

# Illegality Defences, ICSID Procedures and Practice

2021/22  
Investment  
**LAW** & Investor-State  
**MEDIATOR**  
TRAINING

**ALLEN & OVERY**

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# Agenda

- 1 **Illegality Defences**

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- 2 **Overview of ICSID Arbitration Proceedings**
  - Pre-Arbitral Steps
  - Commencement of an ICSID Arbitration
  - Constitution of the Tribunal
  - ICSID Proceedings
  - Award and Post-Award Remedies

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- 3 – Proposed Reform of the ICSID Rules

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- 4 **Costs and Duration of ICSID Arbitrations**



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# Illegality Defences

# Defences Based on Illegal Conduct

**01** Legality Requirement under an Applicable Investment Treaty

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**02** International (or '*Transnational*') Public Policy

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**03** Unclean Hands

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# 1 Legality Requirement under an Applicable Investment Treaty

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# Legality Requirement – *Examples*

“

The term ‘investment’ shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively: [...]

Germany – Philippines BIT (1997), Art 1(1)

”

“

The term ‘investment’ means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, though not exclusively: [...]

Finland – Vietnam BIT (2008), Art 1(1)

”

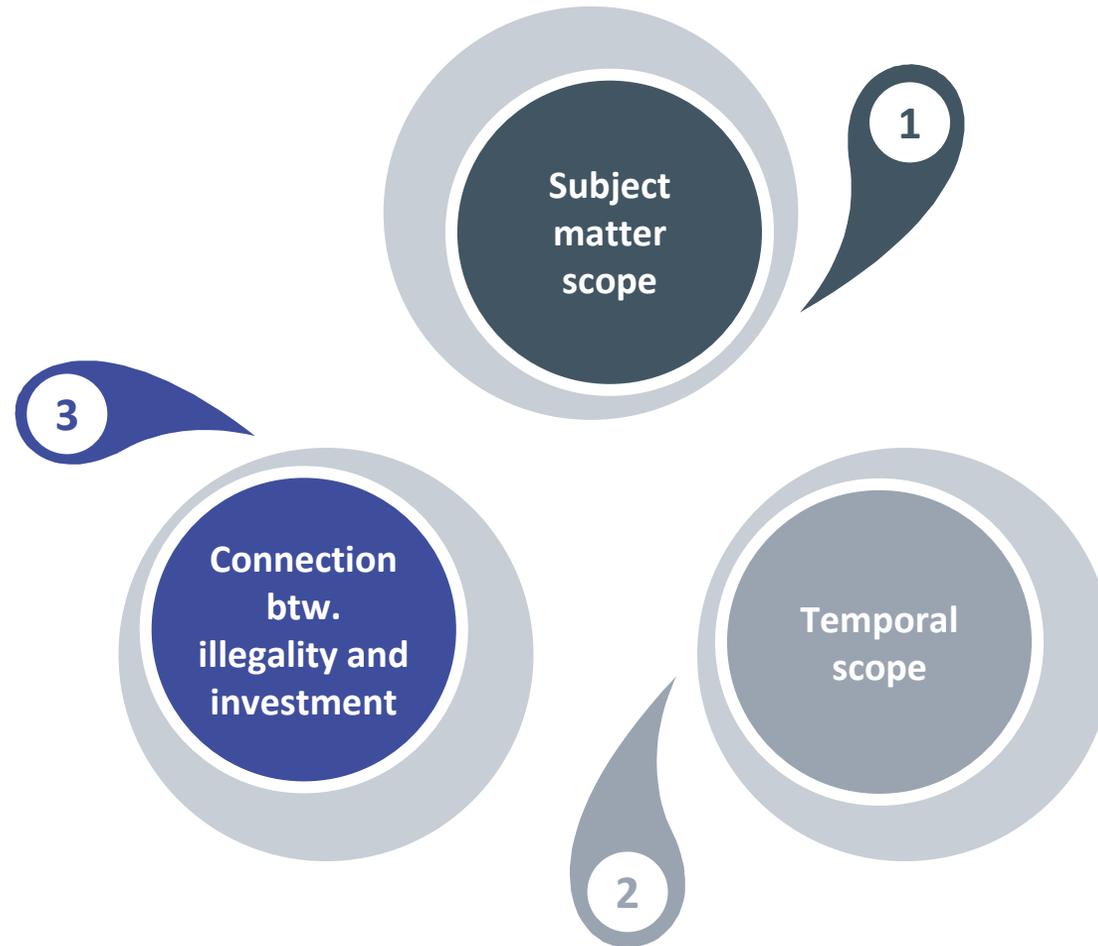
“

The term ‘investments’ means every kind of asset, used as investment by investors of one Contracting Party within the territory of the other Contracting Party, in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment and shall include, in particular, though not exclusively: [...]

China – Korea BIT (2007), Art 1(1)

”

# Legality Requirement – *Overview*



# Legality Requirement – *Subject Matter Scope*

01

## ***Saba Fakes v. Turkey:***

*“compliance with the host State’s domestic laws governing the admission of investments”*

02

## ***Quiborax v. Bolivia:***

legality requirement covers three types of violations

03

## ***Kim v. Uzbekistan:***

interpretation should be guided by proportionality

### Quiborax v. Bolivia

Legality requirement covers:

- (i) non-trivial violations of the host State’s legal order
- (ii) violations of the host State’s foreign investment regime
- (iii) fraud – e.g. to secure the investment, or to secure profits

### Kim v. Uzbekistan

- **First**, the tribunal must assess the significance of the obligation with which the investor is alleged to not comply.
- **Second**, the tribunal must assess the seriousness of the investor’s conduct.
- **Third**, the tribunal must evaluate whether the combination of the investor’s conduct and the law involved results in a compromise of a significant interest of the host State to such extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined.

