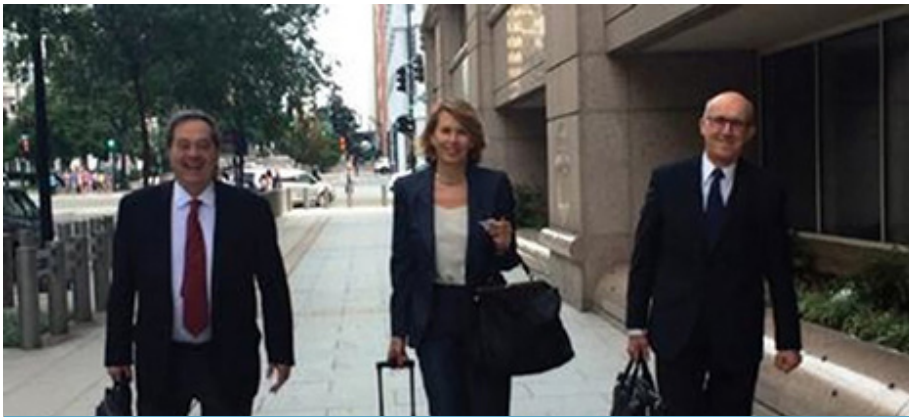


Damages and costs in investment treaty arbitration revisited



Arbitrators arriving at the World Bank for an ICSID arbitration in 2015, Benjamin Garel

14 December 2017

*Four years after GAR published his first study of damages and costs in investment treaty arbitration, Allen & Overy partner **Matthew Hodgson** has produced a second edition, this time with associate **Alastair Campbell**. The study shows tribunal approaches have become more predictable and rigorous but that party costs and damages claimed are also on the rise.*

Since the end of 2012, when this study was first conducted, the use of investment treaty arbitration has continued to grow. In 2015 and 2016, the ICSID Secretariat registered 52 (a record) and 48 cases respectively. Moreover, anecdotal evidence suggests that cases have grown in size and complexity as well as number, with the arbitrations between *Yukos* and Russia (treated as a single case for the purpose of this study and included in the data-set, except where indicated) being the most prominent example of a growing number of multibillion-dollar investment treaty claims.

This study analyses decisions published since the end of 2012 using the same empirical methodology employed in the first iteration of the study, entitled *Investment Treaty Arbitration: How much does it cost? How long does it take?*

It interprets data from an additional 140 awards, which were publicly available as of 31 May 2017, including a number of awards that were handed down before the cut-off date of the first survey, 31 December 2012, but which only became public more recently (these have not been included in the pre-2013 calculations so as not to retrospectively alter the data presented in the previous study but are taken into account in the “all data” calculations).

When combined with the previous study, the final data pool consists of 324 awards and 52 decisions on annulment. The underlying data and detailed methodology are published here.

The study reveals that the median average claim has grown significantly in size, yet median average costs have increased only modestly. It also demonstrates that, unlike in the first iteration of the study, the majority of tribunals now make some adjustment to their costs award in favour of the successful party. Surprisingly, however, this trend does not hold true in annulment proceedings, in which ad hoc committees generally order the parties to bear their own legal costs.

Party costs

As foreshadowed above, the costs of investment treaty arbitration have continued to grow over the past four years. At the end of 2012, mean claimant-party costs were US\$4.4 million and mean respondent-party costs were US\$4.6 million. Today, taking into account only data from 2013 onwards (which gives a pool of 96 cases), mean party costs are US\$7.4 million for claimants and US\$5.2 million for respondents. This represents an increase of 68% and 13%, respectively.

For the total combined dataset covering 177 cases for claimants and 169 cases for respondents, mean claimant-party costs now stand at US\$6 million and mean respondent-party costs at US\$4.9 million.

As with the previous iteration of this study, however, these mean averages are distorted by the largest claims: the claimants' party costs in Yukos were US\$81.4 million, with the respondent's party costs of US\$31.5 million. Nevertheless, the median amount spent has also increased since the end of 2012. Again taking into account only data from 2013 onwards, median party costs are now US\$4.2 million for claimants (an increase of 34% over pre-2013 costs) and US\$3.4 million for respondents (an increase of 48%). Taking into account inflation, and bearing in mind that the pre-2013 data includes cases from as early as 1988, this median increase is relatively modest.

