

The duration and costs

of ICSID and UNCITRAL investment treaty arbitrations



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Before making a decision whether or not to invest in any particular investment treaty claim, a third party funder will typically assess six key variables: jurisdiction, liability, quantum, enforcement/recovery, duration, and cost. The last two of these variables – time and costs – are, of course, not only of interest to third party funders, but have come under increased scrutiny by arbitration users more generally. Indeed, in October 2015, the Queen Mary University of London and White & Case International Arbitration Survey reported that cost and lack of speed were both ranked as amongst the worst characteristics of international arbitration. That said, comprehensive and complete details about time and costs in investment treaty arbitrations – namely, how much arbitrations cost and how long they take – have not been made readily available by arbitral institutions until quite recently, and even then, only in part.

As for ICSID, although it has provided an increasing level of detail and transparency regarding the duration of ICSID Convention and ICSID Additional Facility arbitrations in the last five years, it has not adopted the same approach with respect to costs. For instance, since 2010 ICSID has published details of the average duration of arbitrations in its annual reports, a period typically “between three to four years”. Costs incurred by claimants and respondents in ICSID arbitrations, however, are amounts not made readily available by the institution in published reports,

but which ICSID acknowledges “could be substantial”.

In terms of UNCITRAL treaty arbitrations, as there is no equivalent institution to report on all investment arbitrations conducted under the UNCITRAL Arbitration Rules – to the extent an institution is even involved – there is a paucity of data on duration and costs available.

In the absence of transparency from institutions, observers and users of the system have compiled details about the

duration and costs of ICSID and UNCITRAL arbitrations on their own. For instance, in October 2009, prior to the publication of ICSID’s first statistical report, an oft-cited article published in *Global Arbitration Review* (“ICSID arbitration: how long does it take?” by Anthony Sinclair) featured the first detailed accounting of how long each phase of an ICSID arbitration takes. There it was reported that the average time between a hearing on the merits and an award is 425 days. That finding was based on a review of the 115 ICSID cases resulting in an award from ICSID’s creation until 1 July 2009. No such study has been taken of the duration of UNCITRAL arbitrations.

On the subject of costs, in 2012, the OECD concluded that legal and arbitration costs for claimants and respondents in recent Investor-state Dispute Settlement cases averaged in excess of US\$8,000,000, having surveyed 143 ISDS awards (available as of August 2011). In 2013, UNCTAD reported that legal fees and tribunal expenses, on average, “exceeded \$8 million per party per case”. In 2014, an Allen & Overy study concluded that average party

costs were US\$4,437,000 for claimants and US\$4,559,000 for respondents based on a review of 176 ISDS awards (available as of December 2012). Last year, in 2015, the European Commission suggested in a paper entitled "ISDS: some facts and figures" that "the average legal and arbitration costs for a claimant are around US\$8 million". (In fact, the OECD research to which UNCTAD and the European Commission referred indicated that costs for both parties combined was in excess of US\$8 million, not costs incurred by only one party).

Here, in an effort to supplement these previous studies with more up-to-date duration and costs data in ICSID and UNCITRAL arbitrations – current as of 31 December 2015 – Vannin Capital presents the most recent information publicly available on these two key variables.

The duration of ICSID and UNCITRAL arbitration proceedings

ICSID arbitration proceedings

Writing in the winter 1986 edition of News from ICSID about the duration of arbitration proceedings, the centre's then secretary general Ibrahim Shihata observed that "statistics regarding the average duration of such proceedings have little value because of the many factors that may differentiate one proceeding from another". To recall, at that time, only five arbitration proceedings were pending at ICSID and no new case had been registered all year, as explained by Shihata in ICSID's 1986 Annual Report.

Fast forward 30 years, and, in January 2016, ICSID reported that it had registered 549 cases under the ICSID Convention and Additional Facility Rules as of 31 December 2015. This was reported not in News from ICSID (discontinued since 2009), but in The ICSID Caseload-Statistics, a bi-annual publication started in 2010 that is dedicated to featuring empirical details about aspects of international investment cases administered by ICSID. At the same time, ICSID began publishing details of the average duration of arbitrations in its annual reports. In so doing, it calculated the duration of arbitrations from the date of a tribunal's constitution to conclusion, reporting for the last six fiscal years (lasting



from 1 July to 30 June). For instance, for FY2015, the average duration was reported to be "on average, 39 months"

As explained in Global Arbitration Review earlier this year, Vannin Capital has released data on the average duration of ICSID Convention and Additional Facility proceedings. There, it was explained that the average duration of such proceedings – from registration to award – was 3.75 years, or 1,370 days. Anthony Sinclair arrived at a similar figure in his Global Arbitration Review study concluding then that the average duration of ICSID arbitrations was 3.63 years (1,325 days), on average, from filing of the request for arbitration to the date of the final award.

Proceedings resulting in a final award	Days between registration and award
ICSID arbitration (mean)	1,370
ICSID arbitration (median)	1,266

To that figure must be added the duration of the most prevalent of the post-award remedies in ICSID Convention arbitrations, annulment. As of 31 December 2015, 45 decisions on annulment have been rendered since ICSID's inception. The average amount of time between registration of a request for annulment and the issuance of a decision on annulment was 2 years (730 days).