# Legality Requirement – *Temporal Scope*

## Illegality at *initiation* of the investment

- Determines application of the legality requirement
- Goes towards **jurisdictional** issues / challenges



## Illegality during *performance* of the investment

- Does not determine application of the legality requirement
- Goes towards the **merits** of the case
- Rationale: during performance, usual regulatory / judicial functions apply

# Legality Requirement – *Connection between Illegality and Investment*



## In a nutshell:

- Answer depends on formulation of the legality requirement
- Some case law to support that illegality *in connection* with investment may be sufficient

### *Fraport v. Philippines*

- Majority accepted that claimant’s investment was lawful and validly acquired
- **But:** majority found that claimant had knowingly circumvented prohibition on foreign ownership through a secret shareholder agreement
- **As such:** held, there was “no investment in accordance with law”

### *Metal-Tech v. Uzbekistan*

- Respondent argued claimant had made illegal payments to obtain the alleged investment
- **Held,** corruption was established to an extent sufficient to violate the law “in connection with the establishment of the Claimant’s investment”

### *Kim v. Uzbekistan*

- **Held:** “[i]f a violation of the law is not related to Claimant’s decision to make the investment, then such violation is not an action within the scope of the legality requirement”



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## 2 International (or ‘*Transnational*’) Public Policy

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# International (or ‘*Transnational*’) Public Policy

1

International public policy (or ‘*transnational*’ public policy):

Signifies ‘*an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora*’ (World Duty Free v. Kenya)

2

Operates independently of any treaty provision to deprive tribunal of jurisdiction

3

**Bribery** is contrary to transnational public policy (*World Duty Free v. Kenya*):

‘... the Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States, or to use another formula, to transnational public policy’

4

However, there is no clear consensus on the scope of the prohibition on bribery

# Definition of ‘Bribery’/‘Corruption’

## United Nations Convention Against Corruption

*Lao Holdings N.V. v. Lao People’s Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019

“The Tribunal considers that proof of corruption at any stage of the investment may be relevant depending on the circumstances. While the UNCAC applies to States rather than private parties, it embodies what has become a principle of customary international law applicable, according to the OECD, to root out corruption used “to obtain or retain business or other undue advantage in relation to the conduct of international business.” (para. 105)

## OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

*Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Re-public*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009

“The OECD Convention, to which the Respondent refers, defines bribery as the offer, promising or giving of “undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.” The Tribunal regards that as a reasonable and useful definition.”

(para. 42)



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# 3 ‘Unclean Hands’ Doctrine

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# 'Unclean Hands' Doctrine – Contents of the Doctrine

*“No court will lend its aid to a man who finds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.”*

*Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Final Award, 15 December 2014 at [646]*

*“In several cases tribunals have made clear that a party cannot come to investment arbitration with unclean hands. This has now been recognised in cases where there has been some illegality underlying the contract or the rights which a party is seeking to enforce.”*

*Litpop Enterprises Limited et al. v. Ukraine, SCC Case No. V 2015/092, Final Award, 4 February 2021 at [439]*

# 'Unclean Hands' Doctrine – Status of the Doctrine

## Doctrine Upheld / Applied

### *Al Warraq v. Indonesia*

– Tribunal upheld the doctrine of clean hands

01

### *Inceysa v. El Salvador*

– Held, claimant was denied treaty protections due to violations committed during the bidding process

02

### *Littop v. Ukraine*

– Tribunal appeared to rely on unclean hands doctrine in declining jurisdiction as investment was tainted by bribery and corruption

03

"Unclean hands"

## Doctrine Rejected / Doubted

### *Yukos Universal v. Russia*

– Held, the unclean hands doctrine does not exist as a general principle of international law

04

### *South American Silver v. Bolivia*

– Held, doctrine had not been shown to be part of international public policy / a principle of international law applicable in this case

05

### *Niko Resources v. BAPEX & Petrobangla*

– "[W]hether the principle forms part of international law remains controversial and its precise content is ill defined"

06



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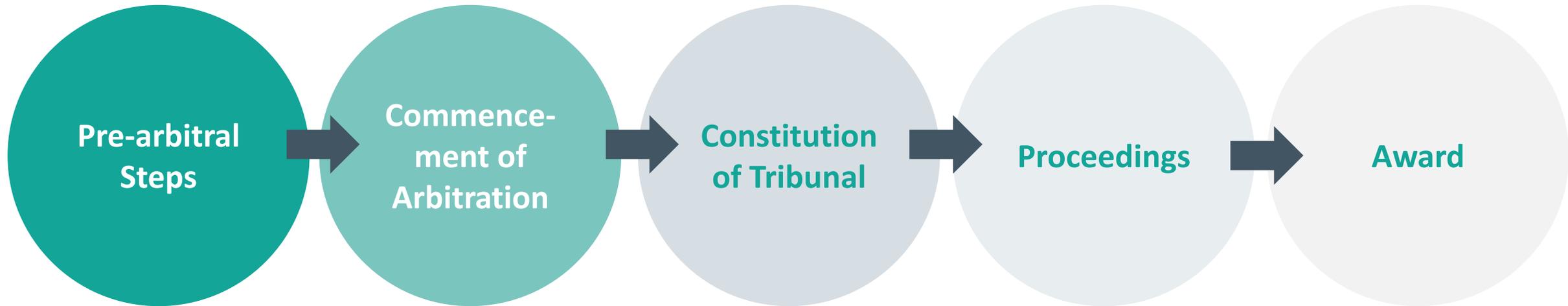
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# Overview of ICSID Proceedings