Table 1: Average Party Costs

	Claimant's Party Costs	Respondent's Party Costs
Pre-2013		
Mean	US\$4,437,000	US\$4,559,000
Median	US\$3,145,000	US\$2,286,000
2013+		
Mean	US\$7,414,000	US\$5,188,000
Median	US\$4,200,000	US\$3,385,000
All data		
Mean	US\$6,019,000	US\$4,855,000
Median	US\$3,375,000	US\$2,793,000

According to the median data, the trend identified previously, that claimants typically incur greater party costs than respondents, has continued. It was suggested that the reasons for this may include the claimant's burden of proof and the tendency for many states to run cost-driven tender processes. It is notable that the increase in median respondent-party costs is more significant than the equivalent increase in median claimant-party costs. It will be interesting to see if this narrowing of the gap continues in future studies and reflects an increasing sophistication of respondent states in moving away from a solely costs-driven approach.

Tribunal costs

Similarly, the size and complexity of modern day investment treaty arbitrations has led to corresponding increases in tribunal costs. At the end of 2012, mean tribunal costs were US\$746,000 (median US\$590,000). Today, taking into account only data from 2013 onwards (a pool of 89 cases), mean tribunal costs are US\$1,118,000 (median US\$905,000). This represents an increase of around 50% in both mean and median tribunal costs.

The last iteration of this study revealed a disparity between tribunal costs depending on the forum used. The table below suggests that, while this disparity has grown when comparing the mean tribunal costs, median tribunal costs are now closely aligned between ICSID and UNCITRAL tribunals.

Table 2: Average tribunal costs

Forum	Mean tribunal costs	Median tribunal costs
Pre-2013		
ICSID	US\$769,000	US\$544,000
UNCITRAL	US\$853,000	US\$714,000
2013+		
ICSID	US\$1,042,000	US\$910,000
UNCITRAL	US\$1,384,000	US\$905,000
All data		
ICSID	US\$920,000	US\$750,000
UNCITRAL	US\$1,089,000	US\$799,000

This is a good example of the distortive impact of the Yukos case on mean averages. Tribunal costs in *Yukos* were US\$11.4 million and, if that number is excluded from the data pool, mean UNCITRAL tribunal costs from 2013 onwards come down to just over US\$1 million, or within 2% of the mean ICSID tribunal costs.

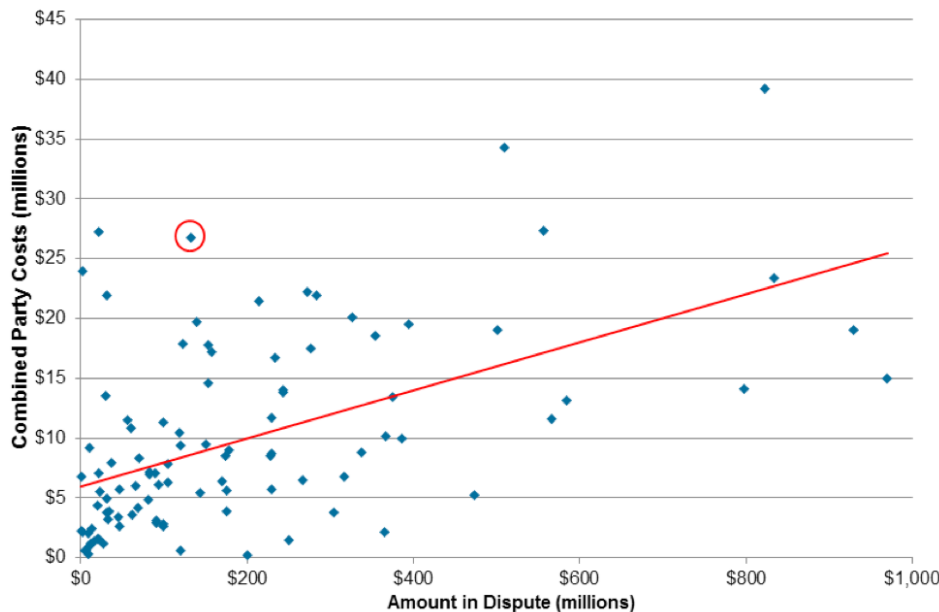
As of the end of 2012, the difference between the cost of ICSID tribunals and UNCITRAL tribunals was 10%. Interestingly, this narrowing of the gap has occurred despite the fact that ICSID has retained the same US\$3,000 per day fee cap that has been in place since 1 January 2008. This convergence also does not appear to have originated from the changes to the UNCITRAL Rules 2010, which were introduced to address unreasonable tribunal fees (since only three cases under the 2010 rules produced sufficient data for this study).

