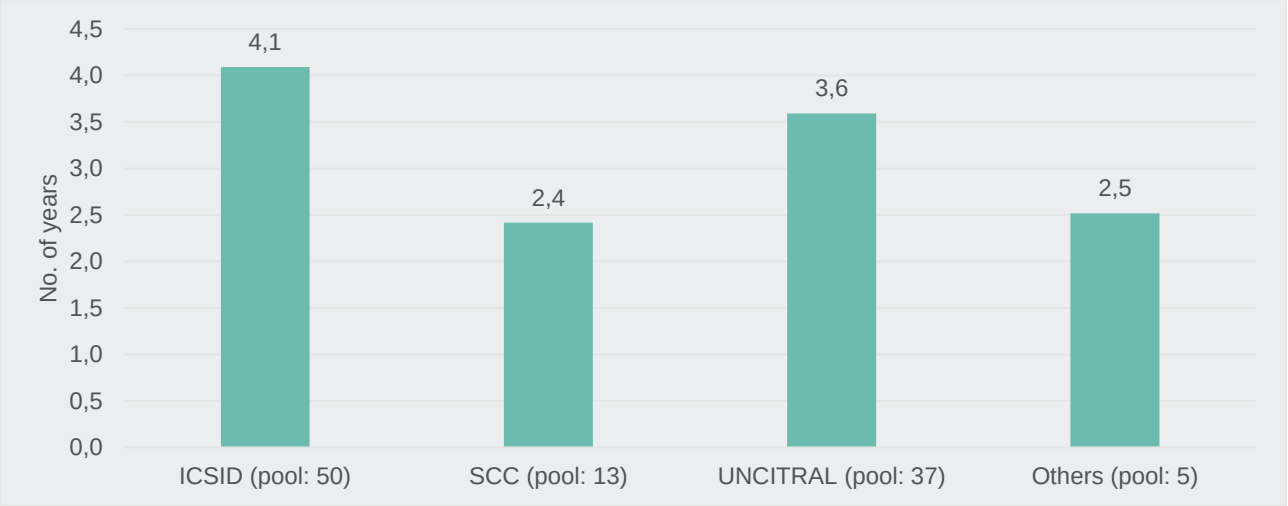


Proceedings against CEE respondent States under the ICSID Rules take the longest, although UNCITRAL proceedings are shorter only by six months. The mean length of ICSID proceedings is approximately 4.1 years while the mean length of UNCITRAL proceedings is approximately 3.6 years. Similarly, as with the global figures, the shortest investor-State proceedings are administered by the SCC.[72] With one exception,[73] all SCC cases were completed in a shorter time-frame than the mean CEE average length of 3.7 years. However, the Bogdanov cases against Moldova are again at play here as they shortened the mean and median duration of the SCC proceedings; with some tribunals having issued their award in less than a year.[74]

Figure 48: Mean and median length of proceedings by arbitration rules

Arbitration rules	Mean length	Median length	Pool
ICSID	4.1 years	3.7 years	50
UNCITRAL	3.6 years	3.3 years	37
SCC	2.4 years	2.3 years	13
Others	2.5 years	2 years	5

67 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL.
68 *Eureko B.V. v. Republic of Poland*, UNCITRAL.
69 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22.
70 *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01.
71 *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2.
72 The small pool of SCC cases (13) can however lead to distortion.
73 *GPF GP S.à.r.l v. Poland*, SCC Case No. 2014/168.
74 *Yury Bogdanov v. Republic of Moldova (III)*, SCC Case No. V (114/2009) and *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova (I)*, SCC Case No. 093/2004 took less than a year. In *Yury Ghenadevich Bogdanov v. Government of the Republic of Moldova (V)*, SCC Case No. V 2012/162, the tribunal issued its award in less than two years.



Finally, significant differences between the CEE sub-regions can be found when looking at mean duration of ICSID and UNCITRAL proceedings.