# Major Phases of an ICSID Arbitration



# Stage 1: Pre-Arbitral Steps

## Potential Procedural Preconditions

- Cooling off period
- Obligation to negotiate in good faith
- Occasional limitations:
  - Limitation period
  - Fork in the road provision
  - Exhaustion / waiver of remedies

### ASEAN-China Investment Agreement (2009)

#### Article 14

[...]

3. The parties to the dispute shall, as far as possible, resolve the dispute through consultations.
  4. Where the dispute cannot be resolved as provided for under Paragraph 3 within six (6) months from the date of written request for consultations and negotiations, unless the parties to the dispute agree otherwise, it may be submitted at the choice of the investor:
    - (a) to the courts or administrative tribunals of the disputing Party, provided such courts or administrative tribunals have jurisdiction; or
    - (b) under the *International Centre for Settlement of Investment Disputes (ICSID) Convention* and the *ICSID Rules of Procedure for Arbitration Proceedings*, provided that both the disputing Party and the non-disputing Party are parties to the *ICSID Convention*; or
    - (c) under the *ICSID Additional Facility Rules*, provided that either of the disputing Party or non-disputing Party is a party to the *ICSID Convention*; or
- [...]
5. In case a dispute has been submitted to a competent domestic court, it may be submitted to international dispute settlement, provided that the investor concerned has withdrawn its case from the domestic court before a final judgement has been reached in the case. In the case of Indonesia, Philippines, Thailand, and Viet Nam, once the investor has submitted the dispute to their respective competent courts or administrative tribunals or to one of the arbitration procedures stipulated in Sub-paragraphs 4(b), 4(c), 4(d) or 4(e), the choice of the procedure is final.



# Stage 2: Commencement of an ICSID Arbitration

Filing of RFA with ICSID



Registration of RFA

- **ICSID Convention Article 36(1) and Institution Rule 2:**  
Prescribe certain content requirements for the Request for Arbitration
- **Administrative and Financial Regulation 16 and Schedule of Fees:**  
Non-refundable lodging fee: US\$25,000
- **ICSID Convention Article 36(3):**  
Preliminary screening by ICSID Secretary-General (standard: manifestly outside the jurisdiction of ICSID)
- **ICSID Institution Rule 6(2):**  
ICSID proceedings are deemed to have been instituted on the date of the registration of the RFA

# Stage 3: Constitution of the Tribunal

## Appointment of Tribunal

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### ICSID Convention

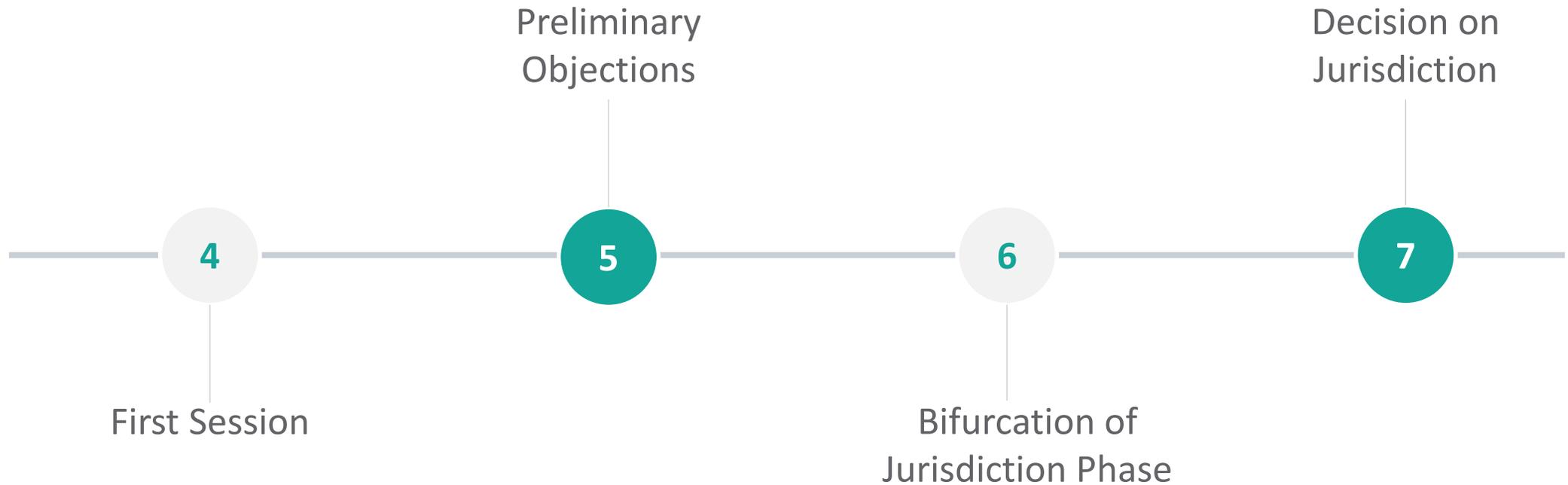
#### Section 2 Constitution of the Tribunal

#### Article 37

- (1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.
- (2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.  
  
