

Study of Cost Awards in Investment Treaty Arbitrations up to end of May 2017

Note on Methodology

Matthew Hodgson & Alastair Campbell, Allen & Overy LLP

During the course of the study we examined a pool of awards dated between the cut-off date of the previous version of this study (31 December 2012) and 31 May 2017. We also reviewed a number of awards which were handed down prior to the cut-off date of the previous study, but which were not publicly available until more recently. In order to avoid retroactively altering the data from the previous study, such cases were not included in the “pre-2013” calculations. They were, however, included in the overall calculations.

This review yielded a total of 147 cases in which costs data was available, giving a total combined datapool of 324 cases. These 324 cases are reflected in the Master Table available [here](#).

All claims which were brought under an investment treaty were included even where the tribunal ultimately concluded that there was no jurisdiction under the treaty but only under a contract (e.g. *CSOB v. Slovakia*, *Tradex Hellas v. Albania*, *CCL v. Kazakhstan*). The reason for this is that the tribunals were required to examine their jurisdiction under an investment treaty (and presumably approached these matters as would any other investment arbitration tribunal) and further most of these cases were brought before ICSID (such that ICSID jurisdictional provisions and rules of procedure including costs provisions applied, making the comparable with other investment treaty cases).

In each cell, the figure highlighted in **bold** is the figure ultimately used in our calculations. Generally speaking, where the amounts stated in the award were ambiguous, a figure was selected if it appeared likely to be accurate, based on a reading of relevant award. There is necessarily a certain degree of subjectivity in the numbers used, especially as regards amounts in dispute/awarded. For that reason, and in the interest of transparency, we have included fairly extensive information in the table and the supporting paragraph references.

In addition, we examined some 52 public annulment awards, these are produced in a separate table available [here](#).

Column F Arbitral Institution

This was defined on the basis of the procedural rules applied by the tribunal; on a few occasions this differed from the institution administering the dispute.

Column D Currency Conversion Rates

All sums were converted to US dollars at the date of the relevant award or decision and rounded to the nearest dollar. There were a few cases where this approach was inapposite, and where an alternative date was selected (as noted in Column D). These exceptions were *Autopista v. Bolivia*, *Eudoro Armanda Olguin v. Paraguay* (where the relevant currencies had significantly devalued between the date of the damage and the date of the award), *Jan Oostergetel v. Slovakia*, *OKO Pankki v. Estonia* (where the currency had become obsolete by the date of the award), and *Desert Line v. Yemen* (where the amount of the award was defined explicitly by reference to a conversion rate on a specified previous date).

Historical conversion rates were ascertained using www.xe.com and www.oanda.com.

Columns E & K Amount in Dispute and Amount Awarded

In a number of cases, claimants submitted alternative amounts simultaneously, or revised their damages claim over the course of proceedings. As a general rule, the “high mark” in the submissions was selected for the purpose of our calculations, on the reasoning that this was the amount that the claimants were hoping to achieve in the best case scenario. However, each case was reviewed on an individual basis and in some cases the lower amount was selected, if this appeared more appropriate in the context. For example, where the claimant had initially submitted a rough estimate of its loss, but then quantified it more accurately later in proceedings, the latter amount was selected, even where lower.

A further factor taken into account when selecting the figure was comparability between amounts claimed and amounts awarded. For example, of the various revised claims submitted by the Claimants in *Victor Pey Casado v. Chile* one of the lower figures was selected because that figure was exclusive of interest and therefore more comparable with the figure for amount awarded, which had been calculated by the tribunal exclusive of interest (such interest having been awarded but not quantified).

On the other hand, there were cases where the claimant had specified (i) a quantified amount of damages, (ii) the interest rate to be used, and (iii) a quantified amount of interest according to that interest rate (albeit this would generally only have been quantified as at a date earlier than the date of the award); and the tribunal had awarded (i) the requested amount of damages and (ii) pre-award interest at the requested rate, but failed to expressly quantify the interest (see, for example, *White Industries Australia v. India*). In such cases it was possible to accurately assess the actual amount awarded, as the interest element had already been quantified by the claimant; thus the amount of quantified interest was added to the amount stated in principal damages by the tribunal. This was considered preferable to selecting amounts excluding interest for both “Amount in Dispute” and “Amount Awarded” as the preferred approach was to use the amounts inclusive of pre-award interest where possible, as this most accurately reflects the financial outcome of the case.

Finally, care was taken where the claimant and/or the tribunal had failed to distinguish between “costs” (i.e. costs incurred in the present arbitral proceedings) and “damages” (costs incurred in previous related litigation would fall under this category). So, for example, amounts claimed in respect of previous court proceedings, etc. were included under “Amount in Dispute”; whereas costs claimed in respect of the current arbitral proceedings were included under “Party Costs”.

Note that in many cases it was not possible to achieve complete comparability between amount claimed and amount awarded, because one figure was given inclusive of interest and the other exclusive. In order to maximise the data pool, we nonetheless included such figures in our calculations.

Interest

Post-award interest was disregarded for the purposes of the methodology, on the basis that this represents a contingent and punitive amount, not part of the amount in dispute.

Where quantified, pre-award interest was included in the total amount claimed and/or total amount awarded, as it was considered that forms an indispensable part of a damages claim, without which the claimant would not be adequately compensated.

References to “interest” are to pre-award interest (except to the extent that pre-award interest had been combined with post-award interest).

Columns H & I Party Costs

In many cases the parties submitted a statement of total costs without providing any breakdown, and without specifying whether the costs claimed included amounts advanced to the institution as deposits for the

tribunal's fees and expenses, etc. It is therefore possible that some of the figures used for "Party Costs" actually include Tribunal Costs. Where this is the case, the potential inaccuracy is noted in the relevant cell.

Column J Tribunal Costs

Tribunal Costs includes fees and expenses of the Tribunal members and Secretary, charges for use of the Centre facilities, registration fees etc. Where these amounts had not been particularised or quantified in the award, the amount paid by the parties in advances to the Institution (where stated) was taken to represent Tribunal Costs.

Column L Award on Costs

Some of the calculations underlying the article required a figure for the "costs award", in cases where costs had been adjusted. This figure was reached by adding (1) in respect of Party Costs, the sum paid by the losing party to the successful party, and (2) in respect of Tribunal Costs, the additional sum over the 50:50 default mark contributed by the losing party towards the tribunal and institutional fees and expenses.