The available data pool for tribunals at the SCC Arbitration Institute was again much smaller (five cases), and average SCC tribunal costs actually fell from US\$480,000 to US\$413,000. This appears to be because the sums in dispute in at least three of the five cases were relatively small in the context of modern investment treaty arbitration (less than US\$2.5 million).

Damages: who wins and how much?

The mean amount claimed in investment treaty arbitrations from 2013 onwards has increased significantly to US\$2,376 million (compared to US\$491.7 million as of the end of 2012). Even excluding *Yukos*, the mean amount claimed is now US\$1,133 million. Again, however, these mean figures are distorted by the larger claims, and the median amount claimed from 2013 onwards was a more modest US\$196.4 million (as compared to US\$66.1 million at the end of 2012). Interestingly, despite the increasing size of the average claim, the mean length of proceedings has only increased by around six months, from 3.7 years before the end of 2012 to 4.3 years from 2013 onwards. Further, on the basis of median averages, this increase is negligible: from 3.6 years to 3.7 years.

It would be expected that the larger the claim, the higher the parties' legal costs will be. After all, the more that is at stake the more the parties will generally be prepared to invest. While it is difficult to present a useful visual overview of all cases where the parties' combined costs are available due to the very broad range in the amounts claimed, the following graph shows the relationship between amount claimed and combined party costs in 99 cases where both parties' costs data were available and the amount claimed was less than US\$1 billion.



This suggests some correlation between combined party costs and the amount in dispute. As noted above, this is in principle unsurprising. There are, however, some interesting outliers such as *EDF v Romania* (circled), in which costs were US\$26.7 million (well above the median) in a claim worth US\$132.5 million (well below the median). This may well be explained by the complexity of the factual issues involved (including allegations of corruption), a request for provisional measures, and what was evidently a drawn-out disclosure process. It serves to illustrate that party costs will always be dependent on the circumstances of a case. The amount claimed is only one factor to be taken into account.

As to the relative success of the parties, the statistics from 2013 onwards are very similar to the pre-2013 statistics. Across a pool of 125 cases concluded after the end of 2012, respondents prevailed in 55% of cases compared to 59% prior to the end of 2012. Respondent success was defined as including cases which were dismissed under Article 41(5) of the ICSID Convention, as well as cases that were terminated. Claimant success includes all awards in which the respondent was found to be in breach of the treaty in question (including those cases such as *Rompetrol v Romania*, in which no damages were awarded).

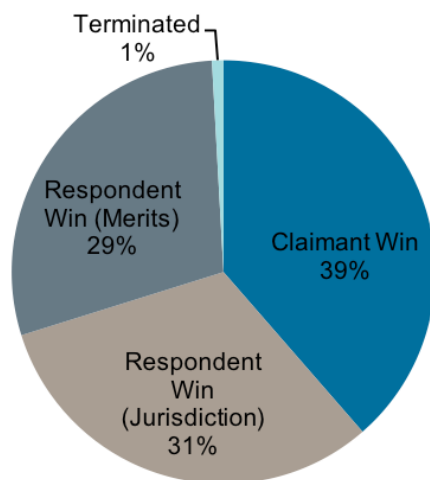


Chart 2: Who wins? (2013+)

The mean amount awarded to the successful claimant has, in no small part due to the *Yukos* case, risen from US\$76.3 million in the last survey to US\$1.08 billion since the end of 2012. However, the fact that the *Yukos* award was over US\$50 billion and the pool of cases with usable data since 2013 was 55 helps put this figure into context.