(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.



# Stage 4: Proceedings – Initial Phase



# Early Dismissal for Manifest Lack of Legal Merit

## Rule 41 Preliminary Objections



[...]

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is **manifestly without legal merit**. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

A respondent is required “to establish its objection clearly and obviously, with relative ease and dispatch” (*Trans-Global v. Jordan*).

A tribunal should generally accept the facts as pleaded by the claimant, unless it considers the factual allegations are “incredible, frivolous, vexatious or inaccurate or made in bad faith” (*Trans-Global v. Jordan*).

A Rule 41(5) objection may result in the dismissal of claims in full or in part (e.g., *Emmis v. Hungary*).

It is *not* necessary for a respondent to prove *separately* that a Rule 41(5) objection, if granted, would result in an efficiency gain (cf Rule 41(1)).

# Bifurcation

## Rule 41 Preliminary Objections



- (1) **Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal** shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
- (2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.
- (3) **Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits.** The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

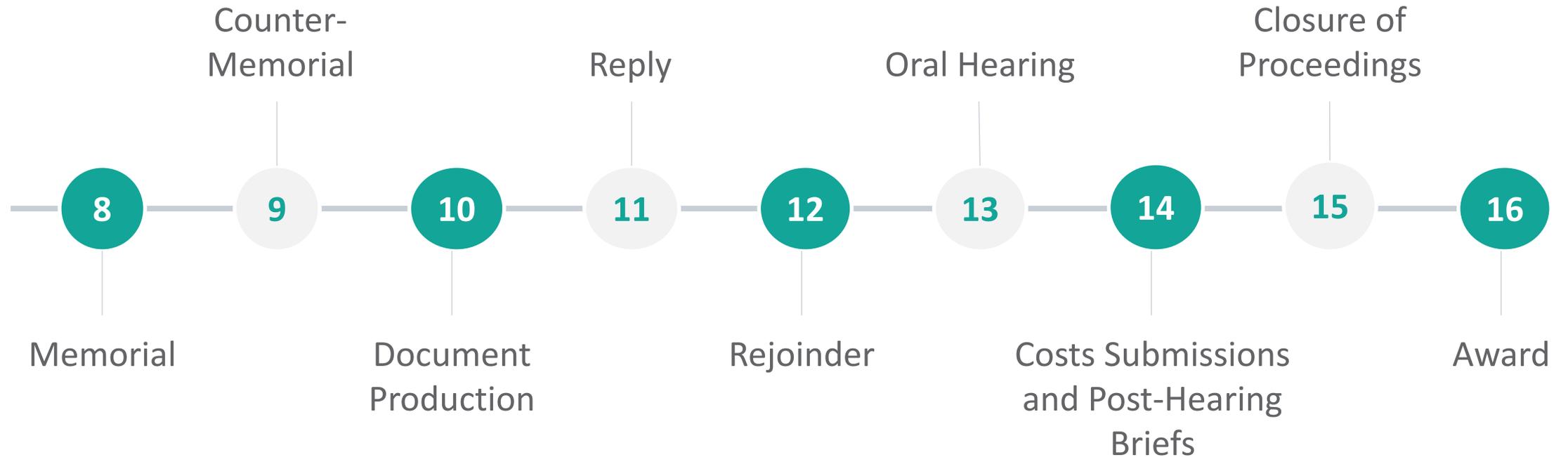
## Relevant Factors for Bifurcation

- Whether the objection is “substantial” or frivolous
- Whether the objection, if upheld, would result in a material reduction or narrowing of the issues in dispute or the termination of the proceedings
- Whether the objection is inextricably intertwined with the merits

## Key Cases

- *Glamis Gold v. United States*
- *Sumrain v. Kuwait*

# Stage 4: Proceedings – Merits Phase



# Provisional Measures

## Types of Provisional Measures:

- restoring or maintaining the status quo (non-aggravation of the dispute)
- preserving the integrity of the arbitral proceedings (including ensuring due process and equality of arms)
- protecting evidentiary rights
- preserving the jurisdiction of the Tribunal
- preventing the frustration of the Award

## Relevant Cases

- *Quiborax v. Bolivia*, Decision on Provisional Measures
- *RSM v. Saint Lucia*, Decision on Security for Costs



### ICSID Convention Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

### ICSID Arbitration Rule 39

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

[...]