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[Continued overleaf]

Proceedings resulting in a decision on annulment	Days between registration and award
ICSID annulment (mean)	730
ICSID annulment (median)	720

UNCITRAL arbitration proceedings

There is, of course, no equivalent institution to report on all investment arbitrations conducted under the UNCITRAL Arbitration Rules. A review of the 60 publicly available investment arbitrations conducted under the UNCITRAL Arbitration Rules resulting in an award between 1990 and 2015 reveals that the average duration of an UNCITRAL arbitration from notice of arbitration to award is 3.96 years, or 1,446 days.

Proceedings resulting in a final award	Days between registration and award
UNCITRAL arbitration (mean)	1,446
ICSID arbitration (median)	1,246

As post-award proceedings in UNCITRAL arbitrations vary depending on the seat of the arbitration, a review of the duration of such proceedings is beyond the scope of this article.

The costs of ICSID and UNCITRAL arbitration proceedings

In the last five years (FY2011 – FY2015), a review of ICSID arbitrations concluded reveals that the average amounts spent were US\$5,619,261.74 by claimants and US\$4,954,461.27 by respondents, as explained in more detail below. A similar review of UNCITRAL treaty arbitrations concluded in the last five calendar years (2010 – 2015) shows an average claimant spend of US\$7,300,344.91 and respondent spend of US\$4,709,504.30.

ICSID arbitration proceedings

In the last five years, a total of 138 ICSID arbitration proceedings were concluded between FY2011 and FY2015. Data on costs in ICSID arbitrations concluded between FY2011 and FY2015 is available for claimants in 55 arbitrations and respondents in 56 arbitrations. Costs data in many of the 93 decisions and awards is not available for one of three reasons: (a) the award is not yet publicly available; (b) the award is publicly available but costs data was not included; or (c) some but not all costs data is included in the award. Details on tribunal costs are available in 40 awards. Any cost amounts not denominated in USD were converted to USD as of the date of award.

The average claimant costs in the 55 ICSID arbitrations concluded between FY2011 and FY2015, where such information was available, was US\$5,619,261.74. In 64% of the arbitrations claimant costs were below US\$5 million, and above US\$5 million in 36%:

Claimant Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	9
US\$1-2 million	10
US\$2-3 million	9
US\$3-4 million	4
US\$4-5 million	3
US\$5 million and above	20
TOTAL	55

In the 56 ICSID arbitrations concluded between FY2011-FY2015 where respondent costs data was available, average costs were US\$4,954,461.27. In 68% of the arbitrations, respondent costs were below US\$5 million, and above US\$5 million in 32%:

Respondent Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	13
US\$1-2 million	9
US\$2-3 million	2
US\$3-4 million	6
US\$4-5 million	8
US\$5 million and above	18
TOTAL	56

As with previous studies, the median figures for both claimant and respondent costs are significantly lower than the averages: US\$2,913,786.50 in the case of claimant costs, US\$3,650,252.62 in respondent costs.

In 40 of the 93 arbitrations, awards included data about tribunal costs incurred. The average tribunal costs were US\$882,668.19, with a median of US\$875,907.97. In the majority of the ICSID arbitrations concluded in FY2011-FY2015 where tribunal costs data was available, such costs were US\$1 million or less:

ICSID/Tribunal Costs in Concluded ICSID Arbitrations FY2011-FY2015	Number of arbitrations
US\$1 million and less	27
US\$1-2 million	12
US\$2-3 million	0
US\$3-4 million	1
TOTAL	40

UNCITRAL arbitration proceedings

Between 2010 and 2015, a total of 40 UNCITRAL arbitration proceedings were concluded, resulting in a final decision or award. Data on costs in those 40 arbitrations is available for claimants in 20 arbitrations and respondents in 26 arbitrations. Details on tribunal costs are available in 28 awards.

The average claimant costs in the 20 UNCITRAL arbitrations concluded between 2010 – 2015, where such information was available was US\$7,300,344.91. In 80% of the arbitrations claimant costs were below US\$5 million, and above US\$5 million in 20%:

Claimant Costs in Concluded UNCITRAL Arbitrations 2010 – 2015	Number of arbitrations
US\$1 million and less	2
US\$1-2 million	5
US\$2-3 million	7
US\$3-4 million	2
US\$4-5 million	0
US\$5 million and above	4
TOTAL	20

In 26 UNCITRAL arbitrations concluded between 2010 and 2015 where respondent costs data was available, average costs were US\$4,709,504.30. In 73% of the arbitrations, respondent costs were below US\$5 million, and above US\$5 million in 27%:

Respondent Costs in Concluded UNCITRAL Arbitrations 2010 – 2015	Number of arbitrations
US\$1 million and less	7
US\$1-2 million	5
US\$2-3 million	4
US\$3-4 million	0
US\$4-5 million	3
US\$5 million and above	7
TOTAL	26

In the majority of the UNCITRAL arbitrations concluded between 2010 and 2015, where institutional/tribunal costs data was available, such costs were US\$1 million or less:

Institutional/Tribunal Costs in Concluded UNCITRAL Arbitrations 2010 – 2015	Number of arbitrations
US\$1 million and less	22
US\$1-2 million	4
US\$2-3 million	1
US\$3 million and above	1
TOTAL	28

The underlying data on duration and costs referenced in these studies will be available in appendices to the forthcoming monograph *Procedural Issues in International Investment Arbitration* (Oxford University Press, 2016) co-authored by Vannin Capital's Senior Counsel Jeffery Commission.