Figure 49: Mean length of ICSID proceedings by CEE sub-regions

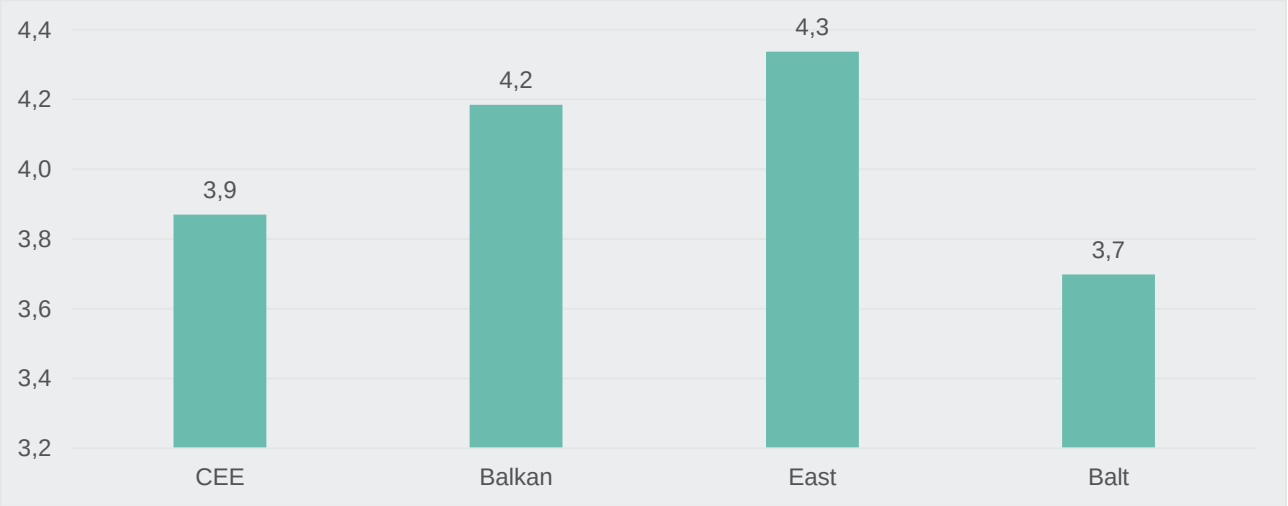
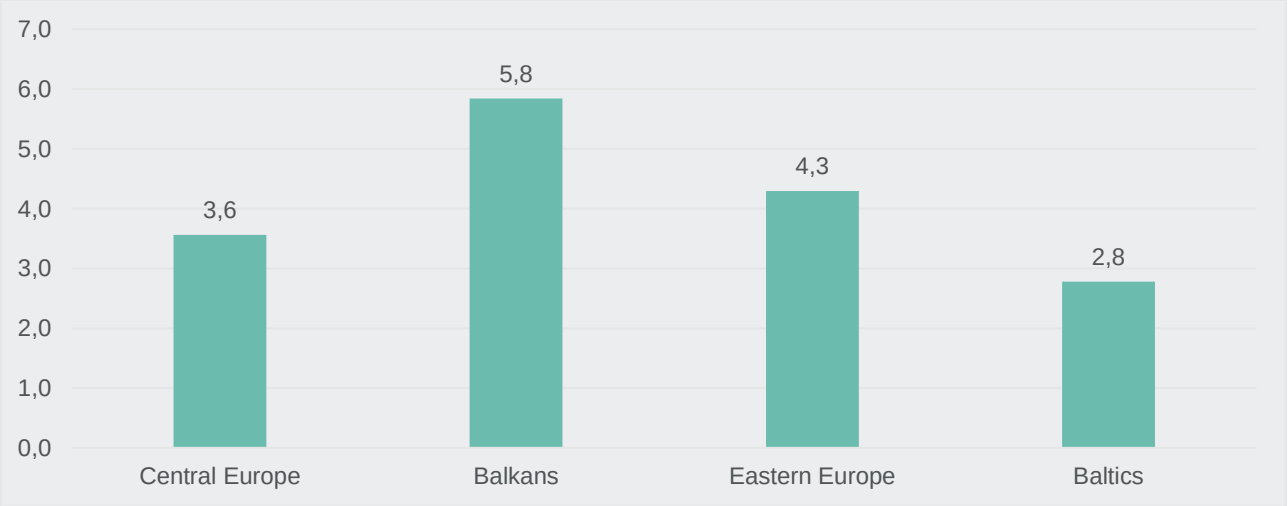


Figure 50: Mean length of UNCITRAL proceedings by CEE sub-regions



Appendix 1

Methodology

This study was conducted in four phases:

Phase 1:

This study builds on the Global study created by Allen & Overy on costs, damages and duration in investor-State arbitration 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 the Global study. In the 2014 iteration of the Global study, 221 decisions were located with a cut-off date of 31 December 2012. An additional 140 awards were covered in the 2017 iteration of the Global study with a cut-off date of 31 May 2017. The 2021 iteration of the Global study (issued in cooperation with the British Institute of International and Comparative Law) added another 110 awards with a cut-off date of 31 May 2020.

The 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.