Nevertheless, even discounting the considerable distortive effect of *Yukos*, the mean amount awarded to successful claimants since 2013 is still US\$171 million – an increase of over 124% against the last survey. The overall mean amount awarded across all cases to date (a data pool of 132 excluding *Yukos*) is now US\$110.9 million. Notably, this figure still eclipses the median amount awarded to successful claimants which, in cases from 2013 onwards, was US\$40 million (compared to US\$10.7 million prior to 2013). This amounts to a 274% rise of the median, which might be considered a better reflection of a “typical” case. At the same time, the mean amount awarded to the successful claimant in comparison to the amount claimed fell from 40% to 32%. This suggests that claimants have continued to overvalue their investments.

In cases since the end of 2012, the mean amount claimed (excluding *Yukos*) has risen from US\$491 million to US\$1,134 million. However, as in the last iteration of this survey, this figure masks an interesting discrepancy between claims which succeed and those which do not. In cases from 2013 onwards (excluding *Yukos*), the average amount claimed where the claimant was ultimately successful was US\$794 million compared to US\$1,539 million in cases where the claimant was unsuccessful. It would appear, therefore, that flawed claims continue to drive up the average amount claimed.

Moreover, the *Levy and Grencitel v Peru* case demonstrates the continuation of the trend noted in the last iteration of this study, namely that the largest unsuccessful claims often involve allegations of misconduct on the part of the claimant investor. In that case, the claimants’ claim of US\$41 billion was dismissed as an abuse of process after the tribunal found that the claimants sought to backdate certain critical documents in order to “manufacture” jurisdiction.

Apportionment – in theory and in practice

In theory

As explained in the first iteration of this article, there are three basic ways in which costs may be apportioned between the parties. First, the “pay your own way” approach dictates that each party should normally bear its own costs and that the costs of the arbitration should be split 50/50. Secondly, the “costs follow the event” approach dictates that a successful party should ordinarily recover its reasonable costs (including the costs of the arbitration). Thirdly, tribunals adhering to the “relative success” approach seek to apportion costs based on the parties’ relative success on the different issues in the arbitration. This approach can also be viewed as a more forensic application of the “costs follow the event” principle.

At present, the ICSID Convention gives tribunals a broad discretion in deciding how costs should be apportioned between the parties, and does not provide guidance as to which of these approaches should be followed and in what circumstances. By contrast, the UNCITRAL Rules have included elements of “costs follow the event” for decades, with the 1976 UNCITRAL Rules providing that tribunal costs (but not party costs) are to be borne “in principle” by the losing party. The 2010 UNCITRAL Rules go further, stating that the costs of the arbitration shall be borne by the unsuccessful party without carving out party costs.

In the absence of a default rule or more extensive guidance regarding the allocation of costs, it was noted in the earlier study that ICSID tribunals have adopted divergent approaches with resulting uncertainty for the centre’s users. In October 2016, ICSID began work on updating and modernising its rules, with costs listed as one of the topics being considered. However, the applicable investment protection agreement of course overrides the costs provisions of the ICSID Rules, and some modern investment treaties, including the EU-Canada Comprehensive Economic and Trade Agreement and the EU-Singapore Free Trade Agreement, have made “costs follow the event” the default approach. Against this apparent shift in newer treaties, it will be interesting to see if ICSID follows suit.

In practice

In the previous iteration of this survey, a slight majority of investment treaty tribunals (56%) required each party to bear their own costs. Just 10% made a fully adjusted costs order, with the remaining 34% making a partially adjusted costs order.

