

Key Findings in 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration

This study examines over 400 costs awards and annulment decisions in investor-State cases under ICSID, UNCITRAL and other arbitration rules rendered on or before 31 May 2021 and gives an empirical account of how much investment arbitral proceedings cost, how tribunals allocate those costs, the amount of damages awarded and how long proceedings last.

1. Party costs have decreased over the past three years



Chart 1: Change in mean and median party costs incurred by investors and respondent States in investor-State arbitration

- Arbitration proceedings have become cheaper in the last three years.
 - The mean costs of investors have decreased by 3% when compared with cases published between 2013 and 2017 whereas the mean costs of respondent States have fallen by 15%.
 - Similar trend can be observed in the median figures. While investor costs have remained roughly at the same level, respondent State costs dropped by 32%.
- This appears to reverse the trend identified in the study in 2017, which observed a narrowing of the gap between investor costs and respondent State costs, and an increased willingness of respondent States to spend on legal representation in amounts similar to claimant investors.



2. Investor costs remain higher than respondent States' costs in arbitral proceedings

- In arbitral proceedings, investor costs significantly exceed respondent States'. When all decisions are taken into account:
 - Investors incur over US\$6.4m (mean) on average. The median figure is US\$3.8m.
 - Mean costs incurred by respondent States stand at around US\$4.7m. The median figure is US\$2.6m.
- In annulment proceedings, respondents' costs are slightly higher than applicants'.
 - The mean costs of an applicant in an annulment proceeding are US\$1.3m (median: US\$0.85m).
 - The mean costs of a respondent in an annulment proceeding are US\$1.4m (median: US\$0.98m).

3. The prospects of recovering costs have improved

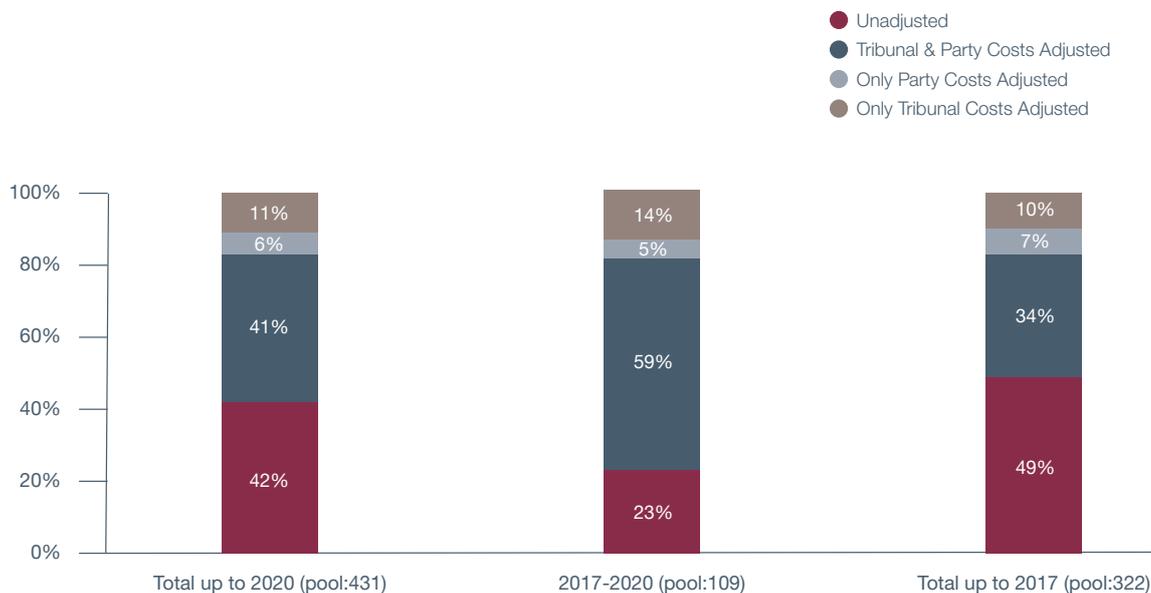


Chart 2: Changes in types of costs adjustment in investor-State arbitration

- There has been a gradual shift in investment arbitral practice towards recognising the “costs follow the event” principle or the “relative success” approach. Since June 2017, more than three quarters (ie 77%) of tribunals have made fully or partially adjusted costs orders. This compares with just 43% of tribunals before December 2012, and 64% of tribunals between January 2013 and May 2017.
- Successful investors recover at least some costs in 62% of cases while successful respondent States recover at least some costs in 53% of cases.
- Annulment committees typically adjust only the costs of the ad hoc committees, whilst leaving the parties bear their own legal costs and expenses. Only 20% of adjusted costs orders issued in respect of annulment proceedings concerned party costs.

4. Investors are claiming and are awarded larger amounts

	Before June 2017	Pool	June 2017 – May 2020	Pool	Combined	Pool
Mean amount claimed by investors	US\$1.2bn (excl. Yukos: US\$719.3m)	234	US\$1.1bn	95	US\$1.16bn (excl. Yukos: US\$817.3m)	329
Mean amount awarded to investors	US\$486.1m (excl. Yukos: US\$110.9m)	133	US\$315.5m	53	US\$437.5m (excl. Yukos: US\$169.5m)	186
Percentage recovered (mean)	37%	122	38%	49	37%	171
Median amount claimed by investors	US\$111.3m	234	US\$108.5m	95	US\$110.3m	329
Median amount awarded to investors	US\$19.9m	133	US\$39.2m	53	US\$21.4m	186
Percentage recovered (median)	29%	122	36%	49	33%	171