The authors of this study then extracted data concerning awards involving selected countries from four CEE sub-regions (Central Europe, Balkans, Baltics and Eastern Europe) as respondent States. Unlike in 2012, 2017 and 2021, authors do not analyse annulment decisions as only a very small number of those concerns respondent States from the CEE region. Individual sub-regions include the following states:

- Balkans: Albania, Bosnia, Bulgaria, Croatia, FYROM, Montenegro, Serbia, Slovenia
- Baltics: Estonia, Latvia, Lithuania
- Central Europe: Czech Republic, Hungary, Poland, Slovakia
- Eastern Europe: Moldova, Romania, Ukraine

Phase 2:

At phase 2, the authors set the research questions focused on regional specifics, 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 (ie 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 (ie 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 2021 Study and select the figures which appear most likely to be accurate based on a reading of the relevant award. As with the 2021 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” (ie costs incurred in the present arbitral proceedings) and “damages” (ie 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 proceedings 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".
Global study	Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, "2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration", Allen & Overy and BIICL, London, 2021
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 (ie 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

Matthew Hodgson
Partner

Matthew Hodgson is an international arbitration partner with a particular focus on investment treaty disputes. He has represented both investors and States (including Azerbaijan, Cambodia, Korea, the Kyrgyz Republic, Pakistan and Poland) in 15 investment treaty arbitrations. His experience includes acting for 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 also regularly sits as arbitrator. Who's Who - International Arbitration 2019 says "[Matthew] *stands out as a "deeply impressive lawyer and advocate*". Chambers 2020 says "*He has a real knack for taking a bird's-eye view and thinking strategically and laterally about a problem, and has a way of making the academic practical*."

Lucia Raimanová
Partner

Lucia Raimanová is an international arbitration partner and head of Allen & Overy's arbitration practice in the CEE. Lucia is a solicitor-advocate of England & Wales with over 15 years of experience in high-stakes international commercial and investment treaty arbitration across the world. She has represented, and appeared as advocate for, both States and corporates in numerous disputes arising out of bilateral investment treaties, the Energy Charter Treaty and commercial contracts governed by a variety of laws. Lucia's investment treaty experience includes successfully defending Pakistan in two related investment treaty claims (and securing an order requiring the claimants to pay 90% of Pakistan's costs). She also brought (and recently settled) the first in a series of cases against Croatia arising out of the forced conversion of Swiss franc loans. The total value of disputes Lucia has handled exceeds US$ 20billion.

Lucia currently serves on the coveted Board of the Vienna International Arbitral Centre ('VIAC'), and helped to draft its recently launched VIAC Rules of Investment Arbitration and Mediation. She also sits as arbitrator. Who's Who Legal 2022 says she is "[a] very strong advocate with a great brain to see the best route to success" and has an "*outstanding knowledge of the CEE region and impressive experience across commercial and investment arbitration*".

Daniel Hrčka
Associate

Daniel specialises in international commercial and investment treaty 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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Appendix 5

Our track record in investment treaty arbitration

Highlights of our investment treaty arbitration practice include representing

Investors	States
A **European financial institution and its CEE subsidiary** 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.	**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.
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.	**The Republic of Azerbaijan** in two separate ICSID arbitration proceedings, where we successfully defended claims valued in excess of USD300m brought under an investment agreement between the Republic of Azerbaijan and a Dutch company relating to the management of an aluminium business. The case subsequently settled on terms favourable to our client with Fondel agreeing a drop hands settlement.
Nissan Motor Co Limited in its successful UNCITRAL 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, with India agreeing to pay Nissan around US$200m.	**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.
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.	**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.
K+ Venture Partners on investment treaty claims arising out of the termination of a contract concluded between the Dutch firm's Czech subsidiary and Czech authorities. The case was settled on favourable terms to our client.	**The Government of Korea** in a claim for in excess of USD3.5 billion brought by a Malaysian real estate investor under the Malaysia-Korea bilateral investment treaty. The claim was settled. We also act for Korea on a current ICSID claim brought by a Chinese investor, alleging expropriation.
AES's subsidiary companies in bringing the first-ever ECT investor-State arbitration claim, alleging a breach by Hungary of two investment protection treaties, the ECT and a separate bilateral investment treaty. The case was brought at ICSID and was settled on terms favourable to our client.	**Republic of Slovenia** in an ICSID arbitration under the ECT and another treaty against a Croatian State-owned entity concerning a nuclear power plant. While Slovenia was found liable under a settlement treaty with Croatia, all the ECT claims were dismissed and the damages awarded substantially lower than claimed.

"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

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

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Global presence

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at **allenovery.com/global/global_coverage**.

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