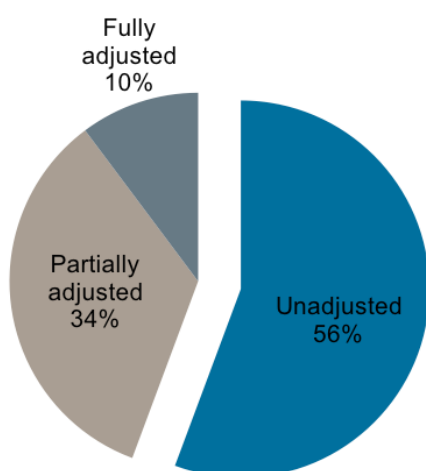


Chart 3: Adjustment of costs pre-2013

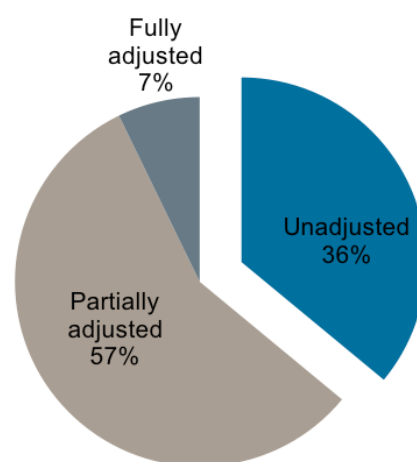


Chart 4: Adjustment of costs post-2012

However, since the end of 2012, there has been a significant increase in the number of tribunals making an adjusted costs order: 57% made a partially adjusted costs order and 7% made a fully adjusted costs order. Only just over a third (36%) of tribunals required each party to bear their own costs.

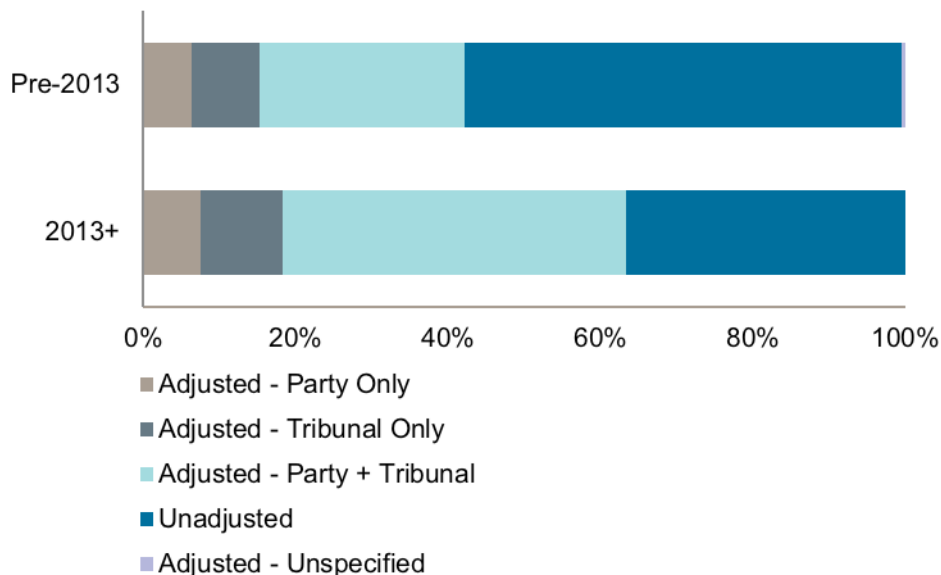
Thus the trend towards some adjustment of costs – whether through application of the “costs follow the event” or “relative success” approaches – seems to have gathered pace over the last few years. Interestingly, this has been driven exclusively by a dramatic increase in the number of ICSID tribunals issuing an adjusted costs order: prior to 2013, only a third (36%) of ICSID tribunals issued an adjusted costs order. Since the start of 2013, however, that figure has risen to almost two thirds (61%). This brings ICSID tribunals broadly into line with UNCITRAL tribunals, who have issued an adjusted costs award in 69% of cases both before and after 2013.

As regards the kind of costs being adjusted, the chart below shows that almost the same percentage of post-2012 tribunals adjusted only party or tribunal costs as was the case up to the end of 2012. The growth in adjusted costs orders has

instead been driven by tribunals adjusting both party and tribunal costs, with almost double the number of post-2012 tribunals making this kind of adjustment.

In the last iteration of this survey, it was noted that successful claimants were more likely to recover their costs than successful respondents, with 53% of successful claimants receiving an adjusted costs award compared to 38% of

Chart 5: Adjustment of costs by date



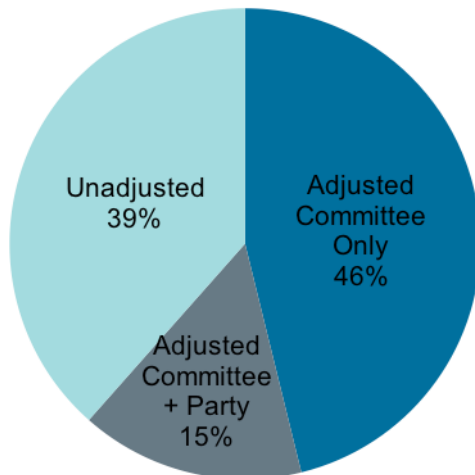
successful respondents. Since 2013, in line with the general trend towards “costs follow the event” identified above, successful claimants have received an adjusted costs award 65% of the time. At the same time the percentage of successful respondents receiving an adjusted costs award over the same period has increased considerably to 63%.

