

Kluwer Arbitration Blog

How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years

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In recent years, ICSID has provided an increasing level of detail and transparency about the practice and procedure of ICSID Convention and ICSID Additional Facility arbitrations. The ICSID Secretariat has done so in a variety of ways: on its website, in Annual Reports, in The ICSID Caseload: Statistics, as well as in one-day primers it conducts throughout the world. The topics covered in those reports and primers cover all phases of an investment arbitration from registration to award. One area that could benefit from further scrutiny, however, are the costs incurred by claimants and respondents in ICSID arbitrations, an amount which ICSID acknowledges “could be substantial”.

In 2012, the OECD concluded that legal and arbitration costs for claimants and respondents in recent ISDS 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 \$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).

In an effort to supplement these previous studies with more up-to-date costs data in ICSID arbitrations, I have examined the 138 ICSID arbitrations concluded during the last five ICSID fiscal years (which run from 1 July to 30 June). As explained in more detail below, a study of ICSID arbitrations concluded between FY2011 and FY2015 reveals that costs incurred, on average, by claimants were US\$5,619,261.74, and US\$4,954,461.27 by respondents. To this must be added tribunal costs, an amount which was, on average, US\$882,668.19 in ICSID arbitrations concluded between FY2011 and FY2015 (where such data was available).

The Last Five Years at ICSID

A total of 138 ICSID arbitration proceedings were concluded between FY2011 and FY2015: (a) 45 were discontinued or settled; and (b) 93 were decided by a tribunal. Data on costs is, of course, not publicly available for the 45 proceedings that were discontinued or settled. As for the remaining 93 arbitrations that were decided by a tribunal: 54 declined jurisdiction, dismissed claims for a lack of

legal merit, or rejected investor claims, and 39 upheld investor claims in part or in full:



Here too, however, costs data in many of the 93 arbitrations decided by a tribunal is not available for one of three reasons: (a) the award itself is not yet publicly available; (b) the award is publicly available but costs data was not included in any form; or (c) some but not all costs data is included in the award. As a result, data on costs in ICSID arbitrations concluded between FY2011 and FY2015 is available for claimants in 55 arbitrations and respondents in 56 arbitrations. Details on tribunal costs are available in just 40 awards. Any cost amounts not denominated in USD were converted to USD as of the date of award for the purposes of this study.

Average Claimant and Respondent Costs

The average claimant costs in the 55 ICSID arbitrations concluded between FY2011 and FY2015 (where claimant costs data was available) was US\$5,619,261.74. In sixty-four percent of the arbitrations claimant costs were below US\$5 million, and above US\$5 million in thirty-six percent:

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

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 is the median for claimant costs, and US\$3,650,252.62 is the median for respondent costs.

ICSID Tribunal Costs

In 40 of the 93 arbitrations, awards or decisions included data about ICSID tribunal costs incurred. The average ICSID tribunal costs were US\$882,668.19, with a median of US\$875,907.97. These figures represent an increase in the US\$769,000 average and US\$544,000 median for ICSID tribunal costs arrived at in the Allen & Overy study of awards (available as of 31 December 2012).

In the majority of the 40 ICSID arbitrations concluded between FY2011 and FY2015 where tribunal costs information 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

ISDS Beyond ICSID

ICSID is, of course, not the only available forum for the resolution of investment arbitration disputes. In the next installment, I will share the results of a similar survey on the amounts spent by claimants and respondents in UNCITRAL and other investment arbitrations concluded in the last five years. The underlying data on costs referenced in these studies will be available in appendices to the forthcoming monograph *Procedural Issues in International Investment Arbitration* (OUP, 2016).

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