Chart 3: Amounts claimed and awarded to investors in investor-State arbitration

- The mean amount in dispute (excluding the Yukos cases which are considered outliers and where the investors claimed more than US\$114.2bn in total) increased nearly by half to US\$1.1bn over the past three years. The difference is however less pronounced with respect to the median figures (which shows a decrease of around US\$3m).
- Tribunals are, however, awarding larger sums of damages to successful investors.
 - The mean amount awarded to a successful claimant has risen by more than 284% to US\$315.5m (excluding the effect of Yukos).
 - The doubling of the median figure confirms the upward trend in the amount of damages awarded by investment tribunals.
- Most tribunals continue to significantly reduce the amount of damages claimed by investors.
 - Overall, the higher the amount in dispute, the greater the discount investors can expect on the claimed sum even where they succeed on the merits.
 - Among successful claimants, the mean amount of damages claimed stands at US\$1.46bn while the mean sum awarded is just US\$437.5m (the median figures being US\$143.4m and US\$21.4m, respectively).
 - There has been a modest increase in the proportion of damages awarded to investors compared to the amount claimed, over the last three years (from 29% to 36%).

5. There is a steady increase in the length of investor-State proceedings

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

Chart 4: Average length of investor-State arbitral proceedings

- Of the 110 new cases published between June 2017 and May 2020, the mean length of proceedings is 5.5 years. This means that recent proceedings last 1.5 years longer than those for which decisions were published before June 2017.
- However, notably the increase in median length is less significant (less than 6 months).

6. The choice of arbitration rules does not significantly impact tribunal costs, costs allocation and duration of investor-State proceedings

Tribunal Costs

All decisions	Mean tribunal costs	Pool	Median tribunal costs	Pool
ICSID	US\$0.96m	140	US\$0.76m	140
UNCITRAL	US\$1.05m	87	US\$0.8m	87
SCC	US\$0.5m	25	US\$0.44m	25
Others	US\$1.02m	11	US\$0.77m	11
Combined (ie all rules)	US\$0.95m	263	US\$0.74m	263

Chart 5: Average tribunal costs by arbitration rules

- Neither the ICSID Rules nor the UNCITRAL Rules appear to offer a significant cost advantage insofar as tribunal costs are concerned. Tribunal costs in ICSID arbitrations and UNCITRAL arbitrations are broadly similar, with mean costs at US\$0.96m and US\$1.05m, respectively (or US\$0.75m and US\$0.78m as median figures).
- Tribunals established under the SCC Rules incurred the lowest costs when compared with tribunals established under the ICSID and UNCITRAL Rules. There is however a smaller pool of SCC investor-State cases.

Costs Allocation

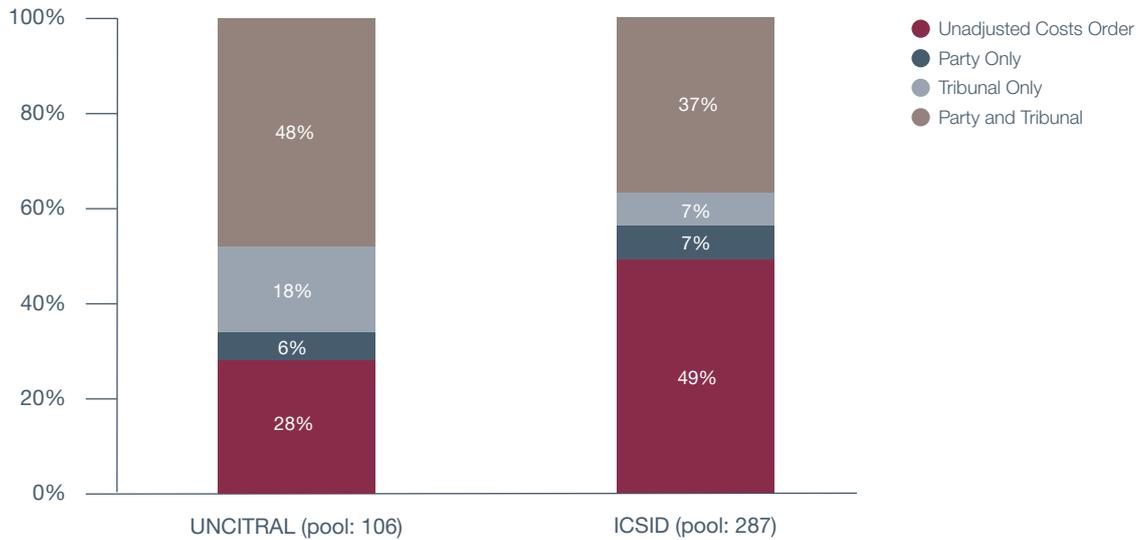


Chart 6: Adjusted costs orders by arbitration rules (all cases up to May 2020)

- Notwithstanding the differences in approach to costs allocation in the rules, ICSID and UNCITRAL tribunals have in recent years shown a similar willingness to issue adjusted costs orders (although the types of adjustments they make vary).
- The mean costs awarded by ICSID tribunals remain slightly higher than those awarded by UNCITRAL tribunals by approximately US\$0.7m.

Duration

- In general, ICSID proceedings last for approximately 4 years and 8 months, while UNCITRAL proceedings conclude 5 months earlier. The median length, however, suggests that the difference in length is not significant (with median duration of ICSID proceedings at 3.8 years and UNCITRAL proceedings at 3.9 years).

The full report will be published on [A&O's website](#) and [BIICL's website](#) in May 2021.

Key contacts

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