The disappearance of this disparity may be explained by an increased willingness on the part of tribunals to sanction claimants for bringing unmeritorious claims. At the extreme end of the scale, the tribunal in *Transglobal v Panama* dismissed the claims as an abuse of process, criticised the claimants’ “cavalier attitude”, and stated that the “fits and starts” of the claimants’ pleadings likely increased the respondent’s costs. Accordingly, the tribunal found that the claimant should bear the respondent’s legal costs (except for those costs relating to the respondent’s own rejected applications).

Annulment proceedings

In annulment proceedings, 85% of ad hoc committees across the entire data pool of 52 (from both before and after the end of 2012) ordered the parties to bear their own costs. As noted in the last iteration of this study, given the exceptional nature of annulment proceedings and the desire to discourage dilatory applications, it is perhaps surprising that ad hoc committees do not make adjusted costs orders on a more regular basis. Notably, however, a small majority of ad hoc committees do order the “losing” party to bear the committee’s costs (61%). Indeed, with the additional data now available, it has become clear that the most common costs order in annulment proceedings is for the parties to bear their own costs, but for the “losing” party to bear the costs of the committee, with such an order being made in 46% of cases. There was not a single case in which only the parties’ costs were adjusted.

Chart 6: Adjustment of costs in annulment proceedings



It is difficult to understand why this might be the case. It may be due in part to the frequently brief discussion of costs in annulment decisions: ad hoc committees spend an average of only 5.5 paragraphs addressing costs compared to almost double that in all pre-annulment proceedings. Further, when one compares average party costs of US\$1.26 million for applicants and US\$1.44 million for respondents with average “committee costs” of US\$435,000, it is clear that the current approach is unlikely to discourage dilatory or speculative applications. The current approach is also inconsistent with the emerging practice in the underlying ICSID cases which, as set out above, shows a strong trend in favour of adjustments to both party and tribunal costs.

ICSID’s latest statistics show that only around 10% of annulment applications made between 2011 and June 2017 were successful or partially successful. This low rate of success undoubtedly reflects the exceptional nature of the annulment remedy, but there may also be an element of some applicants seeing the annulment process as a last roll of the dice to try to avoid liability without any real prospect of success.

A stricter approach to the adjustment of costs could discourage some of the more speculative annulment applications, would serve to emphasise the exceptional nature of the annulment remedy and would be more consistent with the underlying ICSID practice.

More predictability - But there’s still need for guidance

The results of the previous iteration of this survey suggested that tribunals needed to devote more attention to the issue of costs. The post-2012 data analysed in this edition show that there has been some improvement in this regard: post-2012 tribunals spend an average of over 15 paragraphs considering costs, compared to an average of just six paragraphs before that. There has also been a marked improvement in the predictability of how costs will be apportioned, with around two thirds of UNCITRAL and ICSID tribunals making some form of adjusted costs order.

The authors have argued elsewhere that ICSID should adopt a “costs follow the event” approach as the default rule for the apportionment of costs. This would serve to promote greater certainty for the system’s users. The data revealed by this survey, however, suggest that ICSID tribunals have brought themselves into line with their UNCITRAL counterparts without the need for a rule change.

While these developments are welcome, they do not dispose of the need for guidance in the rules. A default “costs follow the event” approach would formalise what appears to be current practice, and would be more likely to discourage

speculative claims and dilatory tactics. Moreover, and as noted above, there are different bases for costs adjustment. In particular, should a simple “costs follow the event” approach be adopted, or should tribunals employ the more complex “relative success” calculation? Finally, a default approach would encourage tribunals to provide more detailed reasoning when exercising their discretion to depart from the default approach. In light of the escalating costs and increased public awareness and scrutiny of investment treaty arbitration, this additional clarity would surely be welcome.

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