# Costs Apportionment in ICSID Arbitrations

## Pay your own way

### ICSID Convention, Article 61(2)

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

## Costs follow the event

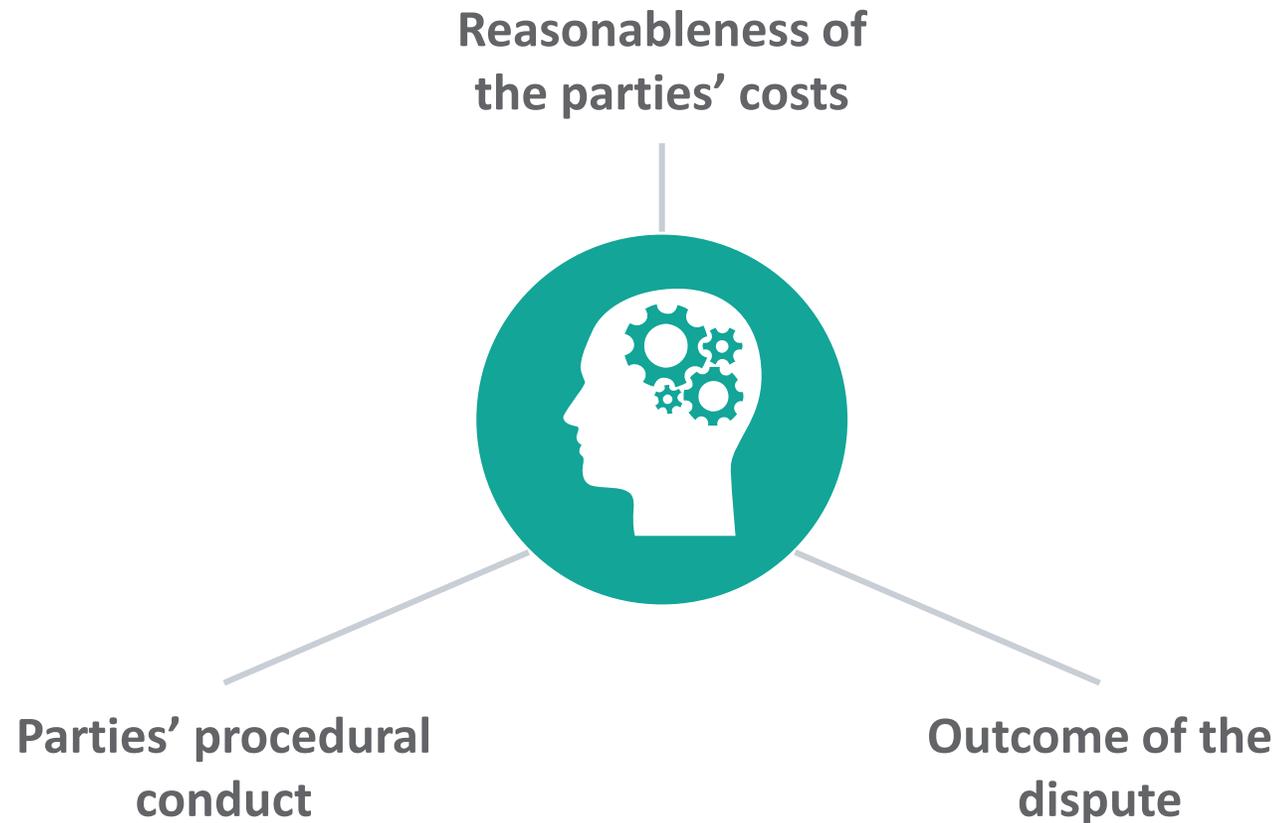
### ICSID Arbitration Rule 28

- (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
  - (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
  - (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
- (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

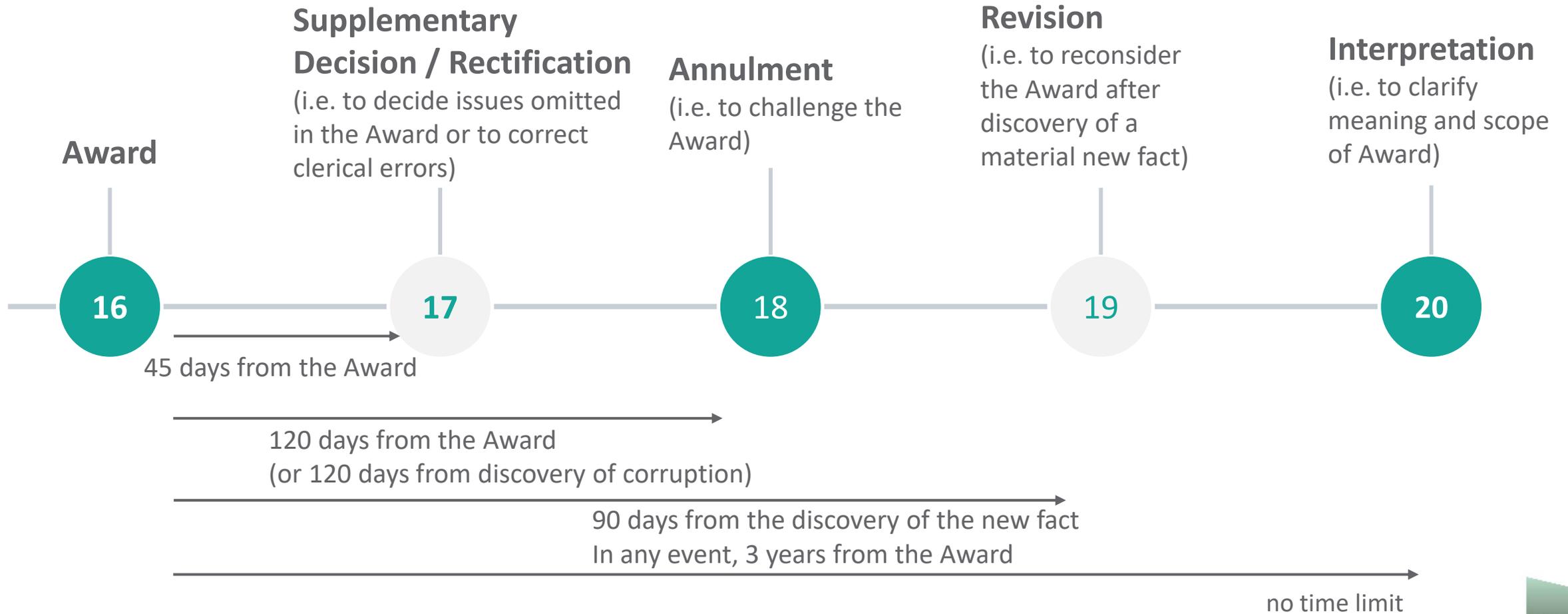
## Relative success

# Costs Apportionment in ICSID Arbitrations (cont'd)

## Factors influencing tribunals' decisions on costs



# Stage 5: ICSID Award and Post-Award Remedies



# Annulment Proceedings

## Five exhaustive grounds to annul an award (in whole or in part) under Article 52(1)

- Tribunal was not properly constituted
  - Tribunal has manifestly exceeded its powers
  - Corruption on the part of a member of the Tribunal
  - Serious departure from a fundamental rule of procedure
  - Award has failed to state the reasons on which it is based
- 
- Time limit under Article 52(2): 120 days from the date of the award (or 3 years in case of corruption)
- 
- Determined by a separate ad hoc three-member committee
- 
- Effect of annulment: dispute may be reheard by a new tribunal (Article 52(6))

# Recognition and Enforcement of ICSID Awards



## Article 53(1):

An ICSID award is binding on all parties to the proceeding

Award is not subject to any appeal or any other remedy except those provided for in the Convention

## Article 54(1):

Must be recognised as binding in any ICSID member state and enforce pecuniary obligations as if it were a judgment of the highest court of that state

## Article 55:

No derogation from law in any Contracting State relating to State immunity



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# Future Developments in ICSID Arbitrations

# Reform and Amendments to ICSID Rules

- 01 Bifurcation
- 02 Provisional Measures
- 03 Allocation for Costs
- 04 Security for Costs
- 05 Expedited Arbitration

# Reform and Amendments to ICSID Rules (*cont'd*)

Key Issue	Current Rules	Proposed Amendments
<b>Bifurcation</b>  <i>(Proposed Rules 42-45)</i>	<b>Rule 41(4)</b> provides that a tribunal “ <i>may deal with the objection [made under Rule 41(1)] as a preliminary question or join it to the merits of the dispute</i> ”.	<b>Proposed amendments</b> include a <u>standalone provision</u> on bifurcation and provide guidance on timing, procedure and factors to be considered in bifurcation  Tribunal must consider <u>all relevant circumstances</u> , including whether: <ul style="list-style-type: none"> <li>• <b>(i)</b> bifurcation would materially reduce time and cost of the proceedings;</li> <li>• <b>(ii)</b> determination of the questions would dispose of all or a substantial portion of the dispute; and</li> <li>• <b>(iii)</b> the questions are so intertwined as to make bifurcation impractical.</li> </ul>
<b>Provisional Measures</b>  <i>(Proposed Rule 47)</i>	<b>Rule 39</b> provides that a party may apply for provisional measures for the preservation of its rights  Current Rules do not specify factors to be considered by a tribunal	<b>Proposed amendments</b> provide that when deciding to recommend provisional measures, a tribunal must consider all relevant circumstances, including: <ul style="list-style-type: none"> <li>• <b>(i)</b> whether the measures are urgent and necessary; and</li> <li>• <b>(ii)</b> the effect that the measures may have on each party.</li> </ul>

# Reform and Amendments to ICSID Rules (*cont'd*)

Key Issue	Current Rules	Proposed Amendments
<b>Allocation of costs</b>  <i>(Proposed Rule 52)</i>	<b>Rule 28</b> provides a tribunal may at any stage decide the portion of costs which each party should pay	When allocating costs, a tribunal should consider <u>all relevant circumstances</u> , including: <ul style="list-style-type: none"> <li>(i) the outcome of the proceedings or any part of it;</li> <li>(ii) the conduct of the parties during the proceeding;</li> <li>(iii) the complexity of the issues; and</li> <li>(iv) the reasonableness of the costs claimed.</li> </ul>
<b>Security for costs</b>  <i>(Proposed Rule 53)</i>	<b>Current Rules</b> do not have a standalone rule allowing a tribunal to order security for costs	A tribunal may order parties to provide security for costs. In doing so, a tribunal should consider <u>all relevant circumstances</u> , including: <ul style="list-style-type: none"> <li>(i) the party's ability and</li> <li>(ii) willingness to comply with an adverse decision on costs;</li> <li>(iii) the effect that the order may have on the party's ability to pursue its claim; and</li> <li>(iv) the conduct of the parties.</li> </ul>
<b>Expedited Arbitration</b>  <i>(Proposed Rules 75-86)</i>	<b>Current Rules</b> do not provide for an expedited arbitration procedure	Parties may <b>opt in</b> to the expedited arbitration procedure at any time by mutual agreement in writing.  <b>Purpose</b> of the new procedure is to achieve time and cost efficiencies by reducing the length of three phases:(1) establishment of tribunal; (2) written procedures; (3) rendering of award.  Expedited arbitration could be suitable for smaller scale claims / cases with costs constraints, and cases with few factual issues in dispute.



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# Current Trends on Costs and Duration in Investment Arbitration

# Background and Methodology of Empirical Study



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## 2021 Empirical Study:

Costs, Damages and Duration in Investor-State Arbitration



Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka  
June 2021

allenoverly.com

An update and expansion to two previous studies conducted in 2013 and 2017

Comprehensive account of how long ISDS proceedings last, how much they cost, how tribunals allocate those costs as well as the amounts of damages award

Provides insight into current position of costs incurred by parties in ISDS proceedings and changes in tribunal's practice in fixing and allocating such costs

Cut-off date: 31 May 2020

Pool of data: 434 costs awards and 75 annulment decisions



<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/costs-damages-and-duration-in-investor-state-arbitration>

# Average Costs and Duration of Investor-State Arbitrations

Mean investor costs:

**US\$6.4m**

Mean respondent State costs:

**US\$4.7m**

Median investor costs:

**US\$3.8m**

Median respondent State costs:

**US\$2.6m**

Mean costs awarded:

**US\$3.5m**

Median costs awarded:

**US\$1.8m**

Mean length of proceedings:

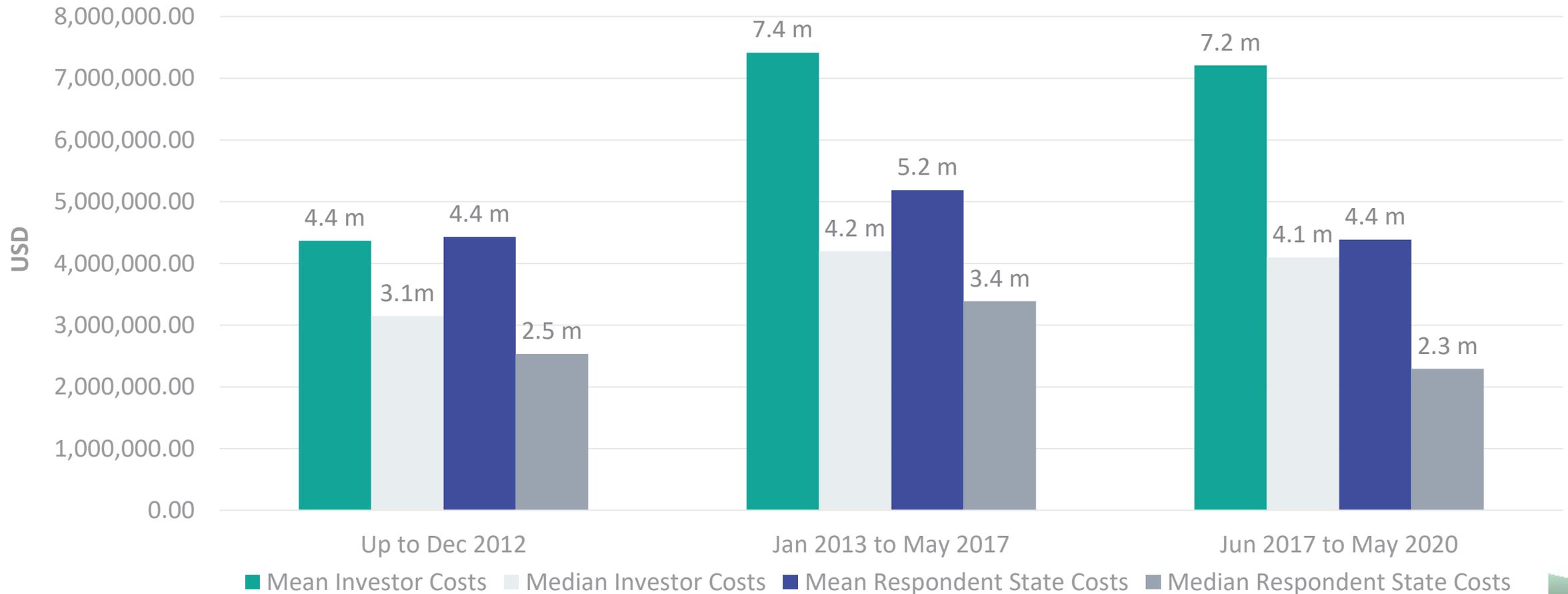
**4.4 years**

Median length of proceedings:

**3.8 years**

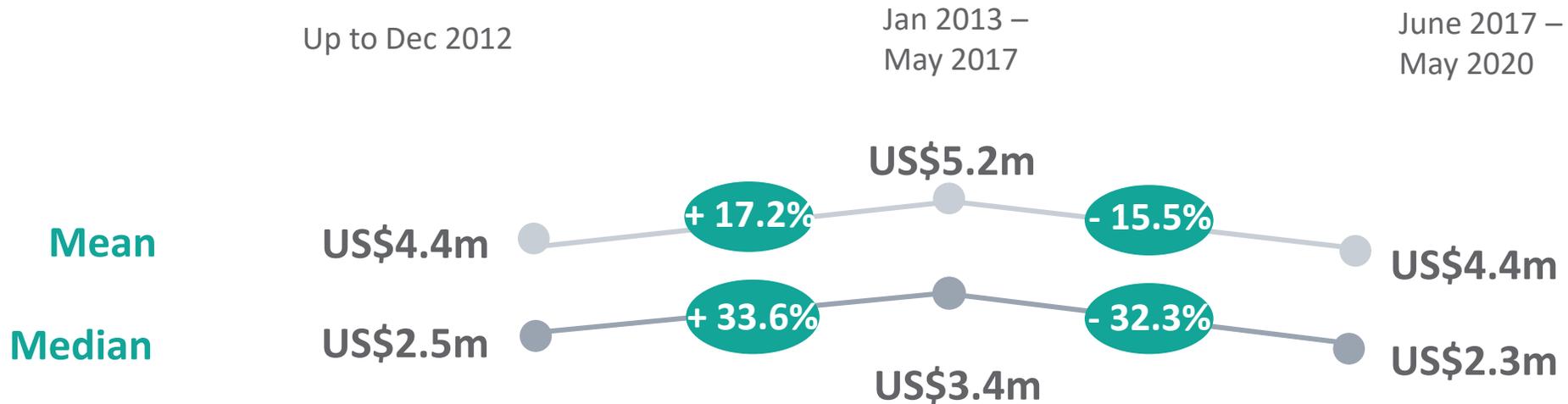
**Source:** Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration”, Allen & Overy and BIICL, London, 2021

# Trends in Party Costs in Investor-State Arbitral Proceedings



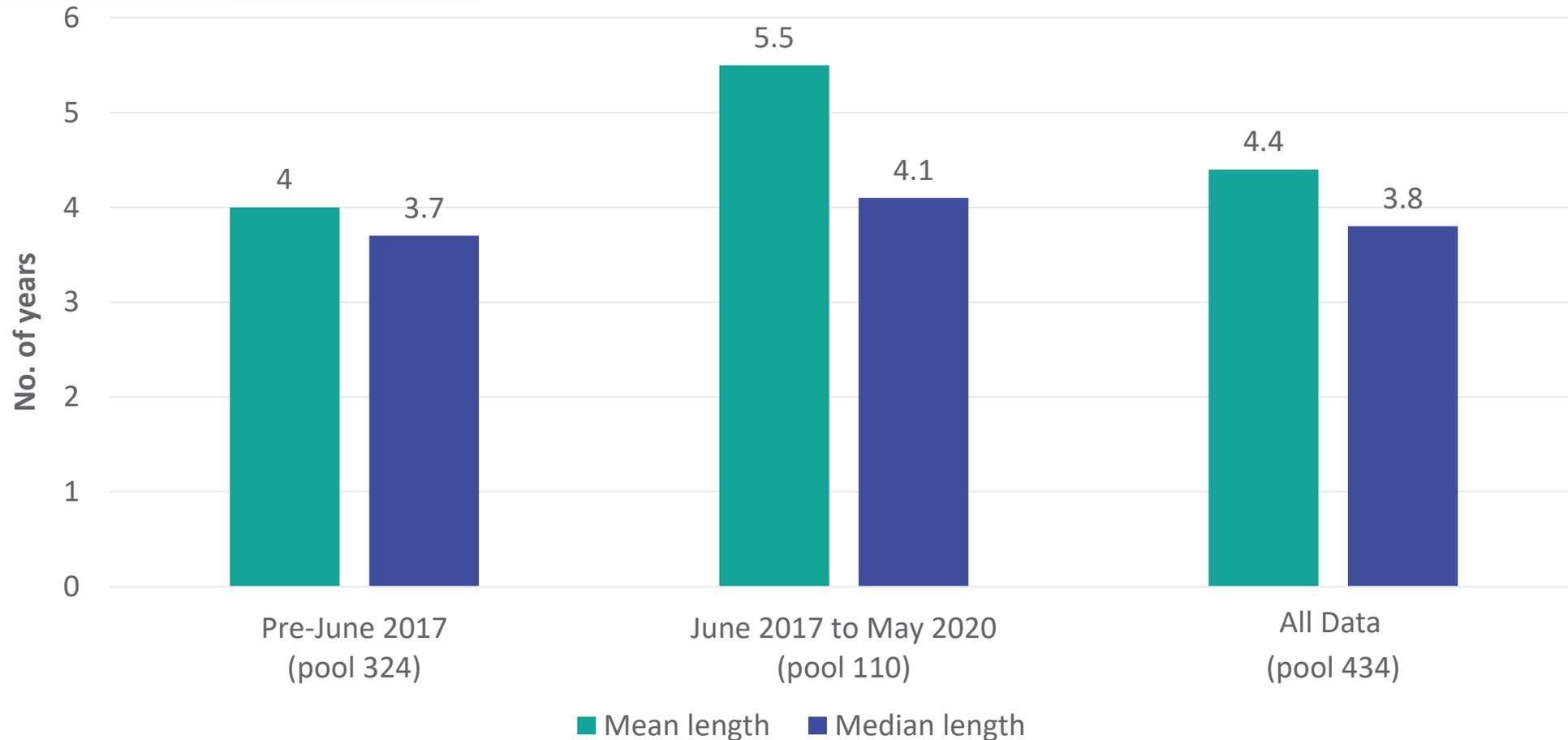
**Source:** Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration”, Allen & Overy and BIICL, London, 2021

# Trends in Respondent Costs in Investor-State Arbitral Proceedings



**Source:** Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration”, Allen & Overy and BIICL, London, 2021

# Trends in Duration of Investor-State Arbitral Proceedings



**Source:** Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration”, Allen & Overy and BIICL, London, 2021

# Trends in Duration of Investor-State Arbitral Proceedings (cont'd)



**Source:** Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, “2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration”, Allen & Overy and BIICL, London, 2021

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# Appendix: Typical Timeline of an ICSID Arbitration

